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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NORMAN ELDER GRUNDY, Defendant and Appellant.	B284927 Los Angeles County Super. Ct. No. YA054987

APPEAL from an order of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

A. William Bartz, Jr., 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, Scott Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Norman Elder Grundy appeals from the superior court's denial of his petition under Proposition 47[1] to reduce his second degree commercial burglary conviction to a misdemeanor. Grundy asks us to refuse to follow the published cases holding that the petitioner bears the burden of proving the value of the property he took was $950 or less. We decline that invitation, and affirm. Our affirmance is without prejudice to the superior court's consideration of any later petition Grundy may file that contains evidence of his eligibility for relief under Proposition 47.

FACTS AND PROCEDURAL BACKGROUND

In an information filed in June 2003, the People charged Grundy with robbery, second degree commercial burglary, and two counts of petty theft with prior theft convictions. The People alleged on April 24, 2003, Grundy entered "a commercial building occupied by Krispie Kreme's [*sic*] with the intent to commit larceny and any felony." The People also alleged Grundy robbed Baoshah Miah on April 25, 2003, apparently at a 7-Eleven on Vermont Boulevard. The People alleged Grundy had five prior strike convictions for robbery.

The minimal record available at this juncture does not reveal what happened in the case, but it appears Grundy was convicted of both the robbery and the commercial burglary. After the passage of Proposition 47, Grundy filed a petition for a writ of habeas corpus seeking to reduce his felony convictions to misdemeanors. The court treated the writ petition as a petition for resentencing under section 1170.18, subdivision (a). The record contains part of a form on which the court (Judge Steven

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[1] The Safe Neighborhoods and Schools Act, Penal Code section 1170.18 (Proposition 47). Statutory references in this opinion are to the Penal Code.

R. Van Sicklen) noted Grundy's robbery conviction did not qualify for reduction. As to the burglary count, a deputy district attorney wrote, under "District Attorney's Response": "As per probation report, [defendant] entered Krispie Kreme [*sic*] 4/24/03 and grabbed money from cash drawer. This is not the fact scenario envisioned by Prop[osition] 47. Probation report is silent on amount of cash taken. [People's] position is that [burglary count] remains a felony. If the court disagrees, burden is on defense to prove value is [less than] $950." The court denied Grundy's petition for resentencing on the burglary count, writing, "Petitioner poses an unreasonable risk of danger to public safety. [Pen. Code, §] 667(c)(2)." The court did not address the issue of the value of the property taken. Grundy apparently did not appeal from the denial of that petition.

On July 11, 2017, Grundy filed a motion to reduce his burglary conviction on a form issued by the Los Angeles Superior Court. Grundy checked the box for "Penal Code § 459 2nd Degree Burglary (Shoplifting)." Grundy provided no information about the value of the property taken, nor did he attach a declaration or any other statement addressing the "$950 or less" eligibility issue. On August 14, 2017, the court (Judge James R. Brandlin) denied Grundy's petition. The court checked the box that states, "The amount in question exceeds $950 (Penal Code offenses only)," writing next to that line: "D[efendant] has the burden to show it is under $950."

DISCUSSION

Grundy contends "the trial court erred in placing the burden on [him] to prove the value of the stolen items" was $950 or less. Grundy argues that placing the burden of proof on him "violates due process because it assumes guilt of a fact that was never adjudicated." Grundy acknowledges California courts of appeal have held, in published opinions, that a defendant seeking

a reduction under Proposition 47 bears the burden of proving the value of the property. But, Grundy says, we are "not required to follow those cases, and should not do so."

We do not agree. Our courts of appeal have held that a defendant petitioning for resentencing under Proposition 47 bears the burden to show the property loss in his crime did not exceed $950. In *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*), Sherow had stolen clothing from two stores. He was convicted of five counts of second degree burglary. After Proposition 47 became law, Sherow petitioned for resentencing. The trial court denied the petition and the court of appeal affirmed. (*Id*. at pp. 877-878.)

The court stated, "Proposition 47 does not explicitly allocate a burden of proof. However, . . . applying established principles of statutory construction we believe a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing. In such cases, it is important to keep in mind a person, like Sherow, was validly convicted under the law applicable at the time of the trial of the felony offenses. It is a rational allocation of burdens if the petitioner in such cases bears the burden of showing that he or she is eligible for resentencing of what was an otherwise valid sentence." (*Sherow*, *supra*, 239 Cal.App.4th at p. 878.)

The *Sherow* court rejected the same due process argument Grundy makes here: "Sherow contends it would violate due process to place the initial burden of proof on him to show eligibility for resentencing. His arguments, however, are directed to principles regarding proof of guilt of an alleged crime. . . . [¶] The difficulty with a due process argument based on the prosecutor's burden of proof in the initial prosecution for an offense is that the resentencing provisions of Proposition 47 deal with persons who have already been proved guilty of their

offenses beyond a reasonable doubt." (*Sherow*, *supra*, 239 Cal.App.4th at pp. 879-880.)

The court noted Sherow's petition was "devoid of any information about the offenses for which Sherow [sought] resentencing." (*Sherow*, *supra*, 239 Cal.App.4th at p. 878.) The court said, "Applying the burden to Sherow would not be unfair or unreasonable. He knows what kind of items he took from the stores . . . ." (*Id*. at p. 880.)

Other decisions are in accord. (See, e.g., *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448-449 [rejecting defendant's contention that prosecution had burden to establish the value of the property exceeded $950 and that without that proof defendant was " 'presumptively entitled' to resentencing"]; *People v. Sweeney* (2016) 4 Cal.App.5th 295, 302 ["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 property was $950 or less."]; *People v. Johnson* (2016) 1 Cal.App.5th 953, 958, 963-965, 969-970 (*Johnson*) [following *Sherow*; petitioning defendant bears initial burden of establishing eligibility; trial court properly denied petition where defendant "did not present any evidence as to the value of the stolen property"]; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137 (*Perkins*) ["In a successful petition, the offender must set out a case for eligibility, stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed $950."].) The leading treatise on felony sentencing agrees. (Couzens et al., Sentencing California Crimes (The Rutter Group 2018) ¶ 25:9 ["The petitioner has the burden of establishing eligibility for relief

under section 1170.18, including, as to qualified theft crimes, that the loss to the victim did not exceed $950."].)

Our Supreme Court cited *Sherow* and *Perkins* with approval in *People v. Page* (2017) 3 Cal.5th 1175 (*Page*). The court stated, "A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility." (*Id*. at p. 1188.) In that case, involving the taking of a vehicle without the owner's consent, the court said, "a defendant must show . . . that the vehicle he or she was convicted of taking . . . was worth $950 or less . . . ." (*Ibid*.) Grundy does not discuss or even acknowledge our high court's statement in *Page*.

Finally, Grundy seems to contend he does not know how much money he took from the Krispy Kreme shop. Grundy argues, "It would be difficult if not impossible for appellant to provide in his petition a statement of the value of the property if the value was not personally known to him at the time he filed the petition in the trial court." This assertion is mysterious. The person who knows how much cash he grabbed from the drawer in the donut shop is Grundy. Grundy is free to file a petition for resentencing that contains *evidence* of his eligibility for relief under Proposition 47. (See *Johnson*, *supra*, 1 Cal.App.5th at p. 971.)

DISPOSITION

We affirm the superior court's order denying Grundy's motion to recall the sentence on his felony conviction for second degree commercial burglary and to resentence him under Proposition 47. This affirmance is without prejudice to the superior court's consideration of a petition Grundy may file, if he wishes, that offers evidence of his eligibility for the requested relief.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.