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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CAROLINA BARRIENTOS, Defendant and Appellant.	B264850 (Los Angeles County Super. Ct. No. GA091231)

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

Janet D. Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The trial court denied Carolina Barrientos's Proposition 47 petition because the court concluded a defendant convicted of theft of access card or account information is not eligible for resentencing under Proposition 47. In light of the Supreme Court's recent holding to the contrary in *People v. Romanowski* (2017) 2 Cal.5th 903, we reverse and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013 Carolina Barrientos was convicted of possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a), and theft of access card or account information in violation of Penal Code section 484e, subdivision (d).[1] Barrientos was also convicted of two misdemeanors, fraudulent use of an access card or access card information in violation of section 484g and theft of personal property in violation of section 484, subdivision (a). The court in that case suspended imposition of sentence and placed Barrientos on formal probation for three years.

In 2015 Barrientos filed a petition for recall of her sentence and for resentencing under the Safe Neighborhoods and Schools Act, enacted by the voters as Proposition 47 (§ 1170.18). Barrientos alleged in her petition she had been convicted of violations of Health and Safety Code section 11377, subdivision (a), and section 484e, subdivision (d), and "the value of the stolen property was less than $950.00." She also alleged she had no

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1 Undesignated statutory references are to the Penal Code.

serious or violent felony convictions or a conviction for an offense requiring registration as a sex offender, and she did not pose an unreasonable risk to public safety.

Pursuant to the parties' stipulation, the trial court granted Barrientos's petition for resentencing on her conviction for possession of a controlled substance. The court, however, denied the petition for resentencing on her conviction for theft of access card or account information, ruling that a petitioner who was convicted of violating section 484e, subdivision (d), "is not eligible for relief pursuant to Proposition 47 . . . ." The court concluded that section 490.2, one of the statutes added by Proposition 47 regarding theft, did not apply to section 484e, subdivision (d), because the latter statute "is not . . . concerned about property taken or stolen" but with "access card information and a person's account numbers that are private."

DISCUSSION

"'Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).'" (*People v. Morales* (2016) 63 Cal.4th 399, 404; see *People v. Valencia* (July 3, 2017, S223825) 3 Cal.5th 347, ___ [2017 WL 2837124, p. 1].) "'As summarized by the Legislative Analyst, the proposition "reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes" and "allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences."'" (*People v. Salmorin*

(2016) 1 Cal.App.5th 738, 742.) In particular, Proposition 47 added section 490.2, subdivision (a), which provides in relevant part: "Notwithstanding . . . 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 . . . ."

"'Under section 1170.18, a person "currently serving" a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.'" (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1261, fn. omitted; see *Harris v. Superior Court* (2016) 1 Cal.5th 984, 989.) "[I]mposition of probation constitutes a sentence under Proposition 47." (*People v. Bastidas* (2017) 7 Cal.App.5th 591, 602, review granted April 26, 2017, S240208; see *People v. Davis* (2016) 246 Cal.App.4th 127, 132, review granted July 13, 2016, S234324 ["persons on probation for a felony conviction are 'currently serving a sentence' for purposes of Proposition 47"]; Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act" (May 2016), <http://www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of April 27, 2017] p. 34 ["[p]ersons on probation are 'currently serving' a sentence and are eligible to petition for relief under Proposition 47"].)

Barrientos argues the trial court erred in ruling that section 490.2 does not apply to section 484e, subdivision (d). At the time Barrientos filed her opening brief, this issue was pending before the Supreme Court. On March 27, 2017 the Supreme Court issued its decision in *Romanowski*, *supra*, 2 Cal.5th 903, which held that section 490.2 applies to convictions under section 484e, subdivision (d), if the value of the stolen access card information does not exceed $950. (*Romanowski*, at p. 914.) On March 28, 2017 we asked the parties to submit supplemental letter briefs discussing *Romanowski* and whether the Supreme Court's ruling in that case entitles Barrientos to relief. Both sides submitted letter briefs.

The Supreme Court in *Romanowski* held that "section 490.2 reduces the punishment for theft of access card information valued at less than $950." (*Romanowski*, *supra*, 2 Cal.5th at p. 914.) The Supreme Court also held that courts should use the "'reasonable and fair market value' test" set forth in section 484, subdivision (a), to "determine whether the value of stolen access card information exceeds $950." (*Romanowski*, at p. 914.) The Supreme Court explained that under this test the trial court must "identify how much stolen access card information would sell for. [Citations.] The fact that stolen access card information is not sold legally does not relieve courts of this duty. . . . When a defendant steals property that is not sold legally, evidence related to the possibility of illegal sales can help establish 'reasonable and fair market value.' Only in cases where stolen property would command no value on any market (legal or illegal) can courts presume that the value of stolen access information is de minimis." (*Id.* at p. 915.)

Finally, the Supreme Court in *Romanowski* clarified that, "in the context of a section 1170.18 petition to recall a sentence," the petitioner has "the ultimate burden of proving" any "newly relevant facts" necessary to establish his or her "eligibility" for relief. (*Romanowski, supra*, 2 Cal.5th at p. 916.) The Supreme Court explained: "In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. When eligibility is established in this fashion, 'the petitioner's felony sentence shall be recalled and the petitioner sentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.] But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.'" (*Ibid*.)

The trial court in this case did not have the benefit of the Supreme Court's decision in *Romanowski*. As the People concede, however, in light of the Supreme Court's decision, Barrientos's "conviction under section 484e[, subdivision (d),] is subject to the recall and resentencing provisions . . . enacted as part of Proposition 47." Therefore, we must reverse the court's order and remand the matter for the trial court to determine whether the

value of the stolen access card information in this case was $950 or less.

In her supplemental brief, Barrientos asks us to reverse the trial court's order denying her petition, which we are doing, and she suggests we should also direct the trial court to enter an order granting her petition. Barrientos argues in her supplemental brief, "The record in this case established that the value of the stolen access card information did not exceed $950 and that [Barrientos] does not pose an unreasonable risk of danger to public safety." Directing the trial court to grant the petition is not an appropriate remedy here. Barrientos argues the record establishes her entitlement to relief under Proposition 47 without further proceedings in the trial court because the fact she "obtained $200 from [the victim's] card . . . is an objective measure of the value of the access card account information." The Supreme Court in *Romanowski*, however, rejected that argument. (See *Romanowski, supra*, 2 Cal.5th at p. 914 ["the $950 threshold for theft of access card information must reflect a reasonable approximation of the stolen information's value, rather than the value of what (if anything) a defendant obtained using that information"].) Moreover, although Barrientos argues she does not pose an unreasonable risk to public safety, the trial court did not reach that issue, and it is not appropriate for us to do so in this appeal. Section 1170.18 requires that the determination of dangerousness "'must be made in the first instance by the trial court; it is not our role to find facts, especially on an incomplete record.'" (*People v. Bunyard* (2017) 9 Cal.App.5th 1237, 1246; accord, *People v. Contreras* (2015) 237 Cal.App.4th 868, 892; see *People v. Awad* (2015) 238 Cal.App.4th 215, 221-222 [Proposition 47 "[m]anifestly . . . vests with the trial

court" the task of reducing a conviction from a felony to a misdemeanor].)

DISPOSITION

The order is reversed. On remand, the trial court is directed to determine whether the value of the stolen access card information in this case was $950 or less. If the court finds the value is $950 or less, and Barrientos is still serving a felony sentence for theft of access card or account information, the court is to resentence her to a misdemeanor, unless the court finds she would pose an unreasonable risk of danger under section 1170.18, subdivision (b). If the court finds the value is $950 or less, and Barrientos is no longer serving a felony sentence for theft of access card or account information, the court is to reclassify her conviction as a misdemeanor under section 1170.18, subdivisions (f)-(h).

SEGAL, J.

We concur:

ZELON, Acting P. J.

MENETREZ, J.*

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