Filed 12/17/19 P. v. Smart CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JAY SMART, Defendant and Appellant.	B293933 (Los Angeles County Super. Ct. No. 8PH03232)

APPEAL from an order of the Superior Court of Los Angeles County, Robert M. Kawahara, Commissioner. Affirmed.

Heather E. Shallenberger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie C. Brenan, Susan Sullivan Pithey, Supervising Deputy Attorneys General, Nikhil Cooper, Deputy Attorney General, for Plaintiff and Respondent.

In this appeal from the order revoking his parole, Michael Jay Smart, who was convicted of first degree murder in 1990, contends the superior court erred in overruling his demurrer to the petition for revocation, which had argued the petition failed to demonstrate the Adult Operations, Department of Corrections and Rehabilitation (DAPO) had adequately considered "intermediate sanctions" as an alternative to revocation as required by Penal Code section 3000.08, subdivision (f).[1] (See *People v. Osorio* (2015) 235 Cal.App.4th 1408, 1413 (*Osorio*) ["less restrictive sanctions for an alleged parole violation must be considered before revocation of parole is sought"], disapproved on another ground by *People v. DeLeon* (2017) 3 Cal.5th 640, 646; accord, *People v. Hronchak* (2016) 2 Cal.App.5th 884, 891 (*Hronchak*).) We affirm the order revoking Smart's parole.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Smart's Murder Conviction and Initial Release on Parole*

In 1990 Smart was convicted of first degree murder (§ 187) and sentenced to an indeterminate term of 25 years to life. He was released on parole in 2015 subject to various terms and conditions, including a prohibition on engaging in criminal conduct. In 2017 Smart's parole was revoked based on a finding he had committed battery on his girlfriend (§ 273.5, subd. (a)), and he was remanded to the custody of the Department of Corrections and Rehabilitation (CDCR). We upheld the order revoking parole in a nonpublished decision. (*People v. Smart* (March 21, 2018, B283566.)

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[1] Statutory references are to this code.

2. *Smart's Second Release on Parole and the Instant Petition for Revocation of Parole*

On April 16, 2018 Smart was again granted parole, subject to conditions compelling him to enroll in, and successfully complete, a batterer's program and a substance abuse program; to refrain from using, possessing or selling any narcotic or other controlled substance, including alcohol and marijuana; and to submit to random drug testing. He was placed in a six-month reentry residential program designed to address his drug addiction and need for stable housing. On May 9, 2018 Smart appeared for a drug test, which was administered by his parole agent, Stacey Collins. The urine sample provided by Smart yielded a positive preliminary result for cocaine, although Smart denied any drug use. On May 18, 2018 a laboratory confirmed Smart's urine sample had tested positive for cocaine and the cocaine metabolite known as benzoylecgonine.

Based on the results of the drug test, DAPO filed a petition for revocation of Smart's parole, attaching a Parole Violation Report prepared by Parole Agent Lisa Bryant and signed by Bryant and her supervisor Alfred Perez, as well as a copy of the conditions of Smart's parole signed by Smart and Agent Collins. The report described Smart as a "lifer" under section 3000.1 with "an extensive violent criminal conviction history" and advised that "intermediate sanctions" had been considered but deemed "inappropriate at this time." According to the report, "parolee voluntarily chose to use cocaine in violation of his special conditions of parole, program requirements, and state law. Due to the unstable and unpredictable behavior caused by being under the influence of cocaine, parolee's condition caused him to represent an unreasonable threat to the community. Based on

the parolee's willingness to use an illegal narcotic while knowing full well that he would inevitably be tested, there is credibility to the concern that he does not care about following the rules, or the possible consequences of those violations. DAPO considered referring the subject back to [the reentry residential program] or a stricter program . . . as an intermediate sanction to address this violation. However, due to the seriousness of the alleged violation there is a significant concern to the safety of the community. DAPO recommends this matter be referred to the court for [a] revocation proceeding." The report also acknowledged the agency had consulted the evidence-based Parole Violation Decision Making Instrument (PVDMI), which had identified Smart's "Static Risk Assessment Level" as low, or one on a scale of five, and had yielded a recommended response level of "Least to most intensive: Continue on parole with remedial sanctions," with zero days of additional incarceration. The petition did not attach the full PVDMI evaluation or explain further the variance between its recommendations and the position taken by DAPO.

Nothing in the petition or the report advised the court that Smart's parole had been revoked in 2017 for beating his girlfriend. In fact, the petition attached a parole violation history form asserting no prior violations had been found. (See Cal. Rules of Court, rule 4.541(d).[2]

3. *The Hearings on the Petition*

At a probable cause hearing on June 21, 2018, Agent Collins testified she had reviewed the conditions on his parole

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[2] All further rule references are to the California Rules of Court.

with Smart on April 17, 2018 and had administered the drug test on May 9, 2018 that yielded a positive result for cocaine. She had not personally prepared the evaluation contained in the petition, consulted the PVDMI factors in connection with Smart's cocaine violation or considered intermediate sanctions for the offense. Nonetheless, she agreed that intermediate sanctions were not appropriate "[b]ecause he had just been out less than 30 days and used cocaine."

Based on this testimony, the defense orally moved to dismiss the petition for failure to demonstrate intermediate sanctions had been considered as required by *Osorio*, *supra*, 235 Cal.App.4th 1408.[3] The court, troubled by the harsh consequence of parole revocation for a single failed drug test, pressed the People to clarify what intermediate sanctions had been considered. Asserting a lack of notice, the prosecutor (who was new to the assignment) requested a continuance of the hearing to prepare a response. The court agreed, but indicated it was inclined to deny the petition without a stronger showing under *Osorio*.

The probable cause hearing was reconvened on June 26, 2018. A new prosecutor introduced a copy of the 2017 parole revocation order, demonstrating the cocaine violation had followed a finding that Smart had committed battery on his former girlfriend, for which his earlier parole had been revoked. In light of this new information, the court overruled the demurrer

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[3] In *Osorio, supra,* 235 Cal.App.4th 1408, the court held a demurrer to the parole revocation petition should have been sustained because the petition failed to adequately explain why revocation, rather than a less restrictive sanction generated by the PVDMI, had been selected. (*Id.* at p. 1415.)

on the ground intermediate sanctions had necessarily been considered when Smart had been re-released on parole in April 2018, found the People had established probable cause for the parole violation and set the matter for a contested hearing.

The contested hearing was held on October 22, 2018. The court heard testimony from Agent Collins; a forensic toxicologist; and Smart, who claimed he must have ingested cocaine through accidental contact, a theory rejected by the toxicologist. The court found the parole violation had been proved, revoked Smart's parole and remanded him to the custody of the CDCR pursuant to section 3000.08, subdivision (h).

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a petition or complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1100; see *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1090 ["demurrer to a criminal complaint lies only to challenge the sufficiency of the pleading and raises only issues of law"].) Thus, we exercise our independent judgment as to whether, as a matter of law, the petition alleged sufficient facts to justify revocation of Smart's parole. (See *Osorio*, *supra*, 235 Cal.App.4th at p. 1412.)

2. *The Statutory Scheme Governing Revocation of Parole*

The Legislature in 2011 enacted and amended "'a broad array of statutes concerning where a defendant will serve his or her sentence and how a defendant is to be supervised on parole,'"

referred to generally as the realignment legislation. (*Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 650, disapproved on another ground by *People v. DeLeon*, *supra,* 3 Cal.5th at p. 646.) Section 17.5, in which the Legislature affirmed its commitment to reducing recidivism, declares: "Criminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety. [¶] . . . California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state's substantial investment in its criminal justice system. [¶] . . . Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society." (§ 17.5, subd. (a)(3)-(5); see *People v. Scott* (2014) 58 Cal.4th 1415, 1425-1426.)

As enacted by the realignment legislation, section 3000.08 and an amended version of section 1203.2 became central elements of the system for parole supervision and revocation. Together with rule 4.541, these statutes provide the framework for parole eligibility, enforcement of parole supervision conditions and procedures to revoke parole in the event of a violation.

Once a parole violation occurs, section 3000.08, subdivision (d), permits DAPO to impose additional conditions of supervision and "intermediate sanctions" without court

intervention: "Upon review of the alleged violation and a finding of good cause that the parolee has committed a violation of law or violated his or her conditions of parole, the supervising parole agency may impose additional and appropriate conditions of supervision, including rehabilitation and treatment services and appropriate incentives for compliance, and impose immediate, structured, and intermediate sanctions for parole violations, including flash incarceration in a city or a county jail."[4]

Section 3000.08, subdivision (f), states, "If the supervising parole agency has determined, following application of its assessment processes, that intermediate sanctions up to and including flash incarceration are not appropriate, the supervising parole agency shall, pursuant to Section 1203.2, petition . . . the court in the county in which the parolee is being supervised . . . to revoke parole." Subdivision (f) also provides, "The petition shall include a written report that contains additional information regarding the petition, including the relevant terms and conditions of parole, the circumstances of the alleged underlying violation, the history and background of the parolee, and any recommendations." (See rule 4.541(c) [setting minimum requirements for the written report], (e) [petition "must include the reasons for that agency's determination that intermediate sanctions without court intervention . . . are inappropriate responses to the alleged violations"]; see also *Osorio*, *supra*,

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[4] "'Flash incarceration' is a period of detention in a city or a county jail due to a violation of a parolee's conditions of parole. The length of the detention period can range between one and 10 consecutive days. . . ." (§ 3000.08, subd. (e).)

235 Cal.App.4th at p. 1413; *Hronchak, supra,* 2 Cal.App.5th at p. 891.)[5]

Subdivision (f) additionally defines the court's options once a parolee is found in violation of the conditions of parole. The court may (1) return the parolee to parole supervision with a modification of conditions, if appropriate, including a period of incarceration in county jail of up to 180 days for each revocation (§ 3000.08, subds. (f)(1), (g)); (2) revoke parole and order the person to confinement in the county jail for up to 180 days (§ 3000.08, subds. (f)(2), (g)); (3) refer the parolee to a reentry court pursuant to section 3015 or other evidence-based program in the court's discretion (§ 3000.08, subd. (f)(3)); or (4) place the parolee on electronic monitoring as a condition of reinstatement on parole or as an intermediate sanction in lieu of returning the parolee to custody (§ 3004, subd. (a)).

No similar choices are authorized in cases that involve parolees like Smart, who came within section 3000.1—that is, "any inmate sentenced under Section 1168 for any offense of first or second degree murder with a maximum term of life imprisonment . . . ." (§ 3000.1, subd. (a)(1).)[6] As to those paroleees, section 3000.08, subdivision (h), divests the court of

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[5] Parole revocation proceedings may also be initiated by the District Attorney under section 1203.2, subdivision (b)(1), which need not be accompanied by a report from the parole agency explaining why intermediate sanctions are not appropriate. (See *People v. Castel* (2017) 12 Cal.App.5th 1321, 1323; *People v. Zamudio* (2017) 12 Cal.App.5th 8, 15.)

[6] Section 3000.08, subdivision (h), similarly limits the discretion of the court upon revocation of parole for certain sex offenders.

authority to modify conditions of parole under section 3000.08, subdivision (f). Section 3000.08, subdivision (h), states: "Notwithstanding any other law, if Section 3000.1 . . . applies to a person who is on parole and the court determines that the person has committed a violation of law or violated his or her conditions of parole, the person on parole shall be remanded to the custody of the Department of Corrections and Rehabilitation and the jurisdiction of the Board of Parole Hearings for the purpose of future parole consideration."

Thus, after a threshold finding by the court that a parolee convicted of first or second degree murder has committed a new violation of law or violated a condition of parole, the Board of Parole Hearings, not the court, must reconsider the person's eligibility for parole: "A Parole Reconsideration initial hearing shall be held by the board on the next available calendar, but no later than 12 months following a lawful determination [of a violation]." At the initial hearing, the board "shall grant parole unless it determines that the circumstances and gravity of the violation . . . , in the context of the parolee's history and all relevant suitability factors, are such that consideration of the public safety requires a more lengthy period of incarceration." (Cal. Code. Regs., tit. 15, § 2275(c).)

3. *DAPO's Parole Revocation Report Adequately Summarized the Reasons the Agency Decided Intermediate Sanctions Were Not Appropriate*

In *Hronchak*, *supra*, 2 Cal.App.5th 884, this court affirmed the order of the superior court denying a parolee's *Osorio* challenge to DAPO's explanation of its conclusion that intermediate sanctions were not appropriate. As we explained, "[t]he parole revocation report, in addition to detailing the

circumstances of the charge against Hronchak, provided specific reasons intermediate sanctions were considered inappropriate," in particular his "arrest and conviction for misdemeanor drug and weapons offenses almost immediately after his release from prison and his inability to conform to the requirements of parole . . . ." (*Id*. at p. 892.) Moreover, we concluded the agency had "adequately explained why it was departing from the PVDMI recommendation [of continuing on parole with remedial sanctions] and seeking revocation and reinstatement of parole with additional custodial time." (*Id.* at p. 892, fn. 6.)

In this case, DAPO provided a similar rationale for finding intermediate sanctions inappropriate, principally Smart's use of cocaine within weeks of his return to parole after the previous revocation. The agency duly reported the low-risk assessment yielded by the DVPMI, although it did not explain its deviation from the recommended course of continuing parole with remedial sanctions.

Nonetheless, Smart is a convicted murderer and thus subject to subdivision (h) of section 3000.08, which limits the options available to the court to craft appropriate sanctions and vests that discretion instead in the Board of Parole Hearings. As the superior court noted, the conditions of Smart's parole had been reviewed by the board only weeks before his re-offense. Moreover, the seriousness of Smart's offense, when seen in light of his previous revocation, persuaded the court, which was previously inclined to sustain the demurrer, to deny it. We cannot say that the court erred under these circumstances.

DISPOSITION

The order revoking parole and remanding Smart to the custody of the Department of Corrections and Rehabilitation is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.