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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE EDUARDO VILLANUEVA, Defendant and Appellant.	2d Crim. No. B270255 (Super. Ct. No. 1116574) (Santa Barbara County)

Jose Eduardo Villanueva appeals an order denying a petition to recall and resentence his 2003 felony conviction for second degree vehicle burglary as a misdemeanor pursuant to Proposition 47. (Pen. Code, §§ 459, 1170.18, subd. (f).)[1] We conclude that vehicle burglary is not an offense reclassified as a misdemeanor by Proposition 47, and its statutory omission does not violate Villanueva's constitutional right to equal protection of the law. (*People v. Acosta* (2015) 242 Cal.App.4th 521, 526-527 [crime of attempted vehicle burglary does not fall within purview of Proposition 47].) We affirm.

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

FACTUAL AND PROCEDURAL HISTORY

On July 18, 2003, the Santa Barbara County prosecutor charged Villanueva with felony second degree burglary of a vehicle (count 1), and felony grand theft (count 2). (§§ 459, 487, subd. (a).) According to the probation officer's report, Villanueva unlawfully entered a locked vehicle and took approximately 50 compact music discs. On October 1, 2003, he entered a guilty plea to count 1. The trial court sentenced him to a two-year prison term; imposed a $400 restitution fine and a $400 parole revocation restitution fine (suspended); ordered $815 in victim restitution; and awarded him 27 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45.)

On August 24, 2015, Villanueva filed a petition to reclassify his felony conviction as a misdemeanor pursuant to section 1170.18, subdivisions (f)-(i). Following a contested hearing, the trial court relied upon *People v. Acosta*, *supra*, 242 Cal.App.4th 521, and ruled that Villanueva's vehicle burglary conviction is not eligible for reclassification.

Villanueva appeals and contends that: 1) second degree vehicle burglary with the intent to commit larceny is eligible for reclassification as a misdemeanor, and 2) constitutional principles of equal protection of the law compel misdemeanor reclassification of his conviction.

DISCUSSION

I.

Villanueva argues that his second degree vehicle burglary conviction is a theft offense within the meaning of Proposition 47. He asserts that although vehicle burglary is not an enumerated felony eligible for reclassification, theft of goods $950 or less in value is subject to reclassification pursuant to newly enacted section 490.2. Villanueva adds that we must

construe Proposition 47 liberally to promote its stated purpose of focusing prison expenditures on violent and serious offenders.

Proposition 47 amended and enacted various provisions of the Penal and Health and Safety Codes to reduce certain drug and theft offenses to misdemeanors, unless committed by ineligible defendants. Proposition 47 also enacted section 1170.18, which creates a procedure whereby a defendant who has suffered a felony conviction of a now-reclassified crime can petition to have it redesignated as a misdemeanor.

Section 1170.18, subdivision (f) provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

Section 490.2, subdivision (a) provides: "Notwithstanding Section 487 or 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, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

Whether Proposition 47 applies to the crime of vehicle burglary is a question of statutory interpretation that we review independently. (*People v. Bush* (2016) 245 Cal.App.4th 992, 1003.)

The plain language of Proposition 47 does not expressly reclassify the crime of vehicle burglary as a misdemeanor, regardless of the value of property a defendant took or attempted to take. (*People v. Chen* (2016) 245 Cal.App.4th 322, 326 [burglary is not a Proposition 47 misdemeanor offense except to the extent shoplifting pursuant to newly enacted section 459.5 applies]; *People v. Acosta*, *supra*, 242 Cal.App.4th 521, 526 [vehicle burglary is not mentioned in the list of crimes reduced to a misdemeanor by Proposition 47].) "Because nothing in the language of Proposition 47 suggests it applies to [the offense of vehicle burglary], there is no merit to [the] argument that reclassifying [this] offense as a misdemeanor is required in order to comply with the express intent of liberal construction of Proposition 47. One aspect of the express intent of Proposition 47 is to 'reduce[] penalties *for certain offenders* convicted of nonserious and nonviolent property and drug crimes.' . . . [Those convicted of vehicle burglary are] not a member of the class of 'certain offenders' expressly enumerated in Proposition 47." (*Acosta*, at p. 526.)

Burglary of a motor vehicle is not merely another form of theft because theft is not an element of the offense. (*People v. Acosta*, *supra*, 242 Cal.App.4th 521, 526.) Burglary of a motor vehicle is committed by entry into the vehicle when the doors are locked with the intent to commit grand or petit larceny or any felony. (*Ibid.*) The crime of burglary can be committed without an actual taking, as opposed to the crimes of theft, robbery, and carjacking. (*Ibid.*)

Proposition 47 made no changes to the burglary statutes (sections 459, 460, 461), nor did it explicitly reduce all prior second degree burglary offenses to misdemeanor second degree burglary. (*People v. Chen*, *supra*, 245 Cal.App.4th 322,

326.) As we noted in *People v. Trevino* (2016) 1 Cal.App.5th 120, 125, vehicles have been used for habitation, sleeping, or storage of possessions. Preserving the felony status of second degree vehicle burglary serves an important societal interest of protecting personal safety and privacy. (*Ibid.*) By contrast, the newly enacted offense of shoplifting requires "*entering a commercial establishment* with intent to commit larceny *while that establishment is open during regular business hours* . . . ." (§ 459.5, subd. (a), italics added.) For these reasons, we adopt the reasoning of *People v. Acosta*, *supra*, 242 Cal.App.4th 521, 526-528, and reject Villanueva's arguments.

II.

Villanueva contends that federal and state constitutional principles of equal protection of the law require that he receive the same treatment pursuant to Proposition 47 as those offenders convicted of grand theft. He asserts that he is similarly situated to a person convicted of vehicle theft.

We disagree that Villanueva has been denied equal protection of the law. Applying a rational basis scrutiny, our Supreme Court has held that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.)

This reasoning also applies to Proposition 47's provisions for resentencing and reclassification of a limited subset of those previously convicted of grand theft of property valued $950 or less, but not for those convicted of vehicle burglary. *People v. Acosta*, *supra*, 242 Cal.App.4th 521, 527-528, rejected such an equal protection challenge: "[T]he electorate

could rationally extend misdemeanor punishment to some nonviolent offenses but not to others, as a means of testing whether Proposition 47 has a positive or negative impact on the criminal justice system. 'Nothing compels the state "to choose between attacking every aspect of a problem or not attacking the problem at all."'" Moreover, the electorate reasonably could view a crime involving entry into a locked vehicle with the intent to commit theft as meriting harsher treatment than vehicle theft. (*Id.* at p. 528.) Absent a showing that a particular defendant "'has been singled out deliberately for prosecution on the basis of some invidious criterion' . . . the defendant cannot make out an equal protection violation." (*People v. Wilkinson*, *supra*, 33 Cal.4th 821, 839.) Villanueva has not made the necessary showing.

The order is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Patricia Kelly, Judge

Superior Court County of Santa Barbara

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.