Filed 8/15/18 P. v. Porcho CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO ROBERT PORCHO, Defendant and Appellant.	2d Crim. No. B285316 (Super. Ct. No. 17F-00058) (San Luis Obispo County)

Armando Robert Porcho appeals from a judgment after the trial court found him guilty of one count of driving or taking a vehicle (Veh. Code,[1] § 10851, subd. (a)) and one count of driving with his privileges suspended (§ 14601.2, subd. (a)). The court sentenced him to two years in county jail. Porcho contends his section 10851 conviction should be redesignated a misdemeanor because the prosecution did not present evidence

[1] All further undesignated statutory references are to the Vehicle Code.

that the vehicle he took was worth more than $950.[2] (See *People v. Page* (2017) 3 Cal.5th 1175, 1180 (*Page*).) We affirm.

FACTUAL AND PROCEDURAL HISTORY

In December 2016, Porcho lived with Tushona Stevens and Larry Howell in Long Beach. One morning, Howell went outside and saw that his SUV was missing. Stevens said she did not know where it was.

There were two sets of keys to the SUV. Stevens and Howell each had a set. The only time Howell did not have his set was when Porcho took the SUV to the store. Howell assumed Porcho made a copy of his keys then.

Howell reported the SUV stolen. Twelve days later, a Highway Patrol officer saw the SUV parked on the shoulder of U.S. Highway 101 in San Luis Obispo County. Porcho was carrying a gas can and walking away from the SUV. Later that afternoon, the officer returned and saw the SUV in the same place. He ran the license plate and learned that it had been reported stolen.

The officer searched the area for Porcho, returned to the SUV, and called a tow truck. As the tow truck pulled away

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[2] In his reply brief, Porcho also contends section 10851's differential treatment of theft and nontheft violations violates the absurd consequences doctrine and equal protection principles. He purported to "reserve" these contentions in a footnote in his opening brief. But our Supreme Court has long instructed appellants to raise all arguable issues in their opening briefs. (See, e.g., *Hibernia Sav. & Loan Society v. Farnham* (1908) 153 Cal. 578, 584; *Webber v. Clarke* (1887) 74 Cal. 11, 12-13.) The contentions are waived. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9.)

with the SUV, Porcho appeared and ran after it. The officer took him into custody. Porcho had keys to the SUV in his pocket.

The officer told Porcho that he was under arrest for a violation of section 10851. Porcho denied the theft and said that Stevens would confirm the SUV was not stolen. He said he had taken the SUV from Long Beach to Northern California, and on his return trip he ran out of gas.

DISCUSSION

Theft of any property valued at less than $950 is petty theft. (Pen. Code, § 490.2, subd. (a).) It must be punished as a misdemeanor. (*Ibid*.) Porcho contends his felony section 10851 conviction should be redesignated misdemeanor petty theft because the prosecution did not prove that the SUV was worth more than $950. We disagree. Because there was a substantial break between the taking and the driving of the SUV, its value was irrelevant.

A person can violate section 10851 by taking a vehicle with the intent to permanently deprive the owner of possession, driving a vehicle after a theft is complete (posttheft driving), or driving a vehicle with the intent to temporarily deprive the owner of possession (joyriding). (*People v. Garza* (2005) 35 Cal.4th 866, 871, 876 (*Garza*).) If a person is convicted of posttheft driving or joyriding, they have not committed a theft offense, and are not subject to misdemeanor treatment under Penal Code section 490.2. (*Page*, *supra*, 3 Cal.5th at pp. 1183, 1188-1189.) Whether a defendant was convicted for a theft or nontheft violation of section 10851 depends on whether there was a "substantial break" between the taking and driving of the vehicle. (*Id*. at p. 1188.) We will uphold the trial court's determination that the defendant drove the car after such a break occurred if supported

by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. Calistro* (2017) 12 Cal.App.5th 387, 403 (*Calistro*).)

The evidence clearly establishes that Porcho committed a nontheft violation of section 10851 because, even if he was the car thief, there was a substantial break between his taking and driving of the SUV. A Highway Patrol officer found Porcho with the SUV 12 days after it was reported stolen. He was more than 200 miles away from the scene of the theft. The temporal and spatial distance between the location of the theft and the location of the SUV constitutes a substantial break. (See, e.g., *Garza*, *supra*, 35 Cal.4th at pp. 872, 882 [substantial break where vehicle recovered six days after theft, two or three blocks away]; *Calistro*, *supra*, 12 Cal.App.5th at pp. 391-392, 403 [substantial break where vehicle recovered five hours after theft, less than five miles away]; *People v. Strong* (1994) 30 Cal.App.4th 366, 375 (*Strong*) [substantial break where vehicle recovered four days after theft].)

Porcho counters that he was convicted of a theft violation of section 10851 because there was no direct evidence that he drove the SUV. But substantial evidence demonstrates that he did. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 [substantial evidence includes circumstantial evidence and reasonable inferences drawn from it].) The Highway Patrol officer saw Porcho walking away from the SUV carrying a gas can. When the officer arrested him, Porcho had keys to the SUV in his pocket. He told the officer he had taken the SUV from Long Beach to Northern California and ran out of gas on his return trip.

Porcho also points out that, during sentencing, the trial court commented that he was convicted of "unlawful taking

of a vehicle," and that the probation report, mandatory supervision order, and abstract of conviction all state that he was convicted for "unlawful taking of a vehicle." But at the conclusion of trial, the court found that "there really [wasn't] any reasonable doubt that [Porcho] was . . . guilty of the crime of unlawfully driving of a vehicle." (Cf. *People v. Beltran* (2013) 56 Cal.4th 935, 945, fn. 7 [whether clerk's transcript prevails over reporter's transcript is determined by the circumstances of each case].) More significantly, it does not matter that the court may have also found that Porcho stole the SUV. (*People v. Cratty* (1999) 77 Cal.App.4th 98, 101.) Even if it did, "no reasonable [factfinder] could have found that he took the [SUV] *but did not drive it* after the theft was complete." (*Calistro*, *supra*, 12 Cal.App.5th at p. 403, original italics.) It is therefore proper to construe Porcho's conviction a nontheft violation of section 10851. (*Id*. at pp. 404-405; see also *Garza*, supra, 35 Cal.4th at pp. 881-882; *Cratty*, at p. 101; *Strong*, *supra*, 30 Cal.App.4th at p. 372.) As such, it is not subject to misdemeanor treatment under Penal Code section 490.2, whatever the SUV's value.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Gayle L. Peron, Judge

Superior Court County of San Luis Obispo

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