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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ALAN BALL, Defendant and Appellant.	B287549 (Los Angeles County Super. Ct. No. VA143774)

APPEAL from an order of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Affirmed.

Richard L. Fitzer, 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, Senior Assistant Attorney General, Noah P. Hill and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Richard Alan Ball appeals from an order denying his petition for resentencing under Proposition 47 and Penal Code section 1170.18. We affirm the order.

II. BACKGROUND

On August 10, 2017, defendant pled no contest to driving or taking a vehicle without the owner's consent. (Veh. Code, § 10851.) The trial court imposed a four-year felony sentence.[1] Four months later, on December 6, 2017, defendant filed his Proposition 47 petition to redesignate his offense a misdemeanor. He relied on Penal Code section 490.2 and *People v. Page* (2017) 3 Cal.5th 1175, 1180 (*Page*). Under section 490.2 and *Page*, defendant was eligible for Proposition 47 relief if (1) he committed a theft of the vehicle and (2) the vehicle's value was not more than $950.[2] (*Page, supra*, 3 Cal.5th at p. 1188.) The

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[1] Ordinarily, Vehicle Code section 10851 is an alternative felony-misdemeanor offense (a "wobbler"). (Veh. Code, § 10851, subd. (a).) Here, however, defendant admitted a strike prior (Pen. Code, §§ 667, subd. (d), 1170.12, subd. (b)) and three prior convictions under Vehicle Code section 10851. Penal Code section 666.5 increases the punishment for recidivist car thieves convicted of a *felony* violation of Vehicle Code section 10851. The trial court imposed a two-year felony sentence under Penal Code section 666.5, doubled to four years because of the strike prior.

[2] Penal Code section 490.2 was added by Proposition 47. (Prop. 47, § 8, eff. Nov. 5, 2014.) Except when a defendant has specified prior convictions, section 490.2 makes obtaining

trial court denied defendant's petition, concluding defendant was ineligible for relief because he was convicted of joyriding not vehicle theft. The trial court made no finding as to the value of the vehicle.

III. DISCUSSION

Defendant does not challenge the trial court's finding that his conviction under Vehicle Code section 10851 (section 10851) was for joyriding, not vehicle theft. Instead he argues for the first time on appeal[3] that excluding posttheft driving and joyriding convictions under section 10851 from Proposition 47 relief would lead to an absurd result and an equal protection violation because a person convicted of vehicle theft (a more serious crime) is guilty of a misdemeanor while a person guilty of unlawful driving (a less serious crime) can receive a felony

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property by theft a misdemeanor if the property's value does not exceed $950. [Penal Code section] 490.2 states:
"(a) Notwithstanding [s]ection 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of [s]ection 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of [s]ection 667 or for an offense requiring registration pursuant to subdivision (c) of [s]ection 290."

[3] The Attorney General does not assert forfeiture.

sentence. This is a question of law subject to our independent review. (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 687; *People v. Castel* (2017) 12 Cal.App.5th 1321, 1325.) We disagree with defendant's arguments.

A. *The Absurd Consequences Doctrine*

In interpreting a voter initiative, "we apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) Those principles require giving the words in the statute "'their ordinary meaning'" and construing them "in the context of the statute as a whole and the overall statutory scheme." (*Ibid.*)

An exception to these basic principles may arise if following them would lead to an absurd result. Another "fundamental principle of statutory construction is that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature [or the electorate] did not intend. [Citation.]' [Citation.]" (*People v. Cook* (2015) 60 Cal.4th 922, 927.) Cases where "the literal meaning of the words may be disregarded to avoid absurd results" should be "rare." (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 897-898 (*Miklosy*) [quoting *California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574, 588].) When a "rational, nonabsurd basis for the distinction" in a statute's treatment of different categories of individuals may be found, the absurd consequences doctrine does not apply. (*Miklosy*, *supra*, 44 Cal.4th at p. 898.)

Defendant contends that in light of *Page*, Proposition 47 must be construed to apply to all violations of section 10851, subdivision (a), and that treating the driving of a vehicle without the owner's consent differently than the taking of a vehicle without the owner's consent creates an absurd result. According to defendant, unlawful driving is "a less culpable act" than theft and should not be punished more harshly, and in passing Proposition 47, the voters intended offenders convicted of unlawful driving under section 10851 be treated similarly to offenders convicted of theft under that statute.

In *Page*, our Supreme Court explained that section 10851's "prohibitions sweep more broadly than 'theft,' as the term is traditionally understood." (*Page, supra*, 3 Cal.5th at p. 1182.) Theft "requires a taking with intent to steal the property—that is, the intent to permanently deprive the owner of its possession." (*Ibid.*) Section 10851 also includes driving the vehicle "without the owner's consent, and 'with intent *either* to permanently *or temporarily* deprive the owner thereof of his or her title to or possession of the vehicle, *whether with or without intent to steal the vehicle*.'" (*Ibid.*, original italics.) Driving a vehicle without the owner's consent and without an intent to steal the vehicle is not theft. An example of this is joyriding—driving a vehicle "'with the intent only to temporarily deprive its owner of possession.'" (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) Joyriding is "not a theft conviction." (*People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1286.)

The *Page* court referred extensively to *Garza*. In *Garza*, the Supreme Court held that "[u]nlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft . . . ." (*Garza*, *supra*, 35 Cal.4th at p. 871.) But,

"unlawful *driving* of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete . . . . Therefore, a conviction under section 10851(a) for posttheft driving is not a theft conviction . . . ." (*Ibid.*)

Relying on *Garza*, the *Page* court held that a conviction for taking a vehicle worth $950 or less is a form of theft that falls within Penal Code section 490.2 and is eligible for resentencing under Proposition 47. (*Page, supra*, 3 Cal.5th at p. 1180.) On the other hand, a conviction under section 10851 for unlawful driving may be "distinct from any liability for vehicle theft." (*Id.* at p. 1188.) The *Page* court explained that to be eligible for Proposition 47 resentencing, the defendant must show that "the conviction was *based on* theft rather than on posttheft driving . . . ." (*Id.* at p. 1189.) The *Page* court therefore modified the judgment to allow the defendant to show he was convicted of theft rather than posttheft driving and that the vehicle's value was $950 or less. (*Ibid.*)

Nothing in *Page* requires the conclusion that a defendant convicted of unlawful driving under section 10851—whether joyriding or posttheft driving—is entitled to Proposition 47 resentencing. To the contrary, *Page* specifically distinguished between taking a vehicle, which may be a theft, and driving, which may not. If *all* section 10851 violations fell under Proposition 47, the Supreme Court would not have modified the judgment to allow the defendant to show that his section 10851 conviction was based on theft and not driving.[4]

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[4] Defendant asserts that *Page* left open the question whether unlawful driving under section 10851 is subject to Proposition 47 resentencing. The question *Page* left open is slightly different—

Further, the *Page* decision details how the statutory language "plainly indicates" that obtaining property by theft falls within Proposition 47 (*Page, supra*, 3 Cal.5th at p. 1186), and explains how this interpretation of the statute is consistent with the voters' intent and legislative history. (*Id.* at p. 1187.) In contrast, defendant here points to no language in the statute, no evidence of the voters' intent, and no legislative history suggesting that Proposition 47 covers unlawful driving.

Nor does defendant persuasively explain why having different punishments for different offenses—theft of a vehicle and non-theft driving of a vehicle—is absurd. The force of his argument is that, in his personal estimation, unlawful driving under section 10851 is "a less culpable act" than theft of a vehicle. But it is not for this court to rank levels of culpability. "It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment, and to distinguish between crimes in this regard. [Citation.] Courts routinely decline to intrude upon the 'broad discretion' such policy judgments entail." (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) We decline to intrude upon the prerogative of the voters who decided that theft of a vehicle worth $950 or less should be

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whether equal protection or the avoidance of absurd consequences requires Proposition 47 resentencing for "those convicted for taking a vehicle *without* the intent to permanently deprive the owner of possession." (*Page*, *supra*, 3 Cal.5th at p. 1188, fn. 5.) This question may be addressed by the Supreme Court in *People v Bullard*, review granted February 22, 2017, S239488. That case may also give the Supreme Court another opportunity to revisit Proposition 47 resentencing for driving violations under section 10851.

punished as a misdemeanor and that unlawful driving would remain punishable as a felony.

B. *Equal Protection*

Defendant argues that the equal protection clauses of the United States and California Constitutions mandate that all convictions under section 10851, whether for vehicle theft or unlawful driving, be punishable as misdemeanors under Proposition 47. We do not agree.

"The concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment." (*People v. Morales* (2016) 63 Cal.4th 399, 408.) Defendant must show that "'"the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citations.]'" (*Ibid.*) Because a "defendant . . . 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives[,]'" the rational basis test applies. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838 (*Wilkinson*).) Under that test, "'a statutory classification must be rationally related to a legitimate governmental purpose.'" (*Id.* at p. 836.)

Those convicted of unlawful driving are not similarly situated to those convicted of unlawfully taking a vehicle under section 10851, but even if they were, defendant cannot show that the different sentencing scheme is not rationally related to a legitimate governmental purpose. The electorate can rationally extend misdemeanor punishment to some offenses but not others, "as a means of testing whether Proposition 47 has a positive or negative impact on the criminal justice system." (*People v. Acosta*

(2015) 242 Cal.App.4th 521, 527-528 [rejecting equal protection claim of no rational basis for treating attempted car burglary (a felony) differently than thefts entitled to misdemeanor resentencing under Proposition 47].) Here, the voters could rationally decide that unlawfully driving a car may be more dangerous to the public than theft of a car valued at $950 or less. (See, e.g., *Wilkinson*, *supra*, 33 Cal.4th at p. 839 [statutory scheme punishing battery on a custodial officer without injury more severely than battery on a custodial officer with injury was not irrational]; *People v. Romo* (1975) 14 Cal.3d 189, 196-197 [statute permitting a harsher sentence for assault with a deadly weapon than for assault with intent to commit murder did not violate the equal protection clause].)

IV. DISPOSITION

The order is affirmed.

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SEIGLE, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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