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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.

PATRICK ROUSSEAU,

Defendant and Appellant.

B285098

(Los Angeles County
Super. Ct. No. GA097891)

APPEAL from an order of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed.

John L. Staley, 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 Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Patrick Rousseaux pled no contest to two counts of felony identity theft. (Pen. Code,¹ § 530.5, subd. (a).) The trial court imposed an agreed-upon sentence of two years in state prison. Seven months later, defendant filed a petition for resentencing under section 1170.18, which was added by Proposition 47. Proposition 47 reduced certain felony drug- and theft-related offenses to misdemeanors. Section 1170.18, subdivisions (a) and (f) allows offenders whose crimes have been reclassified to petition for resentencing. The trial court held a brief hearing on defendant's petition at which a deputy district attorney was present. Defendant was not present; nor was he represented by counsel. The trial court denied the petition. The court held, "[t]he felony conviction is for an offense that does not qualify under Penal Code [section] 1170.18[, subdivision] (a) or (f)." This appeal followed. We affirm the order.

II. FACTUAL BACKGROUND

Because defendant entered a plea and there was no evidentiary hearing, we take the facts from the probation officer's pre-conviction report. Defendant cashed two checks at a Money Mart on separate occasions: October 12, 2015 (\$240) and October 16, 2015 (\$225). Both checks were issued from Cassandra Kwoh. A fraud investigator later told the manager

¹ Further statutory references are to the Penal Code except where otherwise noted.

who cashed defendant's checks that the checks were fraudulent. The manager told sheriff's deputies defendant had cashed a check from Kwoh in the past. The manager thought defendant might have made copies of the original check. Kwoh told sheriff's deputies she issued one check to defendant in May 2015 for \$500. Kwoh subsequently discovered defendant had "writte[n] numerous checks in [her] name." At sentencing, the trial court ordered defendant to pay \$1,800 in restitution to Kwoh.

III. DISCUSSION

A. *Probable Cause Certificate*

Preliminarily, we address an argument the Attorney General briefly raises in a footnote: "Because [defendant] pleaded no contest to the charges well after Proposition 47 was enacted, his claims constitute an attack on the validity of the plea itself, requiring a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 75.) Without a certificate of probable cause, the appeal should be dismissed. (*People v. Johnson* (2009) 47 Cal.4th 668, 678.)" We disagree.

Pursuant to section 1237.5, a defendant must obtain a certificate of probable cause in order to appeal "from a judgment of conviction upon a plea of guilty or nolo contendere." The statute's purpose is "to weed out frivolous and vexatious appeals from pleas of guilty or no contest, before clerical and judicial resources are wasted." (*People v. Buttram* (2003) 30 Cal.4th 773, 790.) A certificate is not required, however, if the appeal is based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4)(B);

People v. Cuevas (2008) 44 Cal.4th 374, 379; *People v. French* (2008) 43 Cal.4th 36, 43.) The crucial issue is whether in substance the defendant is challenging the validity of his or her plea. (*People v. Cuevas, supra*, 44 Cal.4th at p. 381; *People v. French, supra*, 43 Cal.4th at p. 44.)

Defendant does not appeal from a judgment of conviction; he neither seeks to withdraw his plea nor otherwise attack its validity. Rather, he appeals from the trial court's denial of his post-judgment section 1170.18 motion. Under these circumstances, he was not required to obtain a probable cause certificate. (See *People v. Cuevas, supra*, 44 Cal.4th at pp. 379, 381; *People v. French, supra*, 43 Cal.4th at pp. 43-44.)

B. *Defendant's Section 1170.18 Petition*

In the trial court, defendant filed a form "Application/Petition for Resentencing" stating, "[d]efendant requests that the felony sentence be recalled and that he/she be resentenced to a misdemeanor pursuant to Penal Code [section] 1170.18[, subdivisions](a)-(e)." He also checked the box stating, "[t]he amount in question is not more than \$950." Defendant did not specify under which of the code sections enumerated in subdivision (a) of section 1170.18 he sought resentencing.

On appeal, defendant argues: the trial court erred when it denied his section 1170.18 motion because identity theft is a form of theft; the amounts of the two fraudulent checks totaled less than \$951; and his theft of property valued at less than \$951 was eligible for resentencing under Proposition 47. We review de novo the trial court's legal conclusion that identity theft is not a reducible theft offense. (*People v. Bunyard* (2017) 9 Cal.App.5th

1237, 1242; *People v. Dunn* (2016) 248 Cal.App.4th 518, 525.) We see no error.

Defendant was convicted under subdivision (a) of section 530.5. That subdivision states: “Every person who willfully obtains personal identifying information, as defined in subdivision (b) of [s]ection 530.5, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of [s]ection 1170.”² Section 530.55, subdivision (b) defines “personal identifying information” as including name, address, telephone number, driver’s license number, social security number, place of employment, mother’s maiden name, bank account number and similar information.

Identity theft is not an offense enumerated in section 1170.18 as eligible for reclassification under Proposition 47. We recognize that this fact, standing alone, is not fatal to defendant’s petition. (*People v. Martinez* (2018) 4 Cal.5th 647, 652.) The Supreme Court has applied Proposition 47 to offenses not

² The elements of the crime are as follows: “(1) that the person willfully obtain personal identifying information belonging to someone else; (2) that the person use that information for an unlawful purpose; and (3) that the person who uses the personal identifying information does so without the consent of the person whose personal identifying information is being used. [Citation.]” (*People v. Sanders* (2018) 22 Cal.App.5th 397, 405; accord, CALCRIM No. 2040.)

specified in section 1170.18. (*People v. Page* (2017) 3 Cal.5th 1175 [Veh. Code, § 10851]; *People v. Romanowski* (2017) 2 Cal.5th 903 [§ 484e].) “[E]ligibility for resentencing turns on whether [the defendant] is a person serving ‘a sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense . . . ’ (. . . § 1170.18[, subd.] (a).)” (*People v. Martinez, supra*, 4 Cal.5th at p. 652.)

1. Petty Theft: Section 490.2

In his briefs on appeal, defendant repeatedly argues his offense was a form of theft. Defendant cites section 490.2, an enumerated statute added by Proposition 47. Section 490.2 redefines grand and petty theft offenses and provides, “[n]otwithstanding [s]ection 487 [defining grand theft], or any other provision of law defining grand theft, *obtaining 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 [absent certain prior convictions].” (Italics added.) The Supreme Court has applied section 490.2 to theft offenses. (See *People v. Romanowski, supra*, 2 Cal.5th at p. 908 [violation of section 484e, subd. (d), theft of access card information, is statutorily defined as grand theft and therefore falls within scope of section 490.2]; *People v. Page, supra*, 3 Cal.5th at pp. 1183, 1187 [section 490.2 extends to vehicle theft, in violation of Veh. Code, § 10851].)

With respect to identity theft, however, the Courts of Appeal have held a violation of section 530.5 is not a theft offense

falling under section 490.2. (*People v. Sanders* (2018) 22 Cal.App.5th 397, 478-483 [§ 530.5, subd. (a)]; *People v. Liu* (2018) 21 Cal.App.5th 143, 150-153 [§ 530.5, subd. (c)(3); rev. denied April 10, 2018]; see also *People v. Truong* (2017) 10 Cal.App.5th 551, 561 [in dual conviction context (§ 496), identity theft under section 530.5, subd. (c)(3) is not a theft offense; rev. denied July 12, 2017].) The Legislature did not categorize section 530.5 as a theft offense and did not include it among the offenses listed in title 13, chapter 5 of the Penal Code, “[l]arceny.” (§ 484 et seq.) It is instead defined in title 13, chapter 8, “[f]alse [p]ersonation and [c]heats.” It is thus unlike section 484e, which defines acquisition or possession of access card account information as “grand theft.” (*People v. Truong, supra*, 10 Cal.App.5th at p. 561.) Indeed, although commonly referred to as “identity theft,” “[t]he gravamen of the section 530.5, subdivision (a) offense is the unlawful use of a victim’s identity,” not theft. (*People v. Sanders, supra*, 22 Cal.App.5th at p. 400.)

Identity theft is also distinguishable from theft offenses because the potential harm to victims flowing from the use of personal identifying information far exceeds the value of any actual property obtained by the misuse of the information. “Identity theft victims’ lives are often severely disrupted.” (*People v. Valenzuela* (2012) 205 Cal.App.4th 800, 808, quoting Sen. Com. on Public Safety, analysis of Assem. Bill No. 2886 (2005-2006 Reg. Sess.) as amended May 26, 2006, pp. O-P.) “By its plain terms, section 530.5 addresses harms much broader than theft.” (*People v. Liu, supra*, 21 Cal.App.5th at p. 152.)³

³ A footnote in *People v. Liu, supra*, 21 Cal.App.5th 143 merits a brief discussion. The defendant in *Liu* was convicted

“[I]dentity theft in the electronic age is an essentially unique crime, not simply a form of grand theft. [¶] . . . Grand theft is typically a discrete event, not a crime that creates ripples of harm to the victim that flow from the initial misappropriation.” (*People v. Valenzuela, supra*, 205 Cal.App.4th at p. 808, quoting Sen. Com. on Public Safety, analysis of Assem. Bill No. 2886, *supra*, at pp. O-P.)

Proposition 47’s treatment of identity theft in relation to forgery is consistent with the conclusion that identity theft is a more serious crime and one the Legislature did not view as reducible. As amended by Proposition 47, section 473, subdivision (b) defines forgery relating to a check where the value does not exceed \$950 as a misdemeanor. The subdivision is inapplicable, however, to a person who is convicted of both forgery and identity theft. (§ 473, subd. (b).)

Additionally, applying section 1170.18 to section 530.5 would be inconsistent with Proposition 47’s purpose—to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious

under subdivision (c) of section 530.5, which makes it a crime to acquire or retain personal identifying information with an intent to defraud. Unlike subdivision (a), under which this defendant was convicted, subdivision (c) does not require *use* of the information *without consent*. In *Liu* at page 152 and footnote 3, the court in dictum distinguished the subdivisions (a) and (c) violations with respect to the without consent element. We do not read the *Liu* footnote as suggesting the without consent element of subdivision (a) of section 530.5, under which defendant was convicted, makes it more like a theft offense than that described in subdivision (c).

crimes.” (Voter Information Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3(3), p. 70.) Consistent with Proposition 47’s purpose, and given the serious harm posed by identity theft, the electorate could reasonably conclude that unlike petty theft, identity theft is a serious crime worthy of felony status. (Cf. *People v. Martinez, supra*, 4 Cal.5th at p. 654 [“the electorate reasonably could have understood that drug possession and drug transportation crimes are distinct and merit different treatment under [Proposition 47]”].) Therefore, section 490.2 does not support defendant’s motion for reduction.

2. Shoplifting: Section 459.5

Defendant also cites section 459.5, which was added by Proposition 47 and defines the new offense of shoplifting. Section 459.5 addresses conduct that previously would have qualified as burglary.⁴ Defendant has not explained, however, how he would

⁴ Section 459.5 states: “(a) Notwithstanding [s]ection 459 [defining burglary], shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except [when a person has specified prior convictions]. . . . [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”

have been guilty of misdemeanor shoplifting under Proposition 47 had Proposition 47 been in effect when he committed the identity theft. (§ 1170.18, subd. (a); *People v. Martinez, supra*, 4 Cal.5th at p. 652.) He cites section 459.5 without analysis or argument. He does not cite any case discussing section 459.5 in relation to a conviction, as here, of identity theft. Defendant's assertion without pertinent analysis or argument does not warrant further discussion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37; *People v. Bonin* (1989) 47 Cal.3d 808, 857, fn. 6.)

IV. DISPOSITION

The trial court's July 14, 2017 order is affirmed.
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KIM, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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