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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. CARL THOMAS BANKS, Defendant and Appellant.	B262395 (Los Angeles County Super. Ct. No. PA069367)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Affirmed.

Julie Jakubik, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Carl Thomas Banks appeals from an order denying his Proposition 47 petition for a recall of sentence, based upon his no contest pleas to second degree commercial burglary and unlawful driving or taking of a vehicle. (Pen. Code, §§ 459 (count 1), 1170.18, subd. (a); Veh. Code, § 10851, subd. (a) (count 2).)[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A preconviction probation report prepared for an April 6, 2011 hearing indicates as follows. On March 15, 2011, appellant broke into a wardrobe building at Six Flags Magic Mountain (Six Flags), stole a Batman costume and a Flash Gordon costume, and put them in his vehicle. He later broke into a Los Angeles County Sheriff's substation at Six Flags to steal a sheriff's uniform. An alarm went off, which appellant silenced by ripping it from the wall. He also stole, and put on, a security officer uniform. Appellant further stole a Ford maintenance vehicle belonging to Six Flags and drove away in it.

Deputies received a call regarding the substation burglary. They went to the substation, appellant tried to escape in the maintenance vehicle, but they detained him.

The report states appellant admitted sneaking onto the property by blending in with a crowd of employees, taking the character costumes and security uniform, and taking another character costume from Six Flags one month earlier. The report also states the character costumes were found in appellant's vehicle, and he possessed several keys, a large wrench, a utility belt and drill bits, and two black markers.

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

The probation report described Six Flags' property loss as follows. "The police report indicates that defendant stole two costumes; a uniform; a maintenance vehicle and damaged a locker totaling $12,500. It appears the vehicle, costumes and uniform were recovered." The report described the sheriff's department's loss as, "broken front window and damaged alarm box - $1,200."

On April 27, 2011, appellant entered into a negotiated plea bargain. He entered no contest pleas to second degree commercial burglary and unlawful driving or taking of a vehicle, and the court sentenced him to prison for concurrent two-year terms for the convictions.

In January 2015, appellant later filed a Proposition 47 "petition for a recall of sentence" within the meaning of section 1170.18, subdivision (a).[2] On February 17, 2015, the court held a hearing on the petition. Appellant was not present in court but both parties were represented by counsel, and each counsel represented she had reviewed the file.

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[2] The petition is not part of the appellate record. A superior court clerk's certificate states that appellant's petition was not found after a thorough search of the superior court file, courtroom, and clerk's office, and after receiving no response to inquiries sent to the prosecutor and defense attorney. The January 2015 filing date for the petition is reflected in the January 20, 2015, minute order, of which we take judicial notice. (Evid. Code, § 452, subd. (d)(1).)

The prosecutor argued appellant's burglary conviction was not subject to relief because Proposition 47 required burglary of a place "open for business during the normal hours of operation." The prosecutor represented, "It appears from reading the file that [appellant] broke into a section of [Six Flags] not open to the public and stole some uniforms, costumes."

The prosecutor also argued appellant's Vehicle Code section 10851, subdivision (a) conviction was not subject to Proposition 47 relief. The court then asked for the "factual breakdown." The prosecutor represented, "He stole the uniforms from a maintenance vehicle. So they caught him and charged him with both crimes."

Appellant's counsel responded: "Your Honor, I had a chance to review the file. In addition the loss estimated on the case was well over $1,200. In addition to everything else the defendant doesn't qualify on multiple grounds." (*Sic.*)

The court concluded the brief hearing by stating: "I concur with that, having reviewed the file, and will deny the petition. The defendant is not eligible for the relief requested." The minute order indicated: "The court finds that the defendant [is] not eligible for relief pursuant to Proposition 47 and the petition is denied."

ISSUES

Appellant claims (1) Proposition 47 permits resentencing of a violation of Vehicle Code section 10851, subdivision (a) to petty theft when the value of the vehicle does not exceed $950, (2) the People bore, and failed to carry, the burden of proving appellant was ineligible for Proposition 47 relief, and (3) the resentencing court erroneously considered evidence beyond the record of conviction when making its eligibility determination.

DISCUSSION

1. There is No Need to Decide Whether Proposition 47 Permits Resentencing of a Violation of Vehicle Code Section 10851, Subdivision (a) to Petty Theft.

Appellant claims Proposition 47 permits resentencing of a violation of Vehicle Code section 10851, subdivision (a) to misdemeanor petty theft when the value of the vehicle does not exceed $950. Alternatively, appellant claims equal protection guarantees require equivalent relief.

There is conflicting appellate authority as to whether Proposition 47 permits such resentencing. In *People v. Haywood* (2015) 243 Cal.App.4th 515 [198 Cal.Rptr.3d 40], review granted March 9, 2016, S232250 (*Haywood*), the court held that "Unlawful taking/driving [under Vehicle Code section 10851, subdivision (a)] is . . . not a qualifying offense [under section 1170.18, subdivision (a)] under *any* circumstance." (*Haywood*, at p. 523.)

On the other hand, the court in *People v. Ortiz* (2016) 243 Cal.App.4th 854 [196 Cal.Rptr.3d 894], review granted March 16, 2016, S232344 (*Ortiz*), stated, "We hold that a defendant convicted under [Vehicle Code section] 10851 may be eligible for Proposition 47 resentencing if he or she can show the offense qualifies as a petty theft under Section 490.2." *Ortiz* expressly disagreed with *Haywood*. (*Ortiz*, at p. 860.)

Our Supreme Court has granted review of this issue in *People v. Page* (2015) 241 Cal.App.4th 714 [194 Cal.Rptr.3d 164], review granted January 27, 2016, S230793. But there is no need for us to await resolution of the issues raised by appellant. As discussed in the sections below, we conclude for other reasons that the trial court's denial of appellant's resentencing petition was proper and should be affirmed.

2. Appellant Failed to Meet His Burden of Proving He Was Eligible for Proposition 47 Relief.

Appellant claims the People had the burden of proving he was ineligible for Proposition 47 relief and failed to carry their burden. We disagree.

a. *Appellant Had the Burden of Proving His Eligibility.*

Our Supreme Court recently addressed the burden of proof on an eligibility determination under Proposition 47 in *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*). The court made it clear that the petitioner has the burden, by stating: "Who bears the burden of proving newly relevant facts in the context of a section 1170.18 petition to recall a sentence? The ultimate burden of proving section 1170.18 eligibility lies with the petitioner. (See Evid. Code, § 500.)" (*Romanowski*, at p. 916; accord, *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*) ["We think it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts upon which his or her eligibility is based."][3].)

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[3] *Sherow* was cited with approval by the Supreme Court (*Romanowski*, *supra*, 2 Cal.5th at p. 916), and it has been widely followed by appellate courts (see, e.g., *People v. Pak* (2016) 3 Cal.App 5th 1111, 1117; *People v. Johnson* (2016) 1 Cal.App 5th 953, 961 (*Johnson*)).

Appellant therefore had the burden of proving he was eligible for Proposition 47 relief. None of the cases cited by appellant compel a contrary conclusion, as they all were decided before the Supreme Court's definitive ruling in *Romanowski*.

b. *Appellant Failed to Meet His Burden.*

The next issue is whether appellant met his burden. As to Proposition 47 eligibility determinations, we review the resentencing court's legal conclusions de novo and its factual findings for substantial evidence. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137 (*Perkins*).)

Appellant contends he is entitled to resentencing of his second degree burglary conviction because the facts of his conviction establish that the offense would have been shoplifting under Proposition 47's newly enacted statutory provisions. Section 1170.18, subdivision (a), permits a petitioner "to request resentencing in accordance with . . . Section 459.5." Section 459.5, subdivision (a), states, "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)." A "commercial establishment" within the meaning of section 459.5, subdivision (a), "is one that is primarily engaged in commerce, that is, the buying and selling of goods or services." (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114.)

Appellant also contends he is entitled to resentencing of his Vehicle Code section 10851, subdivision (a) conviction because the facts of his conviction establish that the offense would have been petty theft under newly enacted statutory provisions. According to appellant, section 1170.18, subdivision (a) permits resentencing a felony sentence of a violation of Vehicle Code section 10851, subdivision (a) to misdemeanor petty theft where "the value of the . . . personal property taken does not exceed [$950]" within the meaning of section 490.2, subdivision (a).

Appellant did not sustain his burden of proving either of these grounds in the trial court. Regarding appellant's burglary conviction, the record contains no evidence that the wardrobe building or sheriff's substation was (1) a "commercial establishment," (2) "open," or (3) open "during regular business hours" within the meaning of section 459.5, subdivision (a). The record also contains no evidence, as to either building, that "the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)" within the meaning of that subdivision. Regarding appellant's Vehicle Code section 10851, subdivision (a) conviction, the record contains no evidence that the value of the maintenance vehicle "[did] not exceed nine hundred fifty dollars ($950)" within the meaning of section 490.2, subdivision (a). We therefore hold appellant failed to meet his burden of proving he was eligible for Proposition 47 relief as to either of his convictions.

The trial court record contains evidence that appellant was not eligible for Proposition 47 relief. As to the burglary conviction, the probation report indicates appellant broke into a wardrobe building and sheriff's substation, which are not open commercial establishments. In addition, the probation report

described losses that greatly exceeded $950 for both victims. It said Six Flags experienced losses of $12,500, and the sheriff's department suffered a loss of $1,200.

Supporting evidence was so lacking that defense counsel flatly admitted appellant was ineligible for Proposition 47 relief during the trial court proceedings. After the prosecutor presented her arguments against the petition, appellant's counsel acknowledged that "the defendant doesn't qualify on multiple grounds." The court accepted the positions of both counsel and denied the petition.

The statement by appellant's attorney constituted a judicial admission that appellant was, on multiple grounds, ineligible for Proposition 47 relief. (See *People v. Jackson* (2005) 129 Cal.App.4th 129, 161 [counsel's oral statements can be treated as judicial admissions if intended, or reasonably construed by the court or other party, as such].) Appellant does not claim his counsel at the Proposition 47 hearing rendered ineffective assistance of counsel on any matter, including counsel's representation that appellant was, on multiple grounds, ineligible for Proposition 47 relief.

We accordingly conclude the denial of the petition as to both of appellant's convictions was proper in light of appellant's failure to sustain his burden of proof, evidence of his ineligibility, and his admission he was ineligible for Proposition 47 relief.[4]

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[4] In his reply brief, appellant argues for the first time that remand is warranted "to permit further factual determination" because the petition was misplaced and there is no record of what appellant included in his petition. We reject this argument. " 'It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the

3. The Resentencing Court Did Not Erroneously Consider Evidence Beyond the Record of Conviction.

Appellant claims the trial court erroneously considered evidence beyond the record of conviction by reviewing a probation report in making the Proposition 47 eligibility determination. We reject his claim.

As an initial matter, it is not entirely clear whether the court reviewed or relied upon the probation report. During the resentencing hearing, no one mentioned a "probation report" and the attorneys and the court merely stated they each had reviewed the "file." The court did not identify what was in the file and never expressly stated it had read the probation report. The burden is on appellant to demonstrate error from the record, and error will not be presumed. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.)

But even if the court went beyond the record of conviction and relied upon the probation report, it was not error. In *Romanowski*, our Supreme Court recognized that a Proposition 47 eligibility hearing may include matters that go beyond the

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other party.' [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218-1219.) Moreover, appellant has failed to demonstrate that " ' "critical evidence or a substantial part of a [record] is irretrievably lost or destroyed, *and there is no alternative way to provide an adequate record* so that the appellate court may pass upon the question sought to be raised." ' " (*People v. Galland* (2008) 45 Cal.4th 354, 370, italics added.) Finally, there was no prejudice, for reasoning similar to that supporting our conclusion in part 3 of our Discussion. (See *People v. Townsel* (2016) 63 Cal.4th 25, 69-70 [prejudice standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) applies to any state law error].)

record of conviction. The court stated: "In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. . . . 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.' (Cal. Rules of Court, rule 4.551(f) [concerning petitions for habeas corpus].)" (*Romanowski*, *supra*, 2 Cal.5th at p. 916, italics added.)

Appellate courts have repeatedly rejected the argument that Proposition 47 proceedings are limited to the bare record of conviction. In *Johnson,* the court explained, "since Proposition 47 created misdemeanors either that did not exist previously (e.g., § 459.5 [shoplifting]) or that were felony offenses with different showings required (e.g., § 496, subd. (a) [receiving stolen property]), there is no reason to believe that the electorate intended to limit the resentencing court's review to the petitioning defendant's record of conviction." (*Johnson, supra,* 1 Cal.App.5th at p. 967; accord, *People v. Huerta* (2016) 3 Cal.App.5th 539, 544, fn. 3; *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744; *Perkins, supra,* 244 Cal.App.4th at p. 140, fn. 5.)

In *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1096-1098 (*Sledge*), the court expressly held the trial court did not commit error by relying upon a probation report in denying a petition

under Proposition 47. The court explained, "An eligibility hearing is a type of sentencing proceeding. Nothing in Proposition 47 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. Accordingly, limited use of hearsay such as that found in probation reports is permitted, provided there is a substantial basis for believing the hearsay information is reliable." (*Id.* at p. 1095.)

There is certainly no basis to view the probation report in this case as unreliable. The parties utilized it when appellant entered into his negotiated plea on April 27, 2011. At the Proposition 47 hearing on February 17, 2015, the prosecutor and defense counsel both referred to facts consistent with the contents of the probation report. Even in this appeal, appellant has referred to the probation report in summarizing the underlying facts.

To the extent the trial court relied upon the report, there was no error. And any error was harmless in view of appellant's failure to demonstrate his eligibility and his admission, through his counsel, that he was not eligible for Proposition 47 relief. (Cf. *Watson, supra,* 46 Cal.2d at p. 836; *Johnson, supra*, 1 Cal.App.5th at p. 968.)[5]

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[5] Appellant also contends he was entitled to a jury trial on his Proposition 47 eligibility, with proof beyond a reasonable doubt as the standard of proof. This argument has been repeatedly rejected. (See *Sledge*, *supra*, 7 Cal.App.5th, at p. 1095; *People v. Jefferson* (2016) 1 Cal.App.5th 235, 241; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 451.) We do the same.

DISPOSITION

The order denying appellant's petition for a recall of sentence is affirmed.

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JOHNSON, (MICHAEL) J.*

We concur:

LAVIN, Acting P. J.

ALDRICH, 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.

** Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution