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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.

SHAUN MARSHALL ROPER,

Defendant and Appellant.

B272150

(Los Angeles County  
Super. Ct. No. YA055872)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Mark S. Arnold, Judge. Vacated and remanded with directions.

John L. Staley, 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, Mary  
Sanchez and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Shaun Marshall Roper (defendant) appeals from the trial court's postjudgment order denying his petition to reduce his 2003 conviction for receiving stolen property (Pen. Code, § 496)<sup>1</sup> to a misdemeanor pursuant to section 1170.18, subdivisions (b) and (g), also known as Proposition 47. He contends the trial court erred in finding that the value of the property exceeded \$950, thus rendering him ineligible for a reduction. The law concerning the method for valuing the stolen checks at issue in this case was not settled when defendant filed his petition. The reasoning of the California Supreme Court's recent decision in *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*) now shows the proper methodology to be applied. Accordingly, we vacate the trial court's order and remand the matter for a determination of value.

### **BACKGROUND**

On November 21, 2003, defendant pled either guilty or no contest to one count of receiving stolen property (§ 496), one count of forgery involving possession of a blank check (§ 475, subd. (b)), one count of forgery involving possession of a completed check (§ 475, subd. (c)), and one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). Defendant was placed on probation and on October 13, 2004, admitted violating that probation. The court imposed the midterm of two years for the section 496 conviction and stayed punishment on the three other counts pursuant to section 654.<sup>2</sup>

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

<sup>2</sup> The record on appeal is quite limited. The only abstract of judgment in the record is dated November 9, 2004, and thus appears to have been prepared after defendant admitted violating his probation in that case.

Defendant filed a motion to augment the record in this court, seeking the reporter's transcripts for his November 21, 2003 change of plea hearing

On December 4, 2015, defendant filed his Proposition 47 petition in propria persona, using a court form. He checked a box indicating that the amount in question was not more than \$950 but does not appear to have filed any supporting documentation.

On December 21, 2015, the trial court issued its order denying defendant's petition, giving as its reason "Property exceeds \$950 in value." This appeal followed.

### DISCUSSION

Defendant contends the trial court erred in denying his motion on the ground that the stolen property was worth more than \$950 because the stolen property consisted of uncashed checks, and such checks have only nominal intrinsic value.

#### 1. Nature of stolen property

The probation report in this matter, together with the abstract of judgment, show that the stolen property in this case consisted of both completed and blank checks. There is nothing in the record showing what amount, if any, was written on the completed checks. According to the probation report, the completed checks were made payable to defendant, and defendant stated that he was the person who had completed them.<sup>3</sup> Thus, it

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and his October 13, 2004 sentencing hearing; any police reports in the court file; and the probation officer's report. We granted the motion.

As a result of that augmentation, the record now contains a transcript of the October 13, 2004 hearing at which defendant admitted his probation violation. It also contains a copy of the probation report. The court reporter certified that the notes for the November 21, 2003 change of plea hearing had been destroyed and no transcript could be prepared. The clerk of the superior court certified that there were no police reports in the court file.

<sup>3</sup> We recognize that the Sixth District Court of Appeal has held that a probation report is not part of the record of conviction and should not be

is reasonable to infer that when defendant received the checks, they were all blank, that is, that the stolen property received by defendant consisted entirely of blank checks.

## 2. Proposition 47

Proposition 47 enacted section 1170.18, subdivision (f), which provides: “A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.”

Prior to the passage of Proposition 47, a violation of section 496 was punishable as either a misdemeanor or a felony without regard to the value of the property.<sup>4</sup> Defendant’s conviction was sentenced as a felony. Proposition

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considered in determining resentencing eligibility under Proposition 36. (*People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458; see also *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1339-1340 [Third District holding that trial court is limited to the record of conviction in making eligibility determinations under Proposition 36].) We agree with our colleagues in Division 7 of this District Court of Appeal and in the Fourth District Court of Appeal that eligibility determinations under Proposition 47 are not so narrowly constrained. (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 743-744; *People v. Perkins* (2016) 244 Cal.App.4th 129, 140, fn. 5.) As the court in *Perkins* explained, eligibility for resentencing under Proposition 36 turns on the nature of the defendant’s convictions. In contrast, eligibility for resentencing under Proposition 47 often turns on the simple factual question of the value of the stolen property, a question which was not important at the time of conviction. Thus, the record alone may not contain sufficient evidence to determine its value. (*Perkins*, at p. 140, fn. 5.)

<sup>4</sup> Section 496 did permit the prosecutor to charge a violation of section 496 as a misdemeanor if the value of the property did not exceed a stated

47 amended section 496 to provide that “if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor.” (§ 496, subd. (a).) Thus, if the value of the stolen property received by defendant did not exceed \$950, defendant is eligible to have his section 496 conviction reduced to a misdemeanor.

### 3. Value

Defendant contends that an uncashed check under Proposition 47 should be valued in the same way as it would be for purposes of grand theft. He maintains that an uncashed check “is merely ‘an order to pay [citation] and is of no value unless accepted.’ [Citation.]” (*People v. Cuellar* (2008) 165 Cal.App.4th 833, 838 [holding uncashed fictitious check which had aroused suspicion had the slight intrinsic value required to support grand theft conviction].)

Respondent points to cases discussing the value of stolen checks for purposes of section 473, which specifies the punishment for forgery by possession of blank or completed checks in violation of section 475. Section 473, like section 496, was amended by Proposition 47 to require misdemeanor punishment if the value of the property does not exceed \$950, with some exceptions not relevant here. As respondent acknowledges, the issue of valuation under section 473 is now before the California Supreme Court in *People v. Franco* (2016) 245 Cal.App.4th 679 (*Franco*), review granted June 15, 2016, S233973, which will consider the following issue: “For purposes of the distinction between felony and misdemeanor forgery, is the value of an uncashed forged check the face value (or stated value) of the check or only the intrinsic value of the paper it is printed on?” Since granting

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value and it was in the interests of justice to do so. Nothing required the prosecutor to make such a charge.

review in *Franco*, the Supreme Court has granted review in other cases which have considered the issue of valuation under section 473, including *People v. Gonzales* (2016) 6 Cal.App.5th 1067, 1072, footnote 6, review granted February 15, 2017, S240044 (value of check is amount for which check is written; blank checks have no value), and *People v. Lowery* (2017) 8 Cal.App.5th 533, 541, review granted April 19, 2017, S240615 (value of check is its actual monetary value, which may be less than face value), cited for persuasive value only (Cal. Rules of Court, rule 8.1115(e)).<sup>5</sup> Respondent finds persuasive the reasoning of those cases that completed uncashed checks have some value greater than a nominal value for Proposition 47 purposes.

The only published case to consider the issue of the value of a stolen check under section 496 appears to be *People v. Vandiver* (2017) 10 Cal.App.5th 256 (*Vandiver*). A petition for review is currently pending in that case. (S242070, time for granting review extended to July 28, 2017.) In *Vandiver*, the Fourth District Court of Appeal held that the value of a blank stolen check for purposes of the crime of receiving stolen property should be determined by using the methodology for valuing stolen property under the theft statutes: the reasonable and fair market value of the stolen item. (*Id.* at p. 262.) The Court rejected the People’s theory that the value of a stolen uncashed check could be determined by the amount of money in the account linked to the check. We find the reasoning of *Vandiver* persuasive,

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<sup>5</sup> The Supreme Court did not grant review in *People v. Salmorin, supra*, 1 Cal.App.5th 738, a case decided after review was granted in *Franco*. It appears that no party sought review in the case. In *Salmorin*, Division 7 of this District Court of Appeal held that “[i]n the context of forgery, however, the word ‘value’ as used in section 473, subdivision (b), corresponds to the stated value or face value of the check.” (*Salmorin*, at p. 745.) This is the same holding Division 7 had reached in *Franco*, in which review was granted.

particularly given its reliance on our Supreme Court’s recent decision in *Romanowski*, *supra*, 2 Cal.5th 903.

The Court in *Romanowski* was concerned with the valuation of stolen access card information under section 484e. (*Romanowski*, *supra*, 5 Cal.5th at p. 914.) Section 484e “punishes the theft of an access card or access card information itself, not of whatever property a defendant may have obtained using a stolen access card or stolen information. Fraudulent *use* of access cards or account information is punished as a separate crime. (See § 484g.) This means a defendant can be convicted of violating section 484e, subdivision (d), even if he or she never uses the stolen account information to obtain any money or other property. So the \$950 threshold for theft of access card information must reflect a reasonable approximation of the stolen information’s value, rather than the value of what (if anything) a defendant obtained using that information.” (*Romanowski*, at p. 914.),

The Court held that the valuation of the stolen access card account information involved in the case before it “is elucidated in part by the Penal Code’s definition of ‘theft,’ which requires courts to determine the value of property obtained by theft based on ‘reasonable and fair market value.’ (§ 484, subd. (a) [‘In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test.’].)” (*Romanowski*, *supra*, 2 Cal.5th at p. 914.) The Court noted that “courts have long required section 484’s ‘reasonable and fair market value’ test to be used for theft crimes that contained a value threshold, such as violations of section 487, subdivision (a). [Citations.] Acceptance of this approach was part of the backdrop against which Proposition 47 was enacted, and Proposition 47 does not refer to any other approach to valuation.” (*Ibid.*) The Court recognized that some stolen property, such as access card

information, could never be sold legally, and held that in such cases “evidence related to the possibility of illegal sales can help establish ‘reasonable and fair market value.’” (*Id.* at p. 915.)

Following *Romanowski*, the Court of Appeal in *Vandiver* held that the fair market value test should be applied to determine the value of stolen property under the receiving stolen property statutes as it is under the theft statutes, including instances where the stolen property consists of blank checks. (*Vandiver, supra*, 10 Cal.App.5th at p. 262.) We agree. Although section 496 is not a theft offense, at its core it involves the possession of property which has been taken from its true owner by theft. Thus, section 484’s market value test is the appropriate test for valuing stolen property under section 496.

The Court in *Romanowski* recognized that under some circumstances, stolen property might have only intrinsic nominal value. The Court held, however, that “[o]nly in cases where stolen property would command no value on any market (legal or illegal) can courts presume that the value of stolen access information is de minimis.” (*Romanowski, supra*, 2 Cal.5th at p. 915.) The Court of Appeal in *Vandiver* found this logic applied to stolen blank checks as well. (*Vandiver, supra*, 10 Cal.App.5th at p. 264.) We agree, and so reject defendant’s argument that blank checks always have only nominal intrinsic value. Defendant did not present any evidence that there is no market whatsoever for blank checks.

The Court in *Vandiver* was concerned only with valuing stolen blank checks. This case involves completed checks as well as blank checks. We recognize that other courts have held that completed checks should be valued based on their face value. We do not find the reasoning of those cases, which



involve convictions for forgery under section 475, applicable to the factual situation in this case or persuasive.

Defendant is not seeking reduction of his convictions under section 475; he is seeking to have his conviction for receiving stolen property reduced. Based on the minimal record before us, the stolen property was blank checks. Even if face value is the appropriate valuation methodology under sections 473 and 475, the stolen checks were blank and have no face value. Assuming he later wrote an amount on some of those stolen checks, it would be inappropriate to refuse to reduce defendant's punishment under section 496 based on conduct which occurred after he received the stolen property.

Even if we were to assume that defendant's punishment could be based on the altered stolen property, we think the completed checks should be valued using the same method as stolen access card information. Section 475 has a number of similarities to section 484e. Section 475 criminalizes the possession of checks with the intent to defraud.<sup>6</sup> Fraudulent *use* of the checks is punished as a separate crime or crimes, such as theft or a violation of section 476. Thus, a defendant can be punished under section 475 even if he never uses the stolen completed checks to obtain money or other property. (See *People v. Morgan* (1956) 140 Cal.App.2d 796, 801.)

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<sup>6</sup> Section 475, subdivision (b) provides: "Every person who possesses any blank or unfinished check, note, bank bill, money order, or traveler's check, whether real or fictitious, with the intention of completing the same or the intention of facilitating the completion of the same, in order to defraud any person, is guilty of forgery."

Section 475, subdivision (c) provides: "Every person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery."

Assessing the completed check at face value is in effect assigning that check “the value of what (if anything) a defendant [could have] obtained using that [check].” (*Romanowski, supra*, 2 Cal.5th at p. 914.) This is thus inappropriate under the reasoning of *Romanowski*. It is, in effect, punishing the defendant for a crime he had not yet committed. As was the case with stolen access card information in *Romanowski*, fair market value is the appropriate measure.

#### 4. Remand

Because we have found that uncashed checks are capable of having more than nominal intrinsic value and because defendant presented no evidence of that value, the trial court did not err in denying defendant’s petition for sentence reduction.<sup>7</sup>

Defendant requests that if we find that uncashed checks can have more than nominal intrinsic value, we remand the matter to permit him to offer evidence of the checks’ value. Respondent opposes this request on the ground that defendant was aware when he filed his petition in the trial court that he had the burden of proving eligibility but did not do so and should not be given a second chance.

As is apparent from this opinion, the method of valuation of stolen checks was not settled at the time of defendant’s petition and indeed may still not be settled. Defendant has identified a method of valuation reasonably based on established law at the time he filed his petition. No evidence was required to support this method. While defendant’s appeal was pending, the

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<sup>7</sup> There is no evidence of the value of the checks, and so the trial court’s statement that the value of the property exceeded \$950 is not supported by any evidence. However, we are concerned with the correctness of the court’s ruling, not its reasoning. (*People v. Perkins, supra*, 244 Cal.App.4th at p. 139.)

California Supreme Court decided *Romanowski*, which strongly indicates that the appropriate method of valuation for stolen checks is the reasonable and fair market value. Defendant is entitled to an opportunity to present evidence of the checks' fair market value.

### **DISPOSITION**

The trial court's order is vacated and the matter is remanded for a determination of the value of the stolen property.

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GOODMAN, J.\*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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