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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO VALENCIA,

Defendant and Appellant.

2d Crim. No. B269391  
(Super. Ct. No. F497447)  
(San Luis Obispo County)

Marco Antonio Valencia appeals the order resentencing him under Proposition 47 (Pen. Code,<sup>1</sup> § 1170.18) and placing him on one year of misdemeanor parole (*id.*, subd. (d).) He contends the court erred in placing him on parole. We affirm.

**FACTS AND PROCEDURAL HISTORY**

On November 17, 2013, appellant was detained at a traffic stop. He was unable to provide a driver's license, vehicle

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<sup>1</sup> All statutory references are to the Penal Code.

registration, or proof of insurance. The deputies who conducted the stop searched the vehicle and found several items of stolen mail.

Appellant, who was on felony probation for a first degree burglary conviction (§ 459) in Santa Barbara County case number 1349886, was arrested and released on bail. He was subsequently charged with receiving stolen property (§ 496, subd. (a), hereinafter § 496(a)) with an attendant allegation that he had suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). On June 3, 2014, appellant pled no contest in exchange for a specified two-year sentence. The sentencing hearing was continued to allow a probation report to be prepared. Several additional continuances followed.

When the matter was finally called for sentencing on November 4, 2014, appellant failed to appear and a warrant was issued for his arrest. Proposition 47 went into effect the following day.

On December 4, 2014, appellant was arrested and returned to custody. He was subsequently found in violation of his probation in Santa Barbara County case number 1349886 and was sentenced to two years in state prison.

The sentencing hearing in the instant case was rescheduled for March 23, 2015. At the hearing, the court asked the parties if the case had “been evaluated for possible Prop 47 relief.” Defense counsel “d[id]n’t think it’s going to make a difference to the disposition” because the plea agreement contemplated that appellant’s two-year sentence to run concurrent to the two-year sentence imposed for the probation violation. Counsel also offered that Proposition 47 would in any event not apply because he believed that the value of the stolen

property was “over \$900 anyway.” The court sentenced appellant to two years in state prison and ordered the sentence to run concurrent to the two-year sentence imposed in the Santa Barbara County case.

Appellant did not file a notice of appeal from the March 23, 2015 judgment. On May 4, 2015, the trial court received appellant’s handwritten “petition for modification of sentence.” Although the document identified Proposition 47 as the “reason for modification,” it offered no supporting argument.

Counsel was appointed to assist appellant. On July 10, 2015, counsel filed a petition for resentencing under Proposition 47. In the petition, counsel requested that appellant be resentenced to a misdemeanor under subdivisions (a) and (d) of section 1170.18. The People opposed the request.<sup>2</sup> In replying to the opposition, appellant asserted that his “crime was committed before the effective date of the new law, but he was sentenced after the effective date of the new law. Thus, if he is entitled to misdemeanor treatment, he should be treated as a misdemeanant, not a felon entitled to reduction.”

At the hearing on appellant’s request for resentencing, the prosecutor conceded that the value of the stolen property was less than \$950 and that appellant was thus entitled to be resentenced as a misdemeanant. The prosecutor explained: “[T]he facts of the case are basically that [appellant] steals mail from the victim. The victim asserts that as a result of that mail theft, she was not advised of an eviction proceeding hearing . . . , and as a result of that, she suffered a monetary loss of [\$]4,500. [¶] I don’t believe that the statute in Prop. 47 contemplates that kind of loss. It only contemplates a direct loss in regards to a

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<sup>2</sup> The opposition is not included in the record on appeal.

theft under Penal Code section 496.” The prosecutor believed, however, “that it would be appropriate to have [appellant] serve a term of one year of parole if this is granted.” Appellant reiterated his position that he should not be subjected to misdemeanor parole because his conviction “should have been a misdemeanor” when he was originally sentenced.

The court granted the petition, designated the subject conviction as a misdemeanor, resentenced appellant to 364 days in jail with credit for time served, and ordered him to be placed on one year of parole as provided in subdivision (d) of section 1170.18. The court reasoned: “I can’t comment on why the case was handled the way it was . . . , but since it did go forward as a felony and it was [originally] sentenced as a felony . . . , [defense counsel], I’m not in agreement with you. I think the court does have discretion, and I think that it is appropriate to apply the one-year period of parole.”

### DISCUSSION

Appellant contends the court erroneously ordered him to be placed on misdemeanor parole as part of his resentencing under Proposition 47. Although he was resentenced under section 1170.18, he claims the parole provision does not apply to him because he should have been sentenced to a misdemeanor when he was originally sentenced in March 2015.<sup>3</sup>

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<sup>3</sup> The People contend “[i]t is unclear” whether the trial court had jurisdiction to resentence appellant under Proposition 47 because the original sentencing took place after Proposition 47 had been enacted. The fact that appellant was originally sentenced after Proposition 47 did not, however, deprive the court of jurisdiction to resentence him. (*People v. Mutter* (2016) 1 Cal.App.5th 429, 437.)

Appellant's one-year parole term began in November 2015. Because it is now February 2017, it would appear that his claim may be moot. In any event, the claim lacks merit.

Proposition 47 reclassified certain drug- and theft-related offenses as misdemeanors. Section 1170.18 provides that a defendant currently serving a sentence for a felony that would have been a misdemeanor had Proposition 47 been in effect at the time of the offense may file a petition for recall of sentence and resentencing. (§ 1170.18, subd. (a).) If the defendant is entitled to resentencing, he or she "shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole." (*Id.*, subd. (d).)

Appellant committed the offense of receiving stolen property (§ 496(a)) in November 2013. At that time, the crime was punishable as either a misdemeanor or a felony. In the interests of justice, the crime could be charged as a misdemeanor if the value of the stolen property did not exceed \$950. (Former § 496(a).) As relevant here, Proposition 47 amended section 496(a) to provide that the crime *must* be charged as a misdemeanor if the value of the stolen property does not exceed \$950. (§ 496(a).) If the value of the stolen property exceeds \$950, the crime remains punishable as either a misdemeanor or a felony. (*Ibid.*)

Appellant pled no contest to a violation of section 496(a) in exchange for a two-year prison term. He was originally scheduled to be sentenced on November 4, 2014, the day before Proposition 47 went into effect. Had he appeared for sentencing on that date, he would have no basis for now arguing he was

erroneously sentenced under the pre-Proposition 47 law. Instead, he chose not to appear and a warrant had to be issued for his arrest. He cannot now be heard to complain of an alleged error invited by his own wrongdoing.

In any event, when appellant was finally sentenced in March 2015, his attorney conceded that his sentence was not affected by Proposition 47 because the value of the stolen property exceeded the statutory amount for a misdemeanor.<sup>4</sup> Moreover, appellant did not appeal from the ensuing judgment. Instead, he filed a “petition for modification of sentence” under Proposition 47. Because there was no timely appeal from the judgment, we have no authority to revisit it here. (*In re Jordan* (1992) 4 Cal.4th 116, 121.) Although appellant claims the court should have construed the petition as a motion to correct an unlawful sentence, there was nothing to indicate the sentence was unlawful. Moreover, the attorney subsequently appointed to represent appellant did not urge the court to treat the petition as a motion to correct an unlawful sentence. Instead, counsel filed a petition for Proposition 47 resentencing and utilized the form specifically adopted for that purpose.

Under the circumstances, the court did not err in ordering appellant to be placed on one year of misdemeanor parole pursuant to his resentencing under section 1170.18. As the court noted, the case “did go forward as a felony and it was [originally] sentenced as a felony.” Because appellant sought resentencing under section 1170.18, a one-year parole term was warranted unless the court exercised its discretion to release him

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<sup>4</sup> Counsel said he believed that the value of the property was “over \$900.” The threshold is actually \$950. (§ 496(a).)

from parole. (§ 1170.18, subd. (d).) The court properly declined to exercise that discretion.

The order placing appellant on one year of misdemeanor parole under section 1170.18 is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Rita Coyne Federman, Judge  
Superior Court County of San Luis Obispo

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