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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. KARL BENITO HAMILTON, Defendant and Appellant.	B288219 (Los Angeles County Super. Ct. No. YA095774)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Reversed with directions.

Elizabeth Richardson-Royer, 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, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

On November 17, 2017, a jury convicted Karl Benito Hamilton of felony driving or taking a vehicle in violation of Vehicle Code section 10851, subdivision (a). Hamilton admitted a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(j), 1170.12) and having served three prior prison terms (*id.*, § 667.5, subd. (b)). The trial court sentenced him to the middle term of two years, doubled to four years as a second strike, plus two years for two of the prior prison terms.

On November 30, 2017, the California Supreme Court held in *People v. Page* (2017) 3 Cal.5th 1175 (*Page*) that the provisions of Proposition 47[1] apply to a conviction under Vehicle Code section 10851. On appeal, Hamilton contends that his conviction must be reduced to a misdemeanor pursuant to Proposition 47, because there was insufficient evidence that the value of the vehicle he took was over $950. We agree that, under *Page*, Hamilton's felony conviction is no longer valid absent evidence that the value of the vehicle in question was over $950. The appropriate remedy, however, is reversal of the conviction and a remand to allow the People the option to accept a reduction of the conviction to a misdemeanor or to retry the case as a felony.

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[1] "Proposition 47 reclassified as misdemeanors certain drug- and theft-related offenses that previously were felonies or wobblers." (*People v. Valencia* (2017) 3 Cal.5th 347, 355.) Driving or taking a vehicle under Vehicle Code section 10851, subdivision (a), is a "wobbler," meaning that it can be prosecuted as a felony or a misdemeanor. (*Page*, *supra*, 3 Cal.5th at p. 1181.)

BACKGROUND

At about 3:00 p.m. on February 27, 2017, Freddy Rivera parked his sister's 1997 Honda Civic at the Manhattan Village Mall, where he worked as a security guard. As he greeted his coworkers in the parking lot, Eduardo Bonilla pointed out that someone was backing the Civic out of its parking spot. Rivera and Bonilla got into Bonilla's car and pursued the Civic as it was being driven out of the parking lot; they called the police as they drove. Another coworker, Steve Diaz, followed them in his car.

When the Civic halted at a stop sign, Bonilla stopped behind it. Rivera saw Hamilton inside the Civic. When the three cars later stopped at a stop light, Diaz got out of his car and went to the driver's side of the Civic. He reached inside the car and tried to grab the car keys. Hamilton drove away. After Hamilton turned onto a residential street, he jumped from the Civic as it rolled down the street. Rivera exited Bonilla's car and got into the Civic. Before he could stop the Civic, it hit a parked car.

Surveillance video from a nearby house showed Hamilton running down an alley and placing his hands on some trash cans as he jumped over a low wall. Police obtained fingerprints from the trash cans; the lifted prints matched Hamilton's fingerprints.

At about 4:00 p.m., a police officer observed Hamilton walking down the street. Hamilton matched the description of the man seen driving, then running away from, the Civic. The officer arrested Hamilton.

DISCUSSION

The Supreme Court has "recognized the distinction between the theft and nontheft forms of the Vehicle Code section 10851 offense." (*Page*, *supra*, 3 Cal.5th at p. 1183.) " 'Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under [Vehicle Code] section 10851[, subdivision] (a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction . . . . On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete. . . . Therefore, a conviction under [Vehicle Code] section 10851[, subdivision] (a) for posttheft driving is not a theft conviction . . . .' " (*Ibid.*, quoting *People v. Garza* (2005) 35 Cal.4th 866, 871.)

The court held that "[b]y its terms, Proposition 47's new petty theft provision, [Penal Code] section 490.2, covers the theft form of the Vehicle Code section 10851 offense. . . . [Penal Code] section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950. An automobile is personal property. 'As a result, after the passage of Proposition 47, an offender who obtains a car valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.' [Citation.]" (*Page*, *supra*, 3 Cal.5th at p. 1183.)

Under *Page*, if Hamilton's conviction for driving or taking a vehicle under Vehicle Code section 10851 was based on his

"taking a vehicle with the intent to permanently deprive the owner of possession," and the value of the Civic was less than $950, the crime was petty theft, punishable as a misdemeanor. (*Page*, *supra*, 3 Cal.5th at p. 1184.) However, because *Page* had not yet been decided at the time of trial, no evidence was presented as to the value of the Civic, and the jury did not make a finding as to whether Hamilton took a vehicle valued at less than $950 with the intent to permanently deprive the owner of possession.[2]

Hamilton argues that "[t]he only conceivable dispute in this appeal concerns the appropriate remedy: reducing the charge to a misdemeanor, or vacating the felony conviction but permitting retrial at the [People's] option. In this case, because the claim is one of insufficiency, not instructional error, the felony should be automatically reduced to a misdemeanor."

The People claim that "[t]he issue here is not sufficiency of the evidence; rather, in this pre-*Page* jury trial, the jury instructions allowed the jury to convict [Hamilton] of a felony violation of [Vehicle Code] section 10851 based on either taking a vehicle without the owner's consent or driving a vehicle without the owner's consent, and depriving the owner of the vehicle for

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[2] The jury was instructed pursuant to CALCRIM former No. 1820: "The defendant is charged in Count One with unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851(a). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took or drove someone else's vehicle without the owner's consent; [¶] AND [¶] 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time. . . ."

any period of time." In the People's view, "reversal is not required because the evidence showed beyond a reasonable doubt that [Hamilton] unlawfully drove the Honda Civic which did not require proof of its value, and the jury necessarily had to find [Hamilton] drove the car in order to conclude he took it." Inasmuch as the jury must have relied on a legally valid theory to convict Hamilton of a felony, the People claim, his conviction must be upheld. In the alternative, they argue, if the record is unclear whether the jury convicted Hamilton on a legally valid theory, the remedy is to remand the case for the prosecutor to decide whether to accept a reduction to a misdemeanor or to retry Hamilton on the felony charge.

In support of their argument, the People rely on *People v. Gutierrez* (2018) 20 Cal.App.5th 847, decided by Division Seven of this court. In *Gutierrez*, as here, the trial court instructed the jury with CALCRIM former No. 1820. (*Gutierrez*, *supra*, at p. 851.) This instruction "allowed the jury to convict [the defendant] of a felony violation of [Vehicle Code] section 10851 for stealing the [vehicle], even though no value was proved—a legally incorrect theory—or for a nontheft taking or driving offense—a legally correct one. 'When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.' (*People v. Chiu* (2014) 59 Cal.4th 155, 167 . . . .)" (*Gutierrez*, *supra*, at p. 857, citation omitted.) The record did not show whether the defendant was convicted under a legally valid nontheft theory or a legally invalid theory of vehicle theft of a vehicle valued under $950, so the court "reverse[d] the felony conviction for unlawful driving or taking a vehicle and

remand[ed] the matter to allow the People either to accept a reduction of the conviction to a misdemeanor or to retry the offense as a felony with appropriate instructions." (*Ibid*.)

Hamilton relies on *In re D.N.* (2018) 19 Cal.App.5th 898 in support of his claim that a reduction to a misdemeanor is mandated. The court in *Gutierrez* "recognize[d] that in *In re D.N.* . . . the Fifth District employed a different analysis and reached a different conclusion on direct appeal from a juvenile adjudication for a felony theft violation of [Vehicle Code] section 10851 after the effective date of Proposition 47 when no evidence of the vehicle's value had been introduced at the jurisdiction hearing. Considering the case to present an issue of sufficiency of the evidence, the *D.N.* court held permitting the People to introduce evidence of value at a second wardship jurisdiction hearing would violate principles of double jeopardy. Thus, the juvenile adjudication was reduced to a misdemeanor. (*In re D.N.*, at p. 901.)" (*People v. Gutierrez*, *supra*, 20 Cal.App.5th at pp. 857-858.)

Gutierrez noted that the *D.N.* "court acknowledged there had been conflicting published opinions from the Courts of Appeal at the time of D.N.'s contested jurisdiction hearing. It nonetheless concluded, 'The People were . . . on notice as of November 5, 2014, [the effective date of Proposition 47,] that vehicle theft under Vehicle Code section 10851 was to be a misdemeanor unless the value of the stolen vehicle exceeded $950. . . . [¶] The People should have been well aware the value of the stolen vehicle was relevant on whether the offense was a felony. The People chose instead to gamble, and lost their bet, that the Supreme Court would find Vehicle Code section 10851 outside the ambit of Proposition 47 and Penal Code section

490.2.' " (*People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 858, quoting *In re D.N.*, *supra*, 19 Cal.App.5th at p. 903.)

Gutierrez disagreed with that analysis, explaining: "Given the conflicting authority on the issue and the prevailing decisions in the Courts of Appeal at the time of [the defendant's] trial, we decline to fault either the trial court or the prosecutor for failing to correctly anticipate the outcome of cases pending before the Supreme Court. This is not an instance where either the court or the prosecutor misinterpreted or failed to follow established law. Following the guidance of *Chiu*, the appropriate remedy for the error here is to allow a retrial on the felony charge if the People can in good faith bring such a case." (*People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 858, fns. omitted.)

In our view, *Gutierrez* provides the better-reasoned approach. The law was unsettled at the time of trial; the prosecutor could not know that the Supreme Court would hold that Proposition 47 would apply to Vehicle Code section 10851, a statute not specifically listed in Proposition 47's provisions.

However, we cannot agree with the People that the record here shows that the jury necessarily convicted Hamilton on the legally valid theory of driving a vehicle without the owner's consent. Consequently, the appropriate remedy is to "reverse the felony conviction for unlawful driving or taking a vehicle and remand the matter to allow the People either to accept a reduction of the conviction to a misdemeanor or to retry the offense as a felony with appropriate instructions." (*People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.)

DISPOSITION

The judgment of conviction is reversed and the matter remanded for the People to either accept a reduction of the conviction to a misdemeanor, with the court to resentence Hamilton in accordance with that election, or retry Hamilton for a felony violation of Vehicle Code section 10851.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, 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.