Filed 10/19/16 P. v. Talbert CA2/6

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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. JOHN TALBERT, Defendant and Appellant.	2d Crim. No. B269667 (Super. Ct. No. BA440648-01) (Los Angeles County)

John Talbert appeals a postjudgment order denying his petition to reduce his commercial burglary conviction (Pen. Code, § 459)[1] to misdemeanor shoplifting under Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18. subd. (b)). The trial court denied the petition because the value of the property taken was worth more than $950. (§§ 1170.18, subd. (a); 459.5, subd. (a).) We affirm.

In 2015, appellant stole a laptop computer and two cell phones from the Bar Covell in Los Angeles. All the property was recovered but the victim (Jennifer Derobbio) reported that the damage to the laptop was approximately $2,000. On October 20, 2015, appellant waived preliminary hearing, pled guilty to felony commercial burglary (§ 459), and admitted three prior strike convictions (§§ 667, subd. (b) - (j); 1170.12) and five prior prison term enhancements (§ 667.5, subd. (b).) Pursuant to the

[1] All statutory references are to the Penal Code unless otherwise stated.

negotiated plea, appellant was sentenced to 16 months state prison and agreed to pay $500 restitution.

On November 9, 2015, five days after the enactment of Proposition 47, appellant filed a petition for writ of habeas corpus. The trial court treated the habeas petition as a Proposition 47 petition to reduce the commercial burglary conviction to a misdemeanor. (§ 1170.18, subd. (a).) The Los Angeles County Probation Department submitted a Post Sentence Report summarizing the police report and police interview with the victim who reported that the laptop damage was "approximately $2,000." The trial court denied the petition on the ground that the stolen property had a value of more than $2,000.

Proposition 47

Proposition 47 reduces most possessory drug offenses and thefts of property valued at less than $950 to straight misdemeanors. (See Couzens et al., Sentencing California Crimes (Rutter 2015) § 25:1, p. 25-2.) Among the crimes reduced to misdemeanors by Proposition 47 "are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.) Section 459.5, subdivision (a) provides in pertinent part: "Notwithstanding Section 459, shoplifting is 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)."

Appellant bears the burden of demonstrating that the commercial burglary would have been a misdemeanor under Proposition 47. (*People v. Sherow*, *supra*, 239 Cal.App.4th at p. 879; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137; *People v. Bush* (2016) 245 Cal.App.4th 992, 1007; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450.) Other than the fact that appellant agreed to pay a $500 restitution, appellant offered no evidence about the value of the property stolen. The restitution order is not controlling because restitution represents the victim's economic loss, not the

value of the property taken. (See *People v. Baker* (2005) 126 Cal.App.4th 463, 468.) Assuming the stolen property was returned in an undamaged condition, the victim's economic loss would be de minimis and have no bearing on the value of the property taken. (See *People v. Rivera* (1989) 212 Cal.App.3d 1153, 1162-1163.) Here the victim reported that the laptop was "damaged" and estimated that the damages were approximately $2,000.

Appellant contends that the trial court erred in considering the Post Sentence Report because a court may not consider police reports or a postsentence probation report in determining Proposition 47 eligibility.[2] We reject the argument because Proposition 47 evidence may come from outside the record of conviction or from undisputed facts acknowledged by the parties. (See, e.g., *People v. Sherow*, *supra*, 239 Cal.App.4th at p. 880 [petitioner's testimony about the nature of the items taken]; *People v. Hudson* (2016) 2 Cal.App.5th 575, 584 [new evidence to establish eligibility for resentencing may be considered]; *People v. Perkins*, *supra*, 244 Cal.App.4th at p. 140 [declarations or any probative evidence].) Proposition 47 is silent as to what evidence may be considered in determining a defendant's Proposition 47 eligibility. (*Ibid*.)

Appellant cites *People v. Bradford* (2014) 227 Cal.App.4th 1322, a Proposition 36 case (§ 1170.126), for the principle that a trial court is limited to the record of conviction in determining whether a petitioner is eligible for relief under the Three Strikes Reform Act. (*Id.*, at pp. 1338-1339.) Proposition 47, however, is fundamentally different. "[E]ligibility for resentencing under [the Three Strikes Reform Act] turns on the nature of the petitioner's convictions - whether an offender is serving a sentence on a conviction for nonserious, nonviolent offenses and whether he or she has

[2] The argument is based on *People v. Johnson* (2016) 1 Cal.App.5th 953 in which the court concluded that a defendant petitioning for Proposition 47 relief has the initial burden of establishing eligibility for resentencing (*Id.*, at p. 962.) The court, in dicta, stated that a probation report is not evidence but acknowledged that the trial court is not limited to the record of conviction. (*Id*., at pp. 968-969, fn. 16.) Like *Johnson*, the trial court's consideration of the Post Sentence Report is harmless because appellant presented no evidence of facts from any source that the value of the property stolen was worth $950 or less. (*Id*., at p. 968.)

prior disqualifying convictions for certain other defined offenses. (§ 1170.126, subd. (e).) By contrast, under Proposition 47, eligibility often turns on the simple factual question of the value of the stolen property. In most such cases, the value of the property was not important at the time of conviction, so the record may not contain sufficient evidence to determine its value. For that reason, and because [appellant] bears the burden on the issue [citation], we do not believe the *Bradford* court's reasons for limiting evidence to the record of conviction are applicable in Proposition 47 cases." (*People v. Perkins*, *supra*, 244 Cal.App.4th at p. 140, fn. 5.)

Appellant finally argues that he was denied the opportunity to be heard because the Proposition 47 petition was denied at an ex parte hearing. There is no requirement for personal presence at a section 1170.18 eligibility hearing. (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 109; *People v. Perkins*, *supra*, 244 Cal.App.4th at p. 137.)

The judgment (order denying petition for resentencing) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David M. Horwitz, Judge

Superior Court County of Los Angeles

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.