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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MANUEL HERNANDEZ,

Defendant and Appellant.

B263843

(Los Angeles County
Super. Ct. No. MA064402)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Andrew E. Cooper, Judge. Affirmed as modified.

Mark S. Devore, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and
Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Juan Manuel Hernandez appeals from a judgment imposed after a jury convicted him of possession for sale of methamphetamine and marijuana. He contends the trial court erred by imposing a one-year enhancement for a prior felony conviction that was subsequently reduced to a misdemeanor under Proposition 47. In the alternative, he contends trial counsel was ineffective for failing to file a Proposition 47 petition in the prior case before sentencing in this case. Because Proposition 47 is neither retroactive nor self-executing, we conclude the enhancement is valid. As to defendant's second claim, the record on appeal does not contain sufficient information for us to evaluate counsel's effectiveness. We modify the judgment to strike the duplicate \$40 criminal fine surcharge and the \$145 in penalty assessments imposed on the \$50 crime lab fee and affirm as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2014, deputies from the Los Angeles Sheriff's Department conducted a parole compliance check at defendant's home.¹ A search revealed a digital scale and various drugs divided into separate packages. A defense narcotics expert would later testify that this evidence was more consistent with personal use than with a sales operation.

By information filed October 14, 2014, the People charged defendant with possession of a controlled substance for sale (Health & Saf. Code, § 11378; count 1), possession of marijuana for sale (Health & Saf. Code, § 11359; count 2), and possession of a smoking device, a misdemeanor (former Health & Saf. Code, § 11364.1, subd. (a)(1);² count 3). The information also alleged three strike priors (Pen. Code,³

¹ Because the sole issue on appeal is a matter of law unrelated to the facts of the underlying convictions, a lengthy recitation of those facts is unnecessary.

² Health and Safety Code section 11364.1 was repealed effective January 1, 2015 and reenacted without substantive change in Health and Safety Code section 11364. (Stats. 2014, ch. 331, § 9 [repealed]; Stats. 2011, ch. 738, § 10 [reenacted]; see *People v.*

§ 667, subd. (b)–(i); § 1170.12, subd. (a)–(d)) and four prison priors (§ 667.5, subd. (b)). Defendant pled not guilty and denied the allegations.

After a bifurcated trial, the jury convicted defendant of all counts. Defendant waived jury trial on the prior convictions and later admitted them. The court found the prior convictions true.

The court denied defendant’s motion to strike the priors and sentenced him to eight years in state prison followed by six months in any penal institution. The court selected count 1 (Health & Saf. Code, § 11378) as the base term, and sentenced defendant to four years—the middle term of two years, doubled for the strike prior. The court added one year for each of the four prison priors (§ 667.5, subd. (b)), to run consecutive. The court imposed the middle term of two years for count 2 (Health & Saf. Code, § 11359), to run concurrent, and six months for count 3 (former Health & Saf. Code, § 11364.1, subd. (a)), to run consecutive.

Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant challenges the court’s imposition of one of the four one-year enhancements (§ 667.5, subd. (b)) because it was based on a 2007 felony conviction that was eligible for reduction under Proposition 47. To the extent we reject this argument because defendant did not petition to redesignate the conviction until several months after sentencing, he contends trial counsel was ineffective for failing to file a petition in the 2007 case before the sentencing hearing in this one.

The issue before us is a question of law, which we review de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 893–894.)

Colbert (1988) 198 Cal.App.3d 924, 928–929 [rule of abatement “does not apply when the repealed statute is substantially reenacted”].)

³ Undesignated statutory references are to the Penal Code.

1. Proposition 47 is not self-executing.

On November 4, 2014, California voters approved Proposition 47, the Safe Neighborhoods and Schools Act. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014).) The initiative aims 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” the Act in elementary and high school programs, victims’ services, and mental health and drug treatment. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) Proposition 47 targets these goals in four ways: (1) it amends the Penal Code and Health and Safety Code to reduce certain property crimes and possessory drug offenses from felonies or wobblers⁴ to misdemeanors; (2) it allows people serving felony sentences for newly-reduced offenses to ask the court to resentence them as misdemeanants (§ 1170.18, subds. (a), (b)); (3) it allows people who have finished serving a qualified felony sentence to ask the court to reclassify the conviction as a misdemeanor (§ 1170.18, subds. (f)–(h)); and (4) it creates a Safe Neighborhoods and Schools Fund to be financed with savings generated by the changes to the sentencing laws (Gov. Code, § 7599 et seq.). (Ballot Pamp., *supra*, text of Prop. 47, § 3, p. 70.)

Proposition 47 is not self-executing, however. (*People v. Curry* (2016) 1 Cal.App.5th 1073, 1077–1078.) Instead, it creates a mechanism for the court that originally imposed a felony sentence on an eligible defendant to redesignate that conviction as a misdemeanor. (*Ibid.*; see *People v. Conley* (2016) 63 Cal.4th 646 [Prop. 36 reduction not automatic; defendant must follow statutory procedure].) As relevant to this case, the Act provides that any defendant 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

⁴ As the Legislative Analyst explained, “some crimes . . . can be charged as either a felony or a misdemeanor. These crimes are known as ‘wobblers.’ Courts decide how to charge wobbler crimes based on the details of the crime and the criminal history of the offender.” (Ballot Pamp., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.)

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.” (§ 1170.18, subd. (f) [emphasis added].) If the defendant chooses to file a petition, and if the petition satisfies these criteria, “the court shall designate the felony offense or offenses as a misdemeanor.” (*Id.*, subd. (g).) *At that point*, the conviction “shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [the chapter prohibiting firearm access by certain narcotics offenders].” (*Id.*, subd. (k).) In short, relief is optional. A defendant must take affirmative steps to petition for reduction using the established statutory procedure. (*People v. Curry, supra*, at pp. 1077–1079.)

The information in this case was filed on October 14, 2014. Proposition 47 became effective on November 5, 2014. (See Cal. Const., art. 2, § 10, subd. (a) [statutes enacted by initiative take effect the day after the election unless the measure provides otherwise].) One of the prior-conviction allegations was based on a 2007 felony conviction in case no. MA039126 for violating Health and Safety Code section 11377. That offense was eligible for reclassification under Proposition 47. (§ 1170.18, subd. (a); Health & Saf. Code, § 11377, subd. (a).) In the five and a half months between Proposition 47’s effective date and defendant’s sentencing hearing on April 24, 2015, however, defendant failed to avail himself of this procedure. Instead, he waited nearly seven more months—until November 17, 2015—before finally petitioning the court to reclassify his 2007 conviction. Notably, the notice of appeal in this case was filed on April 27, 2015, almost six months before defendant filed a petition to reduce his 2007 conviction.⁵

⁵ On December 23, 2015, the superior court granted defendant’s section 1170.18 petition in case no. MA049126. On January 13, 2016, we denied defendant’s request to augment the record with the minute order from that hearing. Instead, we took judicial notice of the minute order on our own motion. (Evid. Code, § 452, subd. (d)(1).)

2. Proposition 47 is not retroactive.

Because the Act did not automatically reduce defendant's 2007 felony conviction, the enhancement was valid when it was imposed. "The purpose of the section 667.5(b) enhancement is 'to punish individuals' who have shown that they are 'hardened criminal[s] who [are] undeterred by the fear of prison.'" (In re Preston (2009) 176 Cal.App.4th 1109, 1115.) "Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]" (People v. Tenner (1993) 6 Cal.4th 559, 563.)

When defendant was sentenced in this case, his 2007 conviction remained a felony, notwithstanding its eligibility for reclassification. Proposition 47 does not alter that fact or retroactively invalidate the enhancement. (People v. Jones (2016) 1 Cal.App.5th 221 [prison prior that was valid when imposed is not retroactively reducible under Proposition 47]; see People v. Feyrer (2010) 48 Cal.4th 426, 438–439 [reduction to a misdemeanor "for all purposes" under § 17, subd. (b) does not apply retroactively].)

3. Ineffective Assistance of Counsel

As discussed, section 667.5 only applies to prior felony convictions. (People v. Tenner, supra, 6 Cal.4th at p. 563.) When a felony conviction is reclassified under section 1170.18, it becomes "a misdemeanor for all purposes." (§ 1170.18, subd. (k).) Accordingly, when a defendant's prior felony conviction is reclassified as a misdemeanor before he is sentenced in a new case, the reduction eliminates the potential enhancement. (People v. Abdallah (2016) 246 Cal.App.4th 736.) Because his prior conviction could have been reclassified before he was sentenced in this case, defendant contends his trial attorney provided constitutionally inadequate representation by failing to file a section 1170.18 petition in the prior case on his behalf.

Certainly, every criminal defendant has a constitutional right to effective assistance of counsel. (Cal. Const., art. I, § 15; U.S. Const., 6th Amend.) Under either the federal or state constitution, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*)). To establish ineffective assistance, defendant must satisfy two requirements. (*Id.* at pp. 690–692.) First, he must show his attorney’s conduct was “outside the wide range of professionally competent assistance.” (*Id.* at p. 690.) For example, a defendant may establish that “ ‘his attorney’s deficient representation resulted in the withdrawal of a potentially meritorious defense.’ ” (*People v. Fosselman* (1983) 33 Cal.3d 572, 583–584.) Then, he must demonstrate the deficient performance was prejudicial—i.e., there is a reasonable probability that but for counsel’s failings, the result of the proceeding would have been different. (*Strickland, supra*, at p. 694.) “ ‘The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant.’ ” (*People v. Karis* (1988) 46 Cal.3d 612, 656.) If the defendant’s showing is insufficient as to one requirement, we need not address the other. (*Strickland, supra*, at p. 697.)

On direct appeal, we may reverse a conviction for ineffective assistance of counsel “only if the record on appeal demonstrates there could be no rational tactical purpose for counsel’s omissions.” (*People v. Lucas* (1995) 12 Cal.4th 415, 442; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 [“ ‘If the record sheds no light on why counsel acted or failed to act in the manner challenged, “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” [citation], the contention must be rejected.’ ”].) “ ‘In the usual case, where counsel’s trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel’s acts or omissions.’ [Citation.] For this reason, claims of ineffective assistance of counsel ‘are ordinarily best raised and

reviewed on habeas corpus.’ [Citation.]” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.)

The record in this case does not contain sufficient information for us to determine whether counsel’s performance was deficient. Trial counsel was not defendant’s attorney in the 2007 case, and there is no evidence he was subsequently appointed to represent him in that matter. The record does not reveal whether counsel coordinated with defendant’s prior attorney, or whether he advised defendant to file a petition in propria persona. (See Couzens & Bigelow, “Proposition 47: The Safe Neighborhoods and Schools Act” (May 2016) pp. 72–73, at <<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>> [as of Aug. 10, 2016] [no right to appointed counsel to prepare the initial petition].) Though he was counsel of record in this case, he had no apparent basis to ask the court in this case to reclassify the prior conviction. A Proposition 47 petition must typically be reviewed by the original sentencing judge, or if that judge is unavailable, by a judge designated by the presiding judge of the court. (§ 1170.18, subd. (f), (l); see *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1300–1301 [waiver of original sentencing judge in Prop. 36 case].) While the record does not reveal the identity of the sentencing judge from 2007, it certainly was not the judge in this case.⁶

In short, because the “record sheds no light on why counsel . . . failed to act in the manner challenged,” (*People v. Mitcham, supra*, 1 Cal.4th at p. 1058) and because “defendant fails to show that there could be no conceivable reason for” the omission (*People v. Nguyen, supra*, 61 Cal.4th at p. 1052), we must reject his claim on direct appeal.

⁶ Defendant was sentenced in the prior case in 2007. Judge Cooper, who presided over defendant’s trial and sentencing in this case, did not assume the bench until 2015. (L.A. County Registrar-Recorder/Clerk, “Superior Court Primary Election Results” (June 4, 2014).)

4. The crime lab fee is not subject to penalty assessments.

In reviewing the sentencing proceedings, we noticed several erroneous assessments. We modify the judgment to correct them. (See *People v. Hamed* (2013) 221 Cal.App.4th 928, 940 [assessment error correctable on appeal without remand for court to pronounce correct judgment].)

The court properly imposed two mandatory fees—a \$50 crime lab fee (Health & Saf. Code, § 11372.5) and a \$150 drug program fee (Health & Saf. Code, § 11372.7). The court also concluded both fines were subject to seven additional assessments, penalties, and a surcharge—collectively called penalty assessments. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [“In Los Angeles County, trial courts frequently orally impose [these] penalties and surcharge . . . by a shorthand reference to ‘penalty assessments.’”].) While the court properly imposed penalty assessments on the \$150 drug program fee, we conclude penalty assessments do not apply to the \$50 crime lab fee. (*People v. Watts* (Aug. 8, 2016, A145322) 1 Cal.App.5th __ [2016 WL 4183936]; *People v. Vega* (2005) 130 Cal.App.4th 183, 193.) We therefore modify the judgment to strike the \$145 in assessments imposed on the crime lab fee and reduce the total penalty assessments from \$580 to \$435.

We also note that both the sentencing minute order and the abstract of judgment erroneously list the state criminal surcharge twice. (§ 1465.7.) The minute order reflects penalty assessments of \$580, which is 290 percent of the base fine calculated by the court. Since total penalty assessments in Los Angeles County are 290 percent of the base fine, this calculation was correct. The multiplier includes the 20 percent state surcharge (§ 1465.7), however, which indicates that the clerk listed the surcharge twice—once as part of the \$580 in penalty assessments and once as its own line item. It is also possible that the clerk imposed a 70 percent county assessment (Gov. Code, § 76000, subd. (a)) rather than the net assessment of 50 percent required in Los Angeles County. (See Gov. Code, § 76000, subd. (e) [listing net amount to be charged in each county]; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1252–1254.) However it occurred, the simplest way to fix the error is to delete the \$40 criminal fine surcharge

line-item from both the minute order and the abstract of judgment. We therefore direct the clerk of the court to correct the error in both documents.

DISPOSITION

The judgment is modified to reduce the penalty assessments from \$580 to \$435 and to strike the duplicate \$40 criminal fine surcharge from both the sentencing minute order and section 13 of the abstract of judgment. As modified, the judgment is affirmed.

The clerk of the trial court is directed to prepare a corrected minute order and abstract of judgment and to send a copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

STRATTON, J.*

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