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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. STEVE ALCAZAR, Defendant and Appellant.	B265583 (Los Angeles County Sup. Ct. No. BA415314)

APPEAL from an order of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Richard L. Fitzer, 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, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Steve Alcazar stole a car in 2013 and was convicted under Vehicle Code section 10851 of felony unlawful driving or taking of a vehicle. In 2015, he applied to the superior court to have his felony offense designated as a misdemeanor under Proposition 47, which reduced certain theft crimes from felonies to misdemeanors if the stolen property was worth $950 or less. The trial court denied the application on the ground that a felony conviction under Vehicle Code section 10851 may not be redesignated a misdemeanor under Proposition 47 no matter how much the stolen car was worth.

We conclude that felony taking of a vehicle can be redesignated as a misdemeanor if the vehicle is worth $950 or less. A defendant seeking redesignation must factually allege the vehicle was worth $950 or less and adduce supporting evidence or information. Because defendant here failed to make the requisite showing, we affirm the trial court's order without prejudice to his subsequently filing an adequate application.

BACKGROUND

On August 7, 2013, defendant stole a 1995 Honda Accord. The charging information alleged he "did unlawfully drive and take [the vehicle] . . . without the consent of and with intent, either permanently or temporarily, to deprive the . . . owner of title to and possession" of it. Defendant was convicted of felony unlawful driving or taking of a vehicle and was sentenced to 16 months in county jail. (Veh. Code, § 10851, subd. (a).)

In November 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which reduced certain drug- and theft-related offenses from felonies to misdemeanors. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 889-890.) As pertinent here, the act created Penal Code section 490.2, which defines "petty theft," a misdemeanor, as the theft of "any property" worth $950 or less. (§ 490.2, subd. (a).)

In March 2015, defendant filed a court-approved form application to redesignate his offense, arguing Proposition 47 reclassified unlawful driving or taking of a vehicle as

a misdemeanor if the value of the vehicle is $950 or less. At the application hearing, defendant's counsel explained that the 1995 Honda Accord defendant stole would have had a Kelly Blue Book value of "just over $1000" had it been in good condition, but it was worth considerably less because according to the arrest report it was covered in dents and scratches, was missing a backseat, and had no stereo faceplate. Making no determination as to the value of the vehicle, the trial court denied defendant's application on the ground that violation of Vehicle Code section 10851 had not been reclassified as a misdemeanor by Proposition 47. Defendant appealed.

DISCUSSION

The issue is whether Proposition 47 reclassified felony unlawful taking of a vehicle as petty theft where the vehicle is worth $950 or less, an issue on which the appellate courts have split and which is currently before our Supreme Court. (*People v. Page* (2015) 241 Cal.App.4th 714, 717, 719, review granted Jan. 27, 2016, S230793 [conviction for violating Veh. Code, § 10851 is not reducible under Prop. 47]; *People v. Haywood* (2015) 243 Cal.App.4th 515, 520-521, review granted Mar. 9, 2016, S232250 [same]; *People v. Ortiz* (2016) 243 Cal.App.4th 854, 859, review granted Mar. 16, 2016, S232344 [conviction for violating Veh. Code, § 10851 is reducible under Prop. 47]; *People v. Gomez* (2015) 243 Cal.App.4th 319, 326, review granted May 25, 2016, S233849 [same].)

"'In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]'" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) Proposition 47 expressly stated that among its purposes were "to ensure that prison spending is focused on violent and serious offenses" and to "[r]equire misdemeanors

instead of felonies for nonserious, nonviolent crimes . . . ." (Voter Information Pamp. Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 70.) The initiative is to be "liberally construed to effectuate these purposes." (*Id*. at p. 74.)

A. Eligibility for Redesignation under Proposition 47

Penal Code section 487[1] defines theft of any automobile as "grand theft," a felony. (§ 487, subd. (d)(1).) But Proposition 47 created section 490.2, which provides in pertinent part that "*[n]otwithstanding Section 487* or any other provision of law defining grand theft, obtaining *any property* by theft where the value of the . . . property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ."[2] (§ 490.2, subd. (a), italics added.)

Proposition 47 also added a redesignation provision under which an offender who has "completed his or her sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under this act had [it] been in effect at the time of the offense, may file an application . . . to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f); *People v. Jones* (2016) 1 Cal.App.5th 221.)

Here, defendant stole a 1995 Honda Accord purportedly worth less than $950. Had section 490.2 been in effect at the time of the theft, the offense would have fallen

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[1] All statutory reference will be to the Penal Code unless otherwise indicated.

[2] Section 490.2 provides in full: "(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, 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. [¶] (b) This section shall not be applicable to any theft that may be charged as an infraction pursuant to any other provision of law."

squarely within the statute's plain language. Thus, he is eligible to have his felony conviction redesignated as a misdemeanor.

The Attorney General argues defendant would not have been guilty of petty theft because Vehicle Code section 10851, under which he was charged and convicted, "is not strictly a theft crime," as the statute also proscribes the nontheft offense of "joyriding." The argument is without merit.

It is true that Vehicle Code section 10851 proscribes both theft and non-theft conduct, as it provides in pertinent part that "[a]ny person who *drives or takes* a vehicle . . . without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense . . . ." (Veh. Code, § 10851, subd. (a), italics added.) Thus, a person can violate the statute "either by *taking* a vehicle with the intent to steal it or by *driving* it with the intent only to temporarily deprive its owner of possession (i.e., joyriding)." (*People v. Allen* (1999) 21 Cal.4th 846, 851, italics added; accord, *People v. Garza* (2005) 35 Cal.4th 866, 871 ["a defendant convicted under [Vehicle Code] section 10851(a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction"]; *People v. Avery* (2002) 27 Cal.4th 49, 55 [unlawfully taking a vehicle "for so extended a period as to deprive the owner of a major portion of its value or enjoyment" constitutes theft].) Here, the charging information to which defendant pleaded guilty alleged he took and drove the Accord. It is therefore undisputed he committed a theft offense. If the vehicle was worth $950 or less, that offense is now petty theft.

Respondent observes that Proposition 47 redefined as misdemeanors only a specified few crimes described in the Health and Safety Code and the Penal Code, failing to mention Vehicle Code section 10851 and leaving it unchanged. Therefore, respondent argues, pursuant to the familiar maxim *expressio unius est exclusio alterius*, the electorate

must have intended to exclude an offense described by Vehicle Code section 10851 from eligibility for redesignation. We disagree.

A rule of construction such as "*expressio unius est exclusio alterius*," under which inclusion of only certain items in an associated group implies a deliberate choice to exclude unmentioned items, may not be employed "where its operation would contradict a discernible and contrary legislative intent." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195; accord, *In re Cathey* (1961) 55 Cal.2d 679, 689-690, disapproved on another ground by *In re Barnett* (2003) 31 Cal.4th 466, 478, fn. 8.) Proposition 47 expressly states that the voters' intent was to focus prison spending on violent and serious offenses and to make nonserious, nonviolent crimes misdemeanors instead of felonies, and the plain language of section 490.2 makes it applicable to "any" stolen property worth $950 or less. This clear expression of voter intent trumps rules of statutory construction.

B. Value of the Vehicle

Neither the text of Proposition 47 nor the statutes it enacted state which party has the burden of showing an offense is eligible for redesignation. But Evidence Code section 500 provides that a party seeking relief "has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . he is asserting." (Evid. Code, § 500; see *People v. Sherow* (2015) 239 Cal.App.4th 875, 878.)

Because defendant is the party seeking relief, he must first plead sufficient grounds for the relief. To do so, he should state with particularity the facts supporting relief and adduce reasonably available evidence of those facts, including pertinent portions of police reports, trial transcripts, or declarations. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 140 ["defendant should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief"]; see *People v. Duvall* (1995) 9 Cal.4th 464, 474 [setting forth a similar standard for habeas relief].) "'Conclusory allegations made

without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.'" (*People v. Duvall*, at p. 474.)

Here, defendant checked a box on a court-approved form indicating in conclusory fashion that "The amount in question is not more than $950.00." He gave no factual basis for the conclusion. Defendant's counsel represented at the application hearing that a 1995 Honda Accord in good condition would have a Kelly Blue Book valuation of "just over $1000," and further represented that a police report indicated the Accord defendant stole was covered in dents and scratches and was missing a rear seat and stereo faceplate. (The record on appeal contains neither of these sources.) Therefore, counsel argued, it may reasonably be inferred the Accord was worth less than $950. The trial court, concluding a felony violation of Vehicle Code section 10851 can never be redesignated as a misdemeanor under Proposition 47 no matter what the stolen car is worth, declined to conduct an evidentiary hearing on the issue. But even if it had, on this record defendant failed to show his offense constituted petty theft pursuant to section 490.2. His counsel's arguments were not evidence.

Therefore, defendant was not entitled to redesignation under section 1170.18.

DISPOSITION

The trial court's order denying defendant's application for redesignation is affirmed. Nothing in this decision or in section 1170.18 forecloses defendant's filing a new application alleging sufficient facts to support the claim that his offense was a violation of section 490.2.

NOT TO BE PUBLISHED.

CHANEY, J.

WE CONCUR:

ROTHSCHILD, P. J.

JOHNSON, J.