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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY COLE,

Defendant and Appellant.

B278734

(Los Angeles County
Super. Ct. No. BA071480)

APPEAL from an order of the Superior Court of Los Angeles County, David M. Horwitz, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Barbara A. Smith, 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, Mary Sanchez and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Tommy Cole appeals from an order denying his motion to reduce his 1993 felony conviction to a misdemeanor pursuant to Proposition 47.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 29, 2016, Cole filed a motion in propria persona to reduce his felony conviction of unlawful drug possession (Health & Saf. Code, § 11350) to a misdemeanor pursuant to Proposition 47. The motion consisted of a Los Angeles County Superior Court form, signed under penalty of perjury, on which Cole checked a box indicating the type of offense for which he was seeking a reduction and purportedly listed all of his other felony convictions (he listed only one).

Cole attached as an exhibit to the motion a California criminal history record, with a cover letter from the Department of Justice's Bureau of Criminal Information and Analysis. The cover letter stated that the enclosed criminal history record was being provided in response to Cole's request and had been identified by using his fingerprints. The criminal history record listed several arrests and dispositions, including a murder

¹ California voters approved Proposition 47, the Safe Neighborhoods and Schools Act, on November 4, 2014, and it became effective the following day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 added several new Penal Code and Government Code sections, including Penal Code section 1170.18, and amended several Penal Code and Health and Safety Code sections, including Health and Safety Code section 11350. (*Rivera*, at p. 1091.)

conviction on October 21, 2010, in Los Angeles County Superior Court case No. BA354746.

On September 30, 2016, the trial court heard and denied the motion. Cole timely appealed.

DISCUSSION

Proposition 47 reclassified as misdemeanors certain criminal offenses that were previously classified as felonies or wobblers (crimes that can be punished as either felonies or misdemeanors) and established procedures for persons convicted of those crimes to have them resentenced or reclassified as misdemeanors. (*People v. Valencia* (2017) 3 Cal.5th 347, 355; *People v. Rivera, supra*, 233 Cal.App.4th at pp. 1091-1093.) Possession of a controlled substance (Health & Saf. Code, § 11350) is one of the offenses that Proposition 47 reduced from a felony to a misdemeanor. (*Valencia*, at p. 355.) But Penal Code section 1170.18, subdivision (i), states that any person who has a prior conviction of an offense specified in Penal Code section 667, subdivision (e)(2)(C)(iv), is not entitled to relief under Penal Code section 1170.18. A person with a prior murder conviction is ineligible for relief. (Pen. Code, §§ 1170.18, subd. (i), 667, subd. (e)(2)(C)(iv).)

The criminal history record attached to Cole's petition shows that he was convicted of murder in case No. BA354746. His conviction in that case was affirmed on appeal. (*People v. Cole* (Oct. 7, 2015, B251500) [nonpub. opn.].) He is therefore ineligible for relief under Penal Code section 1170.18.

The trial court did not expressly base its ruling on Cole's murder conviction. But any error in the court's stated reasons for

its decision was harmless, because the murder conviction renders Cole ineligible for the relief he sought. (See *People v. Johnson* (2016) 1 Cal.App.5th 953, 968 [error in denial of relief under Proposition 47 is reversible only if prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836].)

Cole argues that the order must be reversed because denial of relief under Proposition 47 cannot be based solely “on an out-of-date, unauthenticated rap sheet, completely lacking in provenance,” and case law allows “use of uncertified rap sheets . . . only to prove identity and service of prison priors,” citing *People v. Martinez* (2000) 22 Cal.4th 106, 112-113. We are not persuaded. As Cole concedes, the criminal history record that he attached to his petition can be used to prove identity. It shows that he was the defendant in Los Angeles County Superior Court case No. BA354746. The Court of Appeal opinion in his appeal in that case is part of the record of conviction. (*People v. Woodell* (1998) 17 Cal.4th 448, 457.) As Cole concedes, the record of conviction is a proper basis for determining the existence of a prior conviction for purposes of Penal Code section 1170.18. (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1263.) The opinion in his appeal conclusively establishes that he was convicted of murder and that he therefore is not entitled to relief.

Cole also argues that we should not affirm on a ground not relied on by the trial court because the rule authorizing such an affirmance “should not apply to a petition decided in a vacuum, without reference to any records of any conviction.” Cole cites no authority for his argument, and we are aware of none. The requirement of a showing of prejudice is imposed by a constitutional provision (Cal. Const., art. VI, § 13), a statute (Pen. Code, § 1404), and case law (*People v. Johnson, supra*, 1

Cal.App.5th at p. 968). Cole's murder conviction renders him ineligible for relief under Proposition 47, so any error by the trial court in denying his petition was not prejudicial. We therefore must affirm.

DISPOSITION

The order is affirmed.

MENETREZ, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.