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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN MICHAEL DAVIS,

Defendant and Appellant.

C052803

(Super. Ct. No. CRF03-702)

In this appeal we conclude: (1) the speedy sentencing rights provided by Penal Code section 1381 apply to a probation revocation proceeding if imposition of sentence was originally suspended; (2) the trial court should have granted defendant Kevin Michael Davis's section 1381-based motion to dismiss his probation revocation proceeding for failing to sentence him within the 90-day period mandated by that section (and therefore that sentence must be vacated); and (3) under Penal Code

section 1387 the People may refile the probation revocation proceeding within defendant's period of probation.

BACKGROUND

On August 25, 2004, pursuant to a plea bargain, defendant pleaded guilty in Yuba County Superior Court case No. CRF03-702 to a single count of violating Health and Safety Code section 11379, subdivision (a) (transporting methamphetamine).

On September 13, 2004, the Yuba County Superior Court suspended the imposition of sentence and placed defendant on probation for three years pursuant to Proposition 36 (drug treatment program).

On October 12, 2004, the Yuba County Probation Office petitioned to revoke defendant's probation because he failed to report to his probation officer on September 16, 2004, as directed; defendant's probation was summarily revoked.

After defendant failed to appear for a Yuba County Superior Court proceeding regarding this September 16 probation violation, the probation violation hearing was held on September 26, 2005, and defendant admitted that he failed to report on September 16, 2004. Defendant was ordered to return on October 17, 2005, for judgment and sentencing, but he failed to appear on that date.

On October 21, 2005, defendant was sentenced in Sutter County Superior Court case No. CRF-05-2182 to two years in state

prison for violating Penal Code section 459 (first degree burglary).¹

Just four days later, on October 25, 2005, at the request of the Yuba County District Attorney, the Yuba County Superior Court issued an Order for Removal of Prisoner. The order specified that a criminal proceeding (case No. CRF03-702) was pending against defendant in the Yuba County Superior Court, and that defendant was to be brought to the Yuba court on November 7, 2005, at 9:00 a.m. The minute order for the November 7 proceeding, described as an arraignment for probation violation, states, "Dropped--Active Warrant."

On January 4, 2006, defendant served the Yuba County District Attorney with a preprinted form entitled "NOTICE AND DEMAND FOR TRIAL (P.C. SECTION 1381)." This notice provided the specifics of defendant's Sutter County conviction, stated that defendant had reason to believe that a Yuba County criminal action for violation of probation was pending against him, and demanded a hearing of that criminal action as prescribed by section 1381.

Based on this section 1381 demand, defendant, on April 4, 2006, moved to dismiss his Yuba County case (case No. CRF03-702; transporting methamphetamine) because he had not been heard within the 90-day period mandated by that section.

¹ Hereafter, undesignated section references will be to the Penal Code.

In late May 2006, the Yuba County Superior Court implicitly denied defendant's section 1381-based motion, finding the section inapplicable to an incarcerated probationer with a pending probation revocation proceeding. The Yuba court then sentenced defendant on his Yuba County conviction (transporting methamphetamine) to a one-year sentence consecutive to his two-year sentence on his Sutter County conviction (first degree burglary).

Defendant has timely appealed from this Yuba County judgment.

DISCUSSION

1. *Application of Section 1381*

Defendant contends his Yuba County case (transporting methamphetamine) must be dismissed because the Yuba County Superior Court failed to sentence him within 90 days of the district attorney's receipt of his section 1381 demand for hearing regarding his pending probation violation proceeding. We conclude that defendant's Yuba County probation revocation (sentencing) proceeding should have been dismissed, and that the sentence imposed at that proceeding must be vacated.

Section 1381 provides in pertinent part: "Whenever a defendant has been convicted, in any court of this state, of the commission of a felony . . . and has entered upon a term of imprisonment . . . and at the time of the entry upon the term of imprisonment . . . *there is pending*, in any court of this state, any other indictment, information, complaint, or any *criminal proceeding wherein the defendant remains to be*

sentenced, the district attorney of the county in which the matters are pending shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment . . . and his or her desire to be brought to trial or for sentencing unless a continuance beyond the 90 days is requested or consented to by the person, in open court In the event that the defendant is not brought to trial or for sentencing within the 90 days the court in which the charge or sentencing is pending shall, on motion or suggestion of the district attorney, or of the defendant . . . or his or her counsel . . . or on its own motion, dismiss the action." (Italics added.)

As this court has noted, the principal purpose "of section 1381 'is to permit a defendant to obtain concurrent sentencing at the hands of the court in which the earlier proceeding is pending, if such is the court's discretion.'" (*People v. Boggs* (1985) 166 Cal.App.3d 851, 855 (*Boggs*), quoting *Boles v. Superior Court* (1974) 37 Cal.App.3d 479, 484 (*Boles*); see also § 669 [section 669 provides that sentences default to concurrent if the trial court fails to order otherwise].) Section 1381 also acts to clean up pending charges, limit anxiety involving unresolved charges, and avoid prolonged imprisonment. (*Boggs, supra*, 166 Cal.App.3d at p. 855; see also *People v. Broughton* (2003) 107 Cal.App.4th 307, 319 (*Broughton*).)

Section 1381 applies, as relevant here, to any person who, at the time of entry upon the term of imprisonment for a

California felony conviction, has "pending . . . any [California] criminal proceeding wherein [he] remains to be sentenced." There has been some disagreement among the courts of appeal as to whether section 1381 applies to a defendant awaiting a probation revocation proceeding. (Compare *Rudman v. Superior Court* (1973) 36 Cal.App.3d 22 (*Rudman*), *People v. Johnson* (1987) 195 Cal.App.3d 510 and *People v. Ruster* (1974) 40 Cal.App.3d 865 (*Ruster*) [*Johnson* and *Ruster* were disapproved on other grounds in *In re Hoddinott* (1996) 12 Cal.4th 992, 1005] and *Boles, supra*, 37 Cal.App.3d 479 [section 1381 applies to probation revocation proceedings], with *Broughton, supra*, 107 Cal.App.4th 307 [a split decision holding that the substantively identical section 1381.5 does not apply to probation revocation proceedings].)

In *Rudman*, the court held that section 1381 applies to probationers--who have been incarcerated on another California offense and thereby have a probation revocation proceeding pending against them--where imposition of sentence was suspended when probation was granted (we will refer to such a probationer as an "incarcerated probationer"). (*Rudman, supra*, 36 Cal.App.3d at pp. 24, 27.) *Rudman* implicitly reasoned that, under these circumstances, an incarcerated probationer faces, within the contemplation of section 1381, a pending criminal proceeding wherein he "remains to be sentenced." (*Rudman, supra*, 36 Cal.App.3d at p. 24; see *id.* at p. 27); see also *Ruster, supra*, 40 Cal.App.3d at p. 872.) The *Rudman* court concluded that a failure to hold a probation

revocation hearing within 90 days of a defendant's section 1381 demand for such a hearing requires dismissal of the probation revocation proceeding. (*Rudman, supra*, 36 Cal.App.3d at p. 27.) *Rudman* also noted that under section 1381 a defendant "has a statutory right to be sentenced on the [underlying conviction] within 90 days of giving appropriate notice to the district attorney." (*Ibid.*)

The *Rudman* court found that sections 1381 and 1203.2a do not conflict, even though both sections contemplate speedy sentencing. There is no conflict because section 1381 provides defendants an opportunity to appear at the sentencing hearing and defend in person with counsel, while section 1203.2a allows a defendant to waive his right to be present and represented by counsel. (*Rudman, supra*, 36 Cal.App.3d at p. 27.)

A split decision in *Broughton* rejected the holding of *Rudman* and its progeny, and concluded that the substantively identical section 1381.5 does not apply to an incarcerated probationer awaiting a probation revocation hearing where imposition of sentence was suspended when probation was granted.² (*Broughton, supra*, 107 Cal.App.4th at pp. 316-318, 319-320.) The majority in *Broughton* found that under the wording of section 1381.5, dismissal of the "'action'" (for untimely

² *Broughton* construed section 1381.5, a statute under which federal prisoners in California may request speedy disposition of a pending California state court proceeding. However, the language that the court was interpreting is identical to the language in section 1381, and *Broughton* invoked section 1381 in its analysis.

sentencing) would require dismissal of the underlying conviction (on which probation was originally granted), and this would be an absurd result. (*Id.* at p. 317.) The majority, therefore, interpreted section 1381.5 as a legislative attempt to provide speedy trial rights to persons awaiting an *initial* sentencing hearing, but not to persons awaiting probation revocation proceedings who had already been “‘brought’” before the court “‘for sentencing’” by being granted probation. (*Id.* at pp. 316-317.)

We take issue with the majority’s analysis in *Broughton* in three respects. First, the majority refused to apply section 1381.5 (and hence, section 1381) to defendants awaiting probation revocation proceedings mainly because dismissal of the “action”--the word these statutes use--would lead to the absurd result of dismissing the underlying conviction on which probation was originally granted. But the *Broughton* majority provided little or no support for its interpretation of the word “action” in the context of sections 1381.5 and 1381. (*Broughton, supra*, 107 Cal.App.4th at p. 317.)

We think it is more reasonable to read the word “action” in sections 1381 and 1381.5 as requiring dismissal of the probation revocation proceeding (as the *Rudman* court did), instead of limiting the application of these statutes, in the sentencing context, to an “initial sentencing hearing” (as the *Broughton* majority did), a phrase that does not appear in the statutes. The term “action” is used in section 1381 because that section broadly requires the dismissal of an indictment, information or

complaint for not timely trying new charges, as well as the dismissal of a criminal proceeding for not timely sentencing old charges. Black's Law Dictionary defines "action" broadly as a "civil or criminal judicial proceeding." (Black's Law Dict. (7th ed. 1999) p. 28, col. 2.) Under this definition, a probation revocation proceeding is an "action."

Our reading of section 1381, moreover, reasonably designates a probation revocation proceeding--in light of its underlying criminal conviction in which imposition of sentence was suspended--as a "pending . . . criminal proceeding wherein the defendant remains to be sentenced," in the language of sections 1381 and 1381.5. This reading makes sense because probation must be revoked before a sentence can be imposed. Such a reading likewise accords with section 1381's language that "at the time of the entry upon the term of imprisonment . . . there is pending, in any court of this state, . . . any criminal proceeding wherein the defendant remains to be sentenced." (And, as is usually the case, here the Yuba County Probation Department obtained a court order summarily revoking defendant's probation when it filed its petition to revoke probation. A summary revocation of probation bolsters the view that sentencing remains to be done.)

Second, the majority in *Broughton* also based its reading of section 1381.5 (and hence, section 1381) on the existence of the speedy sentencing procedure provided in section 1203.2a. (*Broughton, supra*, 107 Cal.App.4th at pp. 320-321.) However, the *Broughton* majority failed to account for substantive

distinctions between sections 1381 and 1203.2a. (*Ibid.*) Under section 1203.2a, a defendant can request imposition of sentence only if he waives the right to be present and have counsel represent him at the hearing; in other words, speedy sentencing under section 1203.2a is sentencing in absentia. In contrast, section 1381 gives the defendant an opportunity to appear before the court with counsel, so that he may defend against the probation revocation charges, the sentence, or both. (§ 1381; see *Rudman, supra*, 36 Cal.App.3d at p. 27.)

And third, but not least, the *Broughton* majority's reading of section 1381.5, in the sentencing context as limited to initial sentencing hearings, would undermine the principal purpose of section 1381, as stated by this court. That purpose is to permit an incarcerated probationer, whose imposition of sentence was originally suspended, to obtain concurrent sentencing if such is the court's discretion. (*Boles, supra*, 37 Cal.App.3d at p. 484; *Boggs, supra*, 166 Cal.App.3d at p. 855; see *Broughton, supra*, 107 Cal.App.4th at p. 316, fn. 12.)

In sum, the majority's interpretation in *Broughton* requires reading the words "initial sentencing hearing" into section 1381, forces an incarcerated probationer awaiting a probation revocation proceeding to use the less protective section 1203.2a procedure, and undermines the principal purpose of section 1381. Our interpretation of the word "action" in section 1381 to require a dismissal of the probation revocation proceeding, and not the underlying conviction, does not read the statute in a strained way. Nor does our interpretation place defendants at

the mercy of the court in order to exercise their right to concurrent sentencing under section 669 (as noted above, under section 669, sentences default to concurrent if the trial court does not order otherwise). Nor does our interpretation result, as we shall see later in this opinion, in incarcerated probationers serving no time on their underlying convictions because of the mere fortuity of the 90-day sentencing deadline of section 1381 being missed. (See § 1387 [companion section to section 1381 that we subsequently interpret to allow a refiling of felony-based probation revocation charges].)

We agree with *Rudman* and its progeny, and conclude that where a defendant has been placed on probation with imposition of sentence suspended and the defendant is subsequently incarcerated on another conviction, a probation revocation proceeding is, in the words of section 1381, a "pending . . . criminal proceeding wherein the defendant remains to be sentenced." (§ 1381.) Section 1381 applies to such a probation revocation proceeding and a dismissal of the "action" under section 1381, in this context, is the dismissal of the probation revocation proceeding.³

We now turn our sights to applying these legal principles to the facts here.

³ We recognize that this court in *Ruster* suggested that dismissal of the "action" under section 1381 would require dismissal of the underlying conviction. (*Ruster, supra*, 40 Cal.App.3d at p. 873.) However, the facts of *Ruster* did not require a decision on that issue and this suggestion was made in the context of a rhetorical point.

Defendant correctly points out that he was sentenced in his Yuba County probation revocation proceeding on May 26, 2006, well after the 90-day deadline required by his section 1381 hearing demand of January 4, 2006. We conclude that defendant's section 1381 demand was sufficient to invoke the protections of that section.

As relevant here, section 1381 is invoked when, "at the time of the entry upon the term of imprisonment [here, imprisonment on the Sutter County conviction] . . . there is pending, in any court of this state, . . . any criminal proceeding wherein the defendant remains to be sentenced [here, the probation violation proceeding in Yuba County]"; if so, "the district attorney of the county in which the matters are pending shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment . . . and his or her desire to be brought to trial or for sentencing[.]" (§ 1381.)

Defendant's section 1381 demand was dated January 4, 2006, and was drafted on a preprinted form entitled "NOTICE AND DEMAND FOR TRIAL (P.C. SECTION 1381)." The demand stated as pertinent: "TO THE DISTRICT ATTORNEY, Yuba C[ounty], State of California. Please take notice that I, Kevin Michael Davis[,] Inmate # F01909[,] (CDC Number) at Salinas Valley State Prison[,] was convicted of the crime of 1st [d]egree burglary in Sutter County, CA, and was sentenced . . . on or about 10-21-05 . . . to a term of 2 years. I have reason to believe that the

following criminal action is now pending against me in Yuba County. CHARGES[:] Violation of Probation[.] WARRANT #[:] BW19670. COURT (Location): 215 5th St. ARRESTING AGENCY[:] Yuba P.D. I HEREBY DEMAND A HEARING AND TRIAL OF SAID CRIMINAL ACTION AS PRESCRIBED BY SECTION 1381 OF THE PENAL CODE OF CALIFORNIA." (Defendant then provided personal information and specified the mailing address for Salinas Valley State Prison.)

To comply with the section 1381 requirements, defendant had to deliver to the Yuba County District Attorney "written notice of the place of his . . . imprisonment . . . and his . . . desire to be brought . . . for sentencing [regarding the criminal proceeding in which he remained to be sentenced]"

The record shows that defendant met section 1381's notice requirement to the district attorney. Aside from defendant's section 1381 demand itself, which was directed to the Yuba County District Attorney, defendant submitted a declaration accompanying his section 1381 motion to dismiss. That declaration stated: "On 1-4-06 I [Kevin Davis] served a Notice and Demand for Trial, per Penal Code § 1381, on the District Attorney of the County of Yuba by placing a completed Notice and Demand for Trial in the United States Mail system at Salinas Prison in conformance with the prison legal mail mailing procedures, by affixing first class postage to an envelope addressed to the District Attorney. There is regular United States Mail service between Salinas Prison and the address of the District Attorney."

The record also shows that defendant met section 1381's contents requirements by stating his place of imprisonment and his desire to be brought for sentencing.

As for place of imprisonment, defendant's section 1381 demand specified his name, his inmate number, his place of imprisonment, and the particulars of the Sutter County conviction on which he was imprisoned (offense, sentencing date and term).

As for defendant's stated desire to be brought for sentencing, his section 1381 preprinted demand specified as pertinent with the blanks on the form filled in as indicated: "I have reason to believe that the following criminal action is now pending against me in Yuba C[ounty]. CHARGES[:] Violation of Probation[.] WARRANT #[:] BW19670 . . . I HEREBY DEMAND A HEARING AND TRIAL OF SAID CRIMINAL ACTION AS PRESCRIBED BY SECTION 1381 OF THE PENAL CODE OF CALIFORNIA." As noted in the Background part of this opinion, the only act remaining to be done with respect to this "violation of probation" criminal action was to *sentence* defendant (i.e., the Yuba County probation violation hearing had taken place on September 26, 2005, defendant had admitted the violation, and he was ordered to return on October 17, 2005, for sentencing; but on October 21, 2005, defendant was sentenced on the Sutter County conviction, and his failure to appear in Yuba County on October 17 led to the warrant whose number is specified in defendant's section 1381 demand). As defendant persuasively argues in supplemental briefing we requested, "[s]ince the only hearing

pending at the time [defendant] made his [section 1381] demand was the sentencing hearing following the revocation of [defendant's] probation, the 'hearing' [defendant] was seeking was that sentencing hearing. No other reasonable conclusion can be drawn with respect to the meaning of the term 'hearing' in [defendant's] Penal Code section 1381 demand."

Furthermore, as defendant notes in his supplemental brief without challenge, his preprinted section 1381 form was a standard form made available to Salinas Valley prison inmates. In preprinted language, this form allows an inmate to demand only "A HEARING AND TRIAL OF SAID CRIMINAL ACTION AS PRESCRIBED BY SECTION 1381 OF THE PENAL CODE." Section 1381 applies only to a "desire to be brought to *trial*" [relating to any pending "indictment, information, [or] complaint"] or for *sentencing* [relating to "any criminal proceeding wherein the defendant remains to be sentenced"]. (Italics added.) Applying this language to the facts here, defendant's demand for "A HEARING" could align only with a demand for a sentencing hearing.

We conclude that defendant has strictly complied with the requirements of section 1381, as mandated by *People v. Gutierrez* (1994) 30 Cal.App.4th 105, 111. To conclude otherwise in light of the facts here would be not only inaccurate, but unfair to defendant.

We conclude that defendant's Yuba County probation revocation (sentencing) proceeding should have been dismissed pursuant to his section 1381 motion and the imposition of sentence at that proceeding must be vacated.

2. Application of Section 1387

Although the Yuba County probation revocation proceeding should have been dismissed and the imposition of sentence at that proceeding must be vacated, a companion statute to section 1381, section 1387, allows the Yuba County District Attorney an opportunity to refile the probation revocation proceeding within defendant's probationary period.

Section 1387, subdivision (a), states in pertinent part:

"An order terminating an action pursuant to this chapter [which includes section 1381] . . . is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to this chapter" (Italics added.)

In plain English, this statute gives the prosecutor one opportunity to refile an action that has been dismissed under section 1381, if the charged offense was a felony. We have interpreted section 1381 as applying to the "action" of a probation revocation proceeding. Consistent with that interpretation, we find that section 1387 applies to a probation revocation proceeding based on a felony charge.

Defendant's probation revocation proceeding (Yuba County) was based in part on a subsequent felony conviction (the Sutter County conviction for first degree burglary), and the record does not indicate that this probation revocation proceeding had ever been dismissed previously. Consequently, section 1387 applies here. (After defendant served his section 1381 demand, the focus of defendant's pending Yuba

County probation revocation proceeding (for which only sentencing remained to be done) became defendant's Sutter County conviction and sentence for first degree burglary.)

Defendant had been placed on probation for his Yuba County offense for a period of three years, beginning September 13, 2004. Accordingly, his probation period would normally end on September 13, 2007, unless his probation had been summarily revoked for any period of time, as summary revocation tolls the running of the probationary period. (§ 1203.2, subd. (a).) The record shows that defendant's probation was summarily revoked on October 12, 2004.

Assuming that defendant's probation has remained revoked from October 12, 2004, the Yuba County District Attorney will have an additional, tolled period of 35 months from September 13, 2007, to refile the probation revocation (sentencing) proceeding, if the District Attorney chooses to do so.

DISPOSITION

The Yuba County trial court is ordered to (1) dismiss the challenged probation revocation/sentencing proceeding; (2) vacate the sentence imposed at that proceeding; and (3) release defendant from custody on that sentence. Given the assumption noted just above, the Yuba County District Attorney will have a period of 35 months from September 13, 2007, to refile the probation revocation (sentencing) proceeding, if the district attorney chooses to do so. If the district attorney does so, it

may seek a revocation order and sentence (which accounts for all time served).

DAVIS, J.

I concur:

RAYE, J.

I respectfully dissent.

I assume for the sake of argument that Penal Code section 1381 (section 1381) applies to a probation revocation proceeding.

"Because of the drastic sanction imposed by section 1381, a prisoner must strictly comply with its conditions. (*People v. Clark* (1985) 172 Cal.App.3d 975, 980-981 [218 Cal.Rptr.481]; *People v. Garcia* (1985) 171 Cal.App.3d 1187, 1191 [217 Cal.Rptr. 783].)" (*People v. Gutierrez* (1994) 30 Cal.App.4th 105, 111.)

Petitioner did not strictly comply with section 1381. His section 1381 demand stated, as pertinent, "I HEREBY DEMAND A HEARING AND TRIAL OF SAID CRIMINAL ACTION AS PRESCRIBED BY SECTION 1381 OF THE PENAL CODE OF CALIFORNIA." However, at the time that defendant filed his section 1381 demand, he had already received a hearing and trial on his probation revocation, such hearing having occurred on September 26, 2005. As the majority acknowledges, all that remained in defendant's probation revocation case was sentencing. However, defendant's section 1381 demand did not demand sentencing but rather demanded a hearing and "*trial*."

Section 1381 itself distinguishes between a trial and sentencing. Thus, section 1381 provides in pertinent part, "the district attorney of the county in which the matters are pending shall bring the defendant to trial *or for sentencing* within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment

or commitment and his or her desire to be brought to trial or *for sentencing*" (Italics added.) It is not asking too much that defendant's demand track the language of section 1381 and put the district attorney on notice with respect to whether the defendant is demanding a trial or sentencing. I think that a deputy district attorney, or more likely a paralegal, having received defendant's section 1381 demand, would check the file to see whether or not defendant had received a hearing and trial on his probation revocation. The deputy district attorney or paralegal would rightfully conclude that defendant had received a hearing and trial of his probation revocation on September 26, 2005, so that there was nothing left to do with respect to defendant's section 1381 demand.

The majority argues defendant's failure to refer to sentencing should be excused because defendant submitted his demand on a form. Nothing in the record indicates the form used by defendant was the only form available to defendant or that no form existed to demand sentencing.

Because, in his section 1381 demand, defendant demanded a hearing and trial that had already occurred and not sentencing, defendant did not strictly comply with section 1381. (*People v. Gutierrez, supra*, 30 Cal.App.4th at p. 111 [defendant's section 1381 demand insufficient where it did not state defendant's desire to be brought to trial but rather his desire to have the charges dismissed].)

I would affirm the ruling of the trial court.

_____SIMS_____, Acting P.J.