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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JESSICA BUTTON, Defendant and Appellant.	B280166 (Los Angeles County Super. Ct. No. NA101479)

APPEAL from an order of the Superior Court of Los Angeles County. Richard M. Goul, Judge. Reversed and remanded.

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, Senior Assistant Attorney General, Mary Sanchez and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jessica Button challenges a trial court order denying her petition pursuant to Proposition 47. Button was convicted of three counts of theft of access card account information; she sought to have the convictions reduced to misdemeanors. The People concede reversal is warranted under *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*). We reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On July 22, 2015, Button pled no contest to three counts of theft of access card account information, in violation of Penal Code section 484e, subdivision (d). The trial court sentenced Button to three years of formal probation.[1]

On September 19, 2016, Button filed a petition pursuant to Penal Code section 1170.18 ("Proposition 47") to reduce her felony convictions to misdemeanors. The People opposed the petition, arguing Penal Code section 484e, subdivision (d) convictions were not eligible for reduction under Proposition 47. On December 23, 2016, the trial court denied the motion without prejudice. Button appealed.

DISCUSSION

Under Penal Code section 484e, subdivision (d), acquiring or retaining the access card account information of another without the cardholder's or issuer's consent is grand theft, a felony. However, Proposition 47 added section 490.2 to the Penal Code, which states, "[n]otwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by

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[1] On August 12, 2016, Button admitted violating probation. The trial court reinstated probation with the requirement that Button serve two years in county jail.

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.) Under Penal Code section 1170.18, subdivision (a), a person currently serving a sentence for a felony conviction who would have been guilty of a misdemeanor under Proposition 47 had it been in effect at the time the crime was committed, may petition for a recall of the sentence and resentencing.

When Button filed her petition in 2016, she argued she was eligible for resentencing because the value of the stolen access cards was less than $950. The People argued the crime was simply not eligible for recall under Proposition 47. At the time, the issue was pending before the California Supreme Court. In 2017, the court, in *Romanowski*, held a felony conviction for unlawfully acquiring or retaining access card information may qualify for a reduction to a misdemeanor under Proposition 47 if the value of the information stolen was less than $950. (*Romanowski, supra,* 2 Cal.5th at pp. 910, 916–917.)

As the *Romanowski* court explained, "[c]ourts must use section 484's 'reasonable and fair market value' test when applying section 490.2's value threshold for theft crimes." (*Romanowski, supra,* 2 Cal.5th at p. 914.) However, when stolen access card information lacks a legal market value, "courts may consider evidence concerning the potential for illicit sale of the access card information in order to determine its value." (*Id.* at p. 917.)

The court further held: "The ultimate burden of proving section 1170.18 eligibility lies with the petitioner. (See Evid. Code, § 500.) In some cases, the uncontested information in the

petition and record of conviction may be enough for the petitioner to establish this eligibility. When eligibility is established in this fashion, 'the petitioner's felony sentence shall be recalled and the petitioner sentenced 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).) 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.' [Citation.]" (*Id.* at p. 916.)

The trial court in this case did not reach the factual issue of the valuation of the access card account information. Therefore, we agree with the parties that the order must be reversed and the matter remanded for further proceedings. On remand, the trial court must allow Button to establish her eligibility for relief under Penal Code section 1170.18 by proving the value of the stolen access card account information did not exceed $950.

DISPOSITION

The order is reversed and the matter is remanded to the trial court with directions to conduct further proceedings on the petition consistent with *Romanowski* and this opinion.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.