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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIS DAVENPORT,

Defendant and Appellant.

B275962

(Los Angeles County  
Super. Ct. No. YA039717)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor L. Wright, Judge. Reversed and remanded.

Jasmine Patel, 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, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

In 1999, defendant Eddis Davenport (defendant) entered a guilty plea to count 2 of an information charging him with forgery—specifically, a felony violation of Penal Code section 470, subdivision (d).<sup>1</sup> The information alleged defendant, acting with intent to defraud, “did . . . falsely make, alter, forge and counterfeit, utter, publish, pass and attempt to offer to pass, as true and genuine, [a] check in the amount of \$998.23.” Many years later, after California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, defendant applied to have his 1999 felony forgery conviction reduced to a misdemeanor. The trial court found defendant was ineligible for relief, but defendant argues, and the Attorney General concedes, that the trial court’s rationale for denying the application was erroneous. Thus, the sole issue we are asked to decide is whether to reverse the order denying defendant’s resentencing application, or to instead affirm on a different ground, namely, that defendant did not carry his burden to establish the forged check’s value did not exceed \$950.

## I. BACKGROUND

### A. *Davenport’s 1999 Felony Forgery Conviction*

In 1999, Davenport’s co-defendant Cheryl Hall attempted to cash a forged check for \$998.23 at a Wells Fargo branch. A bank employee questioned the check’s validity because the check appeared to be “irregular.” The employee went to the rear office area and unsuccessfully tried to verify the check by contacting the issuing party. While attempting to verify the check, the

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<sup>1</sup> Statutory references that follow are to the Penal Code.

employee kept an eye on Hall via a video surveillance system and saw her leave the bank.

Several minutes after Hall left the bank, Davenport entered and headed for the ATM machines but did not initiate a transaction. Approximately a minute later, Hall reentered the premises and stood near the service counter. Davenport approached the service counter and stood behind Hall. The two then began whispering to each other. When the bank employee saw Hall back in the bank, she called the police. Davenport and Hall separated after conversing, and Davenport walked to a table near the ATM machines where he discretely dropped a set of car keys. Hall picked the keys up and headed towards the exit, where a police officer confronted her and took her into custody.

Afterwards, bank personnel informed police Davenport might be a potential accomplice. An officer asked Davenport for identification, but he said he had no ID and only provided a Wells Fargo MasterCard in the name of Corwyn McKinney. The police arrested Davenport, and he ultimately pled guilty to one of the five charges against him, felony forgery in violation of section 470, subdivision (d).

*B. Defendant's Application for Resentencing and the Trial Court's Ruling*

After California voters enacted Proposition 47 in November 2014, Davenport applied to have his 1999 felony forgery conviction redesignated as a misdemeanor. In his Application/Petition for Resentencing, Davenport checked a box declaring that "[t]he amount in question is not more than \$950."

Defendant appeared without counsel at a hearing held by the trial court on his application to reduce his felony conviction to

a misdemeanor. Argument by the parties was brief. The prosecution took the position that defendant's forgery conviction was "not eligible for Prop 47 reduction." The trial court agreed, stating defendant was ineligible "because he has prior conviction of 470 and 475, two prior 470's and 475, which makes him ineligible." Defendant then asked the court if it would reduce his conviction under the general misdemeanor reduction statute, section 17, subdivision (b), and the trial court denied that request as well.

## II. DISCUSSION

We agree with the parties that the trial court erred in finding defendant's prior convictions made him ineligible for Proposition 47 relief. The question is what to do about it. The Attorney General argues we should nevertheless affirm the trial court's order because defendant never discharged his initial burden to establish the value of the forged check was \$950 or less; in the Attorney General's view, the box defendant checked on the application form so averring does not suffice. Defendant, on the other hand, contends we must reverse because the check—as a matter of law—had only intrinsic value, i.e., the worth of the paper used to print it.

This is a dispute our Supreme Court will ultimately resolve: review was granted on June 15, 2016, in *People v. Franco*, S233973, to address whether the value of an uncashed forged check is the face value of the check or only the intrinsic value. Resolving this case, we conclude the appropriate disposition is a remand to the trial court with directions to give defendant an opportunity to establish the value of the forged check meets the Proposition 47 threshold under a legal standard

we will articulate, one that is similar but not identical to the standard announced in *People v. Lowery* (2017) 8 Cal.App.5th 533, review granted Apr. 9, 2017, S240615 (*Lowery*). Briefly stated, we believe the value of a forged check for Proposition 47 purposes is presumptively the face value of the check, subject to change if defendant is able to introduce persuasive evidence that a different value should apply.

Proposition 47 renders certain offenders ineligible for relief, namely, those who are convicted of both forgery and identify theft under section 530.5; those with prior convictions under section 667, subdivision (e)(2)(C)(iv) for serious and/or violent crimes; and those with prior convictions under section 290, subdivision (c) that require registration as a sex offender. (§§ 473, subd. (b), 1170.18, subds. (f) & (i).) None of these exclusions apply to defendant, so the trial court erred in denying defendant's application based on his prior forgery convictions.

Nevertheless, we are not convinced by defendant's argument that an unqualified reversal is required because a forged check is worth, at most, the de minimis cost of the paper and ink used to create it. Defendant relies on *People v. Cuellar*, which held that a forged check's value is "a nullity[,] . . . merely an order to pay [citation] and . . . of no value unless accepted." (*People v. Cuellar* (2008) 165 Cal.App.4th 833, 838 (*Cuellar*), quoting *United States Rubber Co. v. Union Bank & Trust Co.* (1961) 194 Cal.App.2d 703, 708-709, internal quotation marks omitted.) *Cuellar* does not control here because the court in that case decided the value of a check in the separate context of grand theft under section 487, subdivision (c). (*Id.* at p. 836; see also *Lowery, supra*, 8 Cal.App.5th at p. 540 ["*Cuellar*, decided several years before Proposition 47, is inapposite here. This case

concerns the statutory construction of . . . section 473, which was not at issue in *Cuellar*. The language of that section makes clear that check forgery may be punishable as a felony if the value of the check exceeds \$950. If, as Lowery argues, the value of a forged check is never more than the paper on which it is written, the language defining the \$950 limit would be meaningless”].)

Instead, *Lowery* is a better guide to the correct result here. In that case, the trial court denied defendant’s Proposition 47 petition to designate as a misdemeanor a prior felony conviction for attempting to cash a forged \$1,047.85 check. (*Lowery, supra*, 8 Cal.App.5th at p. 535.) On appeal, the court cited case law holding “[t]he ordinary and commonly understood meaning of “value” is fair market value” and concluded “value” for purposes of section 473 “refers to the actual monetary worth of the check,” which is not necessarily the face value, though face value may be “substantial evidence of its monetary worth.” (*Id.* at pp. 536, 539.) We find this analytical approach largely persuasive, but we would state the rule in somewhat stronger terms than *Lowery* does. In our view, the value imprinted on a forged check is not just possibly substantial evidence of its fair market value, it is the *presumptive* fair market value that a defendant who seeks to establish a lower valuation must rebut by introducing persuasive evidence to the contrary. (Compare *Lowery, supra*, at p. 541 [“We think a forged check *may* have a monetary value equal to its written value. . . . If Lowery had successfully cashed the check for its written value, this would be overwhelming evidence that it was worth its written value. But other extrinsic factors may be equally relevant to the determination such that an evidentiary hearing is required. A defendant may be able to introduce

evidence showing the actual monetary value of the check is less than its written value”].)

*People v. Tijerina* (1969) 1 Cal.3d 41 (*Tijerina*), recently cited with approval by our Supreme Court in *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), supports our view that the face value on a check is presumptively the fair market value. The defendant in *Tijerina* was convicted of grand theft for stealing a box of clothes from a department store, and on appeal, argued the value of the clothes stolen did not exceed the \$200 threshold that needed to be met to constitute grand theft. (*Tijerina, supra*, 1 Cal.3d at pp. 44-45.) Specifically, the defendant argued “the retail price of the property does not establish its ‘reasonable and fair market value,’” but our Supreme Court disagreed and held: “In the absence of proof . . . that the price charged by a retail store from which merchandise is stolen does not accurately reflect the value of the merchandise in the retail market, that price is sufficient to establish the value of the merchandise.” (*Id.* at p. 45; see also *Romanowski, supra*, 2 Cal.5th at p. 915 [quoting this language from *Tijerina*].) The face value of a forged check is indistinguishable, in our view, from the price tags on the merchandise in *Tijerina*—both represent, in the absence of some persuasive evidence to the contrary, the declared and ostensible worth of the item for purposes of negotiation in an economic market.<sup>2</sup>

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<sup>2</sup> Treating the written amount of a forged check as the presumptive market value not only makes good logical sense (after all, a check is a negotiable financial instrument entitling the payee to the amount shown, not some lesser amount), it also avoids burdening trial courts with the need to hold an evidentiary hearing in many cases where a Proposition 47

A defendant has the initial burden of establishing eligibility for resentencing under Proposition 47. (*Romanowski, supra*, 2 Cal.5th at p. 916.) This means that where resentencing is sought for a forgery conviction that involves a check possessed or negotiated by defendant written for an amount of \$951 or more, the defendant must come forward with reliable evidence that would explain why the check was actually worth less despite the amount written on the check. Defendant here could meet this burden by introducing evidence (perhaps a copy of the check or expert testimony) demonstrating the check in question was “so ineptly forged that even the most credulous clerk would refuse to honor it.” (*Lowery, supra*, 8 Cal.App.5th at p. 541.) Alternatively, defendant could attempt to show that the value of the check in question was \$950 or less by providing some reliable documentation or a detailed under oath description of the circumstances and amount for which he or she purchased the forged check from another on the black market. But what defendant cannot do is discharge his burden of proof merely by claiming all forged checks are worth less than \$951 or by checking a box on an application form that states the value of the forged item is \$950 or less. Absent evidence sufficient to raise a genuine dispute about the value of the forged check notwithstanding its presumptive value of \$998.23, the trial court

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petition or application is filed. Rather, such hearings will be necessary only in those cases where a defendant makes some appropriate showing that the amount written on the forged check he or she possessed is for some reason unlikely to be the true market value of the check.



will be justified in entering a denial of defendant's application for resentencing.

#### DISPOSITION

The order denying defendant's application is reversed, and the matter is remanded for further proceedings consistent with this opinion.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.\*

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