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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. RAYMOND C. ALONZO, Defendant and Appellant.	B284581 (Los Angeles County Super. Ct. No. TA130424)

APPEAL from an order of the Superior Court of Los Angeles County, Andrew C. Kim, Judge. Affirmed.

Mary Bernstein, 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, Paul M. Roadarmel, Jr., Noah P. Hill, and John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant challenges the resentencing court's denial of his Proposition 47 petition to recall his sentence, which was based on a conviction for unlawfully taking or driving a vehicle with a prior conviction under Penal Code section 666.5.[1] He argues his sentence is eligible for recall because the conviction was based on theft of property with a value of $950 or less as defined in section 490.2, which redefines such crimes as misdemeanors as part of Proposition 47 reform. Where a defendant is convicted of unlawfully taking or driving a vehicle, his or her sentence is ineligible to be recalled if the defendant's underlying conviction is based, at least in part, on posttheft driving. (*People v. Page* (2017) 3 Cal.5th 1175, 1188 (*Page*).) Because there was substantial evidence that appellant engaged in posttheft driving, his sentence is ineligible for recall. We affirm the resentencing court's order.

FACTUAL AND PROCEDURAL SUMMARY

The facts reported in this section, except for those in the final three paragraphs, are taken from this court's earlier unpublished decision in *People v. Alonzo* (Jan. 15, 2016, B256919) [nonpub. opn.].

"In October 2013, a Toyota Camry belonging to Maribel Espinoza was stolen from a parking lot in Compton. About a week later, the Camry was detected in Paramount by a Los Angeles County Sheriff's patrol car electronic license plate reader. Deputy Ryan Kearns followed the Camry as it headed north on Orange Avenue, past Rosecrans Avenue, to where the road dead ends at the 105 freeway. The Camry went over the curb and stopped on the grassy area beneath the freeway. The

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

driver of the Camry (later identified as [appellant]) got out, crouched behind the car, ran to some bushes, and headed east into an industrial park. To the east of the industrial park is a trailer park that is separated from the industrial park by a block wall fence. Kearns lost sight of [appellant] as he ran toward that wall.

"Kearns radioed for assistance and broadcasted a description of the suspect. Deputies and a search helicopter responded to the area and began searching for the suspect.

"About 20 to 30 minutes later, the helicopter spotted a car driving through the trailer park toward the exit at Rosecrans Avenue. Deputy Hector Vasquez stopped the car at the exit. Inside the vehicle were [appellant] in the front passenger's seat, his friend Jesus Estrada in the driver's seat, and [appellant]'s wife Nancy Duarte Alonzo in the rear seat." Vasquez, who testified at trial, observed that appellant matched the description of the suspect.

"Kearns went to the trailer park exit and identified [appellant] as the suspect who fled from the stolen Camry. . . . After [appellant] was taken into custody, the Camry was searched. A shaved Allen wrench was found in the ignition.

"[Appellant] was charged [by information] with unlawful driving or taking of a vehicle with a prior conviction.[2] (§ 666.5.)

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[2] Although the information does not indicate that the charge is based on violation of Vehicle Code section 10851, it is clear from the language of the allegation, which states that appellant unlawfully drove or took a vehicle, that the charge is based upon violation of that statute. Appellant argues the charge may be based upon violation of section 487, subdivision (d)(1) (grand theft auto). That crime is defined as taking an automobile and does not reference driving. Appellant argues that the standard jury instruction for grand theft auto states that it may

The information alleged that he had served two prior prison terms and suffered three prior theft convictions: in 2005 for unlawful driving or taking of a vehicle (No. BA285678) (Veh. Code, § 10851, subd. (a)); in 2006 for felony grand theft auto (No. BA301302) (§ 487, subd. (d)(1)); and in 2008 for felony grand theft auto (No. YA071291) (§ 487, subd. (d)(1)). The 2006 conviction (No. BA301302) was alleged to be a serious felony strike based on the true finding on a criminal street gang allegation. (§§ 186.22, 1192.7, subd. (c)(28).)"

"The prosecution announced its intention to use the 2005 conviction to support the section 666.5 charge, and the 2006 and 2008 convictions to prove a common plan or scheme and identity." The trial court found "the prior convictions admissible to prove a common plan or scheme and identity under subdivision (b) of [Evidence Code] section 1101."

"During the prosecution's case in chief, Kearns testified to the events that occurred on the night of [appellant]'s arrest, and positively identified him in court. Kearns stated that [appellant] was clearly visible from a distance of 30 feet, that 'darkness was not an issue,' and that [appellant] was 'fully illuminated' by street lamps and lights on buildings. Kearns testified that there were no keys in the stolen Camry, only a shaved Allen wrench, which car thieves often use to steal older model vehicles such as this one.

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be based upon a theory of taking or "driving away." (CALJIC No. 14.35) But "driving away" implies driving away at the time of the theft rather than posttheft driving. (See *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1283 (*Van Orden*) ["*Driving theft* is theft accomplished by driving the vehicle away"].) There is no reasonable conclusion but that the conviction was based on an underlying violation of Vehicle Code section 10851.

"Sharlton Wampler, a Los Angeles Police Department gang enforcement officer, testified about [appellant]'s 2006 conviction. She stated that while patrolling near Alameda Street and Vernon Avenue, the LoJack indicator on her vehicle directed her to a stolen Suburban. When she got behind the Suburban, the driver—[appellant]—stopped the vehicle and ran away. [Appellant] was arrested, and the Suburban, which he was driving without a key, had a damaged steering column.

"Deputy Trina Schrader testified about the 2008 conviction. While on patrol near 101st Street, her vehicle's LoJack indicator alerted her to the presence of a stolen Honda Civic. When Schrader began following the Civic, the driver—[appellant]—stopped the car and fled. [Appellant] was arrested and had a shaved key in his sock."

"The parties stipulated that during police broadcasts on the night of the arrest, Kearns stated at 11:38 p.m. that he was running and chasing a suspect southbound on Orange Avenue towards Rosecrans Avenue; at 11:39 p.m. that the suspect was heading eastbound at 1402 Orange; [and] seconds later that the suspect was a male Hispanic, wearing jeans and a long-sleeve plaid-colored shirt."

"In closing argument, the prosecutor focused on the common features of the 2006 and 2008 offenses and the present offense: in each instance, [the perpetrator] used a tool to start the ignition, and ran away when stopped by police. The prosecutor noted that even though no tool was recovered in the 2006 case, the steering column was damaged as it would have been if a tool had been used, and appellant had fled from police." The prosecutor repeatedly stated that appellant was driving a stolen vehicle and driving with a shaved key.

"Defense counsel argued that the prosecution was using the 2006 and 2008 incidents to buttress a weak case. [Counsel

argued] [t]he methods used in the prior crimes are not unique; car thieves often use shaved tools and flee from police."

Following argument, the jury received instructions including the standard CALCRIM No. 375 instruction, "'Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.'"

"After deliberating, the jury convicted [appellant] of the section 666.5 charge.

"At the sentencing hearing, [appellant] admitted the three prior theft convictions in 2005 (No. BA285678), 2006 (No. BA301302), and 2008 (No. YA071291)."

"The trial court imposed a mid-term sentence of three years, doubled to six years under the Three Strikes law."

In *People v. Alonzo* (January 18, 2016, B256919) [nonpub. opn.], appellant sought review by this court on evidentiary, instructional, and sentencing grounds different from those in the present appeal. In that case, we upheld his conviction. During the pendency of that appeal, appellant petitioned the trial court for resentencing pursuant to Proposition 47. The court denied the petition. He appealed the denial in *People v. Alonzo* (July 18, 2016, B265298) [nonpub. opn.]. In the latter case, this court dismissed his appeal because the trial court lacked jurisdiction to rule on appellant's petition while the appeal from his judgment of conviction was pending.

In 2017, appellant again petitioned for resentencing under Proposition 47, arguing that his section 666.5 conviction was a conviction for theft of property with a value of $950 or less and therefore a misdemeanor under section 490.2, subdivision (a). The resentencing court denied the petition on the grounds that, unlike section 490.2, section 666.5 is not enumerated as a qualifying offense under Proposition 47 (§ 1170.18). The court stated: "[Section 666.5] is not included as a specific offense. I am

not aware of any case that allows 490.2 subdivision (a), to be used as a catchall, even though it is phrased very broadly 'any theft $950 or less'; so that's the court's ruling."

This appeal followed.

DISCUSSION

We review the resentencing court's construction of Proposition 47 de novo. (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 743.) Proposition 47 created section 490.2 which provides that "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)" is a misdemeanor. Under section 1170.18, subdivision (a), individuals serving a sentence for a felony who would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of their sentencing are eligible to have their sentences recalled. The resentencing court found appellant's conviction ineligible for recall because it believed that convictions under section 666.5 are not encompassed by section 490.2. For this reason, the court did not find whether the victim's Camry had a value of $950 or less or whether appellant's conviction was based on a driving or theft offense.

After appellant's resentencing hearing, the Supreme Court announced its decision in *Page*, holding that convictions under Vehicle Code section 10851 are not categorically ineligible for recall under Proposition 47. (*Page*, *supra*, 3 Cal.5th at p. 1189.) Appellant's conviction under section 666.5 was based on his violation of Vehicle Code section 10851 with a prior conviction. Therefore, under *Page*, his conviction is not categorically ineligible for resentencing.

In light of *Page*, the resentencing court's statutory interpretation was incorrect. Nevertheless, it reached the only

reasonable result. Because appellant is unable to demonstrate that his conviction was not based in part on posttheft driving, his sentence is ineligible to be recalled. (*Page*, *supra*, 3 Cal.5th at p. 1189.) As no purpose would be served by remanding the case, we affirm. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility. (*People v. Romanowski* (2017) 2 Cal.5th 903, 916.) "To establish eligibility for resentencing on a theory that a Vehicle Code section 10851 conviction was based on theft, a defendant must show not only that the vehicle he or she was convicted of taking or driving was worth $ 950 or less (§ 490.2, subd. (a)), but also that the conviction was based on theft of the vehicle rather than on posttheft driving [citation] or on a taking without the intent to permanently deprive the owner of possession [citation]." (*Page*, *supra*, 3 Cal.5th at p. 1188, fn. omitted.)

Where trial testimony shows posttheft driving—driving a vehicle following a "substantial break" after the vehicle's initial theft, *Van Orden*, *supra*, 9 Cal.App.5th at page 1283—the defendant cannot establish eligibility on the theory that he or she also stole the vehicle; "such testimony would not prove the conviction was *based on* theft rather than on posttheft driving, and therefore would fail to establish that the defendant would only have been guilty of a misdemeanor (petty theft under § 490.2, subd. (a)) had Proposition 47 been in effect at the time of the offense." (*Page*, *supra*, 3 Cal.5th at p. 1189.)

Here, trial testimony established that appellant engaged in posttheft driving. Officer Kearns witnessed appellant driving the Camry about a week after it was stolen. This constitutes a "significant break" following the vehicle's theft. (*People v. Garza* (2005) 35 Cal.4th 866, 879 ["significant break" occurred where defendant was found driving a vehicle six days after it had been

stolen].) Although evidence of appellant's past convictions was introduced to show that he stole the Camry, appellant cannot establish that his conviction was based solely upon a theory of theft, as *Page* requires, because there also is substantial evidence that appellant engaged in posttheft driving. (*Page*, *supra*, 3 Cal.5th at p. 1189.)

Appellant also argues that denial of his petition for recall of sentencing violated his constitutional right to equal protection of the law. He posits that denial of the benefits of Proposition 47 to defendants like him results in a unreasonable disparity of treatment between those who steal low value vehicles for the purpose of transportation and those who steal low value vehicles for the purpose of revenge or resale. We disagree.

Our review of equal protection challenges is de novo. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1338.) Because appellant does not argue he is a member of a suspect class, his equal protection claim is subject to rational basis review. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*) [rational basis review appropriate where disparity does not implicate suspect class or burden fundamental right]; *People v. Wilkinson* (2004) 33 Cal.4th 821, 838 [criminal defendants possess no fundamental interest in specific term of imprisonment].) This review is limited to determining whether a rational relationship exists between the disparity of treatment and some legitimate government interest. (*Johnson*, *supra*, at p. 881.) As respondent notes, one rational basis for punishing posttheft drivers more severely than, for example, posttheft sellers, is that posttheft driving results in dangerous and

resource-intensive police pursuits of stolen vehicles.[3] Having found a rational basis for the disparity, we conclude appellant's right to equal protection of the laws was not violated by the resentencing court's order.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.

[3] For the same reason, appellant's argument that the disparity between posttheft drivers and other posttheft lawbreakers is patently absurd also fails.