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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.

ROBERT MARK DIAZ,

Defendant and Appellant.

B269048

(Los Angeles County
Super. Ct. No. BA404022)

APPEAL from an order granting habeas corpus of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Jackie Lacey, District Attorney, Phyllis C. Asayama and Felicia N. Shu, Deputy District Attorneys, for Plaintiff and Appellant.

Sarvenaz Bahar, under appointment by the Court of Appeal, for Defendant and Respondent.

We reconsider this case on remand from the California Supreme Court. In our first decision in this case, *People v. Diaz* (2015) 238 Cal.App.4th 1323 (*Diaz I*), we declined in the first instance to strike defendant Robert Diaz’s Penal Code section 667.5, subdivision (b) enhancement based on a 2009 felony conviction that had been reduced to a misdemeanor under Proposition 47.¹ In our second decision, *In re Diaz* (2017) 8 Cal.App.5th 812 (*Diaz II*), we reversed the trial court’s grant of habeas corpus relief striking that enhancement. The California Supreme court granted review in *Diaz II*, and later vacated our decision and directed us to reconsider it in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*). Now, under *Buycks*, we affirm the trial court’s order striking the section 667.5, subdivision (b) enhancement based on the 2009 reclassified conviction.

BACKGROUND

Conviction and Sentencing

A jury convicted defendant of possession of a firearm by a felon. (§ 29800, subd. (a)(1).) He admitted one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and two prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him to a term of six years in prison, including one year for each of his two prior prison terms under section 667.5, subdivision (b). The prior felony conviction underlying one of the section 667.5, subdivision (b) enhancements was a 2009 conviction in San Bernardino County under former section 666,

¹ All section references are to the Penal Code.

commonly called petty theft with a prior. (*Diaz II*, *supra*, 8 Cal.App.5th at pp. 815-816.)

Defendant appealed from the judgment of conviction. While his appeal was pending, the voters passed Proposition 47 (The Safe Neighborhoods and Schools Act), effective November 5, 2014. Proposition 47 “reclassified as misdemeanors certain offenses that previously were felonies or ‘wobblers.’ It also added Penal Code section 1170.18, which permits those previously convicted of felony offenses that Proposition 47 reduced to misdemeanors to petition to have such felony convictions resentenced or redesignated as misdemeanors. Section 1170.18 allows those currently serving sentences for Proposition 47 eligible felony convictions to petition to have their sentences recalled and be ‘resentenced to a misdemeanor.’ (§ 1170.18, subd. (b).) It also allows those who have already completed their sentences for Proposition 47 eligible felony convictions to petition to have their convictions ‘designated as misdemeanors.’ (§ 1170.18, subd. (f).) Once an offense is resentenced or redesignated as a misdemeanor it ‘shall be considered a misdemeanor for all purposes.’ (§ 1170.18, subd. (k).)” (*Buycks*, *supra*, 5 Cal. 5th at p. 871.)

Appeal in Diaz I

In *Diaz I*, Diaz contended on appeal from the judgment of conviction that his 2009 felony conviction of petty theft with a prior would be a misdemeanor if Proposition 47 had been in effect at the time of that offense and, therefore, it could not be the basis of an enhancement of his sentence under section 667.5, subdivision (b) which

must be based on a felony. Diaz asked this Court to redesignate his prior offense as a misdemeanor because the record was clear that he was entitled to a re-designation under Proposition 47, and to strike his sentence enhancement. Alternatively, Diaz asked that the Court stay the proceedings to permit him to seek reclassification by the superior court that had sentenced him for petty theft with a prior.

We declined to strike defendant's section 667.5, subdivision (b) enhancement, and directed defendant to first file an application in the court of conviction pursuant to "section 1170.18, subdivision (f) to have his 2009 conviction designated as a misdemeanor." (*Diaz I, supra*, 238 Cal.App.4th at p. 1328.) We advised that after obtaining a redesignation of his 2009 offense, defendant could seek habeas corpus relief in the superior court. (*Id.* at p. 1337.) We also declined to stay the appeal. (*Id.* at p. 1338.)

Appeal in Diaz II

On August 18, 2015, the San Bernardino Superior Court granted defendant's petition under section 1170.18, subdivision (f), reduced his 2009 prior conviction of petty theft with a prior to a misdemeanor and resentenced him to 180 days in county jail with credit for that time. (*Diaz II, supra*, 8 Cal.App.5th at p. 816.) Thereafter, Diaz filed a petition for writ of habeas corpus with this Court, seeking to strike the section 667.5, subdivision (b), enhancement based on the reclassification of the underlying offense. We transferred the habeas corpus petition to the Los Angeles Superior Court and ordered the Director of the Department of Corrections to show cause why Diaz's

section 667.5, subdivision (b), enhancement should not be stricken and Diaz resentenced in light of the reclassification of his 2009 conviction as a misdemeanor.

After briefing and argument, the superior court granted the petition and struck the section 667.5, subdivision (b), enhancement based on the reclassified 2009 conviction. The court resentenced Diaz to five years in state prison, and, based on his presentence credits, ordered him released from custody. (*Diaz II, supra*, 8 Cal.App.5th at p. 816.)

The People appealed from the superior court's order. In *Diaz II*, we reversed the superior court's order and reinstated Diaz's prison sentence of six years. We held that that Proposition 47 does not apply to a sentence enhancement imposed under section 667.5, subdivision (b). (*Diaz II, supra*, 8 Cal.App.5th at pp. 817-824.)

Defendant filed a petition for review in the California Supreme Court. The Supreme Court granted the petition. Following its decision in *Buycks, supra*, 5 Cal.5th 857, the Supreme Court vacated our decision in *Diaz II* and remanded the case for us to reconsider it in light of *Buycks*.

DISCUSSION

In *Buycks*, the Supreme Court held that “that the ‘misdemeanor for all purposes’ provision [of section 1170.18, subdivision (k)] operates prospectively—by having ameliorative effect on any new collateral consequence imposed after a successful Proposition 47 resentencing. However, [under the rule of *In re Estrada* (1965) 63 Cal.2d 740] because

Proposition 47 is a measure designed to ameliorate punishment, the ‘misdemeanor for all purposes’ language also requires felony-based section 667.5 and 12022.1^[2] enhancements to be retroactively stricken, but only with regard to judgments that were not final at the time the initiative took effect.” (5 Cal. 5th at p. 876.) *Buycks* noted that “nothing in Proposition 47 expressly provides a mechanism for recalling and resentencing a judgment because a prior underlying felony conviction supporting an enhancement in that judgment has been reduced to a misdemeanor.” (5 Cal.5th at p. 892.) To fill that gap, the Supreme Court specified two procedures. First, the court held that under the full resentencing rule,³ “at the time of resentencing of a Proposition 47 eligible felony conviction,” the trial court must “reevaluate the applicability” of an enhancement predicated on a now reduced felony conviction. (*Id.* at p. 894.) Second, the court concluded the collateral consequences of Proposition 47 could “properly be enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect.” (*Id.* at p. 895.)

² As here relevant, section 12022.1, subdivision (b) provides a two-year enhancement for a defendant who commits a new felony after having been released on his or her own recognizance on a prior felony arrest.

³ Under the full resentencing rule, when part of a sentence is stricken, a remand for a full resentencing is appropriate to allow the trial court to exercise its sentencing discretion in light of the changed circumstances. (*Buycks, supra*, 5 Cal.5th at p. 893.) That rule does not apply here, as the trial court has already resentenced defendant in light of its order striking the section 667.5, subdivision (b) enhancement.

Here, defendant's judgment of conviction as to which he sought habeas corpus relief in the trial court was not final when Proposition 47 took effect. Therefore, as respondent concedes in its supplemental briefing after remand, defendant is entitled to relief under *Buycks*. Thus, we conclude that the trial court properly struck the section 667.5, subdivision (b) enhancement based on the 2009 San Bernardino conviction, and affirm the trial court's order granting that relief.

DISPOSITION

The order striking defendant's section 667.5, subdivision (b) enhancement based on his reclassified 2009 San Bernardino conviction is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.