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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. TRAVIS GRANT TIPPETS, Defendant and Appellant.	B275631 (Los Angeles County Super. Ct. No. PA073330)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Affirmed with prejudice.

Emily L. Brough, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Travis Grant Tippets appeals from an order denying his Proposition 47 petition for a recall of sentence and resentencing. His petition alleged that the offense for which he was convicted – second degree burglary – would now be classified as misdemeanor shoplifting and should be resentenced as such. The trial court found he was ineligible for relief under Proposition 47 because the court file, including the probation report, showed he entered a residence, not a commercial establishment, and thus his offense could not be deemed "shoplifting." Appellant contends this finding was in error.[1] In particular, he argues the fact that he was convicted of second degree burglary rather than first degree burglary precluded the court from finding that he burglarized a residence.[2] We reject his contentions and affirm with prejudice the order denying the petition.

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[1] On November 22, 2016, appellant's appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. On December 15, 2016, we granted appellant's motion to withdraw that brief and file a substituted opening brief.

[2] First degree and second degree burglary are defined in Penal Code section 460, which provides in relevant part: "(a) Every burglary of an inhabited dwelling house, vessel . . . which is inhabited and designed for habitation, floating home . . . or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree. [¶] (b) All other kinds of burglary are of the second degree."

FACTUAL AND PROCEDURAL SUMMARY

A felony complaint was filed alleging that on or about April 17, 2012, appellant committed the crime of "FIRST DEGREE BURGLARY, PERSON PRESENT" in violation of Penal Code sections 459 and 667.5, subdivision (c).[3] The complaint alleged that appellant "did enter an inhabited dwelling house and trailer coach and inhabited portion of a building occupied by MARGARET BARNES, with the intent to commit larceny and any felony." The complaint also alleged appellant suffered four strikes (§ 667, subd. (d)) and had served a prior prison term (§ 667.5, subd. (b)).

The superior court file[4] contains a Los Angeles Police Department arraignment information sheet reflecting that the "charges filed" were "459 PC," and the type of case was "Susp entered residence while occupied by the victims." The court file also contains a preconviction probation report (and a postconviction report with identical language) that reflects the following concerning the underlying offense: "The victim was in her residence when she heard the south door [rattle] as if someone was trying to open the door. She walked to the north front door and discovered the door which had been closed was open. The defendant was standing inside her residence and stated 'It's okay, just chill out, everything is ok.' The victim told him to 'Get out of my house! You can't be in here. Get out of the

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[3] Subsequent section references are to the Penal Code.

[4] We take judicial notice of the records of the superior court in the court file of the case (Super. Ct. case No. PA073330) underlying appellant's second degree burglary conviction. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

house!' The defendant walked out and sat under a tree in her front lawn. Officers arrived and the defendant was arrested."

On August 21, 2012, appellant waived his right to a preliminary hearing. On the People's motion, the court orally amended the complaint to add a count for second degree burglary. Appellant, represented by counsel and pursuant to negotiations, entered a no contest plea to second degree burglary and admitted he suffered a prior prison term. The facts of the underlying offense were not discussed during the taking of the plea. Pursuant to the negotiations, the court dismissed the first degree burglary count. The court sentenced appellant to four years in prison, suspended execution thereof, and ordered him placed on formal probation for five years. (§§ 459, 667.5, subd. (b), former § 1170.18, subd. (a).)

In February 2015, appellant filed his petition for a recall of sentence pursuant to former section 1170.18, subdivision (a) (petition), but it was not then adjudicated and was refiled in June 2016.[5] The petition alleged that on August 21, 2012, appellant was convicted of "459 PC second degree" and "[t]he amount in question is not more than $950." The petition did not set forth

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[5] Former section 1170.18, subdivision (a), applicable at the time of the February 26, 2015 and June 1, 2016 filings of appellant's petition, stated, "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with . . . Section 459.5, . . . of the Penal Code, as [that] section[] [has] been amended or added by this act."

the facts underlying the offense or the monetary amount or value involved.

In opposition, the People argued that appellant did not qualify for resentencing. They noted that appellant was required to demonstrate that his burglary involved entry into a commercial establishment that was open during business hours but, in the underlying case, appellant entered an occupied residence. The People asserted that "[h]e was charged with first degree residential burglary but was offered a second degree burglary felony in exchange for his plea and sentence."

On May 3, 2016, the court called the case for a probation violation hearing. Appellant's counsel told the court that appellant was convicted of second degree burglary, not first degree burglary, "[h]owever, it does basically involve a situation that doesn't pertain to a retail business, so it's not under the purview of [Proposition] 47." The court commented, "So it wouldn't fall under the shoplifting category. I agree with you there."

On June 1, 2016, the court denied the petition. Stating that it had "[reviewed] . . . the court record, including the pre-conviction probation report," the court found that appellant was ineligible for the relief requested because "[t]he court file shows that the petitioner *broke into a private residence*, and was originally charged with first-degree residential burglary with a person present." (Italics added.) Thus, his offense could not be reclassified as misdemeanor shoplifting.

DISCUSSION

I. Proposition 47 Resentencing for Offenses that Now Constitute Misdemeanor Shoplifting.

"In 2014, the electorate passed initiative measure Proposition 47, known as the Safe Neighborhoods and Schools Act (the Act), reducing penalties for certain theft and drug offenses by amending existing statutes. [Citation.] The Act also added several new provisions, including Penal Code section 459.5, which created the crime of shoplifting. Subdivision (a) of section 459.5 provides: 'Notwithstanding Section 459,[6] shoplifting is defined as entering a commercial establishment[7] with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial

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6 At the time of appellant's 2012 offense, section 459 stated, in relevant part, "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, . . . floating home, . . . railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, . . . any house car, . . . inhabited camper, . . . vehicle as defined by the Vehicle Code, when the doors are locked, aircraft . . . , or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, 'inhabited' means currently being used for dwelling purposes, whether occupied or not."

7 A "commercial establishment" within the meaning of section 459.5, subdivision (a), "is one that is primarily engaged in commerce, that is, the buying and selling of goods or services." (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114.)

establishment with intent to commit larceny is burglary.' Shoplifting is punishable as a misdemeanor unless the defendant has previously been convicted of a specified offense. (§ 459.5, subd. (a).)" (*People v. Gonzales* (2017) 2 Cal.5th 858, 863 (*Gonzales*), fn. omitted.)

"Section 1170.18 now permits a defendant serving a sentence for one of the enumerated theft or drug offenses to petition for resentencing under the new, more lenient, provisions. If the offense committed by an eligible defendant would have been a misdemeanor under the Act, resentencing is required 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).) A person who has already completed a felony sentence may petition to have his conviction designated a misdemeanor. (§ 1170.18, subds. (f), (g).)" (*Gonzales*, *supra*, 2 Cal.5th at p. 863, fns. omitted.)

The burden of proving eligibility under Proposition 47 lies with the petitioner. (*People v. Romanowski* (2017) 2 Cal.5th 903, 916 (*Romanowski*); *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*).) As appellant concedes, an eligibility determination on a Proposition 47 petition may be based on probative evidence outside the record of conviction. (*Romanowski*, at p. 916 ["eligibility for resentencing may turn on facts . . . not established by . . . the record of conviction"]; *People v. Huerta* (2016) 3 Cal.App.5th 539, 544, fn. 3 [court properly considered police report outside record of conviction]; *People v. Johnson* (2016) 1 Cal.App.5th 953, 967; *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744 [police report]; *People v. Perkins* (2016) 244 Cal.App.4th 129, 140, fn. 5 (*Perkins*).)

Indeed, a Proposition 47 eligibility hearing "is a type of sentencing proceeding. . . . Accordingly, limited use of hearsay such as that found in probation reports is permitted, provided there is a substantial basis for believing the hearsay information is reliable. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754 (*Arbuckle*); *People v. Lamb* (1999) 76 Cal.App.4th 664, 683 (*Lamb*); see also § 1170, subd. (b) [sentencing court can consider probation report].)" (*People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095 (*Sledge*).) Thus, hearsay statements in a probation report can provide a sufficient basis for factual findings regarding an offense for which the defendant seeks resentencing under Proposition 47. (See *id.* at p. 1096.)

We review the trial court's legal conclusions de novo and its factual findings for substantial evidence. (*Perkins, supra,* 244 Cal.App.4th at pp. 135-137.)

II. Appellant Failed to Prove He Is Eligible For Resentencing.

Appellant acknowledges that he did not set forth sufficient facts in the trial court supporting his eligibility for recall of his sentence under Proposition 47. It was his burden to show that in committing the offense for which he was sentenced, he committed "shoplifting . . . defined as entering a *commercial establishment* with intent to commit larceny while that establishment is *open* during *regular business hours*, where the value of the property that is taken or intended to be taken does not exceed *nine hundred fifty dollars* ($950)." (§ 459.5, subd. (a), italics added.) Appellant suggests that "the record of conviction is simply devoid of . . . facts — either weighing in favor or against a finding of 'shoplifting' pursuant to Prop. 47," and thus this court should affirm the denial of appellant's petition without prejudice to

consideration of another petition pursuant to Proposition 47 supplying such evidence. Although we agree that appellant has not met his burden to show eligibility for relief under Proposition 47, we do not agree with appellant's requested disposition.

The trial court effectively took judicial notice of the records in the court file, as the court was entitled to do. (*Sledge, supra,* 7 Cal.App.5th at p. 1096.) The preconviction probation report in the court file contained sufficiently reliable statements that the victim told police that appellant entered her residence. (See *ibid.* [hearsay statements in probation report alone were sufficient basis for court's factual findings on Proposition 47 petition].) Thus, the court file contains affirmative proof, upon which the trial court reasonably relied, that the structure appellant entered in committing his offense was not a "commercial establishment" within the meaning of section 459.5, subdivision (a).

Moreover, the transcript of the probation violation hearing reflects the concession of appellant's attorney that appellant's burglary did not pertain to a "retail business" and the matter was "not under the purview of [Proposition] 47." The court commented, "So it wouldn't fall under the shoplifting category. I agree with you there." Appellant's counsel did not dispute the court's understanding that he was conceding appellant was ineligible. The statements by appellant's counsel constituted a judicial admission to the effect appellant did not enter a commercial establishment and appellant was ineligible for Proposition 47 relief. (See *People v. Jackson* (2005) 129 Cal.App.4th 129, 161 [counsel's oral statements can be treated as judicial admissions if intended, or reasonably construed by the court or other party, as such].)

We conclude that substantial evidence supports the trial court's factual finding that appellant's offense did not involve entering a commercial establishment, and thus he is ineligible for resentencing for his 2012 offense. Further, given the evidence affirmatively disproving his eligibility, this is not an appropriate case in which to afford the petitioner another opportunity to present evidence that he qualifies for relief under Proposition 47. (Cf. *Sherow*, *supra*, 239 Cal.App.4th at pp. 880-881 [affirming order denying petition for resentencing burglary as misdemeanor shoplifting "without prejudice to subsequent consideration of a properly filed petition" where nothing in the court record demonstrated value of the items defendant stole].)

III. *People v. Maestas* Does Not Aid Appellant.

Appellant relies on *People v. Maestas* (2006) 143 Cal.App.4th 247 (*Maestas*), to argue that his second degree burglary conviction established as a matter of law that the structure he entered was *not* a residence; therefore, he contends, the trial court's finding that he broke into a private residence contradicted the record of conviction. We reject the argument.

Maestas was not a Proposition 47 case but rather involved "Three Strikes" sentencing. (*Maestas*, *supra*, 143 Cal.App.4th at p. 249.) The trial court in that case sentenced the defendant to prison after determining that the defendant's two prior convictions for second degree burglary involved burglaries of *residences* and therefore qualified as "serious felonies" (*id.* at p. 250) as defined by section 1192.7, subdivision (c)(18), as " 'burglar[ies] of the first degree.' " (*Maestas*, at p. 250.) In making this determination, the trial court looked beyond the fact of the convictions to the preliminary hearing transcript. (*Ibid.*) The appellate court found the trial court should not have done so,

and found that, without looking beyond the judgments of conviction, there was insufficient evidence that the underlying offenses constituted first degree burglary. (*Id.* at pp. 250, 254.)

The court noted that "section 460 defined first degree burglary as 'every' residential burglary and second degree burglary as 'all other kinds of burglary.' . . . Because 'every' residential burglary is first degree burglary and any 'other' burglary is second degree burglary, the essential difference between the two crimes lies in whether the burgled structure is a residence." (*Maestas*, *supra,* 143 Cal.App.4th at p. 252, fn. omitted.) The court further explained that the "defendant was charged with first degree burglary, but those counts were dismissed. Instead, he pled guilty to second degree burglary. The plea agreement meant that defendant did not admit that he burgled a residence, and the People abandoned their effort to prove it was a residence. *In effect, the plea agreement established that the structure was not a residence. The trial court's finding that defendant committed prior first degree burglaries contradicted his convictions of second degree burglary*." (*Id.* at p. 253, italics added.)

The *Maestas* court distinguished *People v. Gomez* (1994) 24 Cal.App.4th 22 (*Gomez*), which *rejected* a similar argument made by the defendant that it was "legally impossible" for his second degree burglary conviction to later be deemed a "residential" burglary. (*Id.* at p. 30.) *Gomez* found it proper for the trial court, for purposes of imposing a five-year sentence enhancement pursuant to section 667, subdivision (a) for prior serious felony convictions, to go beyond the fact of the convictions for attempted second degree burglary and find the attempted

burglaries were of a residence. (*Gomez*, at p. 30; see *People v. Guerrero* (1988) 44 Cal.3d 343, 355.)

The *Maestas* court found that the different outcome in *Gomez* was explained by the fact that an earlier version of § 1192.7, subd. (c)(18), the provision defining serious felonies, was at issue in *Gomez*. That prior version of section 1192.7 defined " 'burglary of an inhabited dwelling' " as a serious felony, and did not specify the degree of the burglary conviction. (*Gomez*, *supra*, 24 Cal.App.4th at p. 31, citing former 1192.7, subdivision (c)(18) (Stats. 1989, ch. 1044, § 2.5).) *Gomez* found it was "clear the focus of the People in adopting the section was the conduct of the defendant, not the specific criminal conviction." (*Gomez*, at p. 31.) However, *Maestas* pointed out that section 1192.7 was amended in 2000 by Proposition 21 so thereafter only a " 'burglary of the first degree' " (*Maestas*, *supra,* 143 Cal.App.4th at p. 252) as opposed to a " 'burglary of an inhabited structure' " (*id*. at p. 253*)* qualified as a serious felony. (*Ibid*.) By voting to so amend the statute, *Maestas* held that the "voters determined that a second degree burglary conviction is insufficient, as a matter of law, to support a serious felony finding." (*Ibid*.)

The logic and holding of *Maestas* do not apply when considering a Proposition 47 petition for resentencing.[8] With

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[8] Because we find *Maestas* to be inapplicable here, we need not decide whether we agree with its holding. We note that the *Maestas* court's characterization of the offenses of first degree burglary and second degree burglary as mutually exclusive is arguably contradicted by our Supreme Court's more recent decision in *People v. Anderson* (2009) 47 Cal.4th 92 (*Anderson*), stating: "[T]he substantive crime of burglary is defined by its elements as: (1) entry into a structure, (2) with the intent to commit theft or any felony. (§ 459; see also CALCRIM No. 1700.)

respect to the serious felony classification at issue in *Maestas*, the focus was on the *crime* itself, not the *conduct* of burglary. (*Maestas, supra*, 143 Cal.App.4th at p. 253.) By contrast, under Proposition 47, the particular classification or degree of the crime at the time of the original sentencing is not paramount. Rather, the focus in considering a petition for resentencing is whether "the offense committed by an eligible defendant would have been a misdemeanor" under the new, more lenient provisions. (*Gonzales, supra*, 2 Cal.5th at p. 863, fn. omitted.) That is why courts may look even outside the record of conviction in order to determine whether a defendant is eligible for resentencing.

Here, evidence in the court file demonstrated that appellant entered a residence in committing his burglary offense. It would be nonsensical to require the trial court to ignore these facts simply because appellant had entered a no contest plea to second degree burglary in lieu of being tried for first degree

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If these elements are proven, the crime of second degree burglary has been committed. (§§ 459, 460, subd. (b).) However, if, *in addition* to these elements, there is also proof that the structure was inhabited at the time of the entry, the crime is elevated from second degree to first degree burglary. (§ 460, subd. (a); see also CALCRIM No. 1701.) First degree burglary is a greater substantive offense than second degree burglary because it requires proof of all the elements of second degree burglary *and* the additional element that the area entered was used as a dwelling." (*Id.* at p. 101, first italics added, fns. omitted.) This description of the burglary offenses does not seem to square with the holding in *Maestas* that an element of second degree burglary is that the structure is *not* a residence. Rather, *Anderson* provides that second degree burglary is a foundational crime to which may be added an element which transmutes the crime into first degree burglary.

burglary.[9] Rather, we hold it was appropriate for the trial court to examine the court record, and any other probative and reliable evidence that was put forward by the parties, to determine whether appellant's offense should be reclassified as misdemeanor shoplifting.

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[9] Moreover, we note that even if the trial court was precluded from finding that the offense involved entry of a residence, that would not establish that the structure was a "commercial establishment" within the meaning of section 459.5, subdivision (a). There are numerous other types of structures that do not qualify under sections 459, 459.5, and 460 as either a residence or a commercial establishment, including a warehouse, barn, stable, railroad car, locked cargo container, or uninhabited trailer. Given the underlying facts of the offense, appellant would be unable to prove that he entered a commercial structure. Moreover, he failed to demonstrate that "the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)" within the meaning of section 459.5, subdivision (a).

DISPOSITION

The order denying appellant's Proposition 47 petition for a recall of sentence is affirmed with prejudice.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STONE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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