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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES SEIVELEY,

Defendant and Appellant.

B283950

(Los Angeles County
Super. Ct. No. BA436309)

APPEAL from an order of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Reversed and remanded.

Richard L. Fitzer, 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, Senior Assistant Attorney General, Noah P. Hill and Ilana Herscovitz Reid, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

In *People v. Buycks* (July 30, 2018, S231765) __ Cal.5th __ [2018 Cal. Lexis 5486] (*Buycks*), our Supreme Court held that the redesignation of a felony conviction to a misdemeanor pursuant to the Safe Neighborhoods and Schools Act (also known as Proposition 47), Penal Code section 1170.18,¹ applies with equal force to subsequent uses of that conviction as a sentencing enhancement under section 667.5, subdivision (b), at least if that use occurred with respect to a conviction that was “not final when Proposition 47 took effect.” (*Buycks*, at pp. *13-*14, *48.) Under *Buycks*, we must reverse the sentence in this case and remand so that the trial court may strike the section 667.5, subdivision (b) enhancement and resentence defendant.

FACTS AND PROCEDURAL BACKGROUND

In 2010, defendant was convicted of possessing a controlled substance as a felony (Health & Saf. Code, § 11350).

In 2015, the People charged defendant with two counts of robbery (§ 211) involving personal use of a dangerous or deadly weapon (§ 12022, subd. (b)(1)). The People alleged that defendant had suffered two prior “strikes” within the meaning of our Three Strikes law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)). The People further alleged that defendant had served eight prior prison terms for felonies (§ 667.5, subd. (b)); among them was the 2010 drug conviction.

Following a trial that ended with a hung jury, the People and defendant entered into a plea agreement: Defendant would enter a no contest plea to a newly added count of assault with a deadly weapon (§ 245, subd. (a)(1)), admit one of his strikes, and

¹ All further statutory references are to the Penal Code unless otherwise indicated.

admit the 2010 drug conviction as a prior prison term; the People would dismiss the other charges and allegations. The trial court accepted defendant's plea and admissions on March 23, 2016.

The court then imposed the agreed-upon sentence of five years, comprised of four years for the assault (two years, doubled due to the prior strike) plus one year for the prior prison term.

Defendant did not appeal his conviction or sentence.

About six weeks later, on May 6, 2016, the trial court granted defendant's petition under Proposition 47 to redesignate his 2010 felony drug conviction as a misdemeanor.

In March 2017, defendant filed a motion asking the trial court to strike the one-year prior prison term enhancement based upon his 2010 drug conviction because it was no longer a felony. The trial court denied his motion.

Defendant filed this timely appeal.

DISCUSSION

Proposition 47 redesignates as misdemeanors "certain drug- and theft-related offenses" that were charged as felonies or charged as "wobblers" (that is, offenses that are punishable as a felony until a court reduces them to a misdemeanor) and ultimately sentenced as felonies.² (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47 entitled defendant to seek redesignation of his 2010 felony drug conviction, and he obtained that relief in May 2016. But does Proposition 47 entitle him to the further relief of having his March 2016 sentence reduced because the 2010 conviction is now a misdemeanor and

² These redesignated offenses can be found in sections 459.5, 473, 476a, 490.2, 496, and 666, as well as in Health and Safety Code sections 11350, 11357, and 11377. (§ 1170.18, subds. (a) & (b).)

thus no longer qualifies as a “prior prison term” under section 667.5, subdivision (b)? (See § 667.5, subd. (b) [applies to “felon[ies]”].)

In *Buycks*, *supra*, 2018 Cal. Lexis 5486, our Supreme Court answered that question, “Yes.” *Buycks* held that Proposition 47’s mandate that a redesignated offense was to “be considered a misdemeanor for all purposes” (§ 1170.18, subd. (k)), when read in conjunction with the mandate of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) that legislative acts that mitigate punishment are presumed to apply retroactively to all “nonfinal judgments” absent a legislative declaration to the contrary, means that felony convictions redesignated as misdemeanors under Proposition 47 may not be used as an enhancement under section 667.5, subdivision (b) in any case that “was not final when Proposition 47 took effect.” (*Buycks*, at pp. *14-*27.)

Buycks is not directly on point with this case because, unlike in *Buycks*, defendant here committed his crime *after* Proposition 47 took effect (and thus his case was not even pending—let alone final—when Proposition 47 took effect). But *Buycks*’s rationale nevertheless dictates reversal. *Buycks* rests in part on *Estrada*’s presumption that laws that ameliorate sentences are to be given retroactive effect to nonfinal sentences. And here, defendant’s sentence was not yet final at the time his 2010 felony drug conviction was redesignated as a misdemeanor on May 6, 2016, because the 90 days he had to file a petition for certiorari after his March 23, 2016 sentencing had yet to expire.³

³ In light of these facts, we have no occasion to consider how *Buycks* would apply when a defendant is convicted and sentenced after Proposition 47 has taken effect, and where a felony used as

(See *People v. Kemp* (1974) 10 Cal.3d 611, 614 [a conviction becomes “final” once “the availability of appeal [is] exhausted, and the time for petition for certiorari has elapsed”].) Defendant is therefore entitled to vacation of the section 667.5, subdivision (b) enhancement and to a resentencing.

DISPOSITION

The order is reversed, and the trial court is ordered to vacate defendant’s section 667.5, subdivision (b) enhancement and to resentence defendant.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ

an enhancement in that case is not redesignated until after the case becomes “final.”