Filed 9/27/17 P. v. Robinson CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JASON ROBINSON, Defendant and Appellant.	B268614 (Los Angeles County Super. Ct. No. LA071762)

APPEAL from an order of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Petition denied.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Chung L. Mar and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 2012 Jason Robinson pleaded no contest to possession of ammunition in violation of Penal Code section 30305, subdivision (a)(1).[1] His sentence included a one-year enhancement based on a 2008 felony conviction for second degree burglary for which Robinson served a prison term (§ 667.5, subd. (b)).

In 2014 the voters enacted Proposition 47, the Safe Neighborhoods and School Act of 2014 (§ 1170.18), which, among other things, reduced some felony property crimes to misdemeanors. The next year Robinson requested and obtained relief under Proposition 47 to designate his 2008 felony conviction for second degree burglary as a misdemeanor. Robinson then filed a "motion for resentencing" in this case asking the trial court to strike the one-year sentence enhancement based on the prior prison term Robinson had served for second degree burglary because that conviction no longer qualified as a felony, a prerequisite for imposing the sentence enhancement under section 667.5, subdivision (b).

The trial court denied the motion. The court concluded Proposition 47 does not apply retroactively to invalidate a sentence enhancement that became final prior to the enactment of Proposition 47. We treat Robinson's appeal as a petition for writ of habeas corpus and deny relief.

---

1 Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2012 the People charged Robinson with possession of ammunition in violation of section 30305, subdivision (a)(1), and alleged, among other things, he suffered convictions for burglary (§ 459) in 2002 and 2008 and for possession for sale of a controlled substance (Health & Saf. Code, § 11378) in 2011, for which he served separate prison terms. Robinson pleaded no contest and admitted the prior prison term allegations. In November 2012 the trial court sentenced Robinson to three years for possession of ammunition, plus three one-year terms for each of the prior prison term enhancements under section 667.5, subdivision (b).[2]

Proposition 47 became effective November 5, 2014. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 740.) On August 5, 2015 the trial court designated Robinson's 2008 conviction for second degree burglary as a misdemeanor pursuant to Proposition 47.[3] In October 2015 Robinson filed a "motion for resentencing" under Proposition 47 and section 667.5, subdivision (b), asking the court

---

[2] Section 667.5, subdivision (b), "'provides a special sentence enhancement for [a] particular *subset* of "prior felony convictions" that were deemed serious enough by earlier sentencing courts to warrant actual imprisonment.'" (*People v. Jones* (1993) 5 Cal.4th 1142, 1148; see *People v. McFearson* (2008) 168 Cal.App.4th 388, 394.)

[3] We grant Robinson's motion to augment the record in accordance with rule 8.155(a) of the California Rules of Court to include the minute order designating Robinson's 2008 felony conviction as a misdemeanor pursuant to section 1170.18, subdivision (g).

in this case to resentence him on his 2012 conviction for possession of ammunition. Robinson contended he "had admitted a prison prior and suffered a sentencing enhancement in a matter that no longer qualifies under [section 667.5, subdivision (b)]." In particular, Robinson argued that, because his 2008 conviction "is now deemed a misdemeanor," the prison term he served for that conviction is not a valid basis for the one-year enhancement under section 667.5, subdivision (b).

The trial court denied Robinson's motion for resentencing, ruling that Proposition 47 does not apply retroactively to invalidate a sentence enhancement that became final prior to the enactment of Proposition 47. Robinson appealed from the order denying his motion.

DISCUSSION

A. *Appealability*

As a threshold matter, the People argue section 1170.18 does not authorize a motion for resentencing seeking to strike a section 667.5, subdivision (b), sentence enhancement based on a felony conviction that was reduced to a misdemeanor under Proposition 47. Thus, the People contend the trial court lacked jurisdiction to consider Robinson's resentencing motion, and the order denying the motion is not appealable. Robinson did not file a reply brief responding to this argument. We agree the denial of a nonstatutory postjudgment motion is not appealable. (See *People v. Totari* (2002) 28 Cal.4th 876, 886.) Nevertheless we will treat Robinson's purported appeal as an original petition for writ of habeas corpus and consider the merits of his challenge to the sentence enhancement. (See *People v. Villa* (2009) 45 Cal.4th

1063, 1069 [an individual in custody may challenge the legality of that detention on habeas].)

B. *Proposition 47*

Proposition 47 "makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Proposition 47 also created section 1170.18, which established a mechanism for resentencing and redesignating felony convictions for offenses that are now classified as misdemeanors.

Under section 1170.18, subdivision (a), a person "currently serving" a felony sentence for an offense that is now a misdemeanor under Proposition 47 may petition for a recall of that sentence and request resentencing in accordance with the statutes that Proposition 47 added or amended. A person who satisfies the criteria in section 1170.18, subdivision (a), shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . 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).)

Subdivisions (f) and (g) of section 1170.18 provide that persons who have completed felony sentences for offenses that are now misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions designated as misdemeanors. Subdivision (k) states, "A felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be

considered a misdemeanor for all purposes," except with regard to certain firearm restrictions. Proposition 47 further provides that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (§ 1170.18, subd. (n).)

C. *Proposition 47 Does Not Apply Retroactively To Invalidate a Sentence Enhancement Based on a Prior Felony Conviction Subsequently Designated as a Misdemeanor*

The Supreme Court has granted review in several cases that held an order designating a prior felony conviction a misdemeanor under Proposition 47 does not provide the basis for striking or dismissing a sentence enhancement based on that conviction.[4] We agree with the reasoning of these decisions, one of which, for now, remains persuasive authority. (See *People v. Jones* (2016) 1 Cal.App.5th 221, 229, review granted Sept. 14, 2016, S235901; Cal. Rules of Court, rule 8.1115(e)(1).)

As in any case involving statutory interpretation, our fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. (*Abdallah*, *supra*, 246 Cal.App.4th at p. 745; accord, *People v. Cole* (2006) 38 Cal.4th 964, 974-975.) "'We examine the statutory language, and give it a plain and commonsense meaning. . . . If the statutory language is

---

[4] See *People v. Valenzuela*, review granted March 30, 2016, S232900 (lead case); *People v. Carrea*, review granted April 27, 2016, S233011; *People v. Williams*, review granted May 11, 2016, S233559; *People v. Ruff*, review granted May 11, 2016, S233201; *People v. Jones* (2016) 1 Cal.App.5th 221, 229, review granted Sept. 14, 2016, S235901.

unambiguous, then the plain meaning controls. [Citation.] It is only when the language supports more than one reasonable construction that we may look to extrinsic aids like legislative history and ostensible objectives.'" (*Abdallah*, at p. 745; see *Cole,* at p. 975.) "'In the case of a provision adopted by the voters, "their intent governs."'" (*Abdallah*, at p. 745; *People v. Rivera*, *supra*, 233 Cal.App.4th at pp. 1099-1100.) We review a trial court's interpretation of Proposition 47 de novo. (*People v. Lowery* (2017) 8 Cal.App.5th 533, 538, review granted Apr. 19, 2017, S240615; *People v. Sherow* (2015) 239 Cal.App.4th 875, 878.)

1. *Proposition 47 Does Not Create a Mechanism For Invalidating a Sentence Enhancement*

Robinson argues voters intended Proposition 47 "to prohibit imposing a collateral sanction on an individual in the form of a sentence enhancement for criminal conduct that is no longer a felony." In *People v. Abdallah*, *supra*, 246 Cal.App.4th 736 we agreed with this proposition in cases where the court resentenced or redesignated the prior felony conviction as a misdemeanor *before* the court imposed a sentence on a subsequent crime. (*Id.* at p. 746; accord, *People v. Evans* (2016) 6 Cal.App.5th 894, 901, review granted Feb. 22, 2017, S239635.) In *Abdallah*, after the trial court redesignated the defendant's felony conviction a misdemeanor under Proposition 47, the defendant no longer qualified for a sentence enhancement under section 667.5, subdivision (b), in a subsequent conviction because the defendant had no longer been previously convicted of a "felony." (See *Abdallah*, at p. 742.)

Where, as here, however, the court imposed a sentence enhancement based on a previous felony conviction that was redesignated a misdemeanor under Proposition 47 *after* the judgment and sentence in the subsequent conviction had become final, Proposition 47 provides no mechanism for invalidating the sentence enhancement. Section 1170.18 allows defendants to obtain relief only for (1) a felony *conviction* for which a defendant is currently serving a sentence that would now be a misdemeanor (§ 1170.18, subd. (a)), and (2) a felony *conviction* for which a defendant has completed a sentence that would now be a misdemeanor (§ 1170.18, subd. (f)).

Robinson is not "currently serving" a sentence for a crime that Proposition 47 now classifies as a misdemeanor under section 1170.18, subdivision (a), and, while he has completed a sentence for a crime that is now classified as a misdemeanor under section 1170.18, subdivision (f), Robinson already obtained the relief Proposition 47 provides for that conviction. Thus, Proposition 47 does not provide for the recall and resentencing of the sentence Robinson challenges. (See *Jones*, *supra*, 1 Cal.App.5th at p. 230, rev. granted [the provisions of Proposition 47 "explicitly allow offenders to request and courts to grant retroactive designation of offenses such as [the defendant's] prison prior, but no provision allows offenders to request or courts to order retroactively striking or otherwise altering an enhancement based on such a redesignated prior offense"].)

2. *Proposition 47 Does Not Apply Retroactively To Invalidate Sentence Enhancements*

Robinson contends Proposition 47's lack of an express mechanism to invalidate sentence enhancements based on felony convictions subsequently reduced to misdemeanors does not preclude defendants from such relief. In support of this argument, Robinson cites section 1170.18, subdivision (k), which provides that any felony conviction a court resentences or redesignates as a misdemeanor "shall be considered a misdemeanor for all purposes," except for certain firearm prohibitions. Thus, Robinson argues, once the trial court deemed his prior felony conviction a misdemeanor, that classification applies to "collateral" consequences both retroactively and prospectively.

Provisions of the Penal Code, however, are not retroactive "unless expressly so declared." (§ 3.) "'[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.'" (*People v. Brown* (2012) 54 Cal.4th 314, 319-320; see *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209.) The same principle applies to a statute enacted through a ballot initiative. (*Evangelatos*, at p. 1209.) "In applying this principle, we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes. [Citations.] Consequently, '"a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective."'" (*Brown,* at pp. 319-320.)

Neither section 1170.18, subdivision (k), nor any other provision of Proposition 47 contains language allowing for the

retroactive dismissal, striking, or modification of a sentence enhancement. (See *Jones*, *supra*, 1 Cal.App.5th at p. 230 ["[a]bsent express language in section 1170.18 allowing the redesignation, dismissal, or striking of past sentence enhancements, we cannot infer voters intended [Proposition 47] to apply retroactively to past sentence enhancements"]; see also *People v. Feyrer* (2010) 48 Cal.4th 426, 439 [interpreting the "for all purposes" language of section 17 to apply prospectively only], superseded by statute on another ground as stated in *People v. Park* (2013) 56 Cal.4th 782, 789-791.) Therefore, section 1170.18 does not apply retroactively to sentence enhancements.

Robinson argues Proposition 47 applies retroactively because section 1170.18, subdivision (k), created only one exception (for firearm restrictions) to the "for all purposes" language, which implies there are no other exceptions (such as for previously imposed sentence enhancements). Robinson cites *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, where the court held the "for all purposes" language of section 1170.18, subdivision (k), requires trial courts to expunge a defendant's DNA evidence from databases consisting of DNA samples from felons after a defendant's conviction is redesignated as a misdemeanor under Proposition 47. (*Alejandro N.*, at p. 1228.) The *Alejandro N.* court reasoned: "Because [section 1170.18] explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so." (*Alejandro N.*, at

p. 1227.) Robinson argues *Alejandro N.* supports his position that Proposition 47 applies to "collateral consequences" of a felony conviction.

Alejandro N., however, addressed "collateral consequences" in the *same case* the defendant received relief under Proposition 47. Here, Robinson seeks to apply the benefits of Proposition 47 in a *different case*, one in which he is *not* eligible for resentencing under Proposition 47. Moreover, section 1170.18, subdivision (n), states that nothing in Proposition 47 "is intended to diminish or abrogate the finality of judgment in any case *not falling within the purview*" of Proposition 47. (§ 1170.18, subd. (n), italics added.) Because this case does not fall within the purview of Proposition 47, section 1170.18, subdivision (k), does not affect the finality of the judgment against Robinson. Thus, even under *Alejandro N.,* this case presents a "reasoned statutory . . . basis" for carving out "misdemeanor treatment of the reclassified offense." (See *Alejandro N.*, *supra*, 238 Cal.App.4th at p. 1227.)[5]

---

[5] Moreover, *Alejandro N.* interpreted section 1170.18, subdivision (k), in light of section 299, subdivision (f), which generally precludes a judge from relieving a defendant of the duty to provide specimens, samples, or fingerprints if the defendant is convicted of a "qualifying offense." (*Alejandro N.*, *supra*, 238 Cal.App.4th at pp. 1227-1230; see § 299, subd. (f).) The Legislature subsequently overruled this aspect of the *Alejandro N.* decision by amending section 299, subdivision (f), to require defendants whose felony convictions are redesignated as misdemeanors under Proposition 47 to provide the required specimens, samples, or fingerprints, even though a misdemeanor conviction does not trigger that administrative duty. (See § 299, subd. (f).)

Robinson also points to section 1170.18, subdivision (m), which provides, "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant." This provision, however, provides no support for Robinson's position. As discussed, invalidating a properly imposed sentence enhancement is not a right or remedy "otherwise available" under Proposition 47 or any other law cited by Robinson.

Because the language of Proposition 47 is unambiguous, we "'presume that the Legislature meant what it said, and the plain meaning of the statute controls.'" (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1123.) Therefore, we do not consider Robinson's argument that the ballot pamphlet accompanying Proposition 47 coupled with the rule of liberal construction "infer" an intent to apply Proposition 47 retroactively to sentence enhancements. (See *People v. Rizo* (2000) 22 Cal.4th 681, 685 [only when a statute's language is ambiguous do "'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet'"]; *Moore v. Superior Court* (2004) 117 Cal.App.4th 401, 406, fn. 6 [when "the language of the statute itself is clear and unambiguous, [courts] need not concern [them]selves with the . . . ballot pamphlet"]; see also *People v. Superior Court* (*Walker*) (2017) 12 Cal.App.5th 687, 715, review granted Sept. 13, 2017, S243072 [courts cannot imply a legislative intent in favor of retrospective operation of a voter proposition from the mere fact that the measure is remedial and subject to the rule of liberal construction].)

D. *Imposing the Section 667.5, subdivision (b), Enhancement on Robinson Does Not Violate Equal Protection*

Robinson also argues that "continuing to subject those who have had their felonies reduced to misdemeanors to the section 667.5, subdivision (b), enhancement, when, going forwards, those same individuals would not be subject to the enhancement" violates his federal and state constitutional rights to equal protection. *Jones* persuasively rejected a similar argument. (See *Jones*, *supra*, 1 Cal.App.5th at p. 232, rev. granted.)

"'A refusal to apply a statute retroactively does not violate the Fourteenth Amendment.' [Citation.] Equal protection principles do 'not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.'" (*Jones*, *supra*, 1 Cal.App.5th at p. 232, quoting *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505; see also *People v. Floyd* (2003) 31 Cal.4th 179, 191 ["'a reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection'"].) "Furthermore, because prospective sentencing changes presumably recognize 'legitimate . . . concerns associated with the transition from one sentencing scheme to another,' applying [Proposition 47] prospectively but not retrospectively bears a rational relationship to the legitimate state interest of transitioning from the old sentencing scheme to the new sentencing scheme." (*Jones*, at p. 232; accord, *Floyd*, at p. 191.) Therefore, Robinson has not shown the trial court's refusal to strike his sentence enhancement violated his right to equal protection of the laws.

DISPOSITION

The petition for writ of habeas corpus is denied.

SEGAL, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

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