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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. ERIC WAYNE CAPLES, Defendant and Appellant.	2d Crim. No. B275260 (Super. Ct. No. 2011037529) (Ventura County)

Eric Wayne Caples appeals the denial of his Proposition 47 resentencing petition. (Pen. Code, § 1170.18.)[1] The petition arises from appellant's 2012 felony conviction for unlawfully taking or driving a vehicle. (Veh. Code, § 10851.) The trial court ruled that Vehicle Code section 10851 convictions are ineligible for resentencing; it did not consider whether the facts of this case support reduction of the conviction to a misdemeanor.

[1] Unlabeled statutory references are to the Penal Code.

After appellant's petition was denied, the Supreme Court decided *People v. Page* (2017) 3 Cal.5th 1175 (*Page*). *Page* holds that Vehicle Code section 10851 convictions are eligible for resentencing *if* the petitioning defendant shows (1) the vehicle was worth $950 or less, and (2) the sentence was imposed for theft of the vehicle rather than posttheft driving or a taking without the intent to permanently deprive the owner of possession. (*Page* at p. 1188.)

The record is inadequate regarding the two factual showings that must be made under *Page*. We affirm the denial of appellant's petition, without prejudice to the trial court's consideration of a petition providing evidence of his eligibility.

FACTS AND PROCEDURAL HISTORY

In 2011, appellant was charged with three felonies: in count 1, unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)) [2]; in count 2, making criminal threats (§ 422); in count 3, dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)). As to count 1, it was alleged that appellant has a 1997 conviction for unlawfully taking or driving a vehicle. As to all three counts, appellant was alleged to have prior convictions under the "Three Strikes Law." (§§ 667, 667.5.)

In 2012, appellant pleaded guilty to counts 1 and 2, and admitted the prior conviction allegations. Count 3 was dismissed. He was sentenced to an aggregate term of seven years, four months in prison.

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[2] The offense requires that the defendant drove or took a vehicle belonging to another, without the owner's consent, with the intent either to permanently or temporarily deprive the owner of title or possession, whether with or without intent to steal the vehicle. (Veh. Code, § 10851, subd. (a).)

A probation report formed the basis for appellant's plea. It states that on July 15, 2011, appellant climbed through a window into the residence of his former girlfriend, Tasha S., who feared for her safety. When she attempted to slip past appellant, he restrained her. On a ruse, Tasha convinced appellant to let her leave the room for cigarettes. She fled while appellant yelled obscenities at her. He took the keys to her 1990 Toyota Cressida and drove away in it. That evening, Tasha received 138 text messages and 23 telephone calls from appellant, threatening harm and warning her not to call the police. The next day, he sent Tasha a text message apologizing for his behavior and blaming his drug use. On July 17, Tasha called police, who found her car and appellant at a residence in Ventura.

In 2016, appellant petitioned for resentencing on count 1. The public defender argued that Tasha's vehicle was worth $600; therefore, the crime should be reduced to a misdemeanor as it involved property worth less than $950. The People opposed the petition. The trial court denied the petition on the ground that Proposition 47 does not authorize resentencing for Vehicle Code section 10851 violations.

DISCUSSION

Proposition 47 allows convicted felons to seek reduced sentences for nonserious, nonviolent theft and drug crimes. (§ 1170.18, subd. (b).) Our Supreme Court recently held that "A defendant who, at the time of Proposition 47's passage, was serving a felony sentence for taking or driving a vehicle in violation of Vehicle Code section 10851 is . . . eligible for resentencing under section 1170.18, subdivision (a), if the vehicle was worth $950 or less and the sentence was imposed for theft of the vehicle." (*Page*, *supra*, 3 Cal.5th at p. 1187.)

Following now-disapproved appellate authority, the trial court in this case determined, as a matter of law, that Vehicle Code section 10851 convictions are ineligible for resentencing. In a supplemental brief, the Attorney General concedes error in the trial court's interpretation of Proposition 47.

Our review does not end here, however. At resentencing, appellant "bears the burden of establishing his . . . eligibility" by showing that the vehicle was worth $950 or less and that the conviction was based on theft of the vehicle rather than on post theft driving, or on a taking without the intent to permanently deprive the owner of possession. (*Page*, *supra*, 3 Cal.5th at p. 1188.) Appellant has not satisfied his burden here.

First, on the issue of value, appellant asserts that the vehicle was worth less than $950. The police report he relies on is not in the record, so no evidence supports the claim. (See *Page*, *supra*, 3 Cal.5th at p. 1189 [neither testimony nor documents supported defendant's claim about the value of the vehicle].)

Second, the probation report that provides the factual basis for appellant's guilty plea does not show whether his conviction was for vehicle theft. The report indicates that appellant had the car two days after he took it from Tasha's home; it does not disclose whether appellant (a) drove straight to his residence from Tasha's home after stealing her car, without ever using it again, (b) continued to use the car (joyride) for the next two days, until police found him, or (c) took the vehicle with no intent to permanently deprive Tasha of possession. (See *People v. Garza* (2005) 35 Cal.4th 866, 871; *Page*, *supra*, 3 Cal.5th at p. 1188.) Vehicle Code section 10851 "'proscribes a wide range of conduct.'" (*Garza* at p. 876; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757.) Appellant's briefs do not cite evidence to resolve this issue.

From this record, we cannot tell if there was post-theft driving, i.e., "driving a vehicle without the owner's consent after the vehicle has been stolen, with the intent to temporarily or permanently deprive the owner of title or possession. Where the evidence shows a 'substantial break' between the taking and the driving, posttheft driving may give rise to a conviction under Vehicle Code section 10851 distinct from any liability for vehicle theft." (*Page*, *supra*, 3 Cal.5th at p. 1188.)

Appellant relies upon *People v. Huerta* (2016) 3 Cal.App.5th 539, for the proposition that he carried his burden of establishing eligibility for resentencing, and the prosecutor forfeited the issue. *Huerta* is distinguishable. During resentencing, the district attorney submitted a police report showing that Huerta "'was caught with eight bottles of perfume totaling $463.'" The trial court made factual findings that (1) Huerta entered with the intent to commit larceny and (2) the value of the stolen property did not exceed $950. (*Id.* at pp. 542-543.)

The trial court in *Huerta* "acted within its discretion to consider evidence contained in court records and to set an evidentiary hearing to establish the facts underlying Huerta's conviction." (*People v. Huerta*, *supra*, 3 Cal.App.5th at p. 543.) The Court of Appeal noted "the prosecutor's silence" when defense counsel represented the value of the stolen perfume, but the very next sentence states that the trial court had before it the police report "confirming the truth of defense counsel's representations." (*Id.* at p. 544.)

In appellant's case, no one submitted the police report showing the value of the stolen vehicle, and his probation report does not say what happened after the car was taken. The trial court did not hold a hearing to establish the facts underlying appellant's conviction, and made no findings about the value of

Tasha's car, or appellant's post-theft driving, or his intent to permanently or temporarily deprive Tasha of the vehicle. Nor did the court consider whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Instead, the court concluded that section 10851 violations are categorically ineligible for resentencing.

"Whatever difficulties of proof defendants seeking relief under section 1170.18 may face, Vehicle Code section 10851 convictions are not categorically ineligible for resentencing, and defendants serving sentences for that offense are due an opportunity to prove their eligibility." (*Page*, *supra*, 3 Cal.5th at p. 1189.) Appellant may file a new petition to "allege and, where possible, provide evidence of the facts necessary to eligibility for resentencing under section 1170.18." (*Ibid.*)

DISPOSITION

The order denying appellant's petition is affirmed without prejudice to the trial court's consideration of a new petition providing evidence of his eligibility for resentencing.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Bruce A. Young, Judge

Superior Court County of Ventura

Benjamin W. Maserang, Russell L. Baker, and William Quest, under appointment by the Court of Appeal, for Defendant and Appellant.

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