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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. JEFFERY L. JOHNSON, Defendant and Appellant.	B269480 (Los Angeles County Super. Ct. No. A966666)

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

David R. Greifinger, 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 William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jeffery L. Johnson appeals the trial court's denial of his application to designate his felony conviction a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act. Because the record appears to be incomplete, contains contradictory information, and does not reflect whether the trial court properly found Johnson ineligible, we reverse the order and remand for a determination of whether Johnson has a disqualifying conviction.

BACKGROUND AND PROCEDURAL HISTORY

On November 3, 2015, appellant Johnson, acting in propria persona, filed an application for redesignation under Proposition 47, Penal Code section 1170.18.[1] The application stated that on October 11, 1988,[2] Johnson was convicted of a felony violation of Health and Safety Code section 11350, subdivision (a) (possession of a controlled substance); he completed his sentence for the offense; and he does not have prior disqualifying convictions, that is, offenses listed in section 667, subdivision (e)(2)(C)(iv) or which require registration as a sex offender pursuant to section 290, subdivision (c).

The trial court conducted a hearing on December 18, 2015, at which it denied the application without prejudice. Johnson was not present. The trial court's minute order states: "The Prosecutor reviews the Application for reduction pursuant to

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1 All further undesignated statutory references are to the Penal Code.

2 Johnson's opening brief states the conviction date was October 11, 1998. While portions of the photocopy of the petition in the record are barely legible, the correct date appears to be October 11, 1988.

Proposition 47. Prosecutor objects to the granting of reduction to misdemeanor. Determination of the criminal history record of the Applicant cannot be determined." The reporter's transcript of the hearing states: "Prop. 47 motion is denied based on the complaint, P & S and based on the criminal history of the defendant."

Johnson timely appealed the trial court's order. (See *Teal v. Superior Court* (2014) 60 Cal.4th 595.) Appellate counsel thereafter sought to augment the record with the abstract of judgment, the information, the memorandum of points and authorities, and all documents evidencing Johnson's criminal history considered by the trial court. The clerk of the superior court thereafter certified that the requested documents were not contained within the superior court's file or archives.

DISCUSSION

1. *Proposition 47*

On November 4, 2014 the voters enacted Proposition 47, which went into effect the following day. (*People v. Morales* (2016) 63 Cal.4th 399, 404; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47 reclassified certain drug and theft offenses from felonies or wobblers to misdemeanors, unless committed by ineligible defendants. (*People v. Lewis* (2016) 4 Cal.App.5th 1085, 1090; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091; *People v. Lynall, supra,* at p. 1108.) As pertinent here, Proposition 47 reduced possession of a controlled substance in violation of Health and Safety Code section 11350 to a misdemeanor, unless the defendant is required to register as a sex offender pursuant to section 290, subdivision (c) or has one or more prior convictions for an offense enumerated in section 667, subdivision (e)(2)(C)(iv), sometimes known as

"super strikes." (See *People v. Lynall, supra,* at pp. 1108-1109; Health & Saf. Code, § 11350, subd. (a).)

Proposition 47 also enacted section 1170.18, which created a procedure whereby an eligible defendant who has suffered a felony conviction of one of the reclassified crimes can petition to have it designated a misdemeanor. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879; *People v. Lynall, supra,* 233 Cal.App.4th at p. 1109.) Section 1170.18 lists Health and Safety Code section 11350 as an offense eligible for resentencing. (§ 1170.18, subd. (a).)

Section 1170.18 provides two separate procedures for redesignating an offense as a misdemeanor. A defendant who is *currently serving* a felony sentence for an offense now classified as a misdemeanor by Proposition 47 may petition to recall the sentence and request resentencing. (§ 1170.18, subd. (a); *People v. Rivera, supra,* 233 Cal.App.4th at pp. 1092, 1099.) If the petitioner meets the statutory eligibility criteria, he or she is entitled to resentencing unless the trial court determines, in its discretion, that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

Eligible persons who have *already completed* their sentences may file an application to have their felony convictions designated as misdemeanors. (§ 1170.18, subds. (f), (g); *People v. Lewis, supra,* 4 Cal.App.5th at p. 1089; *People v. Abdallah* (2016) 246 Cal.App.4th 736, 744; *People v. Rivera, supra,* 233 Cal.App.4th at p. 1099.) No hearing is required unless requested by the applicant, and if the application satisfies the criteria in section 1170.18, subdivision (f), the court "shall" designate the felony offense as a misdemeanor; the trial court does not have discretion to deny the application based on current

dangerousness. (*People v. Lewis*, at p. 1092; § 1170.18, subds. (g), (h); *People v. Marks* (2015) 243 Cal.App.4th 331, 334.)[3]

It is settled that a petitioner seeking reduction of a conviction under section 1170.18 bears the burden of establishing initial eligibility, that is, that his or her crime would have been a misdemeanor had Proposition 47 been in effect when it was committed. (*People v. Romanowski* (2017) 2 Cal.5th 903, 916; *People v. Johnson* (2016) 1 Cal.App.5th 953, 961-962; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137; *People v. Pak* (2016) 3 Cal.App.5th 1111, 1114, 1117; *People v. Sherow, supra,* 239 Cal.App.4th at pp. 879-880; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450.) For example, with respect to a theft-related offense, the petitioner/applicant must show the value of the relevant property was $950 or less. (*People v. Sweeney* (2016) 4 Cal.App.5th 295, 302; *People v. Hall* (2016) 247 Cal.App.4th 1255, 1263.)

The People, on the other hand, have the burden to prove the existence of a disqualifying factor, including a disqualifying prior conviction, beyond a reasonable doubt. (See *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095; Couzens & Bigelow, *Proposition 47:* "*The Safe Neighborhoods and Schools Act*" (May

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[3] Section 1170.18, subdivisions (f) and (g) provide: "(f) 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. [¶] (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

2017) § VI.B., p. 53 <http://www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of June 23, 2017]; cf. *People v. Arevalo* (2016) 244 Cal.App.4th 836, 852-853 [Proposition 36].) As Couzens and Bigelow explain: "Assuming the petitioner has been convicted of a qualified crime, the burden will be on the prosecution to establish that the petitioner has a prior conviction of a disqualifying 'super strike,' or is required to register as a sex offender under section 290(c). Although there is no express pleading and proof requirement regarding the disqualifying factors, as a practical matter the prosecution will have access to the necessary court records to establish the exclusion. Additionally, there is a general principle that if a party seeks the benefit of an exclusion, the burden of proving the exclusion is on the party seeking it. [Citation.] It is unlikely that the language in section 1170.18(b), that the 'court shall determine whether the petitioner satisfies the criteria in subdivision (a),' is meant to place the burden on the petitioner to show that he is *not* excluded because of a prior conviction or sex registration." (Couzens & Bigelow, *supra,* at p. 53.)

Finally, where a dangerousness determination is necessary, the People have the burden to establish, by a preponderance of the evidence, that resentencing would pose an unreasonable risk of danger to public safety. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301; *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076.)

We review the trial court's factual findings for substantial evidence and independently review its construction of Proposition 47. (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 743.)

2. *Application here*

In his opening brief, Johnson asserts that the trial court's order must be reversed because "the prosecution failed to meet its initial burden of presenting evidence that he posed an unreasonable risk of danger to public safety or that he had committed a 'superstrike' offense." He asserts that the "record is silent" as to whether he has completed his sentence. If the sentence is still being served, he argues, the People failed to present evidence of his dangerousness; if the sentence has been completed, they failed to establish he has a prior conviction for a disqualifying offense.

There is no dispute that violation of Health and Safety Code section 11350 is an offense eligible for designation as a misdemeanor pursuant to section 1170.18, subdivision (f). Johnson's application averred that he had already completed his sentence. It appears to be a safe bet that he is correct. According to him, he was convicted in October 1988, over 25 years before the petition was filed, and possession of a controlled substance is not a life offense.[4] Therefore, assuming the accuracy of the representations in Johnson's application, he is entitled to have his conviction reduced to a misdemeanor unless he has suffered a disqualifying prior conviction. (See *People v. Goodrich* (2017) 7 Cal.App.5th 699, 709 ["Section 1170.18 does not apply to persons with one or more prior convictions for 'super strike' offenses or an offense requiring sex offender registration pursuant to section 290, subdivision (c)"].) Again assuming the

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[4] If there is any genuine question about whether the sentence has been served or the date of the conviction, the parties and the trial court are directed to address it on remand.

accuracy of the information in the application, to establish ineligibility, the People were required to show Johnson has a disqualifying prior conviction. (*People v. Sledge, supra,* 7 Cal.App.5th at p. 1095.)

We cannot discern from the record before us what, if any, records or evidence the trial court reviewed and whether the People successfully established Johnson has a disqualifying prior conviction. Johnson argues that the record shows the People failed to meet their burden, because the court's minute order states "[d]etermination of the criminal history record of the Applicant cannot be determined." Moreover, he posits that the fact the superior court clerk was unable to locate any additional records related to the application suggests the trial court did not review any records regarding his criminal history. The People contend that the record is unclear as to whether the prosecutor submitted any documentation of Johnson's prior criminal history.[5] They argue that the matter must therefore be remanded for determination of the eligibility question.

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[5] The People aver Johnson "has a prior conviction in 2012 for seven counts of second degree robbery (§ 211) and two counts of being a felon in possession of a firearm (§ 12021, subd. (a)(1)), in case number B245460, for which he is currently serving 315 years to life in state prison." They request that we take judicial notice of Division Seven's unpublished opinion in Johnson's purported appeal in that case, as well as the record in the case. We decline to do so. Assuming arguendo that the defendant in case No. B245460 is Johnson, the opinion in case No. B245460 does not indicate he suffered a disqualifying offense in that matter, and therefore is irrelevant to the issues before us. While the nature of Johnson's unrelated offenses would be relevant if the trial court were conducting a dangerousness inquiry, it has no bearing on the question of whether he has suffered a

We agree that remand is the appropriate course of action. The trial court's oral statement and written minute order are contradictory. Some authorities hold that when the record of the court's oral pronouncement conflicts with the clerk's minute order, the oral pronouncement controls. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Price* (2004) 120 Cal.App.4th 224, 242 ["Any discrepancy between the minutes and the oral pronouncement of a sentence is presumed to be the result of clerical error. Thus, the oral pronouncement of sentence prevails in cases where it deviates from that recorded in the minutes"].) Others hold that " 'whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case.' [Citations.]" (*People v. Smith* (1983) 33 Cal.3d 596, 599; *People v. Lawrence* (2009) 46 Cal.4th 186, 194, fn. 4 [it is the " 'general rule' " that " 'a record that is in conflict will be harmonized if possible. [Citation.] If it cannot be harmonized, whether one portion of the record should prevail as against contrary statements in another portion of the record will depend on the circumstances of each particular case' "]; *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346 [the portion of the record that "should be given greater credence in the circumstances of the case" prevails]; *People v. Cleveland* (2004) 32 Cal.4th 704, 768; *People v. Malabag* (1997) 51 Cal.App.4th 1419, 1422-1423 ["When a clerk's transcript conflicts with a reporter's transcript,

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disqualifying offense requiring denial of his application. (See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4 [request for judicial notice denied where materials were irrelevant].)

the question of which of the two controls is determined by consideration of the circumstances of each case"].)

Examination of the circumstances does not resolve the conflict here, however. The trial court's oral statement that its denial was based on Johnson's "criminal history" suggests it had information regarding that history before it. Its minute order suggests otherwise. Further, it is not clear whether the People's objection, noted in the minute order, was based on the absence of an adequate criminal history or on some other reason. Consequently, we cannot determine what, if any, evidence regarding Johnson's criminal history was before the court. We cannot ascertain whether the court confirmed the accuracy of the statements in Johnson's petition. (Cf. *People v. Johnson, supra,* 1 Cal.App.5th at pp. 964-965 [defendant presenting a Proposition 36 resentencing petition must establish eligibility by "at a minimum" establishing "the requisite conviction and sentence"].) Based on the record, it is possible the court examined court records and determined Johnson has a prior conviction for a disqualifying offense. Or, the court may have erroneously denied the petition because the People failed to present any evidence of Johnson's criminal history. Given the foregoing, we do not view as dispositive the fact that the superior court clerk was unable to augment the record.

Given the muddled state of the record, we cannot, as Johnson requests, simply order the trial court to grant the application. Instead the People are correct that the appropriate resolution is to remand the matter to allow the trial court to determine whether Johnson has a conviction for violation of Health and Safety Code section 11350, whether he has served his sentence for that offense, and whether he has suffered a

disqualifying "super strike" offense or an offense requiring registration as a sex offender under section 290, subdivision (c).

On remand, if the evidence presented by the parties raises a factual dispute about whether Johnson has suffered a disqualifying conviction, the trial court, of course, can conduct a hearing or take other steps necessary to resolve the question. (See *People v. Romanowski, supra,* 2 Cal.5th at p. 916.)

DISPOSITION

The order denying Johnson's application is reversed. The matter is remanded for further proceedings consistent with the opinions expressed herein.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.