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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TIWON G. McGHEE, Defendant and Appellant.	B271456 (Los Angeles County Super. Ct. No. YA065639)

APPEAL from an order of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed.

Stephen Borgo, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Defendant and appellant Tiwon G. McGhee appeals the trial court's order denying his application to designate his conviction for burglary (Pen. Code, § 459)[1] as misdemeanor shoplifting (§ 459.5) pursuant to Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18, subds. (f), (g)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 22, 2006, McGhee was charged with second degree commercial burglary (§ 459), among other offenses. According to the probation report, on July 24, 2006, McGhee visited a Nix Check Cashing establishment on South Crenshaw Boulevard and attempted to cash a check from "Kidz Online, Incorporated" in the amount of $2,783.59. The check was dated July 21, 2006 and made out to McGhee. The cashier noticed a discrepancy on the check and telephoned the business. An employee there told her Kidz Online had not issued a check to McGhee. It was later determined the check in McGhee's possession was missing from Kidz Online's checkbook. The owner of the business, who resided outside of Los Angeles, typically signed blank checks when he was in town. The signature on the check was the owner's.

On April 13, 2007, McGhee pleaded guilty to one count of second degree burglary and admitted suffering one prior "strike" conviction. The trial court sentenced him to the low term of two years eight months in prison.

In February 2015, McGhee, acting in propria persona, applied to have his conviction redesignated a misdemeanor pursuant to section 1170.18, subdivision (f). At an initial hearing on the application, at which McGhee was not present, the People argued McGhee's conviction was ineligible for redesignation because the check he had attempted to cash was for $2,783.59, above the $950 statutory threshold. The trial court found McGhee was entitled to a hearing and ordered him out of prison for that purpose.[2] (See generally *People v. Shabazz* (2015) 237 Cal.App.4th 303, 314.) The hearing

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[1] All further undesignated statutory references are to the Penal Code.

[2] McGhee had finished serving his sentence on the 2007 commercial burglary conviction, but was apparently incarcerated on unrelated charges.

transpired on February 9, 2016; McGhee was present and represented by counsel. The People averred that McGhee had the burden to establish the amount in question was less than $950; the check he attempted to cash was written for $2,783.59; and therefore he was ineligible to have the conviction redesignated. Defense counsel conceded that the amount of the check was $2,783.59, but argued the amount of loss, rather than the amount of potential loss, had to exceed $950. The trial court denied the application. It reasoned that an actual loss was not required; a defendant is ineligible if he or she attempted to take over $950. Accordingly, because McGhee failed to meet his burden to show the amount in question was $950 or less, the trial court denied the redesignation request. McGhee filed a timely notice of appeal the same day.

After review of the record, appellant's court-appointed counsel filed an opening brief which raised no issues, and requested this court to conduct an independent review pursuant to *People v. Wende* (1979) 25 Cal.3d 436. On June 23, 2016, we advised appellant that he had 30 days to submit by brief or letter any contentions or argument he wished this court to consider. On July 21, 2016, McGhee filed a supplemental brief.

DISCUSSION

Proposition 47 amended and enacted various provisions of the Penal and Health and Safety Codes that reduced certain drug and theft offenses to misdemeanors, unless committed by ineligible offenders. (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1222; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1327-1328.) "Among those crimes are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5." (*People v. Sherow* (2015) 239 Cal.App.4th

875, 879; *In re J.L.* (2015) 242 Cal.App.4th 1108, 1112.)[3] Shoplifting is now a misdemeanor unless the value of the items taken or intended to be taken exceeds $950 or the defendant has prior convictions for certain enumerated offenses.

Proposition 47 also enacted section 1170.18, which created a procedure whereby a defendant who has completed serving his or her felony sentence for one of the reclassified offenses may apply to have the offense designated a misdemeanor. (§ 1170.18, subd. (f).)[4] The defendant has the initial burden of establishing eligibility, including establishing that the property at issue was valued at $950 or less. (See, e.g., *People v. Sherow*, *supra*, 239 Cal.App.4th at pp. 879-880; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450.) Where a defendant's section 459 burglary conviction is based on theft of property valued at $950 or less, he or she may be entitled to redesignation. (*People v. Jones* (2016) 1 Cal.App.5th 221, 232-233.)

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[3] Section 459.5 provides: "(a) Notwithstanding Section 459 [burglary], 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). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor" unless the defendant has suffered enumerated disqualifying convictions. Subdivision (b) of the statute provides: "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property."

[4] Section 1170.18, subdivision (f) provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

Assuming arguendo that McGhee's burglary conviction is otherwise eligible for redesignation,[5] the trial court properly denied his application because he failed to meet his burden to establish he intended to take property valued at $950 or less. Section 459.5, subdivision (a) defines shoplifting 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)." (Italics added.) McGhee attempted to cash a check for $2,783.59. If drawn, the stolen check would have entitled him to that amount, which is well in excess of the statutory minimum. Thus, McGhee clearly intended to take an amount exceeding the statutory minimum. He offered no evidence or argument to the contrary to meet his burden to establish he intended to take $950 or less. Therefore, the trial court correctly found he was not eligible for resentencing.[6] (See *People v. Rivas-Colon, supra,* 241 Cal.App.4th at pp. 449-450.)

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[5] Several courts have held that "larceny" in section 459.5 includes theft by false pretenses. (See *People v. Garrett* (2016) 248 Cal.App.4th 82, 86, 89-99; *People v. Fusting* (July 11, 2016, D069050) __ Cal.App.5th __, __ [2016 Cal.App. Lexis 561, at p. *11]; *People v. Smith* (July 8, 2016, E062858) __ Cal.App.5th __, __ [2016 Cal.App. Lexis 552, at pp. *13-14].) Our Supreme Court is currently considering whether a defendant is entitled to resentencing on a second degree burglary conviction because the conviction meets the definition of misdemeanor shoplifting, or because section 1170.18 impliedly includes any second degree burglary involving property valued at $950 or less. (See *People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171; see also, e.g., *People v. Vargas* (2016) 243 Cal.App.4th 1416, review granted Mar. 30, 2016, S232673; *People v. Valencia* (2016) 245 Cal.App.4th 730, review granted May 25, 2016, S233402.) It has also been held that a check cashing business qualifies as a commercial establishment for purposes of section 459.5. (*People v. Smith, supra,* __ Cal.App.5th at pp. __ [2016 Cal.App. Lexis 552, at pp. *9-11].)

[6] Our Supreme Court is considering whether, for purposes of section 473 (setting forth the punishment for forgery), the value of an uncashed check is the face or stated value of the check, or only the intrinsic value of the paper. (*People v. Franco* (2016) 245 Cal.App.4th 679, review granted June 15, 2016, S233973.) The outcome in *Franco* is not dispositive, because the shoplifting statute (§ 459.5), as applied here, turns on the defendant's intent.

McGhee contends that the trial court's denial of his application was unconstitutional because the court "strayed . . . from the voter[s'] intent and the exact language of the proposition," thereby violating his rights to due process and equal protection under the California and federal constitutions. He argues that "[w]here there is no actual loss then the loss is below $950." In his view, the voters intended to punish "actual theft," not attempted theft, and an uncashed check is only worth the paper upon which the check is written. A contrary holding, he urges, contradicts the plain language of Proposition 47.[7]

We disagree. McGhee was charged with burglary (§ 459) and seeks to have his offense reduced to shoplifting (§ 459.5). Neither section 459 nor 459.5 require that the defendant actually *complete* a theft or that the victim suffer a loss. (See *People v. Rocha* (2013) 221 Cal.App.4th 1385, 1401 [burglary does not require a completed theft but only an entry with intent to steal]; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042.) As we have discussed, section 459.5 defines shoplifting by reference to the amount the defendant took or *intended* to take. When interpreting a voter initiative, we look first to the language of the statute, giving the words their ordinary meaning. (*People v. Park* (2013) 56 Cal.4th 782, 796; *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) If not ambiguous, the plain meaning of the statutory language controls. (*People v. Bush* (2016) 245 Cal.App.4th 992, 1003.) Here, the statute's plain language does not require that an actual loss or theft of property occur. (§ 459.5, subd. (a).) Instead, where the defendant took or *intended* to take property valued at over $950, the offense does not qualify as shoplifting.

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[7] In support of his argument, McGhee cites three cases in which our Supreme Court has granted review. (*People v. Grayson* (2015) 241 Cal.App.4th 454, review granted Jan. 20, 2016, S231757; *People v. Romanowski* (2015) 242 Cal.App.4th 151, review granted Jan. 20, 2016, S231405; *People v. Cuen* (2015) 241 Cal.App.4th 1227, review granted Jan. 20, 2016, S231107.) The issue in each of these cases is whether Proposition 47 applies to the theft of access card information in violation of section 484e, subd. (d)). Section 484e is not at issue here.

McGhee also argues that the electorate intended to reduce non-serious, nonviolent felonies to misdemeanors, thereby ensuring that prison spending is focused on persons who commit violent and serious crimes. McGhee is correct, but the plain language of section 459.5 demonstrates that the electorate intended to exclude from the benefits of Proposition 47 persons who, like McGhee, shoplift, or intend to shoplift, property valued at more than $950.

McGhee's conclusory assertion that the trial court's denial of his petition violates equal protection principles is unavailing. "The concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment. [Citation.] ' "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citations.]' " (*People v. Morales* (2016) 63 Cal.4th 399, 408.) Persons who steal, or attempt to steal, amounts over $950 are not similarly situated to those who steal or attempt to steal lesser amounts. The electorate could rationally conclude that a person who steals or attempts to steal over $950 commits a serious, rather than a petty, crime.

We have examined the entire record and are satisfied appellant's attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 126; *People v. Wende, supra*, 25 Cal.3d at pp. 441-442.)

DISPOSITION

The order is affirmed.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.