Filed 5/31/17 P. v. Tubbs CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

DAVID TUBBS,

Defendant and Appellant.

2d Crim. No. B277524
(Super. Ct. No. 2002008006)
(Ventura County)

David Tubbs appeals an order denying his motion to reduce and reclassify his prior conviction for acquiring or retaining possession of access card account information (Pen. Code, § 484e, subd. (d)) from a felony to a misdemeanor under the Safe Neighborhoods and Schools Act (§ 1170.18) (hereafter "Proposition 47").[1] We conclude the trial court erred by ruling that this conviction does not qualify as an eligible offense for reclassification under Proposition 47 and section 490.2. We reverse and remand.

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

FACTS

In March 2002, Ventura police officers arrested Tubbs in a hotel room. Tubbs possessed access card account information belonging to another person. He possessed that information without that "cardholder's" consent and intended to "use it fraudulently."

On April 17, 2002, Tubbs pled guilty to grand theft in violation of section 484e, subdivision (d). This statute provides, "Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft." (*Ibid.*)

Years after his conviction, the electorate passed Proposition 47. One of its primary purposes was "to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.) Proposition 47 established a procedure for a defendant to petition the court for "a recall of the sentence" for felonies that qualify for resentencing under its provisions and to potentially "be resentenced as a misdemeanant." (*Harris*, at p. 989.)

Section 490.2, one of Proposition 47's provisions, reduces the punishment for certain theft crimes. It provides, in relevant part, "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 . . . ." (§ 490.2, subd. (a).)

A resentencing petition is properly granted for an eligible theft crime where "'the reasonable and fair market value'" of the property taken does not exceed $950 (*People v. Romanowski* (2017) 2 Cal.5th 903, 917) "'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety'" (*id.* at p. 916).

In 2016, Tubbs filed a "motion for Prop. 47 hearing" to reduce his felony conviction (§ 484e, subd. (d)) to a misdemeanor under Proposition 47.

The trial court conducted a hearing and then denied the motion. It adopted the People's position that theft of access card account information (§ 494e, subd. (d)) is not an eligible crime for resentencing under Proposition 47. It did not reach the other issues involved in Tubbs's Proposition 47 motion.

DISCUSSION

Tubbs contends the trial court erred by ruling that his prior felony conviction for acquiring or retaining possession of access card account information (§ 484e, subd. (d) was not an eligible theft offense to be reduced to a misdemeanor under Proposition 47. He claims it falls within section 490.2, which permits grand theft felonies to be reclassified as misdemeanors if they do not exceed the $950 limit. We agree.

In *People v. Romanowski*, *supra*, 2 Cal.5th at pages 905-906, our Supreme Court held "theft of access card account information--an offense that includes theft of credit and debit card information--is one of the crimes eligible for reduced punishment" under Proposition 47. The court said, "What section

490.2 indicates is that after the passage of Proposition 47, 'obtaining any property by theft' constitutes petty theft if the stolen property is worth less than $950." (*Id.* at p. 908.) Consequently, the trial court order must be reversed.

DISPOSITION

The order denying the motion is reversed and the case is remanded to the trial court to decide the remaining issues on Tubbs's motion for Proposition 47 relief. (*People v. Romanowski*, *supra*, 2 Cal.5th at pp. 916-917.)

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Gilbert A. Romero, Judge

Superior Court County of Ventura

Stephen P. Lipson, Public Defender, Michael C. McMahon, Chief Deputy, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.