Filed 5/22/17 P. v. Carrillo CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RAQUEL CARRILLO, Defendant and Appellant.	B276697 (Los Angeles County Super. Ct. No. KA064448)

APPEAL from an order of the Superior Court of Los Angeles County, Wade Olsen, Judge. Reversed and remanded with directions.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Tasha G. Timbadia, Deputies Attorney General, for Plaintiff and Respondent.

The issue in this appeal is whether defendant Raquel Carrillo's felony conviction for violating Vehicle Code section 10851, subdivision (a) may be reduced to a misdemeanor under Proposition 47 ("The Safe Neighborhoods and Schools Act"). The trial court ruled it could not, even if the value of the vehicle was less than $950. Because the appellate record does not foreclose a finding that defendant pleaded guilty to a theft offense, she is potentially eligible for relief. We reverse and remand the case to permit defendant to offer a factual basis for her plea and, if it constitutes a theft, to also present evidence that the value of the vehicle was less than $950. (*People v. Romanowski* (2017) 2 Cal.5th 903, 917.)

PROCEDURAL BACKGROUND

A traffic stop for expired registration tags led to the December 8, 2003 filing of a one-count felony complaint charging defendant with a violation of Vehicle Code section 10851, subdivision (a).[1] The pleading alleged defendant "did unlawfully drive and take a certain vehicle, to wit, a 1982 Datsun . . .

---

[1] Vehicle Code section 10851, subdivision (a) provides: "Any person who drives or takes a vehicle not his or her own, 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, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment."

without the consent of and with intent, *either permanently* or temporarily, to deprive the [ ] owner of title to and possession of said vehicle." (Italics added.) The court accepted defendant's guilty plea the following day. Item 18 in the plea form, where defendant could "offer to the court the following as a basis for [her] plea of guilty," was left blank. The court's December 9, 2003 minute order recited, "Count 01: 10851(A) VC FEL – TAKE VEH W/O OWNER'S CONSENT."

The court suspended defendant's sentence and placed her on three years' probation. She failed probation within a few months and, on February 18, 2004, the trial judge sentenced her to the low term of 16 months. The February 18, 2004 abstract of judgment indicated defendant was convicted of violating Vehicle Code section 10851, subdivision (a) and described the crime as "TAKE VEHICLE W/O OWNER'S CONSENT."

On July 19, 2016, defendant's counsel returned to the same trial judge with an application to designate the felony conviction as a misdemeanor pursuant to Penal Code section 1170.18, subdivision (f). The court acknowledged that Courts of Appeal disagree on the issue, but noted defendant's offense was a joyride and Proposition 47 does not apply to joyriding. Defendant's application was denied.

In briefs to this court, both parties cite to the probation report, which is included in the appellate record. The report explains defendant was driving the car several weeks after the owner reported it stolen. When arrested, she claimed she purchased the car that very day for $300. Although she did not have a receipt for the purchase, she had a shaved key in her pocket. The vehicle's VIN number appeared to have been tampered with.

DISCUSSION

Vehicle Code section 10851 is not one of the statutes listed in either Penal Code section 490.2 or Penal Code section 1170.18. Whether Proposition 47 nonetheless entitles a felony conviction under Vehicle Code section 10851 to be reduced to a misdemeanor if the value of the vehicle is less than $950 has been the subject of debate and disagreement among Courts of Appeal. The Supreme Court has granted review in these cases[2] and on its website generally describes the issue as follows: "Does Proposition 47 ("the Safe Neighborhoods and Schools Act') apply to the offense of unlawful taking or driving a vehicle (Veh. Code, § 10851), because it is a lesser included offense of Penal Code section 487, subdivision (d), and that offense is eligible for resentencing to a misdemeanor under Penal Code sections 490.2 and 1170.18?"

---

[2] *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793 (Veh. Code, § 10851 ineligible for resentencing under § 1170.18, subd. (a)) is the lead case. Other published decisions with "grant and hold" orders include *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250 (same); *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344 (Veh. Code, § 10851 eligible for reduction provided offense meets definition of petty theft); *People v. Gomez* (2015) 243 Cal.App.4th 319, review granted May 25, 2016, S233849 (conviction for violating Veh. Code, § 10851 is reducible under Proposition 47); *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150 (plain meaning of § 490.2 excludes Veh. Code, § 10851 offenses from Proposition 47 relief), and *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041 (same). The Supreme Court has also granted review in numerous unpublished decisions.

The resolution of this appeal does not require us to contribute to the debate or address the lesser included issue. The single-count felony complaint charged defendant with taking the vehicle with the intent to permanently deprive the owner of possession. She pleaded guilty. Her conviction of violating Vehicle Code section 10581 may constitute a theft offense.

The Supreme Court recognized decades ago that theft and nontheft "joyriding" are the two predicate actions proscribed by Vehicle Code section 10851. (*People v. Jaramillo* (1976) 16 Cal.3d 752 (*Jaramillo*).) In *Jaramillo*, the defendant was convicted of violating both Vehicle Code section 10851, subdivision (a) and the Penal Code section 496, subdivision 1 (the statute then in effect for receiving stolen property) and acquitted of grand theft-auto (Pen. Code, § 496, subd. (c).) The dual convictions were reversed: "We conclude . . . an accused can be convicted of both violations *only* if his conviction of the Vehicle Code section is predicated on conduct not constituting a theft of the vehicle involved." (*Jaramillo, supra,* 16 Cal.3d at p. 754.) The Supreme Court then explained that if "the record does not disclose or suggest what specific findings were made in convicting a defendant of a violation of Vehicle Code section 10851 but it nevertheless appears that the fact finder may have found that the defendant intended to steal the vehicle, a second conviction based on a further finding that the defendant received that same stolen property is foreclosed." (*Id.* at p. 759.) This statement is footnoted, and there the Supreme Court observed that while the jury's acquittal of the grand theft charge "might serve as a clue that it did not find that defendant took the automobile with intent to permanently deprive the [owners] of title or possession,

it is by no means conclusive of such a finding." (*Id.* at p. 759, fn. 7.)

The fact situation in *People v. Garza* (2005) 35 Cal.4th 866 (*Garza)* was similar. In *Garza*, however, the defendant's convictions for violating both Vehicle Code section 10851, subdivision (a) and Penal Code section 496, subdivision (a) were affirmed, even though the trial court failed to instruct *sua sponte* that the defendant could not be convicted of both stealing the vehicle and receiving stolen property. The Supreme Court recognized some violations of Vehicle Code section 10851 constitute theft and explained the analysis turned on "whether defendant's section 10851(a) conviction was for the taking of the vehicle with the intent to permanently deprive the owner of possession, and thus a theft conviction, or merely for posttheft driving of the vehicle, and thus a nontheft conviction" (*id.* at p. 879), but concluded the evidence permitted them to "uphold both convictions by construing defendant's conviction under section 10851(a) as a nontheft conviction for posttheft driving." (*Id.* at p. 882, fn. omitted.)

The Attorney General agrees, asserting, "Vehicle Code section 10851 can be violated in two ways: taking a vehicle with the intent to permanently deprive the owner of possession; or driving the vehicle with the intent to temporarily deprive the owner of possession. . . . The former, but not the latter, amounts to theft."

Although the felony complaint alleged in the alternative that defendant had the intent only to temporarily deprive the owner of possession, the record of the guilty plea and the disposition did not so finely parse the allegations. Other than the alternative allegation in the felony complaint, nothing in the

record supports the Attorney General's assertion that defendant's "conviction was based on the *post-theft* driving of the vehicle rather than the theft of the vehicle." (Emphasis in original.) Similarly, nothing in the record unequivocally supports the finding that her conviction was based on theft. Without specific findings, *Jaramillo, supra,* 16 Cal.3d 752, controls, and the matter must be remanded to permit defendant, if she so chooses, to offer a factual basis to support her guilty plea to a theft conviction.

The Attorney General recognizes theft provides a basis for violation of Vehicle Code section 10851, but argues it makes no sense to apply Penal Code section 490.2: "So construed, the law would require that the defendant with the more culpable mental state (the intent to permanently deprive the owner of possession) be convicted of only a misdemeanor, while the defendant with the less culpable mental state (to temporarily deprive the owner of possession) could be convicted of a felony." This is akin to an equal protection argument; and *People v. Wilkinson* (2004) 33 Cal.4th 821, upon which the Attorney General relies in his brief, provides the response: "[N]either 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." (*Id.* at p. 838.)

Moreover, a finding of theft in this case would align with the analysis in *People v. Romanowski, supra,* 2 Cal.5th 903, where the Supreme Court observed, "we know that the voters who approved Proposition 47 had their sights on definitions of grand theft other than the categories in [Penal Code] section 487, since section 490.2 refers to '[s]ection 487 *or any other provision*

of law defining grand theft.'" (*People v. Romanowski, supra,* 2 Cal.5th at p. 908, italics in original.) Vehicle Code section 10851 is "[an]other provision of law" that under certain circumstances defines a theft offense.

DISPOSITION

The order is reversed and remanded with directions to permit defendant to admit her intent to permanently deprive the owner of the vehicle of its possession and present evidence that the vehicle's value was less than $950.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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