Filed 4/21/17 P. v. Crenshaw CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALLEN KEITH CRENSHAW, Defendant and Appellant.	B276628 (Los Angeles County Super. Ct. No. TA009744)

APPEAL from an order of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Allen Keith Crenshaw, appeals from an order denying his Penal Code[1] section 1170.18, subdivision (f) resentencing petition. We affirm the order.

II. BACKGROUND

On February 11, 1991, defendant entered a no contest plea to attempted second degree robbery, a serious felony. (§§ 664, 211, 212.5 subd. (c); 1192.7, subds. (c)(19), (c)(39).) He also admitted the truth of an allegation he had sustained a prior serious felony conviction in case No. A647749 within the meaning of former section 667, subdivision (a). (Stats. 1989, ch. 1043, § 1, pp. 3619-3620.) The trial court dismissed a second count of attempted second degree robbery. Defendant was sentenced to six years and four months in state prison.

On June 27, 2016, defendant filed a petition to reduce his felony conviction to a misdemeanor pursuant to section 1170.18, subdivision (f). On July 11, 2016, the trial court denied defendant's petition. The trial court ruled, "A second degree robbery, including an attempted second degree robbery, is not one of the felony charges reduced by Proposition 47." The minute order of that date notes, "Matter is heard without the original legal file." Defendant timely filed a notice of appeal.

We appointed counsel to represent defendant on appeal. After examining the record, appointed appellate counsel filed an

---

[1] Further statutory references are to the Penal Code except were otherwise noted.

"Opening Brief" in which no issues were raised. Instead, appointed appellate counsel requested this court independently review the entire record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. (See *Smith v. Robbins* (2000) 528 U.S. 259, 277-284.) On November 30, 2016, we advised defendant he had 30 days within which to personally submit any contentions or arguments he wished us to consider. Defendant's time to respond was extended at his request to January 30, 2017.

III. DISCUSSION

A. *Wende* Review

We have examined the entire record and are satisfied appointed appellate counsel has fully complied with his responsibilities. Defendant is not eligible for resentencing under section 1170.18 because attempted second degree robbery is not among the offenses enumerated in section 1170.18, subdivision (a). Accordingly, the trial court properly denied the petition. (Cf. *People v. Johnson* (2016) 247 Cal.App.4th 252, 257-258 [unlawfully taking or driving a vehicle]; *People v. Bush* (2016) 245 Cal.App.4th 992, 1001 [theft from an elder]; *People v. Acosta* (2015) 242 Cal.App.4th 521, 526 [attempted car burglary].)

B. Defendant's Supplemental Brief

In a supplemental brief timely filed on February 1, 2017 (Cal. Rules of Court, rule 8.25 (b)(3)(A)), defendant argues he was convicted of a theft offense, therefore he is eligible to have his offense designated a misdemeanor under section 490.2,

subdivision (a). ~(Supp. brief, pp. 6, 8)~ That assertion was not raised in the trial court and has been forfeited. (*People v. Clark* (2016) 63 Cal.4th 522, 552; *People v. Tully* (2012) 54 Cal.4th 952, 980.)

Even if properly before us, the argument is without merit. We apply well-established rules of statutory construction: "In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621[, disapproved on another point in *People v. Sanchez* (2016) 63 Cal. 4th 665, 686, fn. 13].) In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. (*People v. Lawrence* (2000) 24 Cal.4th 219, 230.) If the statutory language is clear and unambiguous, the plain meaning of the statute governs. (*Id.* at pp. 230-231.)" (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.)

Section 490.2, subdivision (a) states, "(a) 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 . . . ." Section 490.2 generally makes obtaining property by theft a misdemeanor where the property's value does not exceed $950. (*People v. Romanowski* (2017) 2 Cal. 5th 903, __[2017 Cal. Lexis 2326, *6].) The statute by its terms applies only to theft. (See *People v. Sauceda* (2016) 3 Cal.App.5th 635, 643-644.) Theft is defined as follows, "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft." (§ 484.)

Defendant was not convicted of theft. He was convicted of attempted second degree robbery. Our Supreme Court has held, "[T]he central element of the crime of robbery [is] the force or fear applied to the individual victim in order to deprive him of his property." (*People v. Ramos* (1982) 30 Cal.3d 553, 589, revd. on other grounds, *California v. Ramos* (1983) 463 U.S. 992, 1013-1014; accord, *People v. Gomez* (2008) 43 Cal.4th 249, 254.) Section 490.2 is inapplicable to defendant's attempted robbery conviction. (Cf. *People v. Acosta, supra,* 242 Cal.App.4th at p. 526 [attempted car burglary].)

Even if section 490.2 did apply, defendant bore the burden of proving his section 1170.18 eligibility, i.e., that the "reasonable and fair market value" (§484, subd. (a)) of the property he attempted to take did not exceed $950. (*People v. Romanowski, supra,* 2 Cal. 5th at p.__ [2017 Cal LEXIS 2326, *21-22]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448-449; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.) Defendant has not met that burden.

Defendant asks us to consider the preliminary hearing transcript to determine whether he was convicted of a theft offense. He asserts there was insufficient evidence of force to constitute attempted robbery. We granted defendant's motion for judicial notice of the preliminary, plea and sentencing hearing transcripts. We have taken judicial notice of the superior court record in this case. (Evid. Code, §§ 452, 459.)

There were two victims. Defendant was charged with two counts of attempted robbery. As part of defendant's plea agreement, the trial court dismissed one of the attempted robbery counts. Officer David Motts testified at the preliminary hearing. He offered uncontroverted evidence of force. Both victims said

defendant used physical force and struggled with them in an attempt to take their purses. Whether Officer Motts confused one victim's story with that of the other, as defendant asserts, is of no consequence. There was substantial uncontroverted evidence defendant used physical force against and struggled with both victims.

Defendant's notice of appeal is from the July 11, 2016 order in the present case, No. TA009744. Nevertheless, defendant argues a trial court in San Bernardino imposed an unauthorized sentence in case No. FSB20129 because the present conviction, once designated a misdemeanor, does not qualify as a prior serious felony. As discussed above, however, defendant's present conviction remains a felony. Therefore, we need not further address defendant's assertion including whether it is properly before this court.

IV. DISPOSITION

The order denying defendant's resentencing petition is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

KIN, J.*

---

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