Filed 9/12/17 P. v. Shary CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY GEORGE SHARY, Defendant and Appellant.	B280571 (Los Angeles County Super. Ct. No. MA068221)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

John L. Staley, 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, Susan Sullivan Pithey and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

Jeffrey George Shary appeals from the denial of his petition to recall his sentence under Proposition 47 (Pen. Code, § 1170.18),[1] which reduced certain theft-related and drug-related felonies to misdemeanors.[2] The trial court properly found that appellant's conviction under Vehicle Code section 10851, subdivision (a) was not eligible for reduction under Proposition 47. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[3]

Appellant agreed to purchase a vehicle from the victims. He used a false name and gave the victims counterfeit $100 bills for the purchase price. The victims filed a police report when they discovered the money was fraudulent. The police located appellant, arrested him, and returned the vehicle to the victims.

On March 16, 2016, a complaint was filed alleging that on or about February 19, 2016, appellant committed the crime of driving or taking a vehicle without consent, in violation of Vehicle Code section 10851, subdivision (a). The complaint further alleged that appellant had suffered two prior offenses that qualified as strikes and as serious

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1 Unspecified statutory references are to the Penal Code.

2 "Section 1170.18 provides a mechanism by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. (§ 1170.18, subd. (a).)" (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.)

3 Because appellant's conviction was obtained by a no contest plea, the facts are taken from the probation report.

felonies: a 1982 conviction for burglary (§ 459) and a 2009 conviction for a criminal threat (§ 422). (§§ 667, subds. (b)-(j), 1170.12, 1192.7.) It was also alleged that appellant had served 11 prior prison terms. (§ 667.5, subd. (b).)

On April 1, 2016, appellant entered into a plea agreement under which he agreed to plead no contest to the charge and admit one strike, in exchange for a sentence of 32 months in state prison. After indicating that he understood the rights he was waiving, appellant pled no contest to one count of driving or taking away a vehicle without the owner's consent, with the intent to deprive the owner of title or possession of the vehicle. On April 26, 2016, appellant was sentenced to the agreed-upon term of 32 months.[4] The People dismissed the remaining allegations.

In December 2016, appellant filed a petition for recall and resentencing to a misdemeanor pursuant to Proposition 47 on the basis that the value of the property taken was not more than $950. He argued that the car was being sold for $800 and that he paid for it with $600 in counterfeit bills. The trial court denied the petition on December 27, 2016. Appellant timely appealed.

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[4] Appellant appealed, asking this court to reduce his conviction to a misdemeanor under Proposition 47. We dismissed the appeal because there was no indication in the record that he had filed a Proposition 47 petition. (*People v. Shary* (May 10, 2017, No. B275959) 2017 Cal. App. Unpub. LEXIS 3188.)

DISCUSSION

"Proposition 47, enacted by California voters in November 2014, reduced certain felony theft-related offenses to misdemeanors when the value of the stolen property does not exceed $950." (*People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1282 (*Van Orden*), review granted June 14, 2017, S241574.) "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).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092.)

Proposition 47 added section 490.2, which "redefines the crime of petty theft as 'obtaining any property by theft where the value of the . . . property taken does not exceed nine hundred fifty dollars ($950).' (§ 490.2, subd. (a).) Section 490.2 also directs any petty theft, so defined, *shall* be punished as a misdemeanor." (*Van Orden*, *supra*, 9 Cal.App.5th at p. 1282.) Appellant contends that the taking of a vehicle under Vehicle Code section 10851 constitutes a theft and that section

490.2 therefore applies, rendering his conviction a misdemeanor if the vehicle was valued at less than $950.[5]

Section 1170.18 does not identify Vehicle Code section 10851 as one of the code sections amended or added by Proposition 47. (See § 1170.18, subd. (a).) Because Vehicle Code section 10851 was not directly modified by Proposition 47 and is not listed as one of the sections under which resentencing can be requested, courts have divided on the question whether Proposition 47 applies to the offense of driving or taking away a vehicle. (See, e.g., *People v. Page* (2015) 241 Cal.App.4th 714 (*Page*), review granted Jan. 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515 (*Haywood*), review granted March 9, 2016, S232250; *People v. Ortiz* (2016) 243 Cal.App.4th 854 (*Ortiz*), review granted March 16, 2016, S232344; *People v. Solis* (2016) 245 Cal.App.4th 1099 (*Solis*), review granted June 8, 2016, S234150; *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13,

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[5] The People argue that appellant was required to obtain a certificate of probable cause. Section 1237.5 requires a defendant to obtain a certificate of probable cause in order to appeal "from a judgment of conviction upon a plea of guilty or nolo contendere." (1237.5.) However, a certificate of probable cause is not required if the appeal is based solely upon grounds occurring after entry of the plea which do not challenge its validity, such as sentencing issues. (Cal. Rules of Court, rule 8.304(b)(4)(B); *People v. Cuevas* (2008) 44 Cal.4th 374, 379.) Appellant is not challenging the validity of his plea and therefore was not required to obtain a certificate of probable cause. (See *People v. Emery* (2006) 140 Cal.App.4th 560, 564–565 ["In determining whether an appeal is cognizable without a certificate of probable cause, '"the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.]' [Citation.] If the challenge is in substance an attack on the validity of the plea, defendant must obtain a certificate of probable cause."].)

2016, S235041; *People v. Sauceda* (2016) 3 Cal.App.5th 635, review granted Nov. 30, 2016, S237975.)

The California Supreme Court is currently reviewing whether a felony conviction for violating Vehicle Code section 10851, subdivision (a), may be reduced to misdemeanor petty theft (§§ 490.2, 1170.18), and whether the defendant may be resentenced on a Vehicle Code section 10851, subdivision (a) conviction as if convicted of misdemeanor petty theft. Pending guidance by our supreme court, we agree with the reasoning of the cases that have held that Vehicle Code section 10851 is not a theft statute and thus is not affected by section 490.2. (See, e.g., *Page*, *supra*, 241 Cal.App.4th 714; *Solis*, *supra*, 245 Cal.App.4th 1099; *Haywood*, *supra*, 243 Cal.App.4th 515.)

As stated above, section 1170.18 does not include Vehicle Code section 10851 as one of the enumerated offenses eligible for resentencing under Proposition 47. Moreover, Vehicle Code section 10851 does not proscribe theft, but rather "driv[ing] or tak[ing] a vehicle . . . with or without intent to steal." (Veh. Code, § 10851, subd. (a).) "A person can violate section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*People v. Garza* (2005) 35 Cal.4th 866, 876.) For these reasons, we conclude that Proposition 47 does not apply to appellant's conviction offense.

We also disagree with appellant's contention that excluding a conviction under Vehicle Code section 10851 from the mechanism of Proposition 47 would violate the equal protection clause. "It is a

fundamental principle that, '[t]o succeed on [a] claim under the equal protection clause, [a defendant] first must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836 (*Wilkinson*).) Applying rational basis scrutiny to a statutory scheme regarding battery on a custodial officer that resulted in differing sentences, our supreme court held in *Wilkinson* that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles. [Citation.]" (*Id.* at p. 838.) The court also has held that "a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code." (*People v. Romo* (1975) 14 Cal.3d 189, 197.) Absent a showing that a particular defendant "'has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation." (*Wilkinson*, *supra*, 33 Cal.4th at p. 839.) Appellant has not made such a showing.

DISPOSITION

The postjudgment order appealed from is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.