

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Appellant,

v.

ROBERT HERNANDEZ,

Defendant and Respondent.

B268074

(Los Angeles County
Super. Ct. No. BA412612)

APPEAL from an order of the Superior Court of
Los Angeles County, Kristi Lousteau, Temporary Judge.
(Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Jackie Lacey, District Attorney, Phyllis C. Asayama and
John Pomeroy, Deputy District Attorneys, for Plaintiff and
Appellant.

Ronald L. Brown, Public Defender, Albert J. Menaster,
Ruby Mejia and Nick Stewart-Oaten, Deputy Public Defenders,
for Defendant and Respondent.

INTRODUCTION

The People appeal from the trial court's order granting Robert Hernandez's petition for resentencing under Proposition 47, the Safe Neighborhoods and Schools Act (Pen. Code, § 1170.18).¹ The People contend Hernandez did not qualify to have his felony theft conviction reduced to a misdemeanor under Proposition 47 because the value of the property taken exceeded \$950, even though the amount of restitution ordered was \$300. On appeal Hernandez concedes he did not qualify for relief under Proposition 47, but argues we should affirm the trial court's order on other grounds. Because neither the parties nor the trial court had an opportunity to address those grounds, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2013 Hernandez pleaded no contest to one count of grand theft of personal property having a value exceeding \$950 (§ 487, subd. (a)). The preconviction report summarized the circumstances of the theft: "On June 1, 2013, at about 3:30 a.m., the defendant was in the Commerce Casino He was standing next to a poker table when he suddenly grabbed two racks of poker chips valued at \$10,000 each. The defendant then ran through the casino toward the exit. An employee saw this as it happened and yelled for security. The defendant was apprehended as he attempted to leave the casino with the chips." The report noted the casino lost "\$300 worth of chips . . . when security officers had to restrain the defendant." Hernandez

¹ Statutory references are to the Penal Code.

stipulated to this factual basis for the offense. The trial court sentenced Hernandez in accordance with the terms of his plea agreement, placing him on “felony probation for a period of three years, that is, without formal supervision, non-reporting,” and ordering him to perform 45 days of community service and pay \$300 in restitution to the Commerce Casino.

On November 4, 2014 voters enacted Proposition 47, which “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).” (*People v. Morales* (2016) 63 Cal.4th 399, 404.) Proposition 47 also added section 1170.18, which “permits a ‘person currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense’ to petition the trial court that entered the earlier judgment of conviction for a recall of the sentence and to be resentenced as a misdemeanant.”² (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 989; see § 1170.18, subds. (a), (b); *Morales*, at p. 404.) With exceptions not relevant here, grand theft under section 487 is a wobbler (see *People v. Ceja* (2010) 49 Cal.4th 1, 7, fn. 6) that Proposition 47 made a misdemeanor “where the value of the . . . personal property taken does not exceed” \$950. (§ 490.2, subd. (a); see *People v. Perkins* (2016) 244 Cal.App.4th 129, 141.)

² Section 1170.18 also allows persons who have already completed a felony sentence to apply for reclassification of the offense as a misdemeanor. (§ 1170.18, subd. (f).)

In September 2015 Hernandez petitioned to recall his sentence and asked the court to resentence him as a misdemeanor under Proposition 47. In his petition and at the hearing, Hernandez contended his theft conviction was a misdemeanor under Proposition 47 because “[t]he value of loss to the complaining witness was \$300.” The People argued Hernandez did not qualify for relief under Proposition 47 because the value of the property he took was \$20,000, notwithstanding that the court ordered restitution in the amount of \$300. The trial court granted the petition, and the People timely appealed.

DISCUSSION

The People argue the trial court erred in granting Hernandez’s petition to recall his sentence under Proposition 47 because Hernandez was not eligible for relief under section 1170.18, subdivision (a). To qualify for resentencing under that provision, the petitioner must establish that he or she ““is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed.”” (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449; accord, *People v. Sherow* (2015) 239 Cal.App.4th 875, 879; see § 1170.18, subd. (a).) The People argue the grand theft offense for which Hernandez was convicted did not become a misdemeanor under Proposition 47 because the value of the property Hernandez took exceeded \$950. According to the People, the value of that property was \$20,000, not the \$300 the court ordered for restitution.³

³ The difference between the parties’ positions in the trial court appears to be the difference between the replacement value

Hernandez does not contest the People's valuation of the property he took and even concedes he did not qualify for relief under Proposition 47. On this concession, we agree the trial court erred in granting Hernandez's Proposition 47 petition.

Hernandez contends, however, we should affirm the trial court's order granting his petition because, under section 17, subdivision (b)(1), his offense automatically became a misdemeanor when the trial court sentenced him to summary (i.e., unsupervised or non-reporting) probation. (See § 17, subd. (b)(1) [a wobbler "is a misdemeanor for all purposes . . . [a]fter a judgment imposing a punishment other than imprisonment in the state prison"]; *People v. Willis* (2013) 222 Cal.App.4th 141, 147 [by imposing summary probation, trial court effectively and automatically converted the defendant's offense from a felony to a

of the physical chips Hernandez stole (\$300) and the value of the chips if presented to the casino cashier's booth (\$20,000). This raises an interesting valuation issue regarding the value of poker chips. (Compare *Collins v. C.I.R.* (2d Cir. 1993) 3 F.3d 625, 634 [gambling chips "had 'no independent economic value' . . . because the chips could not be used outside the casino, only having value as a means of facilitating gambling within the casino itself"] with *In re Lewinski* (Bankr. N.D. Ind. 2008) 410 B.R. 828, 834 [casino chips are "fungible tokens used as a substitute for the cash or credit amount the debtor brought into the casino"].) Like access card information, poker chips can be valued at the replacement value of the chips or the market value of the chips (i.e., the amount of money the chips could have obtained at the cashier, discounted by the risk the casino would discover at the time of cashing in that the chips were stolen). The former valuation issue is before the California Supreme Court in *People v. Romanowski*, review granted January 20, 2016, S231405.

misdemeanor under section 17, subdivision (b)(1)]; *People v. Glee* (2000) 82 Cal.App.4th 99, 105-106 [“when the court suspended proceedings, granted summary probation, ordered appellant to serve one year in the county jail and directed that probation be terminated upon completion of the jail term, it automatically rendered the crime a misdemeanor pursuant to . . . section 17, subdivision (b)(1)”].) He contends in the alternative we should affirm the trial court’s order because the trial court had discretion to reduce his offense to a misdemeanor under section 17, subdivision (b)(3). Under that provision, a wobbler becomes a misdemeanor for all purposes “[w]hen the court grants probation to a defendant without imposition of sentence and . . . on application of the defendant . . . thereafter . . . the court declares the offense to be a misdemeanor.” (§ 17, subd. (b)(3).)

Hernandez, however, did not petition the court to declare his offense a misdemeanor under section 17, subdivision (b), and his attorney did not mention that provision at the hearing on his petition. Thus, the parties did not present, and the trial court did not consider, whether Hernandez is entitled to relief under either subdivision (b)(1) or (b)(3) of section 17. In particular, when a court exercises its discretion to reduce a wobbler to a misdemeanor under section 17, subdivision (b)(3), “[t]he facts and circumstances of the offense remain a relevant consideration,” and “[t]hose circumstances are weighed against other circumstances, including defendant’s conduct on probation, post-probation behavior, efforts at rehabilitation, and the longevity and duration of his or her rehabilitation.” (*People v. Tran* (2015) 242 Cal.App.4th 877, 892.) The trial court knew virtually nothing of those “other circumstances” here, and therefore could not have properly exercised its discretion under section 17,

subdivision (b)(3). And even though it appears probable on this record that Hernandez is entitled to relief under section 17, subdivision (b)(1), we believe it is appropriate to request such relief first in the trial court pursuant to a proper application, so that the parties will have a full and fair opportunity to be heard and the trial court will have an opportunity to rule on such an application in the first instance. Thus, our decision is without prejudice to any future application Hernandez may make under section 17, subdivision (b).⁴

DISPOSITION

The order granting the petition under section 1170.18 is reversed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.

⁴ The People concede Hernandez may bring a request pursuant to section 17, subdivision (b) at any time, and represent they will not argue any such application is untimely. (See, e.g., *People v. Wood* (1998) 62 Cal.App.4th 1262, 1267, fn. 3 [“[a]n application by a defendant to have the trial court declare a ‘wobbler’ a misdemeanor [under section 17, subdivision (b)(3),] may be made at any time”].)