Filed 8/9/17 P. v. Lyons CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CAMERON LYONS, Defendant and Appellant.	B276986 (Los Angeles County Super. Ct. No. LA080631)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph Brandolino, Judge. Reversed and remanded for further proceedings.

John L. Staley, 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, Susan Sullivan Pithey, Supervising Deputy Attorney General and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Cameron Lyons was charged with 12 counts of burglary, theft, and identity theft committed between May 8, 2014 and August 14, 2014. He entered a plea to five counts of theft, based on possessing access card information with the intent to defraud, which was classified as a felony at the time of the crimes. (See Pen. Code, § 484e, subd. (d).) At sentencing, Vargas filed a motion to have the offenses classified as misdemeanors for purposes of sentencing. The trial court denied the motion and imposed a felony sentence; Lyons appealed. We reverse the judgment, and remand for further proceedings.

FACTUAL BACKGROUND

In an information filed on July 1, 2015, appellant was charged with twelve counts of violation of the Penal Code, including five counts of violating Penal Code section 484e, subdivision (d),[1] which provides that any person who "acquires or possesses access card account information" belonging to another person with "the intent to use it fraudulently, is guilty of grand theft." No allegations were made as to the value of the access card information. On July 8, 2016, as part of a negotiated disposition, Lyons pleaded no contest to those five counts with an agreement the remaining counts would be dismissed. On July 26, 2016, the court sentenced Lyons to state prison for 8 years.

On the date of the sentencing hearing, Lyons, in pro per, filed a motion seeking sentencing on these counts as misdemeanors and citing Proposition 47 as support. Section 490.2 (enacted as part of Proposition 47), states that

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[1] All further statutory references are to the Penal Code.

notwithstanding "any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed [$950] shall be considered petty theft and shall be punished as a misdemeanor. . . ."

The court denied the motion, concluding that section 490.2 does not apply to the type of offense described in section 484e, subdivision (d).

DISCUSSION

A. Summary of Relevant Provisions of Proposition 47

"'On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)' [Citation.]" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) "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). . . ." (*Id.* at p. 1091.) Relevant here, Proposition 47 added section 490.2, which provides in relevant part: "Notwithstanding . . . any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor. . . ." (§ 490.2, subd. (a).).

"Proposition 47 also created a new resentencing provision: section 1170.18." (*Rivera, supra,* 233 Cal.App.4th at p. 1092.)

Under subdivision (a) of this provision, any person who is "'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47 may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Ibid.*) If the petitioner falls within the category of persons described in subdivision (a), subdivision (b) requires the trial court to recall the petitioner's felony sentence, and resentence him or her 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).)

B. Section 490.2 Applies to the Offense Described in Section 484e, Subdivision (d)

Lyons argues the trial court erred in concluding that section 490.2 does not apply to the type of offense described in section 484e, subdivision (d). At the time Lyons appealed, the issue was pending before the California Supreme Court. On March 27, 2017, the Court decided *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), which held that section 490.2 applies to convictions under section 484e, subdivision (d) if the value of the stolen access card information is "less than $950." *Id.* at p. 914 ["we hold that that section 490.2 reduces the punishment for theft of access card information valued at less than $950"].)[2]

Romanowski also held that courts should use the "reasonable and fair market value test" set forth in section 484, subdivision (a), to "determine whether the value of stolen access card information exceeds $950." (*Romanowski, supra*, 2 Cal.5th

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[2] Respondent's brief, filed after *Romanowski* was decided, concedes that section 490.2 applies.

at p. 914.) The Court further explained that under this test, the trial court must "identify how much stolen access card information would sell for. [Citations.] The fact that stolen access card information is not sold legally does not relieve courts of this duty. . . . When a defendant steals property that is not sold legally, evidence related to the possibility of illegal sales can help establish 'reasonable and fair market value.' Only in cases where stolen property would command no value on any market (legal or illegal) can courts presume that the value of stolen access information is de minimis." (*Id*. at p. 915.)

Finally, *Romanowski* clarified that "in the context of a section 1170.18 petition to recall a sentence," the petitioner has "the ultimate burden of proving" any "newly relevant facts" that are necessary to establish his or her "eligibility" for relief. (*Romanowski, supra*, 2 Cal.5th at p. 916) According to the Court, "[i]n some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. When eligibility is established in this fashion, 'the petitioner's felony sentence shall be recalled and the petitioner sentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.] But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner

may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' [Citations.]" (*Ibid.*)

C. *Lyons Is Entitled to an 1170.18 Recall Hearing*

Lyons's appeal indicates both that he seeks to challenge the sentence, and that he seeks review of the denial of his petition pursuant to section 1170.18. This court does not have jurisdiction to consider his appeal of the sentence, as he failed to seek a certificate of probable cause. (§ 1237.5; Cal. Rules of Court, rule 31(d).) Where, as here, the sentence was agreed to as part of the negotiated disposition, a challenge to the sentence is a challenge to the plea itself, and a certificate of probable cause is required. (*People v. Panizzon* (1996) 13 Cal.4th 68, 78 [attack on sentence agreed to in plea is attack on plea itself].)

This court does, however, have jurisdiction to consider the court's denial of appellant's request to recall the indicated, and imposed, sentence, under section 1170.18 as respondent urges. In *People v. Mutter* (2016) 1 Cal.App.5th 429, the court permitted a petition for recall of sentence by a defendant who, like Lyons, was convicted and sentenced after the effective date of Proposition 47. There, as here, the new law should have been applied at the time of sentencing; there, as here, it was not. Because Mutter, like Lyons had committed the offenses that were the basis for the conviction prior to the effective date of section 1170.18, the court concluded he was entitled to seek relief, and remanded for a 1170.18 hearing. We agree with the reasoning of the *Mutter* court. Lyons is entitled to a hearing under 1170.18.

We reverse the court's order, and remand the matter for resentencing, at which time the trial court must determine whether the value of access card information at issue in this case

does not exceed $950 and, if so, to impose misdemeanor sentencing unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

DISPOSITION

The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

ZELON, Acting P. J.

We concur:

SEGAL, J.

MENETREZ, 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.