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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW SEAN ASHLEY FELIX,

Defendant and Appellant.

2d Crim. No. B268707
(Super. Ct. No. 1479726)
(Santa Barbara County)

Appellant Andrew Sean Ashley Felix pled no contest to the unlawful taking or driving of a vehicle in violation of Vehicle Code section 10851, subdivision (a). He also admitted the truth of a prior strike conviction. (Pen. Code, §§ 136.1, 1170.12, subds. (a)-(d), 667, subds. (b)-(i).)¹ Appellant moved to reduce the charge to a misdemeanor pursuant to Proposition 47. The trial court denied the motion, and sentenced appellant to the low term of 16 months, doubled pursuant to the “Three Strikes” law, for a

¹ All further statutory references are to the Penal Code unless otherwise stated.

total of 32 months in state prison. Appellant filed a notice of appeal and requested a certificate of probable cause, which the court granted.

Appellant contends Proposition 47 reduces his conviction for violation of Vehicle Code section 10851 to a misdemeanor. He claims specifically Proposition 47 applies to his conviction because it is a theft crime and falls under the language of section 490.2. We disagree and affirm.

FACTS

The information alleged that “[o]n or about April 28, 2015, in the County of Santa Barbara, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851 [subdivision] (a), a Felony, was committed by [appellant], who did unlawfully drive and take a certain vehicle, to wit: 91 RED HONDA ACCORD, then and there the personal property of ANTONIO MACIAL ROSALES without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.” Appellant, who pled no contest to the charge, proffered evidence that the vehicle was worth less than \$950 at the time of the offense.

DISCUSSION

In November 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (Act). The Act established procedures for petitions for reduced sentences for specified nonserious and nonviolent property and drug crimes by adding section 1170.18. This statute provides in relevant part: “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the [A]ct that added this section . . . had

this [A]ct been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this [A]ct.” (§ 1170.18, subd. (a).) Section 1170.18, subdivision (b) provides that a court that receives such a petition shall resentence the petitioner “unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

Though section 1170.18 does not specifically refer to Vehicle Code section 10851, appellant argues that the voters of California intended that violations of Vehicle Code section 10851 be included in the reforms of Proposition 47. There is no consensus among the courts of appeal on this issue, which is currently on review before our Supreme Court.² As we shall explain, we agree with the holding in *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041

² The Supreme Court has granted review of several cases raising this issue. In *People v. Page*, the Fourth District Court of Appeal held a defendant convicted under Vehicle Code section 10851 was not eligible for relief under section 1170.18. (*People v. Page*, review granted Jan. 27, 2016, S230793 (*Page*).) The Third District followed the reasoning of *Page* in *People v. Haywood*, review granted March 9, 2016, S232250, and *Johnston, supra*, 247 Cal.App.4th at pp. 255-259, review granted. Similarly, the Second District held that Proposition 47 does not apply to Vehicle Code section 10851. (*People v. Solis*, review granted June 8, 2016, S234150.) The Sixth District disagreed with *Page* in *People v. Ortiz*, review granted March 16, 2016, S232344.

(*Johnston*), that unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851 does not come within the ambit of section 1170.18.³ (*Johnston*, at p. 255.)

“[O]ur interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. [Citations.] We therefore first look to ‘the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.’ [Citations.]” (*People v. Park* (2013) 56 Cal.4th 782, 796.) ““When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.” [Citation.]’ [Citation.]” (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.)

Section 1170.18, subdivision (a) does not identify Vehicle Code section 10851 as one of the code sections amended or added by Proposition 47. Moreover, Proposition 47 did not amend language in Vehicle Code section 10851, subdivision (a), which provides that a violation of the statute is punishable as either a felony or a misdemeanor. Appellant focuses on Proposition 47's addition of section 490.2, which states in relevant part: “Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor” (§ 490.2, subd. (a).) Appellant argues that section 490.2 broadens the scope of petty theft to include a violation of Vehicle Code section 10851.

³ *Johnston* is citable as persuasive authority under new publication rules that went into effect on July 1, 2016. (See Cal. Rules of Court, rules 8.1105, 8.1115.)

Appellant's statutory interpretation is not persuasive. Section 490.2 amends the definition of grand theft, as set forth in section 487 or any other provision of law, to reclassify as petty theft certain offenses that would have previously been grand theft. But, unlike section 487, Vehicle Code section 10851 is not included in section 490.2. Nor can Vehicle Code section 10851 be considered "any other provision of law defining grand theft." Vehicle Code section 10851 does not define the taking or driving of a vehicle as grand theft and is much broader than statutes that prohibit theft. A theft is committed only if the defendant intends to permanently deprive the owner of his or her property (*People v. Abilez* (2007) 41 Cal.4th 472, 510), while a defendant can violate Vehicle Code section 10851 if he or she either takes a vehicle with intent to steal it or by driving it with the intent only to temporarily deprive the owner of its possession. (*People v. Garza* (2005) 35 Cal.4th 866, 871.) Thus, section 490.2 does not apply to appellant's conviction. (See *Johnston, supra*, 247 Cal.App.4th at p. 258, review granted.)

Appellant asserts that any ambiguity in the statute must be read in his favor. Section 1170.18 expressly includes certain theft offenses (§§ 459.5, 473, 476a, 490.2, 496 & 666), but does not include Vehicle Code section 10851. There is nothing ambiguous about the offenses that are included or about excluding Vehicle Code section 10851 from the list. "The expression of some things in a statute necessarily means the exclusion of other things not expressed. [Citation.]" (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) In other words, where the Legislature expressly includes certain criminal offenses in a statute, the legislative intent was to exclude offenses that were

not mentioned. (*People v. Sanchez* (1997) 52 Cal.App.4th 997, 1001-1002; *Johnston, supra*, 247 Cal.App.4th at p. 257, review granted “[T]he inclusion of only certain items in an associated group gives rise to a strong inference of a deliberate legislative choice to exclude any items not mentioned, absent a compelling indication of legislative intent to the contrary”].) Given Vehicle Code section 10851’s exclusion from the statutes added or amended by Proposition 47, we conclude appellant is ineligible for resentencing. (See *Johnston*, at pp. 257-259.)

DISPOSITION

The order denying the Proposition 47 petition is affirmed.

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PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

John F. McGregor, Judge

Superior Court County of Santa Barbara

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