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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.

JEFFREY GEORGE SHARY,

Defendant and Appellant.

B275959

(Los Angeles County  
Super. Ct. No. MA068221)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Dismissed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Jeffrey George Shary entered a plea of no contest to one count of driving or taking a vehicle without consent. (Veh. Code, § 10851, subd. (a).) He admitted one prior strike and was sentenced to a term of 2 years 8 months. On appeal, he asks us to reduce his sentence under Proposition 47 (Pen. Code, § 1170.18),<sup>1</sup> which reduced certain theft-related and drug-related felonies to misdemeanors. Appellant's appeal must be dismissed for two reasons. First, there is nothing in the record indicating that appellant filed a Proposition 47 petition in the superior court. Second, appellant did not obtain a certificate of probable cause under section 1237.5, which is a prerequisite to an appeal following a guilty or no contest plea. We therefore dismiss the appeal.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

Appellant agreed to purchase a vehicle from the victims. Appellant used a fake name and gave the victims fraudulent \$100 bills for the agreed purchase price. When the victims discovered the money was fake, they filed a police report. Police officers subsequently arrested appellant and returned the vehicle to the victims.

A complaint was filed, alleging that on or about February 19, 2016, appellant committed the crime of driving or taking a vehicle without consent. (Veh. Code, § 10851, subd. (a).) It was further alleged that appellant had suffered two prior offenses that qualified as strikes

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<sup>1</sup> Unspecified statutory references are to the Penal Code.

<sup>2</sup> Appellant's conviction was obtained by a no contest plea. The facts therefore are taken from the probation report.

and as serious felonies: a 1982 conviction for burglary (§ 459) and a 2009 conviction for a criminal threat (§ 422). (§§ 667, subds. (b)-(j), 1170.12, 1192.7.) The information further alleged that appellant had served 11 prior prison terms. (§ 667.5, subd. (b).)

On April 1, 2016, appellant signed a change of plea form in which he agreed to enter a plea of no contest to the charge and admit one strike, with an agreed-upon term of 2 years 8 months. At the change of plea hearing, the court explained appellant's rights to him, asked appellant if he understood the rights he was waiving as explained in the plea agreement, found that appellant intelligently gave up his constitutional rights, and accepted the plea. The court sentenced appellant to the agreed-upon term of 2 years 8 months. Appellant filed a notice of appeal "based on the sentence or other matters occurring after the plea that do not affect the validity of the plea." Appellant did not obtain a certificate of probable cause. (§ 1237.5.)

After review of the record, appellant's court-appointed counsel filed an opening brief asking this court to review the record independently pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441 (*Wende*).

On December 27, 2016, appellant filed a supplemental brief, stating that he had filed a petition in the superior court under section 1170.18, a provision of Proposition 47 enacted in November 2014, seeking to reduce his assault conviction to a misdemeanor. He states in his brief that he had not "heard anything back" from the superior court as of December 23, 2016 and asks this court to reduce his felony conviction to a misdemeanor.

“For persons currently serving sentences for a felony conviction that would be a misdemeanor under Proposition 47, and for persons who have already completed a sentence for such an offense, the initiative specifies the procedures for relief. ‘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 act that added this section . . . 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 . . .*’ (§ 1170.18, subd. (a), italics added.) The procedure for ruling on a petition for recall requires the trial court to determine whether the prior conviction would be a misdemeanor under Proposition 47, in which case ‘the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.18, subd. (b).)” (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328–1329 (*Diaz*).)

Appellant states that he filed a Proposition 47 petition in the superior court, but there is no evidence of a petition in the record. “[T]he voters did not intend to permit an appellate court to declare in the first instance that a felony conviction for a crime reduced by Proposition 47 is a misdemeanor.” (*Diaz, supra*, 238 Cal.App.4th at p.

1332.) We cannot address appellant’s request until the superior court rules on his petition, if he indeed has filed one.<sup>3</sup>

Moreover, absent a certificate of probable cause under section 1237.5, an appeal from a judgment following a guilty or no contest plea is limited to review of a ruling denying a motion to suppress evidence under section 1538.5, or to issues that do not challenge the validity of the plea but rather relate to subsequent hearings determining the degree of the crime or punishment imposed. (*People v. Johnson* (2009) 47 Cal.4th 668, 677.) We have independently reviewed the record, and neither exception applies here. Therefore, the appeal is dismissed for failure to obtain a certificate of probable cause.

We have independently reviewed the record and conclude that there are no arguable issues on appeal. (See *Wende, supra*, 25 Cal.3d at pp. 441–442; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278–279 [upholding the *Wende* procedure].)

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<sup>3</sup> Vehicle Code section 10851 was not directly modified by Proposition 47 and is not listed as one of the sections under which resentencing can be requested. The California Supreme Court is currently reviewing whether a felony conviction for violating Vehicle Code section 10851, subdivision (a), may be reduced to misdemeanor petty theft (§§ 490.2, 1170.18), and whether the defendant may be resentenced on a Vehicle Code section 10851, subdivision (a) conviction as if convicted of misdemeanor petty theft. (See, e.g., *People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344; *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150; *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041; *People v. Saucedo* (2016) 3 Cal.App.5th 635, review granted Nov. 30, 2016, S237975.)

## **DISPOSITION**

The appeal is dismissed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.