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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY FABRICANT,

Defendant and Appellant.

B276493 c/w B276513
& B277576

(Los Angeles County
Super. Ct. Nos. A105194,
A107937 & A139320)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael K. Kellogg, Judge. Affirmed.

Leonard J. Klaif, 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 Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Danny Fabricant (defendant) filed three petitions under Proposition 47, Penal Code section 1170.18,¹ to redesignate as misdemeanors four theft-related and one ostensibly theft-related felony convictions he suffered in 1968, 1969, 1970, and 1978. The trial court denied all three petitions. We affirm those denials, but do so without prejudice to defendant filing new petitions supported by evidence that the items taken in those prior cases were worth less than \$950.

FACTS AND PROCEDURAL BACKGROUND

In 1968, defendant was convicted of the felony of taking or driving a vehicle without consent, in violation of Vehicle Code section 10851. In 1969 and 1970, defendant was convicted of the felonies of (1) theft, in violation of section 487.3, and (2) receiving stolen property, in violation of section 496. In 1978, defendant was convicted of the felonies of (1) theft, in violation of section 487.1, and (2) receiving stolen property, in violation of section 496. All five crimes involved Harley-Davidson motorcycles.

In 2015 and 2016, defendant filed three petitions to have these five convictions redesignated as misdemeanors under Proposition 47. The trial court held a hearing on all three petitions in June 2016. The court denied the petition seeking to redesignate the 1968 Vehicle Code section 10851 conviction because, in its view, Proposition 47 did not allow for redesignation of this felony. The court denied the petitions as to the remaining felonies because Proposition 47 allowed for redesignation of theft and receipt of stolen property convictions only if the item taken was worth less than \$950 and because defendant “did not provide . . . ample information to show that the value of the property taken” was less than \$950.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Defendant filed timely notices of appeal as to each petition, and we consolidated the appeals.

DISCUSSION

Proposition 47 redesignates as misdemeanors “certain drug- and theft-related offenses” that were (1) charged as felonies or (2) charged as “wobblers” (that is, offenses that are punishable as a felony until a court reduces them to a misdemeanor) and ultimately sentenced as felonies. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108; § 1170.18; see also § 17 [defining “wobbler” offenses].) Among other things, Proposition 47 permits persons previously convicted of eligible offenses and who have fully served their sentences to file a petition to redesignate those convictions as misdemeanors. (§ 1170.18, subd. (f).)

Proposition 47 expressly spells out the felonies and wobblers to which it applies. Those crimes include theft and receiving stolen property, but only if the item taken or received was worth less than \$950. (§§ 490.2, subd.(a) & 496, subd. (a).) Proposition 47 does not specifically list Vehicle Code section 10851, and courts have split over whether it is to be considered a “theft” offense for purposes of Proposition 47—at least where the underlying crime involves the *taking* of a vehicle as opposed to *driving* it. (Compare *People v. Saucedo* (2016) 3 Cal.App.5th 635, 651 [Vehicle Code section 10851 not eligible for redesignation under Proposition 47], review granted Nov. 30, 2016, S237975; *People v. Solis* (2016) 245 Cal.App.4th 1099, 1104 [same], review granted June 8, 2016, S234150; *People v. Orozco* (2016) 244 Cal.App.4th 65, 68-69 [same], review granted Aug. 10, 2016, S235603; *People v. Page* (2015) 241 Cal.App.4th 714, 720 [same], review granted Jan. 27, 2016, S230793 with *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1282-1283 [Vehicle Code section 10851 conviction based on *theft* of vehicle eligible for

redesignation under Proposition 47], review granted June 14, 2017, S241574.)

A defendant bears the burden of establishing that any prior conviction is eligible for relief under Proposition 47. (*People v. Romanowski* (2017) 2 Cal.5th 903, 916.)

Defendant has not carried his burden in this case. Although all three of his petitions alleged that “[t]he value of the property involved . . . did not exceed \$950,” this allegation is not evidence and is insufficient to carry his burden. (*People v. Sweeney* (2016) 4 Cal.App.5th 295, 302 (*Sweeney*).) And, as the trial court noted, defendant produced no evidence at the hearing on this matter. The absence of evidence precludes the grant of relief on all five of defendant’s convictions. It also obviates any need for us to weigh in on the issue whether Proposition 47 applies to Vehicle Code section 10851 because, even if we assume that Proposition 47 applies, it would be considered a “theft” offense to which the \$950 threshold applies.

However, the rule we rely upon to decide this appeal—namely, that a Proposition 47 petitioner has the burden of producing evidence supporting his petition—was not settled at the time defendant filed his petitions. In this circumstance, the proper remedy is to deny his petitions “without prejudice to subsequent consideration of a properly filed petition.” (*People v. Perkins* (2016) 244 Cal.App.4th 129, 140; *Sweeney, supra*, 4 Cal.App.5th at pp. 302-303.)

DISPOSITION

The orders are affirmed, and the petitions are denied without prejudice to subsequent consideration of a properly filed petition.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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