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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ANTONIO SARMIENTO, Defendant and Appellant.	B235420 (Los Angeles County Super. Ct. No. SA074447)

APPEAL from an order revoking the suspension of execution of sentence of the Superior Court of Los Angeles County, Joseph Brandolino, Judge. Vacated and remanded.

Lea Rappaport Geller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Carlos Antonio Sarmiento appeals from the order revoking the suspension of the execution of his four-year prison sentence previously imposed following his plea of no contest to petty theft with a prior conviction (former Pen. Code, § 666; count 2) with an admission he suffered a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)). We will vacate the above order and related orders, and remand the matter for resentencing.

FACTUAL SUMMARY

The record reflects that on May 20, 2010, appellant entered, and stole merchandise from, a West Hollywood store.

ISSUE

Appellant claims former Penal Code section 666, subdivision (a), enacted by the Legislature after he committed the present theft offense, retroactively applies to said offense with the result the matter must be remanded with directions to the trial court to reduce the offense to a misdemeanor and resentence appellant accordingly.

DISCUSSION

Former Penal Code Section 666, Subdivision (a), Applies Retroactively; Therefore, Remand for Resentencing Is Warranted.

1. *Pertinent Facts.*

In the present case, the felony complaint alleged that on or about May 20, 2010, appellant committed second degree commercial burglary (Pen. Code, § 459; count 1) and petty theft with a prior conviction (former Pen. Code, § 666; count 2). The alleged prior conviction was an August 2008 conviction for a violation of former Penal Code section 666 in case No. BA341708. The complaint also alleged appellant, in case No. BA356199, suffered a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)).

On June 21, 2010, the court indicated it had read a preplea report, and a report from A.I.R. (apparently referring to Assessment Intervention Resources) reflecting appellant had qualified for a residential drug treatment program. The court indicated it had evaluated the present case as warranting either (1) imposition of a low term prison

sentence to be served concurrently with appellant's sentence for a parole violation in another case or (2) if appellant wanted to participate in a six-month drug treatment program, imposition of a four-year prison sentence with execution suspended, allowing him to participate in said program. The court stated, "So those are his options. This is an open plea to the court." Appellant elected the second option, and the court indicated it would sentence him pursuant to that option.[1]

The court later indicated appellant was "going to enter an open plea to the court" and admit his Penal Code section 667.5, subdivision (b), prior conviction. The court also indicated appellant would be on supervised probation for three years and the court would allow appellant to participate in the drug program. The court advised appellant of various consequences of his pleas and stated that "in order to accept the court's offer," appellant had to waive various constitutional rights. Appellant subsequently waived his constitutional rights so he could accept "the court's offer."

Based on the May 20, 2010, incident, appellant pled no contest to count 1. The following then occurred: "The Court: To the charge in count 2, which is a violation of 484 subsection (a) of the Penal Code which is petty theft with a prior conviction for petty theft, how do you plead? Not guilty or no contest? [¶] The Defendant: No contest. [¶] The Court: And do you admit in case No. BA341708 that in August of 2008 you were

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[1] In particular, after appellant and his counsel had an unreported conference, appellant's counsel represented as follows. Appellant had spoken to his counsel in another case in which appellant had been placed on parole (the parole case). Appellant's immigration hold and parole hold could be lifted if the present court made the order "for the alternative sentence which includes the six-month rehab." Appellant needed a copy of that order to show to his counsel in the parole case.

The court in the present case indicated it would provide a copy of the above order. The following then occurred: "[The Court]: My question to your client, I want him to understand that he's going to be on supervised probation, and instead of 16 months, if he violates probation he's going to do four years. So I want to be sure he's serious about this because that's exactly what I intend to do if he steals again. [¶] The Defendant: Okay."

convicted of a petty theft with a prior and that you served time in jail as a result of that conviction? [¶] The Defendant: Yes." The parties concede appellant admitted the Penal Code section 667.5, subdivision (b), allegation.

The court later stated, "In regard to this matter, the court is going to utilize count 2 as the principal term for sentencing. That's the petty theft with a prior. And in regard to that matter, the court has selected the high term as indicated . . . ." The court also imposed a one-year term for the Penal Code section 667.5, subdivision (b), enhancement. The court suspended execution of sentence on count 2 and placed appellant on supervised probation for three years on various conditions, including the condition that appellant complete the drug program. The court later stated that pursuant to Penal Code section 1385, the court allowed count 1 to be withdrawn and dismissed because count 1 was a violation of Penal Code section 654.

The court took the above pleas and admission, imposed but suspended execution of sentence on count 2, and dismissed count 1, as previously discussed. During those proceedings, neither the trial court, appellant's counsel, nor appellant ever referred to the prosecutor, and the prosecutor remained silent. In fact, the prosecutor remained silent during the entirety of the June 21, 2010, proceedings except the prosecutor provided to the court the address of the West Hollywood store so the court could order appellant to stay away from it.

As discussed below, effective September 9, 2010, the Legislature added former Penal Code section 666, subdivision (a), as urgency legislation. In November 2010 and May 2011, appellant violated probation.

As a result of the second probation violation, the court, on August 1, 2011, revoked the suspension of execution of the four-year prison sentence on count 2 in the present case. The court ordered that the sentence in the present case (case No. SA074447) be served concurrently with appellant's concurrent sentences in two

other cases (case Nos. LA067012 & SA075609).[2] On August 23, 2011, appellant filed in the present case a notice of appeal, and filed a certificate of probable cause pertaining to the issue of whether former Penal Code section 666, subdivision (a), was retroactive.

2. *Analysis.*

Appellant claims as previously indicated. We partially agree with appellant, i.e., we agree remand for resentencing is appropriate. At the time of appellant's May 20, 2010, offense, former Penal Code section 666, made petty theft with a qualifying prior theft-related conviction (hereafter, prior conviction) punishable by, inter alia, imprisonment in state prison with the result the offense was a felony.[3] If a defendant committed petty theft, one or more prior convictions triggered application of former Penal Code section 666.

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[2] As to case No. LA067012, the court in the present case sentenced appellant to prison for the low term of 16 months. As to case No. SA075609, the court in the present case sentenced appellant to prison for four years, consisting of a three-year upper term for the substantive offense, plus one year for a Penal Code section 667.5, subdivision (b), enhancement.

[3] On May 20, 2010, former Penal Code section 666, stated, "Every person who, having been *convicted* of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison." (Former Pen. Code, § 666, as amended by Stats. 2000, ch. 135, italics added.) A crime punishable by imprisonment in the state prison is a felony. (Pen. Code, § 17, subd. (a).)

However, effective September 9, 2010, the Legislature added former Penal Code section 666, subdivision (a), as urgency legislation.[4] Former subdivision (a), made petty theft a felony if, and only if, the defendant had three or more prior convictions.[5] (Former Pen. Code, § 666, subd. (a), added by Stats. 2010, ch. 219 § 15 (AB 1844), eff. Sept. 9, 2010.) "Clearly, new subdivision (a) of section 666 requires proof of at least three prior convictions, not just one, . . ." (*People v. Vinson* (2011) 193 Cal.App.4th 1190, 1194 (*Vinson*).) Under former subdivision (a), absent three or more prior convictions, petty theft was a misdemeanor. (Pen. Code, §§ 17, subd. (a), 490; former Pen. Code, § 666, subd. (a).)

Vinson held the former Penal Code section 666, subdivision (a), applied retroactively to cases not yet final when the September 9, 2010, amendment became effective. (*Vinson, supra*, 193 Cal.App.4th at p. 1193.) The present case is such a case. Respondent concedes it appears former Penal Code section 666, subdivision (a), was retroactive. We accept the concession. We hold former Penal Code section 666, subdivision (a), applied retroactively to appellant's offense.

The remaining issue is the impact of the above holding on this case. At the outset, we distinguish two dispositional schemes: an open plea and an indicated sentence.[6] "An open plea is one under which the defendant is not offered any promises. [Citation.] In

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[4] The subdivision was later amended in respects not pertinent here.

[5] Former Penal Code section 666, subdivision (a), effective September 9, 2010, provides, "(a) Notwithstanding Section 490 [specifying the punishment for petty theft alone], every person who, having been *convicted three or more times* of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison." (Italics added.)

[6] We asked for, and received, supplemental letter briefs on this and related issues.

other words, the defendant 'plead[s] *unconditionally*, admitting all charges and exposing himself to the maximum possible sentence if the court later chose to impose it.' [Citation.]" (*People v. Cuevas* (2008) 44 Cal.4th 374, 381, fn. 4, italics added.)

An indicated sentence is a trial court indication of the unbargained-for sentence that the court would impose whether the defendant pled guilty or went to trial, and that the court will, if a given set of facts is confirmed, impose in the exercise of its sentencing discretion upon a plea of guilty to all charges and upon an admission to all allegations. The validity of an indicated sentence does not depend upon prosecutorial agreement therewith. A guilty plea based on an indicated sentence is a *conditional* plea of guilty, i.e., a guilty plea entered on the condition the indicated sentence will be imposed. (*People v. Feyrer* (2010) 48 Cal.4th 426, 434-435, fn. 6; *People v. Labora* (2010) 190 Cal.App.4th 907, 910, 916; *People v. Lopez* (1993) 21 Cal.App.4th 225, 230; *People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1264-1265, 1270-1271 *(Ramos)*; *People v. Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270, 276.) We determine the nature of a dispositional scheme; the trial court's characterization of it is not controlling. (Cf. *Ramos, supra*, 235 Cal.App.3d at pp. 1264, 1266-1267.)

We have set forth the pertinent facts of the June 21, 2010, dispositional scheme. Although at times the trial court on that date characterized the dispositional scheme as an open plea, this case did not involve open pleas. Once appellant, on that date, elected the second option presented by the court and the court indicated it would sentence appellant pursuant to that option, the dispositional scheme, which contemplated appellant would plead to, and admit, everything, consisted of conditional pleas of guilty or no contest to counts 1 and 2, and a conditional admission of the Penal Code section 667.5, subdivision (b) enhancement allegation, pursuant to an indicated sentence the terms of which included the condition that the trial court impose a four-year prison sentence.[7]

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[7] A sentence is generally unauthorized when it could not lawfully be imposed under any circumstance in a particular case. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) In the present case, on June 21, 2010, the court, prior to appellant's no contest pleas to counts 1

Under former Penal Code section 666, in effect at the time appellant committed his petty theft, a prior conviction was not an element of a former section 666 "offense" but merely served to elevate that offense from a misdemeanor to a felony. (*People v. Bouzas* (1991) 53 Cal.3d 467, 474-480 (*Bouzas*).) That is, "[former Penal Code] section 666 establishe[d] a penalty, not a substantive 'offense.' " (*Bouzas, supra,* 53 Cal.3d at p. 478.) *Bouzas* stated, "We conclude that, on its face, [former] section 666 is a sentence-enhancing statute, not a substantive 'offense' statute." (*Id.* at p. 479.) We see no reason to conclude differently as to former section 666, subdivision (a).

Based on the former Penal Code section 666, when appellant committed the petty theft at issue in count 2, that petty theft, with his *single* prior conviction (in case No. BA341708), was a felony. However, under former section 666, subdivision (a), petty theft with a *single* prior conviction is *not* a felony. Moreover, the fact former subdivision (a), is retroactive compels the conclusion the *felony* penalty the trial court imposed on June 21, 2010, and executed on August 1, 2011, on count 2 for petty theft with a *single* prior conviction was an unauthorized sentence. An unauthorized sentence may be corrected at any time. (*People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.)

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and 2, gave an indicated sentence. That indicated sentence included four years in prison. The court, when giving that indicated sentence, did not expressly refer to any count or, in particular, state that appellant would receive three years in prison *on count 2*. A four-year prison sentence, per se, lawfully could have been imposed even though former Penal Code section 666, subdivision (a) was retroactive. At the time of appellant's offenses, second degree burglary (count 1) was a felony punishable by, inter alia, an upper term of three years in prison. (Pen. Code, §§ 18, 459, 460, subd. (b), 461, subd. (b).) Thus, on June 21, 2010, when calculating the indicated sentence, the trial court properly could have relied on count 1, instead of count 2, to arrive at a three-year prison term which, when added to the one-year Penal Code section 667.5, subdivision (b) enhancement, would have resulted in a total prison term of four years. The *indicated sentence* of four years in prison did not therefore indicate the court would impose an unauthorized sentence. However, as later discussed, the later *imposed sentence*, expressly predicated upon a three-year felony prison term *on count 2*, was unauthorized.

The parties do not dispute the court imposed an unauthorized sentence on June 21, 2010, by imposing, based on a single prior conviction, a felony sentence on count 2; the issue is the remedy. Appellant requests we remand the matter with directions to the trial court to reduce appellant's conviction on count 2 to a misdemeanor. This would be the appropriate sentence on that count under former Penal Code section 666, subdivision (a), if, as to count 2, appellant was convicted of petty theft with a single prior conviction. However, former section 666, subdivision (a) is retroactive; therefore, the People must have an opportunity to prove three or more prior convictions in an effort to elevate the matter from a misdemeanor to a felony. We will remand the matter to permit the People to prove, as to count 2, said prior convictions, i.e., to prove prior convictions in addition to the single prior conviction (in case No. BA341708) which already stands admitted by appellant.[8]

Moreover, there is no dispute that, before the court on June 21, 2010, indicated that pursuant to Penal Code section 1385, the court in its discretion would allow count 1 to be withdrawn and dismissed because count 1 was a violation of Penal Code section 654, appellant stood properly convicted on that count based on his commission of second degree burglary. There is also no dispute that the court in the present case was entitled to

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[8] Respondent, in his opening brief, argues we should remand, in part because a remand would give the People an opportunity to allege and prove "additional *convictions*, if it determines there are any (see CT 16-17). [Citations.]" (Italics added.) Pages 16 and 17 of the clerk's transcript, cited by respondent, reflect the probation report's recitation of appellant's criminal history, including alleged prior theft-related *convictions*. Appellant, in his reply brief, counters that "on remand the prosecution cannot add additional *charges* it did not see fit to bring in the first instance; rather, it can only, . . . show that a defendant is still *guilty* of the same *charges*, even under an amended statute." We understand respondent to be arguing that the People, following remand, should have an opportunity to prove, not appellant's *guilt* on newly added *charges* of substantive offenses, but additional *prior convictions* to elevate appellant's *penalty* on the *current* conviction for petty theft to a felony. These are additional prior convictions which had been unnecessary to prove to elevate petty theft before *Vinson* held former Penal Code section 666, subdivision (a) (a new penalty provision that completely replaced former section 666) was retroactive. We agree with respondent's argument.

sentence appellant pursuant to Penal Code section 667.5, subdivision (b), and entitled to sentence him on his two other cases (case Nos. LA067012 & SA075609).

The court's sentencing scheme with respect to all of the above matters suggests it was interrelated and that the court might have reached a different disposition as to these matters if the court had known that petty theft with a single prior conviction was a misdemeanor. Accordingly, we will vacate appellant's sentences in the present case and the two other cases, and remand for resentencing. (See *People v. Kelly* (1999) 72 Cal.App.4th 842, 844-847; *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455-1458.)[9]

We express no opinion as to (1) whether Penal Code section 654 bars multiple punishment on counts 1 and 2, (2) whether the People should seek to prove additional prior convictions as to count 2 to elevate the petty theft to a felony, (3) how the court should resentence appellant in the present case and/or appellant's two other cases (case Nos. LA067012 & SA075609), and/or (4) what any component of the resentence should be.

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[9] As a matter of guidance to the trial court, we note an unauthorized sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement. (*People v. Hanson* (2000) 23 Cal.4th 355, 360, fn. 3; *People v. Serrato* (1973) 9 Cal.3d 753, 763-764.) We express no opinion as to whether the resentence should or should not be more severe.

DISPOSITION

The trial court's August 1, 2011, order revoking the suspension of execution of sentence on count 2 in the present case (case No. SA074447), and the trial court's August 1, 2011, sentences in case Nos. LA067012 and SA075609, are vacated; appellant's June 21, 2010, sentence (imposed with execution thereof suspended) in the present case is vacated; the court's June 21, 2010, order allowing appellant's conviction for second degree burglary (count 1) to be withdrawn and dismissed is vacated and that conviction stands reinstated; and the matter is remanded to permit the People to prove additional prior theft-related convictions as to count 2 to elevate the petty theft at issue in that count to a felony, and for resentencing in the present case (case No. SA074447) and case Nos. LA067012 and SA075609, consistent with this opinion.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.