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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD JURADO,

Defendant and Appellant.

B271171

(Los Angeles County
Super. Ct. No. KA031959)

APPEAL from an order of the Superior Court of
Los Angeles County. Daniel Lopez, Judge. Affirmed.

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

Kathleen A. Kenealy, Acting Attorney General, Gerald A.
Engler, Chief Assistant Attorney General, Lance E. Winters,
Senior Assistant Attorney General, Susan Sullivan Pithey and
Heather B. Arambarri, Deputy Attorneys General, for Plaintiff
and Respondent.

Defendant and appellant Richard Jurado (defendant) appeals from an order denying his petition for resentencing under Proposition 47, the Safe Neighborhood and Schools Act (Proposition 47 or the initiative), asking that his felony conviction under Vehicle Code section 10851, subdivision (a) be reduced to a misdemeanor. We affirm the trial court's order.

BACKGROUND

A jury convicted defendant in 1996 of unlawfully driving or taking a car, in violation of Vehicle Code section 10851, subdivision (a). The jury also found that defendant had suffered prior "strike" convictions for first degree burglary (Pen. Code, § 459)¹, kidnapping (§ 207), and robbery (§ 211) within the meaning of the "Three Strikes" Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he had served two prior prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to a term of 25 years to life, plus a one-year enhancement for one prior prison term.

In December 2012, defendant filed a petition for recall of his sentence pursuant to Proposition 36 and section 1170.126.² On April 6, 2016, the trial court granted the petition, finding that resentencing defendant would not pose an unreasonable risk of danger to public safety. Defendant was resentenced to seven

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Proposition 36 enacted section 1170.126, which established a procedure by which a defendant serving an indeterminate life sentence as a third strike offender for a nonserious or nonviolent felony which was a strike under the earlier version of the Three Strikes law, may file a petition for recall of sentence and resentencing as a second strike offender. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 596-597.)

years and awarded 7,350 days of custody credit. He was released and placed on post-release community supervision.

On September 22, 2015, while defendant's Proposition 36 petition was pending, defendant filed a petition for resentencing pursuant to Proposition 47, seeking to have his conviction under Vehicle Code section 10851, subdivision (a) reduced to a misdemeanor. The trial court denied the petition on September 24, 2015. Defendant filed a second petition pursuant to Proposition 47 and section 1170.18 on October 5, 2015. The trial court again denied the petition, finding that Vehicle Code section 10851 offenses were not eligible for reduction under Proposition 47.

Defendant failed to appeal from the trial court's September 24, 2015 order denying his petition for resentencing; however, he requested and was granted relief from default for failing to file a timely notice of appeal. The instant appeal followed.

DISCUSSION

In November 2014, California voters approved Proposition 47, which reduced certain drug and theft offenses from felonies to misdemeanors. (§ 1170.18, subd. (a).) Proposition 47 added section 1170.18, which allows a person currently serving a felony sentence "who would have been guilty of a misdemeanor" if Proposition 47 had been in effect at the time of the offense, to petition the court for resentencing "in accordance with" certain specified statutes that "have been amended or added by this act" which provide for different, lesser punishment than applied before Proposition 47. (§ 1170.18, subd. (a).)³

³ 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

Section 490.2 is one of the specific statutes amended or added by Proposition 47. Section 490.2 provides:

“Notwithstanding Section 487 or any other provision of law defining grand theft, 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) shall be considered petty theft and shall be punished as a misdemeanor.” (§ 490.2, subd. (a).)

Defendant contends his offense is eligible for resentencing under Proposition 47 if he can establish that it qualifies as petty theft under section 490.2, i.e., that he committed theft of a vehicle valued at \$950 or less. Defendant argues that his position is supported by the language of section 490.2, which he claims broadly covers thefts of all property with a value that does not exceed \$950. Defendant further contends the California Supreme Court has held that “a defendant convicted under [Vehicle Code] section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction.” (*People v. Garza* (2005) 35 Cal.4th 866, 871 (*Garza*).)

Defendant further claims his interpretation is consistent with the purpose and intent of Proposition 47 “to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment.” (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), text of Prop. 47, p. 70.) Defendant adds that his position is

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.”

supported by the express language of Proposition 47, which requires a liberal construction of its provisions. (*Id.* at p. 74 [this act shall be liberally construed to effectuate its purposes].)

The issue as framed by defendant -- whether felony violations of Vehicle Code section 10851 are eligible for resentencing under Proposition 47 -- is currently pending before the California Supreme Court. (See *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted Mar. 9, 2016, S232250; *People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793.) Absent further guidance from the Supreme Court, and for reasons we discuss, we find defendant's arguments to be unpersuasive and hold that his conviction for violation of Vehicle Code section 10851 is ineligible for resentencing under Penal Code section 1170.18.

As discussed, section 1170.18 allows an eligible person "who would have been guilty of a misdemeanor" had Proposition 47 been in effect at the time of the offense, to petition for resentencing in accordance with certain enumerated statutes that were amended or added by Proposition 47. (§ 1170.18, subd. (a).) It is uncertain whether defendant would have been guilty of a misdemeanor if Proposition 47 had been in effect at the time of his offense. A violation of Vehicle Code section 10851 is a "wobbler" offense, punishable either as a misdemeanor or a felony. (Veh. Code, § 10851, subd. (a).) Proposition 47 did not amend the language of Vehicle Code section 10851, subdivision (a). Defendant therefore could have been convicted of a felony violation of section 10851, either before or after Proposition 47. He is not a person "who would have been guilty of a misdemeanor" had Proposition 47 been in effect at the time of his offense and is accordingly ineligible for resentencing under Penal Code section 1170.18, subdivision (a).

The plain language of section 1170.18 is also incompatible with defendant's position. Section 1170.18 provides a means for an offender to petition for resentencing "in accordance with" certain enumerated statutes that were amended or added by Proposition 47 and which provide for a different, lesser punishment than applied before enactment of Proposition 47. Vehicle Code section 10851 is not included among the enumerated statutes added or amended by Proposition 47. Its statutory language imposing punishment for violations is the same before and after enactment of the initiative. Because the same sentencing considerations apply to defendant's conviction under Vehicle Code section 10851 before and after enactment of Proposition 47, there is no basis for reconsidering or reducing the sentence initially imposed.

Defendant argues that Vehicle Code section 10851 is a theft offense eligible for resentencing by operation of Penal Code section 490.2 so long as he can demonstrate that the theft involved an automobile valued at \$950 or less. Section 490.2 does not broadly cover all theft offenses. The statute, on its face, does no more than amend the definition of grand theft, as defined in section 487 "or any other provision of law" by redefining a limited subset of offenses that would formerly have been grand theft to petty theft. (§ 490.2, subd. (a).) Vehicle Code section 10851 does not define the taking of a vehicle as grand theft or petty theft; rather, it proscribes taking or driving a vehicle "with or without intent to steal." (Veh. Code, § 10851, subd. (a).) Our Supreme Court noted in *Garza* that Vehicle Code section 10851 "proscribes a wide range of conduct." [Citation.] A person can violate section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*Garza, supra*, 35 Cal.4th at p. 876.) Unlawful taking or driving of a vehicle does

not come within the ambit of Penal Code section 1170.18 by operation of section 490.2.

In a further attempt to bolster his argument that Vehicle Code section 10851 is a theft offense eligible for resentencing under Proposition 47, defendant cites Penal Code section 666, which elevates a misdemeanor petty theft to a “wobbler” offense for certain recidivist offenders. As amended by Proposition 47, section 666 continues to include “auto theft under Section 10851 of the Vehicle Code” among the list of thefts to which it applies. (Pen. Code, § 666, subd. (a).) We are not persuaded that this classification of Vehicle Code section 10851 as a theft offense for the purpose of imposing harsher punishment for certain recidivist offenders is evidence of any electoral intent to include that statute in an entirely unrelated section of the initiative for the ameliorative purpose of resentencing as a misdemeanor. Unlike section 490.2, section 666 does not reduce any offense to a misdemeanor after Proposition 47 was enacted.

We conclude that violations of Vehicle Code section 10851 and Penal Code section 666 are not offenses that are eligible for resentencing under Proposition 47.

DISPOSITION

The order denying the petition for resentencing is affirmed.
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_____, J.
CHAVEZ

We concur:

_____, Acting P. J. _____, J.*
ASHMANN-GERST GOODMAN

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.