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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMEL WALKER,

Defendant and Appellant.

B269320

(Los Angeles County  
Super. Ct. No. PA076873)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed.

Law Office of Elizabeth K. Horowitz and Elizabeth K. Horowitz, 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, Assistant Attorney General, Chung L. Mar and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Jamel Walker appeals from the denial of his petition to recall his sentence under Proposition 47 (Pen. Code, § 1170.18),<sup>1</sup> which reduced certain theft-related and drug-related felonies to misdemeanors.<sup>2</sup> In August 2014, appellant pled guilty to one count of second degree commercial burglary (§ 459) and admitted one prior strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). After Proposition 47 was passed in November 2014, appellant filed a petition alleging that his conviction should be reduced to a misdemeanor because the value of the property he took did not exceed \$950. In this appeal, he challenges only the denial of his Proposition 47 petition. We conclude that appellant has failed to meet his burden of establishing eligibility for relief under Proposition 47 and therefore affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>**

On May 8, 2013, two people were walking to a store when they saw appellant and codefendant, Ricky Rynell Rose, leaving a Farmer's Insurance office through a broken glass door, carrying a computer monitor and computer tower. Appellant was wearing a gas mask.

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

<sup>2</sup> “Section 1170.18 provides a mechanism by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. (§ 1170.18, subd. (a).)” (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.)

<sup>3</sup> Appellant's conviction was obtained by a guilty plea. The facts therefore are taken from the probation report.

Sheriff's deputies arrived and saw that the front door had been smashed and the office had been ransacked. Wires belonging to a computer were seen on a "rear desk." The deputies saw a car that matched the description given by the witnesses and detained appellant and Rose. The deputies searched the vehicle and found a computer, gas masks, and a crowbar.

The victim stated that approximately \$2,400 in damage was done to the business, including a broken window. The victim said that the stolen computer equipment was recovered.

On August 7, 2014, appellant entered a guilty plea to one count of second degree commercial burglary (§ 459) and admitted to one prior strike. He was sentenced to a term of 16 months.

On February 20, 2015, appellant, acting in propria persona, filed a petition for recall and resentencing pursuant to Proposition 47 on the basis that the value of the property taken was not more than \$950. The trial court denied the petition, finding the value of the property exceeded \$950.

On December 17, 2015, appellant, again acting in propria persona, filed another petition for resentencing. In an attachment, appellant argued that the value of the broken window could not be relied upon to deny him relief because he was not charged with vandalism, and the value of the property that was the subject of the theft was not more than \$950. The court found that the value of the property involved exceeded \$950 and therefore denied the petition. Appellant timely appealed the denial of the petition.

## DISCUSSION

“On November 4, 2014, California voters approved Proposition 47, which took effect the next day. [Citation.] Proposition 47 reclassified certain drug- and theft-related offenses as misdemeanors, unless the offenses were committed by ineligible defendants. [Citation.]

Proposition 47 also added the misdemeanor crime of shoplifting to the Penal Code. The new shoplifting statute, section 459.5, provides in relevant part: ‘Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. . . . [¶] Any act of shoplifting as defined . . . shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.’ (§ 459.5, subds. (a) & (b).)

Thus, after Proposition 47, a defendant who previously would have been charged with felony burglary under section 459 must be charged with misdemeanor shoplifting if he or she (1) entered into a commercial establishment, (2) with intent to commit larceny, (3) while the establishment is open during regular business hours, and (4) took or intended to take property valued at \$950 or less. [Citation.] Such a defendant no longer may be charged with burglary. (See § 459.5, subd.

(b).)” (*People v. Pak* (2016) 3 Cal.App.5th 1111, 1116-1117 (*Pak*), fn. omitted.)

“Under Proposition 47, the petitioner has the burden to show that he or she is eligible for resentencing. With respect to a theft-related offense, this includes showing that the value of the relevant property was \$950 or less. [Citations.] Simply alleging that the petitioner ‘believes’ the property was worth \$950 or less is not enough, even if the petition is under penalty of perjury. “An affidavit based on ‘information and belief’ is hearsay and must be disregarded.” [Citation.]’ [Citation.] Rather, the petitioner must ‘indicate . . . the factual basis of his claim regarding the value of the stolen property.’ [Citation.]” (*People v. Sweeney* (2016) 4 Cal.App.5th 295, 302.) In order to meet his burden, the petitioner should attach to his petition “some evidence, whether a declaration, court documents, record citations, or other probative evidence showing [he] is eligible for relief.” (*Pak, supra*, 3 Cal.App.5th at p. 1121.) The trial court’s factual findings on its ruling on a Proposition 47 petition are reviewed for substantial evidence. (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 743.)

Appellant relies on his codefendant’s probation report to argue that he has established the value of the stolen computer equipment as less than \$950. Rose’s probation report contained a statement by the victim that he suffered “computer damage of \$500,” which appellant construes to mean the computer was valued at \$500. Rose’s probation report further quotes the victim as stating that he suffered vandalism damage of \$1,000. Appellant’s probation report states only that \$2,400

in damage was caused to the business, referring to a broken window, and does not refer to the value of the stolen computer.

The People contend that the trial court did not have Rose's probation report at the hearing, and appellant does not dispute that this is so. Appellant thus failed to meet his burden of showing the value of the stolen computer was less than or equal to \$950. (*Pak, supra*, 3 Cal.App.5th at p. 1121.) Even if Rose's probation report had been presented to the trial court, we disagree with appellant's contention that the phrase, "computer damage of \$500" means the value of the computer equipment was \$500. Deputies reported that the victim's office had been ransacked. Thus, the phrase "computer damage" could refer to damage to the business's computers and does not establish that the value of the computer equipment appellant tried to steal was \$500.<sup>4</sup> Therefore, appellant has failed to satisfy his burden "to provide some evidence of the value of the property" he took from the insurance office (*Pak, supra*, 3 Cal.App.5th at p. 1121), and we affirm the trial court's denial of his petition for relief under Proposition 47.

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<sup>4</sup> The People argue that appellant has not established eligibility for Proposition 47 relief because the offense did not occur during regular business hours, citing the fact that appellant was seen exiting through a broken glass door. The trial court's denial of appellant's petition was based on its determination that the value of the property taken exceeded \$950. Although the circumstantial evidence suggests that the offense did not occur during regular business hours, the trial court did not make such a finding. The trial court must make factual findings about appellant's eligibility for resentencing in the first instance. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 892.)

**DISPOSITION**

The denial of appellant's petition is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.