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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.

SILVIO HERNANDEZ,

Defendant and Appellant.

B287934

Los Angeles County  
Super. Ct. No. KA068934

APPEAL from a post-judgment ruling of the Superior Court of Los Angeles County, Wade D. Olson, Commissioner. Affirmed.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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In an information filed January 31, 2005, the People charged Silvio Hernandez with first degree residential burglary in violation of Penal Code section 459 (count one); grand theft of a firearm in violation of Penal Code section 487, subdivision (d)(2) (count two); possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a) (count three); and possession of more than 28.5 grams of marijuana in violation of Health and Safety Code section 11357, subdivision (c) (count four). The information also alleged Hernandez had a prior serious felony conviction and had served a prior prison term.

On March 22, 2005, the prosecution amended the burglary count to allege grand theft of property over \$400.<sup>1</sup> (Pen. Code, § 487, subd. (a).) Hernandez then pled nolo contendere to grand theft of property over \$400 and to possession of methamphetamine. (*Ibid.*; Heath & Saf. Code, § 11377, subd. (a).) He also admitted his prior strike and prison term. The court dismissed the remaining charges. The court sentenced Hernandez to a total of eight years and four months in state prison. As to grand theft, the court doubled the three-year high term, for a total of six years. (Pen. Code, §§ 487, subd. (a), 667, subds. (b)-(i), 1170.12, subd. (a)(2).) The court imposed a consecutive one-third the midterm of eight months in state prison for the possession charge, doubling it to 16 months. (Health & Saf. Code, § 11377, subd. (a); Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court also sentenced Hernandez to an additional year in state prison for the prison prior. (Pen. Code, § 667.5, subd. (b).) Hernandez received custody

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<sup>1</sup> At that time, the amount stolen for felony grand theft under section 487, subdivision (a) had to exceed \$400. The statute was amended in 2010 to require the theft exceed \$950. (Stats. 2010, ch. 693, § 1.)

credits for 157 days and was ordered to pay restitution, fines, and fees.

After the passage of Proposition 47,<sup>2</sup> Hernandez filed an application with the superior court to redesignate his felony convictions as misdemeanors.<sup>3</sup> On January 6, 2015, the trial court granted Hernandez’s application as to the possession conviction (count 3), but denied it as to the grand theft conviction (count 1).<sup>4</sup> On February 27, 2015, the court denied Hernandez’s motion for reconsideration of its ruling because, “The amount of loss suffered in count 1 is in excess of \$950.00.” Hernandez filed an appeal under case number B263443.

On August 1, 2016, we affirmed the trial court’s ruling. In that opinion, we described facts relating to the amount of loss: “According to the probation report, when Hernandez was arrested on suspicion of burglary, he had in his possession a plastic baggie that contained methamphetamine, a Play Station Joy Box, an electronic gram scale, a cell phone charger, a gun holster, several shaved keys, several driver’s licenses and social security cards, and a Ruger semi-automatic .22-caliber handgun. The victim told a probation officer that some of his property had been recovered and he estimated the total loss to him and his family to be more than \$5,000.” We concluded Hernandez was not eligible for relief

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<sup>2</sup> The Safe Neighborhoods and Schools Act, Penal Code section 1170.18 (Proposition 47).

<sup>3</sup> By this time, Hernandez already had served his prison sentence; he was released from custody on March 12, 2012.

<sup>4</sup> We have gleaned the facts relating to Hernandez’s first Proposition 47 application from our unpublished opinion affirming the trial court’s denial of that application, *People v. Hernandez* (Aug. 1, 2016, B263443) [nonpub. opn.].

under Proposition 47 on his grand theft conviction “because he failed to make any showing that the value of the stolen property did not exceed \$950.” Hernandez had erroneously argued it was the People’s burden to prove the stolen property’s value.

On November 13, 2017, Hernandez filed a second, “amended” Proposition 47 application to reclassify his grand theft conviction. In his attached declaration, Hernandez declared he did not want the amount of loss specified when he pled nolo contendere to grand theft “because as a matter of principle, I was very rel[u]ctant to pay restitution to a victim that was given my property by the police, especially because it [ ]seemed to me that the victim was either not being truthful or just mistaken about what he was missing or even the possibility that the occupant of the house that owed me money could’ve stole [*sic*] and sold those items to someone else. . . . Though my guilty plea is essentially a legal admission that I stole some items, . . . I can’t state an amount of value on property ‘stolen’ because I held I did not ‘steal’ any property and as such, I can say the amount was not over \$950.”

Hernandez’s amended application was heard on December 14, 2017. He was not present, but was represented by appointed counsel, who waived his appearance. The district attorney told the court, “The loss exceeded \$950, Your Honor. It was approximately [\$]5000.” The court asked Hernandez’s attorney if he wished to be heard. Counsel responded, “Submitted, Your Honor.” The trial court then denied the application, stating, “This was denied previously, it looks like for the same reason. . . . The loss was in excess of \$5,000. . . . [T]his is denied again for the same reason. The loss is in excess of \$5,000.” The court’s minute order reads, “The court finds this matter does not qualify for reduction of a felony conviction to a misdemeanor pursuant to

Proposition 47 as the loss suffered in this matter exceeds \$950.00.”

Hernandez filed his notice of appeal on February 1, 2018. We appointed counsel to represent Hernandez on appeal. After examining the record, counsel filed an opening brief raising no issues and asking this court independently to review the record. On May 14, 2018, we notified Hernandez that he had 30 days within which to submit any contentions or issues he wished this court to consider. To date, we have received no response.

As we explained when we affirmed the court’s denial of Hernandez’s first application, Hernandez had the burden to prove his eligibility for relief under Proposition 47, “including the \$950 valuation cut-off.” Hernandez did not meet that burden in his new application, and his attorney, on his behalf, essentially conceded at oral argument that the victim reported losses of approximately \$5,000.

We have examined the entire record, and we are satisfied that Hernandez’s counsel has fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

**DISPOSITION**

The judgment is affirmed.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, 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.