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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

AQUALINA JAIME,

Defendant and Appellant.

B267552

(Los Angeles County
Super. Ct. No. GA089412)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Mary Sanchez and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

On October 7, 2013, a jury convicted Aqualina Jaime (Jaime) of (among other offenses) four counts of theft of access card information, in violation of Penal Code¹ section 484e, subdivision (d). The court struck three of those convictions at sentencing. On June 10, 2015, the trial court denied Jaime's petition to have the remaining section 484e, subdivision (d) offense reclassified as a misdemeanor under section 1170.18, enacted pursuant to Proposition 47. Jaime appeals, and we affirm.

BACKGROUND

Our prior opinion in Jaime's direct appeal includes the following facts. An information charged Jaime with 14 felony counts, including four counts of theft of access card information in violation of section 484e, subdivision (d). Jaime pleaded not guilty. The evidence at trial showed that Jaime used the victim's Discover card to make a total of \$10,994.25 in transactions. A jury found her guilty on all counts. At sentencing, the court struck three of the section 484e, subdivision (d) convictions, as Jaime's acquisition of the card could not be the basis of multiple convictions for repeated use of the account information. (*People v. Jaime* (Jan. 22, 2015, B252835) [nonpub. opn.])

¹ All further statutory references are to the Penal Code.

Jaime received a sentence of six years and eight months.² On count 5, the remaining conviction on section 484e, subdivision (d), Jaime received a three-year sentence, stayed pursuant to section 654.

On April 22, 2015, Jaime filed a petition for recall and resentencing under section 1170.18, subdivision (a), in which (as relevant to this appeal) she requested her sentence on count 5 be stricken. The trial court denied the petition in part and granted it in part. As to count 5, the trial court denied the petition on the ground that a violation of section 484e, subdivision (d) was not reducible to a misdemeanor. The court lifted the stay on the sentence on count 5 and resentenced Jaime to eight months on count 5, to run consecutively.³

² The court also imposed a consecutive sentence of eight months in another case, resulting in a total overall sentence of seven years and four months. After resentencing, Jaime's total sentence (including the other case) was six years and eight months.

³ At the resentencing hearing, Jaime did not object to lifting the stay, and neither Jaime nor respondent addresses whether section 654 required that the eight-month sentence for count 5 be stayed. Nevertheless, "the waiver doctrine does not apply to questions involving the applicability of section 654. Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal." (*People v. Perez* (1979) 23 Cal.3d 545, 550, fn. 3.) The hearing transcript, in which the trial court referred to "switching" the sentences on count 4 and count 5,

Jaime filed a timely appeal.

Section 484e, subdivision (d), provides: “Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder’s or issuer’s consent, with the intent to use it fraudulently, is guilty of grand theft.”

Proposition 47, approved by the electorate in November 2014, made certain theft offenses misdemeanors by enacting section 490.2, subdivision (a), which states:

“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 . . . shall be considered petty theft and shall be punished as a misdemeanor,” with exceptions not in issue here.

Section 1170.18 creates a resentencing procedure for defendants whose offenses have been reclassified as misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092–1093.)

The California Supreme Court has granted review in the published decisions addressing (with conflicting results) whether a violation of section 484e, subdivision (d) may be classified as a misdemeanor under the provisions enacted by Proposition 47. (See (*People v. Thompson* (2015) 243

does not explain why the count 5 sentence, which originally was stayed, was not stayed on resentencing. On the record before us, we cannot say that the trial court committed error.

Cal.App.4th 413, review granted Mar. 9, 2016, S232212; *People v. Grayson* (2015) 241 Cal.App.4th 454, review granted Jan. 20, 2016, S231757; *People v. Cuen* (2015) 241 Cal.App.4th 1227, review granted Jan. 20, 2016; *People v. Romanowski* (2015) 242 Cal.App.4th 151, review granted Jan. 20, 2016, S231405; *People v. King* (2015) 242 Cal.App.4th 1312, review granted Feb. 24, 2016, S231888; *People v. Thompson* (2015) 243 Cal.App.4th 413, review granted Mar. 9, 2016, S232212.)

Jaime had the burden of proving to the trial court that she was eligible for resentencing. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.) That includes the requirement that the value of the property not exceed \$950. (*People v. Pak* (2016) 3 Cal.App.5th 1111, 1117–1118.) Jamie has failed to show that the value of the property in issue did not exceed \$950. Her petition does not give any evidence of the value of the property. At the hearing, neither the trial court nor Jaime’s counsel discussed the value of the property in issue on count 5, although counsel stated, “[O]ur position is that the [484e, subdivision (d)] is reducible since it is a grand theft crime and pursuant to . . . section [490.2], all grand theft crimes under \$950 are now misdemeanors.” As we stated above, the evidence at her trial was that Jaime charged almost \$10,994.25 to the Discover card, and at her sentencing hearing an investigator testified that the transactions Jaime made totaled that amount. Jaime has not shown that the value of the property in issue on count 5 did not exceed \$950, as required for eligibility for

resentencing under Proposition 47. We therefore do not address whether violation of section 484e, subdivision (d) is reclassifiable as a misdemeanor under the provisions enacted by Proposition 47.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.