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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO MEDINA,

Defendant and Appellant.

2d Crim. No. B275615
(Super. Ct. No. 2015031125)
(Ventura County)

Here the trial court determined that a felony conviction for violating Vehicle Code section 10851,¹ unlawful driving or taking of a vehicle, categorically did not qualify for treatment under Proposition 47, making theft offenses misdemeanors. Thereafter, our Supreme Court decided *People v. Page* (2017) 3 Cal.5th 1175. *Page* determined that a violation of section 10851 qualifies under Proposition 47 if the defendant can prove the violation

¹ All references to section 10851 are to the Vehicle Code. References to any other section are to the Penal Code unless stated otherwise.

constituted theft and the value of the vehicle was \$950 or less. We reverse and remand to give the defendant an opportunity to so plead and prove.

FACTS

On January 25, 2016, Fernando Medina pled guilty to a felony violation of section 10851, subdivision (a), taking or driving a vehicle not his own without the consent of the owner. At sentencing, Medina requested that the offense be determined to be a misdemeanor pursuant to Proposition 47. He offered to prove the value of the vehicle was less than \$950. The trial court denied the motion. The court determined that even if the value of the vehicle were less than \$950, section 10851 is not an offense within the scope of Proposition 47.

DISCUSSION

Proposition 47 was enacted as an initiative on November 5, 2014. It reduced certain drug and theft offenses to misdemeanors and allowed prior felony convictions for those offenses to be redesignated misdemeanors for qualifying defendants. (§ 1170.18.)

Section 1170.18, subdivision (a) lists the qualifying offenses as sections 459.5, 473, 476a, 490.2, 496 and 666 and Health and Safety Code sections 11350, 11357 and 11377. Section 10851 is not among them.

Section 10851, subdivision (a) provides in part: “Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense” The offense may be a felony or a misdemeanor.

Medina relies on the portion of Proposition 47 codified as section 490.2. Section 490.2, subdivision (a) provides in part: “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” Section 487 is the general statute defining grand theft. It provides the taking of an automobile is grand theft. (*Id.*, subd. (d)(1).)

Our Supreme Court in *People v. Page*, *supra*, 3 Cal.5th at page 1183, recognized that a violation of section 10851 may constitute theft if the defendant unlawfully obtained a vehicle with the intent to permanently deprive the owner of possession of the vehicle. A violation of section 10851 does not constitute theft if the defendant has no such intent. (*Page*, at p. 1183.) “As a result . . . an offender who obtains a car valued at [\$950 or less] *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.” (*Ibid.*)

The court went on to state: “A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility. . . . To establish eligibility for resentencing on a theory that a Vehicle Code section 10851 conviction was based on theft, a defendant must show not only that the vehicle he or she was convicted of taking or driving was worth \$ 950 or less (§ 490.2, subd. (a)), but also that the conviction was based on theft of the vehicle rather than on posttheft driving . . . or on a taking without the intent to permanently deprive the owner of

possession” (*People v. Page, supra*, 3 Cal.5th at p. 1188, citations omitted.)

We reverse and remand to allow Medina the opportunity to amend his Proposition 47 petition and to prove the elements required for relief.

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GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Bruce A. Young, Judge
Superior Court County of Ventura

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Appeal, for Defendant and Appellant.

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