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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID WAYNE KAPPLER, Defendant and Appellant.	B276251 (Los Angeles County Super. Ct. No. GA088890)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed.

Brad Kaiserman, 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, Assistant Attorney General, Mary Sanchez and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

David Wayne Kappler appeals a trial court order denying his application to resentence him on a one-year prison term enhancement related to a prior felony conviction. (Pen. Code, §§ 667.5, subd. (b); 1170.18.)[1] He contends that, because his prior felony conviction was reduced to a misdemeanor under section 1170.18, the conviction can no longer support the enhancement.[2] We disagree and therefore affirm.

BACKGROUND

In December 2013, appellant was charged by information with one count of second degree commercial burglary.[3] (§ 459.) The information alleged that appellant had suffered one prior serious felony conviction (§ 1192.7), one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and served four prior prison terms (§ 667.5, subd. (b)).

Appellant was convicted by jury of second degree commercial burglary on April 29, 2014. The trial court found true the prior strike allegation and three of the prior prison term allegations. On June 10, 2014, the court sentenced appellant to a term of six years in prison, which included one year each for two of his prior prison terms under section 667.5, subdivision (b). The prior felony conviction underlying one of the section 667.5, subdivision (b) enhancements was a 2006

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[1] Unspecified statutory references are to the Penal Code.

[2] Section 1170.18 is a provision of Proposition 47, the Safe Neighborhoods and Schools Act.

[3] The facts regarding appellant's underlying offense are not pertinent to the issue on appeal.

conviction for a violation of Health and Safety Code section 11377, possession of a controlled substance, case No. SWF012510. The court ordered the sentence stayed for his third prior prison term, a 1995 controlled substance conviction.

Proposition 47 was enacted in November 2014. (*People v. Morales* (2016) 63 Cal.4th 399, 404.) It "'makes certain drug-and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants'" (*Ibid.*)

On November 2, 2015, appellant's conviction in case No. SWF012510 was reduced to a misdemeanor pursuant to Proposition 47.

In April 2016, appellant filed a motion for resentencing in the instant case on the basis that the one-year enhancement imposed for the conviction in case No. SWF012510 could not be imposed because the felony conviction had been reduced to a misdemeanor and therefore no longer qualified for the section 667.5, subdivision (b) enhancement. The court denied the motion, and this timely appeal followed.

DISCUSSION

Proposition 47 provides a procedure for defendants currently serving a felony sentence for a Proposition 47 crime to petition for a recall of the sentence and for resentencing (§ 1170.18, subd. (a)), as well as a procedure for persons who have completed their sentence for such a crime to file an application to have the offense designated as a misdemeanor (§ 1170.18, subd. (f)). (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328–1329 (*Diaz I*).) "Any felony conviction that is

recalled and resentenced . . . or designated as a misdemeanor . . . shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k).)

Section 667.5, subdivision (b) provides, with certain exceptions, that: "where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony[.]"

Section 1170.18 addresses "redesignation of *convictions*, not enhancements." (*People v. Jones* (2016) 1 Cal.App.5th 221, 228, review granted Sept. 14, 2016, S235901 (*Jones*).) Nonetheless, appellant contends that his controlled substance conviction cannot be used to support the section 667.5, subdivision (b) enhancement because it has been reduced to a misdemeanor under Proposition 47.

We addressed this issue in *In re Diaz* (2017) 8 Cal.App.5th 812, review granted May 10, 2017, S240888 (*Diaz II*). The defendant, Diaz, was convicted of possession of a firearm by a felon. At sentencing, the trial court imposed two one-year enhancements under section 667.5, subdivision (b) for prior prison terms. One of the felony convictions

underlying the enhancement was a 2009 conviction under former section 666, petty theft with a prior. (*Id.* at p. 816.) Like appellant, "Diaz contended that his 2009 felony conviction of petty theft with a prior would be a misdemeanor if Proposition 47 had been in effect at the time of that offense, and that therefore it could not be the basis of an enhancement of his sentence under section 667.5, subdivision (b)." (*Ibid.*)

In Diaz's appeal, we held that his "contention that Proposition 47 compelled the striking of his section 667.5, subdivision (b) enhancement was premature," because he had not first filed an application in the court of conviction to have his 2009 conviction designated as a misdemeanor. (*Diaz II*, *supra*, 8 Cal.App.5th at p. 816; see *Diaz I*, *supra*, 238 Cal.App.4th at p. 1331.) Following his appeal, the superior court granted his petition reducing the 2009 conviction to a misdemeanor. Diaz then filed a petition for writ of habeas corpus "requesting that his section 667.5, subdivision (b) enhancement based on the 2009 conviction be stricken." (*Diaz II*, *supra*, 8 Cal.App.5th at p. 816.)

We held that "the reclassification of defendant's 2009 felony conviction of petty theft with a prior as a misdemeanor, which occurred after his original sentence, does not preclude its use to support his section 667.5, subdivision (b) enhancement." (*Diaz II*, *supra*, 8 Cal.App.5th at p. 817; see also, e.g., *Jones*, *supra*, 1 Cal.App.5th at p. 230 [provisions of section 1170.18 "explicitly allow offenders to request and courts to grant retroactive designation of offenses such as Jones's

prison prior, but no provision allows offenders to request or courts to order retroactively striking or otherwise altering an enhancement based on such a redesignated prior offense"].) We noted that "[t]he Supreme Court has granted review in several cases that have reached the same conclusion. [Citations.]" (*Diaz II*, *supra*, 8 Cal.App.5th at p. 817, listing cases.)

Because the issue is pending before the Supreme Court (allowing appellant to preserve the issue for decision by the Supreme Court by petitioning for review), we will not discuss his contention at length. We addressed the retroactivity and equal protection arguments that appellant here raises in *Diaz*. (See *Diaz II*, *supra*, 8 Cal.App.5th at pp. 818-826.) Appellant has not made any argument that allows us to distinguish his situation from that presented in *Diaz*.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. COLLINS, J.