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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.

DAVID RICHARD DIAZ,

Defendant and Appellant.

2d Crim. No. B264244
(Super. Ct. No. 2010001002)
(Ventura County)

David Richard Diaz appeals from an order recalling his felony sentence, resentencing him to a misdemeanor, and placing him on misdemeanor parole for one year. The order was entered pursuant to Penal Code section 1170.18, enacted by Proposition 47.¹ Appellant contends that he is entitled to have the one-year period of misdemeanor parole reduced by his "excess custody credits" and prior periods of parole on the felony commitment offense. We affirm.

Factual and Procedural Background

In April 2010 appellant pleaded guilty to felony receiving stolen property. (§ 496, subd. (a).) He was sentenced to prison for two years and given credit for time served of 173 days. He was informed that, after his release from prison, he could be placed on parole for up to three years.

In December 2010 appellant was released on parole. In March 2011 he absconded from parole supervision and was returned to custody for one year. In July 2012 he

¹ All statutory references are to the Penal Code.

absconded a second time and was returned to custody for 100 days. In September 2012 he absconded a third time and remained at large until his arrest in February 2015.

In March 2015 appellant filed an application to have his felony conviction designated a misdemeanor pursuant to subdivision (f) of section 1170.18. Appellant alleged that he had completed his felony sentence.

The prosecutor contended that appellant was still serving his felony sentence but was eligible for resentencing to a misdemeanor pursuant to subdivisions (a) and (b) of section 1170.18. The prosecutor requested that appellant be resentenced to 364 days on the misdemeanor, that he be given credit for time served of 364 days, and that he be placed on misdemeanor parole for one year pursuant to subdivision (d) of section 1170.18. Defense counsel protested that the court could not impose a period of misdemeanor parole because appellant had "completed the whole sentence." Counsel asserted that his client was entitled to 364 days of actual custody credit and 364 days of conduct credit.

The trial court resentenced appellant to a misdemeanor and placed him on parole for one year. The trial court stated, "The fact that he has absconded from parole for two and a half years makes that an appropriate use of discretion."

Proposition 47

"On November 4, 2014, the voters enacted Proposition 47, 'the Safe Neighborhoods and Schools Act' . . . , which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Before the passage of Proposition 47, receiving stolen property was punishable either as a felony or a misdemeanor. Proposition 47 amended section 496, subdivision (a) to make the offense punishable only as a misdemeanor if the value of the stolen property does not exceed \$950 and the defendant has not previously been convicted of specified serious felonies.

Proposition 47 added section 1170.18 to the Penal Code. Subdivision (a) of section 1170.18 permits persons who are "currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] . . . [to] petition for a recall of sentence . . . [and] to request resentencing" under Proposition 47. If the petitioner satisfies the criteria in subdivision (a), subdivision (b) provides that "the

petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Subdivision (d) provides, "A person who is resentenced . . . shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole."

*The One-Year Period of Misdemeanor Parole Is Not Reduced
By Excess Custody Credits or Prior Periods of Parole*

Appellant contends that, against the one-year period of misdemeanor parole, he is entitled to credit for "excess custody credits," the number of days by which his time served in prison exceeds his misdemeanor sentence.² Such credits are referred to as "*Sosa* credits." In *In re Sosa* (1980) 102 Cal.App.3d 1002, the court held that presentence custody credits in excess of a prisoner's term of imprisonment reduce the prisoner's time on parole.

"[O]ur task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent.' [Citation.]" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) " '[W]e apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.]" (*Id.*, at pp. 900-901.)

² This issue is before the California Supreme Court in *People v. Morales*, no. S228030, review granted Aug. 26, 2015. (See Supreme Ct. News Release dated Oct. 16, 2015, p. 2, <http://www.courts.ca.gov/documents/ws101215.pdf> [*Morales* "presents the following issue: Can excess custody credits be used to reduce or eliminate the one-year parole period required by Penal Code section 1170.18, subdivision (d), upon resentencing under Proposition 47?].) The Supreme Court has granted review in two cases decided by this court that involve the same issue: *People v. McCoy*, no. S229296, review granted Oct. 14, 2015; and *People v. Hickman*, no. S227964, review granted Aug. 26, 2015.)

The language of section 1170.18, subdivision (d) is unambiguous. It provides, "A person who is resentenced . . . shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion . . . releases the person from parole." The phrase "shall be given credit for time served and shall be subject to parole for one year" indicates that, irrespective of the amount of credit for time served on the felony offense before it was reduced to a misdemeanor, the petitioner shall be subject to parole for one year. Otherwise, the phrase would read, "shall be given credit for time served and shall be subject to parole for one year *unless credit for time served reduces the one-year parole period.*" Instead, the "unless" clause states, "unless the court, in its discretion . . . releases the person from parole." The statutory language makes clear that the only exception to the one-year parole requirement is if the court releases the person from that requirement. " '[T]he existence of specific exceptions does not imply that others exist. The proper rule of statutory construction is that the statement of limited exceptions excludes others, and therefore the judiciary has no power to add additional exceptions; the enumeration of specific exceptions precludes implying others.' [Citation.]" (*In re James H.* (2007) 154 Cal.App.4th 1078, 1083-1084; see also *Building Profit Corp. v. Mortgage & Realty Trust* (1995) 36 Cal.App.4th 683, 689 [" 'When a statute contains an exception to a general rule laid down therein, that exception is strictly construed [citation] [and] [o]ther exceptions are necessarily excluded' "].)

If the language of section 1170.18, subdivision (d) were ambiguous, the ambiguity would be cured by the Legislative Analyst's comments in the official ballot pamphlet. The Legislative Analyst informed the voters: "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.) Any voter who read this statement would have assumed that a one-year period of parole is mandatory unless the judge reduces or eliminates it. "The Legislative Analyst's comments, like other materials presented to the voters, 'may be helpful but are not conclusive in determining the probable meaning of initiative language.' [Citation.] Thus, when other statements in the election materials contradict the Legislative

Analyst's comments we do not automatically assume that the latter accurately reflects the voters' understanding. [Citation.]" (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 580.) Nothing in the election materials for Proposition 47 contradicts the Legislative Analyst's conclusion that a person resentenced to a misdemeanor "would be required to be on state parole for one year." This is the only statement in the election materials concerning the one-year misdemeanor parole period. (See *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78, 82 [Legislative Analyst's comment "eliminates doubt" as to correct interpretation of ballot proposition].)

Appellant contends that, against the one-year period of misdemeanor parole, he is entitled to credit for prior periods of parole on the felony commitment offense. For the reasons explained above, he is also not entitled to this credit. Furthermore, it would be absurd to give appellant credit for prior parole periods when he repeatedly violated parole.

Disposition

The order recalling appellant's felony sentence, resentencing him to a misdemeanor, and placing him on misdemeanor parole for one year is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Rebecca Riley, Judge
Superior Court County of Ventura

Mark Feeser, under appointment by the Court of Appeal, for Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.