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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TED GAMMAGE, Defendant and Appellant.	B280243 (Los Angeles County Super. Ct. No. MA059862)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Ted Gammage was convicted following a jury trial on one count of second degree robbery. (Pen. Code, § 211.)[1] We affirmed his conviction in a prior appeal. (*People v. Gammage* (Feb. 25, 2016, B256154) [nonpub. opn.].) Appellant subsequently filed a nonstatutory motion for DNA testing based on his constitutional rights to procedural due process and equal protection. The trial court denied the motion. We now affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014, appellant was convicted by jury of second degree robbery.[2] The trial court suspended the imposition of sentence and placed appellant on three years of summary probation on the condition that he serve 365 days in county jail. Appellant was released from jail on July 1, 2014.

Following his release from jail, appellant filed a motion for DNA testing under section 1405, which the trial court denied on the ground that appellant was not then serving a term of imprisonment.[3] In

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[1] Unspecified statutory references are to the Penal Code.

[2] We do not set forth the facts regarding appellant's conviction because they are not relevant to the issues on appeal.

[3] Section 1405 provides in pertinent part: "A person who was convicted of a felony and *is currently serving a term of imprisonment* may make a written motion . . . before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing." (§ 1405, subd. (a), italics added.)

August 2015, we denied appellant's petition for writ of mandate to reverse the court's order.

On June 21, 2016, appellant filed a nonstatutory postconviction motion for DNA testing of a napkin that law enforcement collected and preserved but never tested. A witness who identified appellant as the getaway driver in the robbery saw the driver use and discard the napkin. The trial court denied the motion, and this appeal followed.

DISCUSSION

I. *Due Process*

Appellant relies on the Fourteenth Amendment to contend that his due process and equal protection rights are violated by denying him access to DNA testing to prove his innocence.[4] Under the Fourteenth Amendment, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend., § 1.) "This Clause imposes procedural limitations on a State's power to take away protected entitlements. [Citation.]" (*District Attorney's Office v. Osborne* (2009) 557 U.S. 52, 67 (*Osborne*).)

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[4] Respondent relies on the language of section 1405 to argue that the order is not appealable: "An order granting or denying a motion for DNA testing under [section 1405] shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General." (§ 1405, subd. (k).) However, appellant's motion was not filed under section 1405 but instead is a constitutional claim that the State of California's failure to provide DNA testing to someone in his position violates his rights to due process and equal protection. We therefore consider the merits of his appeal.

In *Osborne*, the United States Supreme Court rejected the defendant's postconviction request under 42 United States Code section 1983 for "the recognition of a freestanding and far-reaching constitutional right of access to [DNA testing] evidence." (*Osborne*, *supra*, 557 U.S. at pp. 55–56.) Following his conviction for kidnapping, assault, and sexual assault, Osborne sought postconviction relief in Alaska state court, seeking DNA testing in reliance on a state postconviction statute and the federal and state constitutions. The Supreme Court reversed the holding of the federal appellate court that the due process clause extended the prosecutorial duty under *Brady v. Maryland* (1963) 373 U.S. 83, to disclose exculpatory evidence to postconviction proceedings. (*Osborne, supra*, 557 U.S. at pp. 61-62.)

The court acknowledged that postconviction, a defendant has "a liberty interest in demonstrating his innocence with new evidence under state law." (*Osborne*, *supra*, 557 U.S. at p. 68.) However, the court explained that "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. . . . [¶] The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. '[W]hen a State chooses to offer help to those seeking relief from convictions,' due process does not 'dictat[e] the exact form such assistance must assume.' [Citation.] . . . [¶] Instead, the question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or

'transgresses any recognized principle of fundamental fairness in operation.' [Citations.]" (*Id.* at pp. 68-69.) The court examined Alaska's procedures for postconviction relief and found them to be constitutionally adequate. (*Id.* at p. 69.) The court further rejected Osborne's claim that he had a substantive due process right to the evidence. (*Id.* at p. 72.)

The Supreme Court accordingly has "rejected the extension of substantive due process to this area [of DNA testing], [citation], and left slim room for the prisoner to show that the governing state law denies him procedural due process, [citation]." (*Skinner v. Switzer* (2011) 562 U.S. 521, 525.) Courts have a "'duty to uphold a statute unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity. [Citations.]' [Citation.]" (*People v. Hansel* (1992) 1 Cal.4th 1211, 1219.)

Although *Osborne* recognized that a criminal defendant has a postconviction "liberty interest in demonstrating his innocence with new evidence under state law," the court did not hold that a defendant has the right to access DNA testing. (*Osborne*, *supra*, 557 U.S. at p. 68.) Instead, the question is whether our state postconviction procedures "'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress[] any recognized principle of fundamental fairness in operation.' [Citations.]" (*Osborne*, *supra*, 557 U.S. at p. 69.) We find our procedures to be constitutionally adequate.

Appellant has available to him the postconviction procedure of habeas corpus. The statute provides: "A person unlawfully imprisoned or restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint." (§ 1473, subd. (a).) "'[T]he decisional law of recent years has expanded the writ's application to persons who are determined to be in constructive custody.'" (*People v. Villa* (2009) 45 Cal.4th 1063, 1069.) The writ thus is available to someone like appellant, who is on probation. (*Ibid.*)

Reasons for seeking a writ of habeas corpus include, but are not limited to, false material evidence and new evidence. (§ 1473, subd. (b).) Thus, "'[h]abeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates a prisoner is actually innocent.' [Citation.]" (*In re Lawley* (2008) 42 Cal.4th 1231, 1238.) Habeas corpus relief also may be sought "on the ground that the prosecution did not disclose evidence." (*In re Sassounian* (1995) 9 Cal.4th 535, 543; see also *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1225-1236 [granting a petition for writ of habeas corpus based on a *Brady* claim that the prosecution failed to disclose materially favorable evidence to the accused].) Our state postconviction procedures thus allow a defendant on probation to seek relief based on a showing of actual innocence. "These procedures are not without limits, . . . [but] they are not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.' [Citation.]" (*Osborne*, *supra*, 557 U.S. at p. 70.)

Appellant contends that California's statute is constitutionally inadequate because it unfairly and arbitrarily limits access to DNA testing to a person "currently serving a term of imprisonment." (§ 1405, subd. (a).) The decision to restrict access to DNA testing to incarcerated persons is a legislative decision. Thus, "courts must proceed cautiously so as not to overstep the boundaries of separation of powers." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 175 (*Rodriguez*).) In addressing whether the application of a penal statute violated substantive due process, the court in *Rodriguez* explained that ""'a Legislature does not violate due process so long as an enactment is . . . reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute.'" [Citation.]" (*Ibid.*)

The legislative history of section 1405 indicates that the Legislature was concerned not only with "the unjust deprivation of an individual's freedom," but with the costs of incarceration. (California Bill Analysis, Sen. Bill No. 1342, 4/11/2000.) The Senate Committee hearing comments noted that "[a]t an annual cost of more than $25,000 per inmate . . . we simply cannot afford to incarcerate the innocent." (*Ibid.*) Providing access to DNA testing to a person "currently serving a term of imprisonment" (§ 1405, subd. (a)) is reasonably related to the legislative goals of both providing justice to innocent people and decreasing the costs of incarceration. (*Rodriguez*, *supra*, 66 Cal.App.4th at p. 175.)

As the Supreme Court explained in *Osborne*, "'[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field.' [Citation.] '[J]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures.' [Citation.] . . . We are reluctant to enlist the . . . Judiciary in creating a new constitutional code of rules for handling DNA." (*Osborne*, *supra*, 557 U.S. at p. 73.) Our state postconviction procedures do not violate appellant's right to procedural due process.

II. *Equal Protection*

Appellant further contends that his right to equal protection is violated. Again, we disagree.

"The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, "'[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.'" [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."' [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 328 (*Brown*).)

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. [Citations.] We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. [Citation.]" (*Romer v. Evans* (1996) 517 U.S. 620, 631; *People v. Parker* (2006) 141 Cal.App.4th 1297, 1309 ["When an equal protection case does not involve a suspect classification such as race and does not infringe on a fundamental right, the legislative classification will be upheld whenever it has a rational relationship to a legitimate state interest. [Citations.] This is true even if the law seems unwise or works to the disadvantage of a particular group."].)

Appellant, who was placed on probation, is not similarly situated to someone who is serving a term of imprisonment. "Following a defendant's conviction of a crime, the sentencing court may choose among a variety of dispositional options. One option is to release the offender on probation. 'Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation.' [Citation.] A grant of probation is 'qualitatively different from such traditional forms of punishment as fines or imprisonment. Probation is neither "punishment" (see § 15) nor a criminal "judgment" (see § 1445). Instead, courts deem probation an act of clemency in lieu of punishment

[citation], and its primary purpose is rehabilitative in nature [citation].' [Citation.]" (*People v. Moran* (2016) 1 Cal.5th 398, 402; see *People v. Mancebo* (2002) 27 Cal.4th 735, 754 ["probation is not punishment"].)

Because appellant is not similarly situated to someone who is serving a term of imprisonment, he has not met the """first prerequisite to a meritorious claim under the equal protection clause."""" (*Brown*, *supra*, 54 Cal.4th at p. 328; see *People v. Valencia* (2017) 3 Cal.5th 347, 375-376 [refusing to apply Proposition 47's definition of risk to Proposition 36 does not violate equal protection because "those resentenced under Proposition 36 are not similarly situated to those resentenced under Proposition 47. These are two very different populations of offenders."]; *People v. Jones* (1985) 176 Cal.App.3d 120, 128 ["former probationers do not have the same status and, therefore, are not similarly situated with former state prisoners (and those discharged from parole) for purposes of applying section 1203.4"].)

Even if he were similarly situated, as discussed above, the Legislature's concerns with the costs of incarceration provide a rational basis for the decision to provide access to DNA testing only to those serving a term of imprisonment. (See *People v. Martinez* (2016) 5 Cal.App.5th 234, 243 [unnecessary to decide whether persons convicted of certain forgeries are similarly situated to persons convicted of other forgeries eligible for resentencing under Proposition 47 because "the disparate treatment between the two groups has a rational basis"]; *People v. Mendoza* (2015) 241 Cal.App.4th 764, 785 [no violation of equal protection in "excluding misdemeanants from the application of

Penal Code section 1203.2a" where "[t]he short length of misdemeanor sentences, coupled with the heavy burdens on the justice system caused by large numbers of newly eligible defendants, provides the rational basis for refusing to extend the benefit of Penal Code section 1203.2a to county jail misdemeanants"].)

"Equal protection analysis does not entitle the judiciary to second-guess the wisdom, fairness, or logic of the law. [Citation.] [¶] . . . [E]qual protection of the law is denied only where there is no 'rational relationship between the disparity of treatment and some legitimate governmental purpose.' [Citation.] In other words, the legislation survives constitutional scrutiny as long as there is "'any reasonably conceivable state of facts that could provide a rational basis for the classification."' [Citation.]" (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) The Legislature's decision to provide access to DNA testing to incarcerated persons is reasonably related to its concern regarding the costs of incarceration. Moreover, we agree with respondent that, because of the large numbers of persons in the state who have suffered convictions but are on probation or otherwise not imprisoned, the Legislature needed to provide some "reasonable limitation" on the provision of access to DNA testing. We find no constitutional violation.

DISPOSITION

The order appealed from is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.