Filed 9/14/17 P. v. Hurth CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JONATHAN B. HURTH,<br><br>Defendant and Appellant. | B271126<br><br>(Los Angeles County Super. Ct. No. YA051658) |

APPEAL from a post-judgment order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Law Office of Elizabeth K. Horowitz and Elizabeth K. Horowitz, 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, Susan Sullivan Pithey and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jonathan B. Hurth appeals from the trial court's denial of his petition to reduce his felony convictions for receiving stolen property and second degree burglary to misdemeanors under Penal Code section 1170.18,[1] a provision of Proposition 47, the Safe Neighborhoods and Schools Act. Defendant failed to satisfy his burden of establishing his eligibility to reduce his sentence. Accordingly, we affirm the denial of his petition, but do so without prejudice to subsequent consideration of a new, properly supported petition.

## SUMMARY

In April 2002, Ms. Allen (the victim) and her family were locked out of their residence after being evicted. Some personal items were left behind. A couple of days after the eviction, a neighbor saw two men, one of whom he identified as defendant, load televisions and other items from the victim's residence into a brown van. The neighbor called the police, who detained defendant and another man in a brown van nearby. Officers recovered numerous electronic items from the van, including a television that belonged to the victim.

In August 2002, defendant was convicted of second degree burglary (§ 459) and receiving stolen property (§ 496, subd. (a)). Defendant was sentenced under the Three Strikes law to 25–years–to–life for the burglary (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).) The

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[1] All undesignated code references are to the Penal Code.

sentence was stayed on the second count, pending completion of the sentence for the burglary (§ 654).

In April 2015, defendant filed a two–page petition seeking to have his sentence recalled under Proposition 47, arguing he had been convicted of crimes now classified as misdemeanors, because the value of the property taken was less than $950. (§ 1170.18.) Although defendant's petition was not initially accompanied by a declaration or any evidence relating to the value of the property or other issue, the court nevertheless found that a prima face showing of eligibility was made. The District Attorney filed an opposition, supported by excerpts of trial testimony. Defendant submitted supplemental materials to support his petition, including excerpts of trial testimony and a statement from Stanley Allen, the now–deceased victim's adult son, indicating the value of items removed from his mother's yard in connection with the April 2002 incident was less than $500.

An eligibility hearing was conducted on March 21, 2016. The court stated it was precluded from considering Stanley Allen's "declaration," as its review was necessarily "limited to the record of conviction." Because the record of conviction contained no evidence regarding the value of the property, the court found defendant "ineligible for relief under Proposition 47." The court also found defendant ineligible for Proposition 47 relief as to the burglary count, because the crime was not committed in a "commercial establishment that was open for business," a point conceded by defendant's counsel. The petition was denied. Defendant timely appealed.

## DISCUSSION

Defendant contends the trial court erred in denying his petition for reclassification of his conviction by refusing to consider evidence outside the record of conviction which demonstrates the value of the stolen property did not exceed $950.

1. *The Standard of Review*

This appeal presents mixed questions of law and fact. The legal issue–whether the trial court erred in refusing to consider evidence outside the record of conviction–is reviewed de novo. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878 (*Sherow*).) Factual findings are reviewed for substantial evidence. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960 (*Johnson*).)

2. *Reclassification of Prior Conviction of Receiving Stolen Property*

Proposition 47 amended the statute on receiving stolen property to make the offense a misdemeanor unless the value of the stolen property exceeds $950. (§§ 496, subd. (a), 1170.18, subd. (a).)

A defendant submitting a section 1170.18 petition and arguing that a theft crime should be resentenced as a misdemeanor, because the value of the property stolen was $950 or less, has the initial burden of presenting evidence of the value of the property. (*Johnson, supra,* 1 Cal.App.5th at pp. 964–965; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136–137 (*Perkins*); *Sherow, supra*, 239 Cal.App.4th at p. 879.)

Some or all of the information or evidence necessary to enable the court to determine a defendant's eligibility, must accompany the petition. (*Sherow, supra*, 239 Cal.App.4th at p. 880; *Perkins, supra*, 244 Cal.App.4th at pp. 136–137, 140; *Johnson, supra*, 1 Cal.App.5th at p. 970.) "In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish . . . eligibility" for recall of his felony sentence. (*People v. Romanowski* (2017) 2 Cal.5th 903, 916 (*Romanowski*).) More often, however, excluding evidence outside the record of conviction will impede a defendant from meeting his or her burden to prove eligibility under Proposition 47, which often turns on establishing key facts not previously adjudicated, e.g., when newly relevant evidence was not an element at the time defendant was convicted, or when a defendant pled guilty. (*Ibid*.)

Where eligibility for resentencing turns on facts not established by the record of conviction, the court may require an evidentiary hearing if it "'finds there is a reasonable likelihood that the petitioner may be entitled to relief and [his] entitlement to relief depends on the resolution of an issue of fact.' [Citations.]" (*Romanowski, supra,* 2 Cal.5th 904 at p. 916.) That evidence can come from any *competent* source. (See *Johnson, supra,* 1 Cal.App.5th at pp. 968, 971 [petitioner seeking recall of sentence under Prop. 47 may present probative evidence from any source]; *Perkins, supra,* 244 Cal.App.4th at p. 140, fn. 5 [petitioner may use declarations or any probative evidence]; *Sherow, supra*, 239 Cal.App.4th at p. 880 [petitioner's testimony about the

nature of items taken].) In a case such as this, new evidence offered to demonstrate the value of stolen property was less than $950, may be presented in various forms. Of course, facts in the record of conviction relevant to the value of the property may be relied on. (*Perkins, supra*, 244 Cal.App.4th at p. 137.) A declaration from the defendant or a witness containing "testimony about the nature of the items taken" may also be informative, even sufficient. (See *Sherow, supra*, 239 Cal.App.4th at p. 880.) If and once the defendant makes this showing, the People have an opportunity to attempt to demonstrate defendant's ineligibility for resentencing. (*Johnson, supra*, 1 Cal.App.5th at p. 965.)

If the trial court determines defendant has submitted evidence sufficient to create a dispute as to the value, but has not established his or her eligibility, the court may "permit further factual determination." (*Sherow, supra*, 239 Cal.App.4th at p. 880.) Proof of eligibility for resentencing or redesignation of a conviction must be made by a preponderance of the evidence. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040; *People v. Bush* (2016) 245 Cal.App.4th 992, 1001.)

3. *Analysis*

The trial court denied defendant's petition based, in part, on its mistaken belief that its review was confined to the record of conviction. That was error. Excluding evidence outside the record of conviction may impede a defendant from meeting his burden to prove eligibility under Proposition 47, if that evidence was not an element at the time

defendant was convicted. (*Romanowski, supra,* 2 Cal.5th at p. 916; *Johnson, supra,* 1 Cal.App.5th at p. 968; *Perkins, supra,* 244 Cal.App.4th at p. 140.) Here, new evidence was necessary in order for defendant to attempt to demonstrate his eligibility for sentencing within the misdemeanor statute's $950 threshold, a monetary limit that had not been an element of his felony conviction.[2]

Although its stated rationale was mistaken, the trial court did not err in refusing to consider Stanley Allen's statement as evidence that the value of the stolen property did not exceed $950.

In support of his petition, defendant submitted a declaration and two letters from an investigator,[3] and a November 2015 "statement" by Stanley Allen. The letters indicate that, in late October 2015, the investigator met with Stanley Allen who claimed to recall the incident at his late mother's former home in April 2002. After purportedly reviewing a property report, Stanley Allen provided a short, handwritten note stating without further explanation that "the value of the items removed and received is less than $500." Stanley Allen's vague and unsworn hearsay "statement" does not constitute probative

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[2] "A conviction for receiving stolen property may be based on evidence 'that the property in question was stolen, that the defendant was in possession of it, and that the defendant knew the property to be stolen' [citation]." (*People v. Price* (1991) 1 Cal.4th 324, 464; § 496, subd. (a).)

[3] The declaration is illegible, and our efforts to obtain a legible copy were unsuccessful.

evidence. It is not a declaration, signed under penalty of perjury. It is a confusing, speculative statement by someone who claims no first–hand knowledge about an incident he "remember[s]" from 13 years before, that the value of one television and some or all unspecified items of property "recovered," "removed and received" from his mother's yard, was less than $500. This unsworn submission is not *competent*, *probative* evidence of the value of the property. (See *People v. Pak* (2016) 3 Cal.App.5th 1111, 1121 (*Pak*) [finding no probative evidence sufficient to support Prop. 47 petition where "neither counsel, appellant, nor any witness provided sworn testimony or a sworn affidavit about the value of the property"]; cf., *In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11 ["unsworn statements of counsel are not evidence"]; *People v. Lee* (1985) 164 Cal.App.3d 830, 841 ["unsworn testimony [does] not constitute 'evidence' within the meaning of the Evidence Code"].) Thus, independent of the court's mistaken refusal to consider evidence outside the record of conviction, defendant failed to provide competent evidence that the value of the stolen property did not exceed $950. Accordingly, he failed to satisfy his burden of proof as to eligibility. (*Sherow, supra*, 239 Cal.App.4th at pp. 878–880.)

Our determination that defendant's petition cannot rest on Stanley Allen's unsworn statement does not preclude him from filing a new petition supported by competent sworn testimony by Stanley Allen (or other probative evidence) as sufficient proof of value to establish eligibility for relief under Proposition 47. (See *Pak, supra*, 3 Cal.App.5th at p. 1121 [affirming the denial of Prop. 47 petition without

prejudice, explaining that "[i]n any new petition, appellant should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing she is eligible for relief"]; *Perkins, supra*, 244 Cal.App.4th at p. 140.)

On remand, the trial court has substantial flexibility to devise practical procedures to implement Proposition 47, so long as those procedures are consistent with the proposition and any applicable statutory or constitutional requirements. (*Perkins, supra*, 244 Cal.App.4th at p. 138.) The court may exercise its discretion to develop a factual record to address appellant's eligibility by requesting the submission of additional evidence or by conducting a hearing. Both parties will have an opportunity to litigate the valuation issue under the applicable standards on remand. We express no opinion on the merits of that issue.

4. *Reduction of Felony Burglary Conviction to Misdemeanor Petty Theft*

On appeal, as below, defendant has properly conceded that his burglary conviction is ineligible for resentencing as misdemeanor shoplifting, because the property stolen from the Allen's former residence "was not [taken from] a commercial establishment within the meaning of section 459.5." (See *In re J.L.* (2015) 242 Cal.App.4th 1108, 1114 [theft of cell phone from high school locker did not occur at a "commercial establishment" as contemplated by § 459.5].)

Instead, defendant now contends his felony burglary conviction is eligible for resentencing under section 490.2, consistent with the spirit and purpose of Proposition 47. He contends that the nonviolent, nonserious conduct that allegedly involved the theft of less than $500 worth of property not from a commercial establishment, but from an unoccupied residence, for which he received a felony burglary conviction (and is serving a life sentence), should more appropriately be treated as misdemeanor petty theft. (§ 490.2.) In contrast with the shoplifting statute (§ 459.5), there is no requirement under section 490.2 that the defendant have entered a commercial establishment during regular business hours to qualify for Proposition 47 sentence reduction. (See *People v. Sloat* (2017) 10 Cal.App.5th 761, 762 (*Sloat*).)

But the defendant in *Sloat* was convicted of felony petty theft. (*Sloat, supra*, 10 Cal.App.4th at p. 762.) Here, defendant was convicted of burglary under section 459. Section 459.5, subdivision (a) specifically provides that an "entry into a commercial establishment with intent to commit larceny," that does not satisfy the definition of "shoplifting" is "burglary." Reading section 490.2 as implicitly amending the definition of burglary in section 459 would render section 459.5 superfluous because it would reduce any burglary conviction based on theft not exceeding $950 to a misdemeanor, *regardless of the type of building entered*. We cannot construe Proposition 47 in a manner that would render an entire statutory provision superfluous. (See *People v. Hall* (2016) 247 Cal.App.4th 1255, 1266.)

## DISPOSITION

The trial court's order denying defendant's petition is affirmed without prejudice to defendant's right to file a new, properly supported petition offering evidence of his eligibility for the requested relief.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.