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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES BARNES, Defendant and Appellant.	B268216 (Los Angeles County Super. Ct. No. MA063899)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

Emily Lowther Brough, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

James Barnes appeals from the trial court's denial of his petition to reduce his felony second degree burglary conviction to a misdemeanor under

Penal Code section 1170.18,[1] a provision of Proposition 47, the Safe Neighborhoods and Schools Act. Appellant has failed to meet his burden of establishing his eligibility to reduce his sentence. We therefore affirm but without prejudice to appellant filing a subsequent petition supported by evidence showing his eligibility.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with eight counts of second degree commercial burglary on eight dates between May and July of 2014. (§ 459.) The information alleged that appellant had served six prior prison terms (§ 667.5, subd. (b)) and had one prior strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On October 15, 2014, appellant pled no contest to count 1, second degree burglary of a commercial building occupied by El Tucan. Appellant admitted three of the prior convictions alleged in the information: (1) a 1995 prior strike for burglary (case No. PA021500), (2) a 2011 burglary (case No. PA069471), and (3) a 2013 violation of Health and Safety Code section 11359 (case No. BA403517).

On November 20, 2014, appellant moved to reduce his sentence under Proposition 47, which had become effective on November 5, 2014. The court denied the motion. The court found appellant guilty of count 1 and dismissed the remaining counts pursuant to the plea agreement. The court sentenced appellant to the high term of three years, plus three years for the prior strike, plus one year each for the prior prison terms, for a total of eight years in state

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[1] Further unspecified statutory references are to the Penal Code.

prison. The court also ordered appellant to pay restitution, which we discuss in further detail below.

On July 30, 2015, appellant filed a petition for resentencing under section 1170.18. The trial court again denied the motion. The minute order states only that appellant's petition for resentencing was denied on November 20, 2014. Appellant timely appealed.

DISCUSSION

"'On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act . . . .' [Citation.] 'Proposition 47 makes certain drug-and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).' [Citation.] [¶] Proposition 47 also added section 1170.18, concerning persons currently serving a sentence for a conviction of a crime that the proposition reduced to a misdemeanor. It permits such a person to 'petition for a recall of sentence before the trial court that entered judgment of conviction in his or her case to request resentencing in accordance with' specified sections that 'have been amended or added by this act.' (§ 1170.18, subd. (a).) If the trial court finds that the person meets the criteria of subdivision (a), it must recall the sentence and resentence the person to a misdemeanor, 'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)" (*People v. Morales* (2016) 63 Cal.4th 399, 404.)

Appellant was convicted of second degree burglary, which is a wobbler. (§ 461; *People v. Contreras* (2015) 237 Cal.App.4th 868, 890.) He pled no

contest to the offense as a felony, but second degree burglary can be reduced to shoplifting under Proposition 47, which added the misdemeanor crime of shoplifting to the Penal Code. (*Id.* at pp. 890-891; *People v. Pak* (2016) 3 Cal.App.5th 1111, 1117 (*Pak*).)

"The new shoplifting statute, section 459.5, provides in relevant part: 'Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. . . .' [Citation.]" (*Pak*, *supra*, 3 Cal.App.5th at p. 1117.) The defendant has the initial burden of establishing "the facts upon which his or her eligibility is based." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*); *Pak*, *supra*, 3 Cal.App.5th at p. 1117.)

Appellant concedes that the record contains no evidence of the value of the property at issue. In the absence of any evidence, he relies on the trial court's restitution order. The court ordered appellant to pay the following restitution under the terms of the plea agreement: $383.05 to Divine Salon, the named victim in count 5 of the information, and $909.39 to Domonique's Jewelry, the named victim in case No. PA075200.[2]

Appellant cites section 1202.4, which provides in pertinent part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other

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[2] Case No. PA075200 is not one of the prior convictions alleged in the information.

showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record." (§ 1202.4, subd. (f).) He argues that because the trial court did not order restitution for El Tucan, the victim of the count to which appellant pled no contest, the value of the property at issue must have been less than $950. We are not persuaded.

Appellant has provided no evidence that the value of the property did not exceed $950. There is nothing in the record to reveal why the trial court did not order him to provide restitution to El Tucan, and in the absence of any evidence we cannot assume this necessarily means the value of the property at issue was less than $950. "In a successful petition, the offender must set out a case for eligibility, stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed $950. [Citations.] The defendant must attach information or evidence necessary to enable the court to determine eligibility. [Citation.]" (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136–137 (*Perkins*).) Appellant's speculation based on the trial court's restitution order does not constitute evidence of the value of the property. (See *Pak*, *supra*, 3 Cal.App.5th at p. 1121 [finding the evidence insufficient to support petition where "neither counsel, appellant, nor any witness provided sworn testimony or a sworn affidavit about the value of the property"]; *Perkins*, *supra*, 244 Cal.App.4th at p. 137 [defendant did not meet his burden where he submitted a form asserting the value of the property did not exceed $950 but "he did not indicate anywhere on the form the factual basis of his claim regarding the value of the stolen property"].)

Our conclusion that appellant has failed to establish his eligibility for resentencing does not preclude him from filing another petition supported by evidence of the value of the property at issue. (See *Pak*, *supra*, 3 Cal.App.5th at p. 1121 [affirming the denial of the appellant's Proposition 47 petition without prejudice, explaining that "[i]n any new petition, appellant should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing she is eligible for relief."]; *Perkins*, *supra*, 244 Cal.App.4th at p. 142 ["We affirm the order denying defendant's petition for resentencing of his conviction for receipt of stolen property without prejudice to consideration of a subsequent petition that supplies evidence of his eligibility."].)

In one of the earliest cases addressing Proposition 47, the court concluded that the defendant carries the burden of establishing eligibility for resentencing under section 1170.18. (*Sherow*, *supra*, 239 Cal.App.4th at pp. 878.) The court reasoned that applying the burden to the defendant "would not be unfair or unreasonable. He knows what kind of items he took from the stores in counts 1 and 2." (*Id.* at p. 880.)

The court in *Perkins* relied on *Sherow* in affirming the denial of a petition for resentencing without prejudice to the defendant filing a new petition. (*Perkins*, *supra*, 244 Cal.App.4th at pp. 133, 136-137.) The court reasoned that "defendant may have been misled about the requirements of petitioning for relief under Proposition 47. Though Evidence Code section 500 establishes petitioners have the burden of establishing eligibility, Proposition 47 itself is silent on the point and the courts had not made the connection explicit until after defendant had filed his petition. Moreover, Proposition 47 is silent as to the submission of evidence or information to support an application for resentencing. In addition, the form defendant used

to petition includes no space for and no directions to include evidence or information regarding the value of stolen property. Even the revised form the superior court now provides omits any discussion or directions about submitting evidence. [Citation.] In short, when defendant filed his petition, the ground rules were unsettled." (*Id.* at pp. 139-140.) The court therefore decided to "follow the court in *Sherow* in affirming the order denying the petition 'without prejudice to subsequent consideration of a properly filed petition.' [Citation.] In any new petition, defendant should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief." (*Id.* at p. 140.)

Similar to *Perkins*, appellant's motion to reduce his sentence was in November 2014, shortly after Proposition 47 went into effect. His second petition for relief, which was not addressed on the merits by the trial court, was in July 2015, before the decision in *Sherow*, which was decided in August 2015. Thus, when appellant filed his petitions, "the ground rules were unsettled." (*Perkins*, *supra*, 244 Cal.App.4th at p. 140.) Also as in *Perkins*, the form petition for resentencing used by appellant did not indicate that he needed to include evidence of the value of the property.

For the foregoing reasons we affirm the trial court's denial of appellant's petition for resentencing without prejudice to appellant filing another petition supported by evidence of the value of the property.

DISPOSITION

We affirm the trial court's denial of appellant's application without prejudice to subsequent consideration of a new, properly supported application.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.