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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRIS FERREIRA,

Defendant and Appellant.

B277078

(Los Angeles County
Super. Ct. No. NA032763)

APPEAL from an order of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

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, Assistant Attorney General, Mary Sanchez and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Chris Ferreira appeals the denial of his petition under Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (Pen. Code, § 1170.18), to reduce his conviction for driving or taking a vehicle in violation of Vehicle Code section 10851, subdivision (a),¹ to a misdemeanor. The trial court ruled that Ferreira’s felony conviction did not qualify for reduction to a misdemeanor under Proposition 47. Since the trial court issued its ruling, however, our Supreme Court in *People v. Page* (2017) 3 Cal.5th 1175 (*Page*) held that convictions under section 10851 are eligible for resentencing under Proposition 47 if (1) the vehicle was worth \$950 or less, and (2) the sentence was imposed for theft of the vehicle, and not post-theft driving. (*Page, supra*, at p. 1188.)

However, a defendant has the burden to establish his or her eligibility for resentencing. (*Page, supra*, 3 Cal.5th at p. 1188.) Because Ferreira failed to meet this burden, we affirm. However, our decision is without prejudice to the filing of a new petition providing evidence of eligibility for resentencing consistent with the court’s holding in *Page*.

FACTUAL AND PROCEDURAL BACKGROUND

On September 9, 1997 Ferreira was charged by information with driving or taking a vehicle (§ 10851, subd. (a); count 1) and evading an officer in willful or wanton disregard for the safety of persons or property. (§ 2800.2, subd. (a); count 2).

¹ All further undesignated statutory references are to the Vehicle Code.

On October 7, 1997, pursuant to a plea agreement, Ferreira pleaded no contest to driving or taking a vehicle in violation of section 10851, subdivision (a). He also admitted that he had served two prison terms for prior felony convictions within the meaning of Penal Code section 667.5, subdivision (b). As part of the plea agreement, the trial court dismissed count 2 for evading an officer. The trial court sentenced Ferreira to the upper term of three years, plus two years for the prison priors, for an aggregate term of five years in state prison.

Ferreira filed his Proposition 47 petition on February 3, 2016, seeking to have his conviction reduced to a misdemeanor. The petition stated that Ferreira entered “a plea agreement for Driving w/out Owners [*sic*] Consent.” Ferreira stated further, “I allege the value at less than \$950.00.” The trial court denied the petition on May 13, 2016, finding that Ferreira’s felony conviction under section 10851 did not qualify for reduction to a misdemeanor under Proposition 47.

DISCUSSION

“Approved by the voters in 2014, Proposition 47 . . . reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies.” (*Page, supra*, 3 Cal.5th at p. 1179.) Penal Code section 1170.18, subdivision (a), provides: “A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment

of conviction in his or her case to request resentencing in accordance with . . . Section[s] 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code . . .” Penal Code section 1170.18 does not include section 10851 as a conviction for which a defendant may request resentencing.

However, in *Page*, the Supreme Court held that Proposition 47 applies to a person convicted of “vehicle theft” under section 10851 if the person can show the vehicle was worth \$950 or less. (*Page, supra*, 3 Cal.5th at p. 1184.) In reaching this conclusion, the court relied on its earlier holding in *People v. Garza* (2005) 35 Cal.4th 866, in which the court distinguished between convictions under section 10851 for theft and those for driving the vehicle away. The court in *Page* described the distinction as follows, “Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under section 10851[, subdivision] (a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete Therefore, a conviction under section 10851[, subdivision] (a) for posttheft driving is not a theft conviction” (*Page, supra*, 3 Cal.5th at p. 1183, citing to *Garza, supra*, at p. 871.)

The court in *Page* concluded, “By its terms, Proposition 47’s new petty theft provision, [Penal Code section] 490.2, covers the theft form of the . . . section 10851 offense.” (*Page, supra*, 3 Cal.5th. at p. 1183.) Therefore, “Proposition 47 makes some, though not all, section 10851 defendants eligible for resentencing:

A defendant convicted and serving a felony sentence under . . . section 10851, subdivision (a), for vehicle theft—taking a vehicle with the intent to permanently deprive the owner of possession—could (if the vehicle was worth \$950 or less) receive only misdemeanor punishment pursuant to [Penal Code] section 490.2 and is thus eligible for resentencing under [Penal Code] section 1170.18.” (*Id.* at p. 1184.)

Accordingly, if Ferreira’s conviction for driving or taking a vehicle under section 10851 was based on his “taking a vehicle with the intent to permanently deprive the owner of possession,” and the vehicle was worth \$950 or less, he would be eligible for resentencing under Proposition 47. (*Page, supra*, 3 Cal.5th at p. 1184.) However, the record before the court does not show the nature of Ferreira’s conviction.

Ferreira urges us to reverse the trial court’s order, and to remand the case to the trial court so the parties can present evidence of the value of the stolen vehicle and the theory of Ferreira’s liability (presumably whether the conviction was based on a theft or driving). However, “[a] defendant seeking resentencing under [Proposition 47] bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility.” (*Page, supra*, 3 Cal.5th at p. 1188; accord, *People v. Romanowski* (2017) 2 Cal.5th 903, 916 [“The ultimate burden of proving [Pen. Code, §] 1170.18 eligibility lies with the petitioner”].)

As the Fourth District held in *People v. Sherow* (2015) 239 Cal.App.4th 875, 880, “We think it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts upon which his or her eligibility is based. [¶] Applying

the burden to [the petitioner] would not be unfair or unreasonable. He knows what kind of items he took from the stores in counts 1 and 2. . . . [¶] A proper petition could certainly contain at least [the petitioner's] testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination.”

Here, Ferreira’s petition describes the conviction as one for “[d]riving” without the owner’s consent, and “allege[s]” that the value was less than \$950. It does not present any facts showing the value of the vehicle or how it was taken. Accordingly, the trial court properly denied the petition.²

However, because Ferreira filed his petition before our Supreme Court’s ruling in *Page*, as the court there held, the “petitioner is entitled to an opportunity to file a new petition meeting the statutory requirements. Such a petition should allege and, where possible, provide evidence of the facts

² Because Ferreira has not met his burden to present the underlying facts relating to his conviction, we do not reach Ferreira’s argument that allowing reduction of a conviction of section 10851 to a misdemeanor for a conviction based on taking a vehicle, and not for driving a vehicle, violates his right to equal protection under the federal and state constitutions. (See *Page*, *supra*, 3 Cal.5th at p. 1188, fn. 5 [“We have no occasion here to consider whether equal protection . . . requires that misdemeanor sentencing under [Pen. Code, §§] 490.2 and 1170.18 extend not only to those convicted of theft under . . . section 10851, but also to those convicted for taking a vehicle *without* the intent to permanently deprive the owner of possession. . . . We therefore leave the question for a case where it is squarely presented by the facts and briefing”].)

necessary to eligibility for resentencing under [Penal Code] section 1170.18.” (*Page, supra*, 3 Cal.5th at p.1189; see also *People v. Sherow, supra*, 239 Cal.App.4th at p. 881 [affirming denial of petition for resentencing where there was insufficient information as to the defendant’s eligibility under Proposition 47, “without prejudice to subsequent consideration of a properly filed petition”].) Therefore, our ruling is without prejudice to Ferreira filing a new petition providing evidence of his eligibility.

DISPOSITION

The order is affirmed without prejudice to consideration of a new petition providing evidence of Ferreira’s eligibility for resentencing under Proposition 47.

FEUER, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.