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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOHN WAYNE WILLIS, Defendant and Appellant.	B277280 (Los Angeles County Super. Ct. No.BA421580)

APPEAL from an order of the Superior Court of Los Angeles County, Carol H. Rehm, Jr., Judge. Affirmed.

Adrian K. Panton, 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, Mary Sanchez and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant John Wayne Willis pled guilty to felony driving or taking a vehicle with a prior conviction in violation of Penal Code section 666.5.[1] He later moved to reduce the conviction to a misdemeanor under Proposition 47, sections 490.2 and 1170.18. The trial court held that defendant was not eligible for a reduction as a matter of law. Defendant appealed.

While this appeal was pending, the Supreme Court held that a person convicted of vehicle theft may be eligible for resentencing under sections 490.2 and 1170.18 if the defendant can show the conviction was for a theft offense and the vehicle was worth $950 or less. (*People v. Page* (2017) 3 Cal.5th 1175 (*Page*).) We requested further briefing to address the effects of *Page* on this case. The parties agree that defendant is entitled to file a new petition to allow him to assert facts that may render him eligible for a reduction under sections 490.2 and 1170.18. We therefore affirm the denial of defendant's motion without prejudice to consideration of a future petition providing evidence of defendant's eligibility under sections 490.2 and 1170.18.

FACTUAL AND PROCEDURAL BACKGROUND

At a preliminary hearing on March 3, 2014, Los Angeles Police Officer Jack Stannard testified that he witnessed defendant driving a 1992 Mazda B2200 pickup truck on February 17, 2014. Stannard stopped[2] and searched defendant, and found defendant to be in possession of a "shaved key," which Stannard described as a vehicle key that has the side ridges and face

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

[2] The reason for the stop is not revealed in the record on appeal.

shaved down "in order to fit into . . . multiple different vehicles' ignition system[s]." The shaved key was able to start the Mazda pickup. The title to the truck was found in defendant's pocket. The title was in the name of Erik R.[3]

Erik R. testified that although title of the pickup was in his name, several months earlier he had sold the truck to Victor C. At the hearing, defense counsel asked Erik R. how much Victor C. paid for the truck. The prosecution objected, and the court sustained the objection. Defense counsel also asked how many miles were on the truck when it was sold, and again the prosecution's objection was sustained.

Victor C. testified that he purchased the pickup in November 2016. He did not know defendant and had not given him permission to drive the truck. Victor C. also said that the title to the vehicle had been in the glove compartment of the truck earlier that day, and he had not yet transferred the title into his name because he had not had time to do it.

The Los Angeles County District Attorney (the People) filed an information charging defendant with felony driving or taking a vehicle after a prior conviction, in violation of section 666.5 (count 1) and misdemeanor driving while privilege suspended for a prior conviction for driving under the influence in violation of Vehicle Code section 14601.2 (count 2). The information further alleged that defendant suffered ten prior convictions (§ 667.5, subd. (b)), and one prior serious or violent felony conviction. (§§ 667, subds. (b)-(j), 1170.12) The court later granted defendant's motion to dismiss the strike prior.

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[3] We refer to victims by first names to protect their privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

In July 2014, Defendant pled guilty to both counts pursuant to a plea agreement. The court imposed a ten-year sentence, calculated as the high term of four years as the base term on count 1, six months on count 2 to be served concurrently, and six consecutive one-year terms for six prior prison terms under section 667.5, subdivision (b). The court suspended the sentence, placed defendant on probation for three years, ordered him to a one-year residential drug treatment program, and imposed various fines and fees.

Defendant's probation was revoked two months later in September 2014. Defendant admitted to the probation violation. The court reinstated probation on September 10, 2014.

Defendant's probation was revoked again in June 2015. At the probation violation hearing in October 2015, defendant asked the court to consider reducing count 1 to a misdemeanor under Proposition 47. The court questioned whether a violation of Vehicle Code section 10851 (section 10851)[4] was eligible for reduction under Proposition 47, but allowed defendant the opportunity to brief the issue.

Defense counsel did not file a written motion, but at the subsequent hearing counsel argued that defendant's conviction should qualify for a reduction because "it is a theft charge" and because defendant was not a danger to society. The prosecution disagreed, asserting that section "666.5 is a penalty provision . . . which is not eligible for reduction." The court held that

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[4] Section 10851 makes it illegal for a person to "drive[ ] or take[ ] 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." (§ 10851, subd. (a).)

defendant's conviction did not qualify for a reduction under Proposition 47, and denied the motion.

Defendant filed a notice of appeal about five months later. The notice was rejected as untimely, and this court granted defendant's motion for relief from default.

DISCUSSION

On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the following day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) "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)." (*Id.* at p. 1091.) "Proposition 47 also created a new resentencing provision: section 1170.18. 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. (§ 1170.18, subd. (a).)" (*Id.* at p. 1092.)

Proposition 47 also added section 490.2 to the Penal Code. (*Rivera, supra*, 233 Cal.App.4th at p. 1091.) Section 490.2 states in part, "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."

In his opening brief, defendant argued that his conviction under section 666.5 was a "theft offense," and therefore if the

vehicle taken had a value of less than $950, the conviction necessarily falls under the definition of misdemeanor petty theft in section 490.2. Respondent Attorney General asserted that convictions for taking vehicles under section 10851 do not fall under the purview of Proposition 47.

While this appeal was pending, the Supreme Court decided *Page, supra*, 3 Cal.5th 1175. In that case, the defendant was serving a sentence for a violation of section 10851, and he sought relief under Proposition 47. The trial court and Court of Appeal held that violations of section 10851 were not affected by Proposition 47. The Supreme Court reversed, stating, "A person convicted before Proposition 47's passage for vehicle theft under Vehicle Code section 10851 may . . . be resentenced under section 1170.18 if the person can show the vehicle was worth $950 or less." (*Page, supra*, 3 Cal.5th at p.1180.)

The *Page* opinion noted that section 10851 includes both theft offenses and non-theft offenses, because it "punishes not only taking a vehicle, but also driving it without the owner's consent, 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*." (Veh. Code, § 10851, subd. (a), italics added.) Theft, in contrast, requires a taking with intent to steal the property—that is, the intent to permanently deprive the owner of its possession. [Citation.]" (*Page, supra*, 3 Cal.5th at p. 1182.) The Court stated, "[O]btaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged." (*Id*. at p. 1187.) Thus, a "defendant who, at the time of Proposition 47's passage, was

serving a felony sentence for taking or driving a vehicle in violation of Vehicle Code section 10851 is therefore eligible for resentencing under section 1170.18, subdivision (a), if the vehicle was worth $950 or less and the sentence was imposed for theft of the vehicle." (*Ibid*.)

We asked the parties for briefing to address how the *Page* ruling affected the issues in this case. The parties acknowledge that a defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility. (See, e.g., *Page, supra*, p. 1187 ["A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility."].) Because defendant did not present evidence of his eligibility below, both parties request that we remand the case without prejudice to defendant bringing a new petition supported by evidence that would meet the *Page* standards.

Defendant asks that the trial court's order be reversed without prejudice; the Attorney General asks that the order be affirmed without prejudice. "'[W]e we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm.'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 351 fn. 11.) Here, the trial court's reasoning was erroneous because, pursuant to the reasoning in *Page*, a conviction under section 10851 is not ineligible under Proposition 47 as a matter of law.[5] Nevertheless,

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[5] *Page* involved a conviction under section 10851. Here, defendant was convicted of violating section 666.5, which allows for additional penalties when a defendant has a prior conviction for violating 10851, and suffers a subsequent conviction under section 10851. (§ 666.5, subd. (a).) The parties' supplemental briefs do not address whether Proposition 47 applies to a conviction under section 666.5. (See, e.g., *People v. Carter* (1996) 48 Cal.App.4th 1536, 1541 ["The Legislature's obvious purpose in

the court's ruling was correct—defendant was ineligible for relief under Proposition 47 because he did not meet his burden to show his conviction was eligible for resentencing. We therefore affirm.

DISPOSITION

The court's order denying defendant's motion for resentencing is affirmed without prejudice to any future motion defendant may bring pursuant to Proposition 47.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

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enacting Penal Code section 666.5 was to increase the punishment for repeat offenders."].) Given that the parties agree that the case should be remanded for further proceedings in light of *Page*, we do not address that issue here.