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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TREVOR THOMAS TARDIFF,

Defendant and Appellant.

2d Crim. No. B261352
(Super. Ct. No. 2010015108)
(Ventura County)

Trevor Thomas Tardiff petitioned to have his felony offense declared a misdemeanor pursuant to Proposition 47. (Pen. Code, § 1170.18.)¹ The trial court initially granted the petition. Later in the day, however, when the court learned that a parole violation hearing was pending, the court vacated its grant of the petition.

We reverse. A parole violation is not a circumstance that precludes relief under Proposition 47. We remand for the trial court to determine whether Tardiff poses an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

FACTS

Tardiff had prior convictions for receiving stolen property (§ 496, subd. (a)) and vehicle theft (Veh. Code, § 10851, subd. (a)).

¹ All statutory references are to the Penal Code unless stated otherwise.

On April 29, 2010, Tardiff pled guilty to felony petty theft with prior theft convictions (§ 666) and admitted he had previously served two prior prison terms (§ 667.5, subd. (b)). The trial court sentenced Tardiff to two years in state prison.

On January 7, 2015, the trial court granted Tardiff's petition pursuant to Proposition 47 to reduce his conviction to a misdemeanor. (§ 1170.18.) The court placed him on parole for one year. (*Id.*, subd. (d).) The court denied his request to deduct his excess presentence credits from the period of parole and any unpaid fines.

Later that same day in the same court, a petition to revoke Tardiff's parole came on for hearing. The petition had been filed on January 5, 2015; that is, two days before the hearing at which the court granted Tardiff's Proposition 47 petition.

The trial court stated it was unaware that a parole revocation hearing was pending at the time it granted Tardiff's Proposition 47 petition. The court vacated its order granting Tardiff's Proposition 47 petition and set the matter for a parole revocation hearing.

DISCUSSION

I

Tardiff contends the vacation of the misdemeanor judgment and resentencing him to a felony violates the prohibition on double jeopardy.

Tardiff cites *United States v. Benz* (1931) 282 U.S. 304, 307, for the proposition that a court has the discretion to decrease a sentence but not to increase it. Increasing a sentence violates the Fifth Amendment's ban on double jeopardy (*Ibid.*)

But here the trial court did not increase the original sentence. It vacated its order declaring the offense a misdemeanor, leaving the original sentence intact.

Thus, in *People v. Salgado* (2001) 88 Cal.App.4th 5, a jury found the defendant guilty of carjacking. After the jury's verdict, the trial court dismissed the carjacking count as not supported by substantial evidence. The People appealed. We concluded the People's appeal would not violate double jeopardy. A successful appeal would simply restore the defendant to the position he found himself after the jury's

verdict in his only trial. (*Id.* at p. 12.) Here Tardiff was simply restored to the position in which he found himself after the jury's verdict in his only trial.

The People concede, however, that the pendency of a parole hearing is not a disqualifying circumstance that renders Tardiff ineligible for resentencing under Proposition 47. Resentencing may be denied if the trial court, in its discretion, determines that resentencing would pose an "unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) An "unreasonable risk of danger to public safety" means an unreasonable risk that petitioner will commit a new violent felony within the meaning of section 667, subdivision (e)(2)(C)(iv). (§ 1170.18, subd. (c).) We must remand for the exercise of the trial court's discretion.

II

Tardiff argues he is entitled to apply excess custody credits to his term of parole and fines. He relies on *In re Sosa* (1980) 102 Cal.App.3d 1002, holding that presentence credit applies against both the imprisonment and parole portions of a determinate sentence. He claims excess credits should apply to Proposition 47 parole.

We rejected a similar argument in *People v. Espinoza* (2014) 226 Cal.App.4th 635 in which a three strikes defendant was resentenced pursuant to Proposition 36 with credit for time served. (§ 1170.126.) Defendant argued that he was not subject to postrelease community supervision (PRCS) (§ 3451, subd. (a)) because his custody credits exceeded the new sentence and three-year PRCS period. We concluded that PRCS is not a term of imprisonment within the meaning of section 2900.5, subdivision (c). (*Espinoza*, at pp. 638-639.) "Even if [defendant] was entitled to custody credits before he was resentenced, it does not reduce the mandatory [postrelease community] supervision period." (*Id.* at p. 639.)

Proposition 47 is similar to Proposition 36 but provides for misdemeanor "parole" supervision. Parole supervision is, in the opinion of sentencing experts, "*in addition* to any resentence imposed by the court, and without consideration of any [custody] credit that the petitioner may have earned" (Couzens et al., *Sentencing California Crimes* (The Rutter Group 2015) § 25, p. 25-62.)

We again reject the argument that presentence custody credits negate or reduce the Proposition 47 supervised parole term. When interpreting a voter initiative, we examine the language of the statute enacted as an initiative, giving the words their usual, ordinary meaning. Section 1170.18, subdivision (d) expressly states that supervised parole is the rule unless the superior court, in its discretion, determines that parole supervision is not required. The Legislative Analyst informed the electorate: "Offenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), Prop. 47, Analysis by Legislative Analyst, p. 36.) We cannot rewrite the statute. (See *People v. Garcia* (1999) 21 Cal.4th 1, 6 [refusing to rewrite a statute unless it is "compelled by necessity and supported by firm evidence of the drafters' true intent"].)

The People concede, however, that *Sosa* credits are applicable to Tardiff's drug program fee.

We reverse and remand for the trial court to determine whether Tardiff poses an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Patricia M. Murphy, Judge
Superior Court County of Ventura

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