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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMIAH RIVERA,

Defendant and Appellant.

E078502

(Super.Ct.No. SWF1707460)

OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III,
Judge. Affirmed.

Benjamin Kington, under appointment by the Court of Appeal, for Defendant and
Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney
General, Charles C. Ragland, Assistant Attorney General, Arlene A. Sevidal and Susan
Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Jeremiah Rivera appeals from the denial of his petition to have his conviction for oral copulation of a minor (former Pen. Code,¹ § 288a, subd. (b)(1))² expunged. We affirm.

PROCEDURAL BACKGROUND

In 2017, defendant was charged by felony complaint with having sexual intercourse with a person under the age of 18 years and more than three years younger than him (§ 261.5, subd. (c), count 1), penetration by a foreign object (§ 289, subd. (h), count 2), and oral copulation of a person under the age of 18 years (former § 288a, subd. (b)(1), count 3). On September 1, 2017, defendant entered a plea agreement and pled guilty to count 3. In exchange, a trial court ordered him to serve 180 days in jail and placed him on probation for a period of five years, under specified conditions.

On January 26, 2018, the probation department filed an “allegation of violation of probation” alleging that defendant violated the following conditions: (1) “Obey all laws, ordinances, and court orders”; (2) “Do not engage in any communication on the internet with anyone identified as a minor or anyone you know to be a minor, unless authorized by probation officer”; (3) “Do not visit any ‘chat rooms’ message board forums or similar internet sites where minors are known to frequent”; and (4) “Report to probation officer

¹ All further statutory references will be to the Penal Code unless otherwise indicated.

² Former section 288a was renumbered as section 287, effective January 1, 2019. (See *People v. Rhoades* (2019) 8 Cal.5th 393, 399, fn. 1.)

immediately or within 2 days of release from custody for initial instructions, and follow all reasonable directives of PO.” The document alleged that the probation officer met defendant on October 12, 2017, for an initial interview and reviewed defendant’s terms and conditions with him. Due to the circumstances of his convicted offense, the probation officer directed defendant to “deactivate, delete, and not access any social media accounts, to include: Facebook, Instagram, Snapchat, Twitter, Tumblr, and YouTube.” Defendant signed and dated a copy of his terms and conditions and stated that all of his social media accounts had been deleted. On January 19, 2018, defendant reported to the probation office for an appointment, and the probation officer searched his cell phone, which indicated defendant had accessed Facebook. Defendant admitted that he last accessed Facebook on December 20, 2017. He also admitted to accessing YouTube and Candy Crush, a game app known to be frequented by minors, which allowed players to chat with each other. Defendant also admitted to accessing “YouPorn,” which is a pornographic video-sharing website. He stated he knew that accessing social media websites was a violation of his terms and conditions.

The probation officer stated that defendant’s behavior was unacceptable since defendant “continues to use the same social media website, ‘Facebook,’ as he once did to victimize a 16 year old female.” Thus, the officer recommended that the court order defendant to serve another 180 days in jail and add the following condition to his probation: “Do not knowingly own, use, possess any form of sexually explicit movies, videos, material, or devices unless recommended by a therapist and approved by the Probation Officer. Do not enter any establishment where such items are the primary

items viewed or sold, and do not utilize any sexually oriented telephone services” and “Do not possess or have under your control any obscene matter as defined in PC 311.”

At a hearing on February 5, 2018, defendant admitted that he violated his probation by visiting messaging boards, forums, and websites. The court found him in violation, placed him back on probation, and ordered him to serve 210 days with credit for the time served, leaving a balance of 30 days, which were to be served through the work release program. The conditions of probation remained the same, with the addition of the conditions that defendant not possess obscene matter as defined by section 311 and not enter any establishments where the primary items for sale were sexually-oriented materials.

On October 26, 2021, the court terminated defendant’s probation under Assembly Bill No. 1950, which limited the length of probation for many felonies to two years, effective January 1, 2021.³ The court found that defendant’s probation had expired as of January 1, 2021.

On January 6, 2022, defendant filed a motion to set aside his guilty plea and dismiss the complaint under section 1203.4, on the grounds that he complied with all his probation conditions for the entire period. The People filed an opposition, asking the court to deny relief due to the nature of the charge. Defendant filed a reply, arguing that the nature of the charge was irrelevant to a court’s decision to expunge a defendant’s record. He also asserted he was not arguing that he was entitled to expungement as a

³ See *People v. Faial* (2022) 75 Cal.App.5th 738, 742-743.

matter of right, but that he just violated his probation one time, nearly three years prior; thus, it was within the court’s discretion to expunge his record, and it was in the interests of justice to do so.

The court held a hearing on January 21, 2022, and denied defendant’s section 1203.4 motion. The court stated: “The nature of the charge speaks for itself. I believe it was sodomy with a minor or oral cop with a minor . . . [Defendant] pled guilty, received sixty months of probation. This is a very serious charge. [¶] And based on the violation of probation . . . that even though he was prohibited from going onto the Web, he did so, nonetheless, and actually accessed pornography sites. [¶] What that tells the Court is that he has a fixation on minors, minor girls, and he remains a danger to the community. And even though he’s completed his terms of probation, in the discretion of the Court . . . he is not suitable . . . for the Court to dismiss these charges.”

DISCUSSION

The Court Properly Exercised its Discretion and Denied Defendant’s Motion

Defendant argues the trial court abused its discretion in denying his motion to withdraw his guilty plea and dismiss the complaint. He claims the court based its denial on two grounds—that his offense was “very serious,” and his probation violation demonstrated a “fixation on minors.” Defendant argues that the first ground was improper, and the second ground was not supported by substantial evidence. We conclude the court did not abuse its discretion in denying his motion.

A. *Relevant Law*

Section 1203.4, subdivision (a)(1), provides in relevant part: “When a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interest of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if they are not then serving a sentence for an offense, on probation for an offense, or charged with the commission of an offense, be permitted by the court to withdraw their plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if they have been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant”

In other words, “a defendant who has been convicted of a crime and granted probation is entitled to have his record expunged after the period of probation has terminated ‘if he comes within any one of three fact situations: (a) he has fulfilled the conditions of his probation for the entire period; (b) he has been discharged before the termination of the period of probation; or (c) in any case in which a court, in its discretion and the interests of justice, determines he should be granted relief.’ ” (*People v. McLernon* (2009) 174 Cal.App.4th 569, 571 (*McLernon*); see *People v. Butler* (1980) 105 Cal.App.3d 585, 587 (*Butler*).) “If the petitioner comes within either of the first two fact situations, the court is required to grant the requested relief [citation].” (*Butler*, at p. 587; see *People v. Holman* (2013) 214 Cal.App.4th 1438, 1459 (*Holman*).) “Under the third

scenario, the court exercises its discretion whether to grant relief in the interests of justice.” (*Holman*, at p. 1459.) “[I]n determining whether to grant relief under the discretionary provision, the trial court may consider any relevant information, including the defendant's post-probation conduct.” (*McLernon*, at p. 577.)

B. *There Was No Abuse of Discretion*

In this case, the first and second situations were not applicable since defendant had violated the terms of his probation, and he was not discharged prior to the termination of his probation. (See *Holman*, *supra*, 214 Cal.App.4th at p. 1459 [“Any violation of any of the probationary terms will disqualify a probationer from seeking dismissal under the first scenario”].) Defendant contended, under the third scenario, that it was within the court’s discretion to expunge his record, and it was in the interests of justice to do so.

Defendant now claims the court abused its discretion by denying his section 1203.4 motion based on the seriousness of the offense and his “fixation on minors.” He first points out that the seriousness of the offense was not a proper basis upon which to deny his motion. (*People v. Hawley* (1991) 228 Cal.App.3d 247, 250, fn. 4 [“the seriousness of the original offense was wholly irrelevant to the issue before it”] (*Hawley*).) *Hawley* is clearly distinguishable. *Hawley* did not deal with that portion of section 1203.4 that permits a court to grant relief in any “case in which a court, in its discretion and the interest of justice, determines that a defendant should be granted the relief available under this section.” (Pen. Code, § 1203.4, subd. (a)(1).) Instead, *Hawley* was decided upon that portion of the statute that requires mandatory relief where a

defendant “has been discharged prior to the termination of the period of probation.”

(*Ibid.*; see *Hawley, supra*, 228 Cal.App.3d at p. 250.)

In the context of that case, it is true that “the seriousness of the original offense was wholly irrelevant to the issue before it” but that was because the court found that the defendant was entitled to mandatory relief under the statute notwithstanding the charge.

(*Hawley, supra*, 228 Cal.App.3d at p. 250 & fn. 4.) “It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court.” (*People v. Harris* (1989) 47 Cal.3d 1047, 1071.)

The court here had broad discretion to determine whether it was in the interests of justice to grant the relief requested. The nature of the offense was just one of several factors the court considered in making its decision. It noted that defendant pled guilty to oral copulation with a minor and was placed on probation for five years. It also noted that he was prohibited from going on the internet as a condition of his probation, and he violated such condition and actually accessed a pornography site. The court concluded that defendant’s willingness to violate probation by accessing websites he was prohibited from accessing due to the nature of his conviction indicated that he remained a danger to the community. Thus, the record does not indicate that the court based its denial on the seriousness of the offense, as defendant claims, but rather considered the seriousness of the offense in the context of defendant’s violation of probation.

Defendant next argues that the court’s other basis for its denial—that his use of the internet showed he had a “fixation on minors”—was unsupported by the evidence. He specifically contends his use of the internet did not indicate he had a fixation on minors

and points out that he was not prohibited from going on the internet or accessing pornography. The record shows that defendant was instructed to “deactivate, delete, and not access any social media accounts, to include: Facebook, Instagram, Snapchat, Twitter, Tumblr, and YouTube.” However, he admitted to accessing Facebook, YouTube, Candy Crush, and “YouPorn,” knowing that such actions violated his probation. Thus, while the court may have misspoken by saying defendant “was prohibited from going onto the Web,” the context and crux of the court’s comment was that defendant violated his probation, which was undisputed. We further note the probation officer was concerned with defendant’s continued use of Facebook since he had previously used it to “victimize a 16 year old female.” The court considered defendant’s use of the internet, specifically noting he accessed a pornography site, in the context of defendant’s offense (oral copulation of a minor), and reasonably concluded that defendant was still a danger to the community. Moreover, we note that “[t]he expunging of the record of conviction is, in essence, a form of legislatively authorized certification of complete rehabilitation based on a prescribed showing of exemplary conduct during the entire period of probation.” (*People v. Turner* (1961) 193 Cal.App.2d 243, 247.) As the court observed, defendant did not show exemplary conduct during the entire period of probation. (*Ibid.*) In view of the circumstances, we cannot say the court abused its discretion in denying defendant’s motion.

After a thorough review of the record, we conclude that the court properly exercised its discretion in denying defendant’s motion to withdraw his guilty plea and dismiss the complaint.

DISPOSITION

The judgment is affirmed.

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FIELDS
J.

We concur:

MILLER
Acting P. J.

MENETREZ
J.