



People v. Costanzo

2002 | Cited 0 times | California Court of Appeal | March 29, 2002

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Gary M. Costanzo appeals from an order denying his petition for a certificate of rehabilitation and pardon (Pen. Code, § 4852.01 et seq. ¹), with respect to his 1984 convictions, based upon a plea of guilty, to a felony count of incest (§ 285) and of oral copulation with a person under the age of 18 (§ 288a, subd. (b)(1)), for which he served five years on probation, and is required to register under section 290. ²

The court may grant a petition for a certificate of rehabilitation and pardon if it determines that the petitioner, for five or more years after his release on probation, or from custody, has "live[d] an honest and upright life, . . . conduct[ed] himself with sobriety and industry, . . . exhibit[ed] good moral character, and . . . conform[ed] to and obey[ed] the laws of the land." (§§ 4852.03, 4852.05) Appellant contends that the court abused its discretion in denying his petition because there was no evidence to support the conclusion that he did not conduct his life in the manner described. (See *People v. Lockwood* (1998) 66 Cal.App.4th 222, 227 [decision to deny petition is reversible only if appellant demonstrates an abuse of discretion].) We, however, do not reach this contention, because we shall affirm the order denying the petition on the independent ground that appellant failed to demonstrate compliance with the condition specified in subdivision (c) of section 4852.01 that, as a person who was granted probation, he must first have the accusatory pleading dismissed pursuant to section 1203.4.

Subdivision (c) of section 4852.01 provides: "Any person convicted of a felony or any person who is convicted of a misdemeanor violation of any sex offense specified in Section 290, the accusatory pleading of which has been dismissed pursuant to Section 1203.4, may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter. . . ." (Italics added.) Section 1203.4 allows a person who has successfully completed probation to obtain dismissal of the accusatory pleading. It is undisputed that appellant did not obtain a dismissal pursuant to section 1203.4. The dispositive question then is whether dismissal under section 1203.4 is a prerequisite to filing a petition for a certificate under section 4852.01, or whether, as appellant suggests, subdivision (c) merely clarifies that obtaining relief under section 1203.4, does not preclude relief under section 4852.01.



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We hold that obtaining relief under section 1203.4 is a prerequisite to relief under section 4852.01 for the following reasons:

In *People v. Ansell*, supra, 25 Cal.4th 868, 872-878, our state supreme court, in recognition of the dearth of published decisions interpreting the statutory scheme established by section 4852.01 et seq., the related statutory scheme for a direct application to the Governor for a pardon set forth in section 4800 et seq., and the relief provided to felony probationers pursuant to section 1203.4, provided a detailed summary of these statutory schemes, and a description of how, and to what extent they provide relief from certain disabilities imposed upon persons who have been convicted of a felony. The issue before the court in *Ansell*, supra, was whether an amendment to section 4852.01 which excluded persons convicted of certain specified sex offenses from petitioning for a certificate violated the prohibition against ex post facto laws under the federal and state constitutions (§ 4852.01, subd. (d)).³ The court stated, in discussing the relationship between the procedures set forth in sections 1203.4 and 4852.01 that, "[i]nsofar as it applies to convicted felons who have completed probation and meet all other requirements, the certificate of rehabilitation scheme, assumes 'the accusatory pleading . . . has been dismissed pursuant to Section 1203.4.' (§ 4852.01, subd. (c))." (*Id.* at p. 879, fn. 19.) This statement is not dispositive of the issue of statutory interpretation before us, because in *Ansell*, supra, the petitioner had first obtained dismissal of the accusatory pleading pursuant to section 1203.4. (*Id.* at p. 879.) Therefore, the court did not have to decide whether the failure to obtain a dismissal is a basis for denial of the petition. Nevertheless, the court's observation that section 4852.01, subdivision (c), "assumes" that the accusatory pleading has been dismissed, is consistent with our own conclusion that the plain language requires that the accusatory pleading first be dismissed pursuant to section 1203.4. (See also *People v. Frawley* (2000) 82 Cal.App.4th 784, 797 [describing § 4852.01, subd. (c) as "explicitly con-templating pardon for probationer after obtaining relief under § 1203.4" (italics added)].)

The plain language of subdivision (c) of section 4852.01 supports this construction because, in describing a person who may seek relief under that subdivision, it refers to a person convicted of a felony, or misdemeanor violation of certain sex offenses listed in section 290, "the accusatory pleading of which has been dismissed." If, as appellant suggests, the Legislature merely intended to clarify that the dismissal of the accusatory pleading does not preclude a person from filing a petition, instead of definitively declaring that the accusatory pleading "has been" dismissed, the legislature would have used qualifying or permissive language, such as "may have been dismissed," or would have preceded the phrase with the words "even if." (See also *People v. Frawley*, supra, 82 Cal.App.4th 784, 789 [starting point of task of statutory construction is the language of the statute].)

The legislative history also supports our conclusion that, when the Legislature added subdivision (c), it intended to limit the class of probationers to which it was, for the first time, including in the class of persons entitled to petition for a certificate. Prior to January 1, 1977, section 4852.01 provided for relief only to persons who had been convicted of a felony and were "released from a State prison or other . . . institution or agency." Former subdivision (c) specified, among other things, that a



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certificate was not available " to persons convicted of misdemeanors," or who served time only in county jails. (Historical and Statutory Notes, 50C West's Ann. Pen. Code (2000 ed.) foll. § 4852.01, pp. 170-171, italics added; Stats. 1955, ch. 708, § 1, p. 1197; Stats 1974, ch. 1365, § 1, p. 2954; see also *People v. Taylor* (1960) 178 Cal.App.2d 472, 480, superseded by statute on another ground as stated in *People v. Bell* (1989) 49 Cal.3d 502, 545 [noting under the version of section 4852.01 then in effect, only persons who had been released from state prison or other state institution could petition for a certificate, whereas section 1203.4 provided relief to probationers who successfully completed probation].) Effective January 1, 1977, the Legislature added a new subdivision (c), which for the first time included certain felony probationers within the class of persons who may petition for a certificate. It described this class as "[a]ny person convicted of a felony . . . the accusatory pleading of which has been dismissed pursuant to Section 1203.4" These amendments also renumbered former subdivision (c) as subdivision (d) and deleted the language excluding persons who served time only in county jails, from the class of persons entitled to petition for a certificate. (Stats. 1976, ch. 434, § 2, p. 1111.) This legislative history makes it clear that, prior to January 1, 1977 probationers were not within the class of persons entitled to petition for a certificate, and that one of the purposes of the 1977 amendment was to expand the class of persons entitled to petition to probationers, who have proceeded under section 1203.4 and had the accusatory pleading dismissed.⁴

Our supreme court's comparison in *People v. Ansell*, supra, 25 Cal.4th 868 of the statutory scheme available to probationers under section 1203.4, and the statutory scheme providing for a petition for a certificate, reveals at least one reason why the Legislature may have chosen to so limit the class of probationers who may petition for a certificate: A person who is entitled to petition for a certificate under section 4852.01 may proceed "without personal expense and with professional assistance. (§§ 4852.04 [establishing a right to counsel and to assistance from rehabilitative agencies, including probation and parole officers], 4852.08 [authorizing representation by the public defender or other appointed counsel], 4852.09 [prohibiting court fees of any kind], 4852.1 [authorizing the production of official records at no charge], 4852.18 [making the petition and other necessary forms available at no charge])." (*People v. Ansell*, supra, 25 Cal.4th 868, 875.) By contrast under 1203.4, no similar provisions are expressly made for appointed counsel, or relief from court fees.⁵ The Legislature may have reasoned that the burden upon public resources that would follow from expansion of the class of persons entitled to petition for a certificate under section 4852.01 to felony probationers, could be ameliorated by requiring that they first obtain a dismissal of the accusatory pleading under section 1203.4. Although a probationer who is successful in obtaining dismissal of the accusatory pleading pursuant to section 1203.04 would then be entitled to petition for a certificate pursuant to section 4852.01, and to receive the financial and professional assistance provided under that statutory scheme, the prerequisite that he, or she, first obtain relief under section 1203.4, operates as a gatekeeper to insure that public resources are used only for petitions likely to be meritorious, because the petitioner would have already demonstrated satisfaction of the standards for relief under section 1203.4.

Appellant, alternatively, suggests that, even if subdivision (c) of section 4852.01 requires that he



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obtain a dismissal of the accusatory pleading pursuant to section 1203.04, subdivision (b) of section 4852.01 also applies, and permits probationers to file a petition without first obtaining a dismissal pursuant to section 1203.4. He argues that he qualifies under subdivision (b) as a person who "is committed to a state prison or other institution or agency" because service of probation entails commitment to the custody of the probation department.

Appellant cites no authority for the proposition that the class described in subdivision (b) of section 4852.01 includes individuals who were granted probation, and this construction is not supported by the history of the amendments to section 4852.01 that we have already discussed. Subdivision (b) was added by amendment in 1955, at which time the Legislature also added former subdivision (c) which expressly stated that the chapter governing petitions for a certificate of rehabilitation and pardon did not apply to a person who had only served time in county jail. (Stats 1955, ch.708, § 1, p. 1197.) Although none of the subdivisions of section 4852.01 expressly stated that persons who were granted probation were not entitled to relief, prior to 1977, section 4852.01, including subdivision (b), was understood by the courts and the Legislature to exclude probationers from the class of persons entitled to petition for relief, and that was one of the reasons for the 1977 amendments.

In any event, a grant of probation, by definition, is the antithesis of a commitment to a state prison, or "other institution or agency." (§ 4852.01, subd. (b).) Unlike a judgment and sentence of imprisonment, which must provide that the defendant be delivered into the custody of the Director of Corrections (§ 1202a), probation is "the suspension of the imposition or execution of a sentence, and the order of conditional and revocable release in the community under the supervision of a probation officer." ⁶ (§ 1203, subd. (a), italics added.) If the probation officer, or any peace officer has probable cause to believe that "a person released on probation" is violating any term or condition of probation, the officer must rearrest the probationer, and bring him or her before the court, and after notice and a hearing, probation may be modified or revoked by the court. (§§ 1203.2, subd. (a), 1203.3.) A probationer therefore is not "committed" to a state penal institution, or other institution or agency. Instead, a probationer remains free from custody, subject only to the supervision of the probation department, and subject to rearrest only upon probable cause to believe that the terms and conditions of probation have been violated.

For all the foregoing reasons, we conclude that the court did not err in denying appellant's petition, because dismissal of the accusatory pleading pursuant to section 1203.4 is a prerequisite to filing a petition pursuant to subdivision (c) of section 4852.01, and appellant failed to satisfy this condition.

The order denying the petition is affirmed.

We concur:

Marchiano, P.J.



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Margulies, J.

1. All subsequent statutory references are to the Penal Code, unless otherwise indicated.
2. Under a recent amendment to section 290.5 a person convicted of certain sex crimes is not relieved of the duty to register under section 290 based upon a certificate of rehabilitation, and must continue to register " `until that person has obtained a full pardon' [from the Governor pursuant to] section 4800 et seq. or under 4852.01 et seq." (People v. Ansell (2001) 25 Cal.4th 868, 877, fn. 16.) Section 290.1 also now provides that "an expungement under section 1203.4 does not relieve a felony sex offender from the continuing duty to register under the provisions of section 290." (People v. Fioretti (1997) 54 Cal.App.4th 1209, 1212.)
3. The same language that appears in section 4852.01, subdivision (d) excluding persons convicted of a "violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289," was also added to Section 1203.4, subdivision (b). (Stats 1997, ch. 61, § 1; see People v. Ansell, supra, 25 Cal.4th 868, 879, fn. 19.) Appellant mistakenly relies upon this language for the proposition that he could not have the accusatory pleading dismissed pursuant to section 1203.4 because the nature of his convictions precludes him from obtaining relief, and that we should therefore not require him to first obtain relief pursuant to section 1203.4. He was convicted of violations of section 285, and subdivision (b)(1) of 288a, neither of which is one of the offenses listed. In any event, the same language, if it applied to him, also appears in section 4852.01, subdivision (d), and would also preclude him from petitioning for a certificate.
4. Our conclusion that the accusatory pleading must be dismissed pursuant to section 1203.4 before a probationer may petition for a certificate pursuant to subdivision (c) of section 4852.01 is supported by additional legislative history: In a report by the Senate Committee on the Judiciary, the Committee stated the purpose of the bill, which in its final version added subdivision (c) to section 4852.01, was to "[p]ermit former probationers who have obtained a dismissal of charges to seek a certificate of rehabilitation and pardon." (Sen. Com. on Judiciary, com. on Assem. Bill No. 2403 (1975- 1975 Reg. Sess.) p. 3, italics added.) It also stated one of the facts which must exist is that, "[t]he accusatory pleading has been dismissed pursuant to the procedure available under existing law." (Id. at p. 1.) Similarly, the Assembly Committee on Criminal Justice, stated that Assembly Bill No. 2403 would allow former probationers to petition for a certificate, "if . . . probation has been successfully completed and the charges `dismissed' under Section[] 1203.4." (Assem. Com. on Criminal Justice, Bill Digest, Assem. Bill No. 2403 (1975- 1976 Legis. Sess.) p.1.)
5. In fact, in 1983, an amendment to section 1203.4 added subdivision (c) which provides that a person who seeks relief under section 1203.4 may be required to reimburse the county and city for the actual cost of services rendered. (Stats. 1983, ch. 1118, § 1.)
6. The meaning of the phrase "committed to a state penal institution or other institution or agency" was also considered in an opinion of the Attorney General explaining why a person who was committed to the California Rehabilitation Center after conviction of a felony is within the class of persons eligible to petition under section 4852.01. The Attorney General reasoned that the CRC is an institution within the Department of Corrections, and its purpose is to provide treatment, and to hold the person undergoing treatment in custody. (60 Ops.Cal.Atty.Gen. 223 (1977).) By contrast, as we



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have explained, a probationer is released from custody, and only subject to supervision by the probation department. In this same opinion, the attorney general also construes subdivision (c), as we do, to require the dismissal of the accusatory pleading pursuant to section 1203.4 before a former probationer may petition for a certificate under section 4852.01. (People v. Lockwood, supra, 66 Cal.App.4th at pp. 230- 231; see Fischer v. Los Angeles United School Dist. (1999) 70 Cal.App.4th 87, 102 [Attorney General's opinion is not binding precedent but is entitled to great weight in the absence of authority construing statute].)

