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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KAREN KATHLEEN CLARKE,

Defendant and Appellant.

B272187

(Los Angeles County
Super. Ct. No. MA022366)

APPEAL from the judgment of the Superior Court of
Los Angeles County, Steven D. Ogden, Judge. Reversed and
remanded.

Elizabeth K. Horowitz, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Kathleen A. Kenealy,
Acting Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General,
Margaret E. Maxwell and Nicholas J. Webster, Deputy Attorneys
General, for Plaintiff and Respondent.

Appellant Karen Kathleen Clarke appeals from an order denying her application to have her felony conviction redesignated as a misdemeanor under Penal Code¹ section 1170.18, subdivision (f). Appellant contends the trial court erred in denying her application because her felony conviction for violation of section 484e, subdivision (d)—the unlawful acquisition and possession of access card account information—fell under the recall provisions of Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18, subds. (a)–(e)). In view of the Supreme Court’s recent decision in *People v. Romanowski* (Mar. 27, 2017, S231405) ___ Cal.5th___ [2017 D.A.R. 2938] (*Romanowski*), holding that the theft of access card account information is one of the crimes eligible for reduced punishment under Proposition 47, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, appellant was charged with five counts of theft of access card account information (§ 484e, subd. (d) (counts 1-5)) and one count of acquiring access cards (§ 484e, subd. (b) (count 6)). Pursuant to a negotiated plea agreement, appellant pled nolo contendere to count 1, violation of section 484e, subdivision (d) and the court dismissed the other counts. The court sentenced appellant to two years in prison, imposed various fines and awarded appellant custody credits.

On May 3, 2016, appellant filed an application for redesignation of her conviction to a misdemeanor under section 1170.18, subdivision (f). At the hearing on the application, she argued that a section 484e, subdivision (d) conviction is eligible for resentencing under Proposition 47 because it is a theft crime. The trial court disagreed and denied appellant’s application.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

Appellant filed a timely notice of appeal.

DISCUSSION

Proposition 47, codified in section 1170.18, reduced the penalties for certain enumerated nonserious, nonviolent crimes like petty theft and drug possession.² The initiative also amended and added a number of sections to the Penal Code, including section 490.2, subdivision (a), which provides in pertinent part, “[n]otwithstanding [s]ection 487^[3] or any other provision of law defining grand theft, obtaining any property by theft where the value of 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).)

Section 484e is “‘part of a comprehensive statutory scheme which punishes a variety of fraudulent practices involving access cards.’” (*People v. Molina* (2004) 120 Cal.App.4th 507, 512; see §§ 484d–484j.) Subdivision (d) provides: “Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person,

² Section 1170.18, subdivision (a) provides:

“A person who, on November 5, 2014, was 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 act that added this section (“this act”) had this act 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 act.”

³ Section 487 defines grand theft as occurring “[w]hen the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars (\$950).” (§ 487.)

without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft." (§ 484e, subd. (d).)

Last month the California Supreme Court in *Romanowski* resolved the split of authority among the appellate courts on whether the theft of access card information under section 484e, subdivision (d), is reducible to a misdemeanor under section 490.2. (See *People v. Grayson* (2015) 241 Cal.App.4th 454, review granted Jan. 20, 2016, S231757 (*Grayson*) [holding that a section 484e, subdivision (d) conviction is not subject to reduction under section 490.2]; *People v. Cuen* (2015) 241 Cal.App.4th 1227, review granted Jan. 20, 2016, S231107 (*Cuen*) [in accord with *Grayson*]; *People v. King* (2015) 242 Cal.App.4th 1312, review granted Feb. 24, 2016, S231888 [following *Grayson* and *Cuen*]; *People v. Thompson* (2015) 243 Cal.App.4th 413, review granted Mar. 9, 2016, S232212 [holding that section 490.2 applies to section 484e, subdivision (d)].)

In concluding that section 484e, subdivision (d) offenses may be eligible for reduction to misdemeanors under Proposition 47, the *Romanowski* Court held that "[a]fter Proposition 47, theft of access card information 'where the value of the . . . property taken does not exceed nine hundred fifty dollars (\$950)' can be a misdemeanor. (§ 490.2, subd. (a).) As with any other theft that is punished based on the stolen property's value, 'the reasonable and fair market value shall be the test' for applying section 490.2's \$950 threshold. (§ 484, subd. (a).)" (*Romanowski, supra*, ___ Cal.5th___ [2017 D.A.R. at p. 2943].) In addition, the Supreme Court explained that "[w]hen stolen access card information lacks a legal market, moreover, courts may consider evidence concerning the potential for illicit sale of the access card information in order to determine its value." (*Ibid.*)

The *Romanowski* Court further held that the petitioner bears the burden of proving the value of the access card information,

observing, that, “[i]n some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. . . . But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be ‘required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner’s entitlement to relief depends on the resolution of an issue of fact.’ ” (*Romanowski, supra*, ___ Cal.5th___ [2017 D.A.R. at p. 2943].) Here because the trial court rejected appellant’s application based on the court’s conclusion that her section 484e, subdivision (d) conviction was ineligible for reclassification as a matter of law, this matter must be remanded for further proceedings to give appellant an opportunity to demonstrate whether her conviction is eligible for reclassification under Proposition 47.

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court for reconsideration of appellant's application for reclassification of her section 484e, subdivision (d) conviction in light of *Romanowski*.

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ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.