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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRRAN D. BURRELL,

Defendant and Appellant.

B280063

(Los Angeles County  
Super. Ct. No. MA060633)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed.

Cindy Brines, 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, Mary Sanchez and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Tyrran D. Burrell appeals from the superior court's denial of his motion to modify his sentence to strike four enhancements under Penal Code section 667.5, subdivision (b),<sup>1</sup> on the ground that the convictions underlying those enhancements have been reclassified under Proposition 47 as misdemeanors and no longer support the enhancements. We affirm.

## **BACKGROUND**

On December 10, 2013, a jury convicted defendant of possession of a firearm by a felon (§ 29800, subd. (a)(1)) and possession of ammunition (§ 30305, subd. (a)(1)). He admitted one prior strike conviction (§§ 667, subds. (a) — (i), 1170.12, subds. (a) — (d)) and six prior prison terms (§ 667.5, subd. (b)). The court sentenced him to a total term of 12 years in state prison (double the upper term of three years for felon in possession of a firearm, plus one year each for the six prison priors, the sentence on the possession of ammunition stayed under section 654). Defendant appealed from the judgment.

While the appeal was pending, he filed four petitions for resentencing pursuant to section 1170.18, a provision of Proposition 47, in the superior courts of origin, seeking reduction of the felonies underlying four of his section 667.5, subdivision (b) prior prison terms to misdemeanors. On October 14, 2015, appellant's petitions were granted in case Nos. MA020861 and MA033109. On May 6, 2015,

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<sup>1</sup> All undesignated section references are to the Penal Code.

appellant's petition was granted in case No. MA043385. On January 22, 2015, appellant's petition was granted in case No. MA053732.

On February 2, 2016, we affirmed the judgment of conviction in a nonpublished opinion, B254383. The Supreme Court denied review on April 20, 2016, and the remittitur issued on May 9, 2016.

On December 28, 2016, after the case was final on appeal, appellant moved in the superior court to modify his sentence to strike four prior prison terms (MA020861, MA033109, MA043385, MA053732) on the ground that the reduction of the underlying convictions to misdemeanors precluded imposition of the terms under section 667.5, subdivision (b). The trial court denied appellant's request.

## DISCUSSION

On appeal, defendant renews his contention that four of his prior prison term enhancements under section 667.5, subdivision (b), must be stricken because the convictions underlying them have been reduced to misdemeanors under Proposition 47. We disagree.

Section 667.5, subdivision (b) provides that under certain circumstances when the current offense is a felony, the trial court "shall impose a one-year term for each prior separate prison term . . . imposed . . . for any felony." "Imposition of a sentence enhancement under . . . section 667.5[(b)] requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*In re Preston* (2009) 176 Cal.App.4th

1109, 1115.) The four convictions in the instant case met all four elements of section 667.5, subdivision (b) at the time the enhancement was imposed. Defendant argues that under section 1170.18, subdivision (k), which provides that any offense reduced to a misdemeanor under Proposition 47 “shall be considered a misdemeanor for all purposes,” the reclassified convictions no longer satisfy the first element.

This issue is currently under review by the California Supreme Court in *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900, as well as several other cases in which review has been granted and held pending resolution of *Valenzuela*. In *In re Diaz* (2017) 8 Cal.App.5th 812, review granted May 10, 2017, S240888, this court held that “[t]he redesignation under Proposition 47 of a prior felony conviction to a misdemeanor operates prospectively, from the date of the redesignation forward, and not retroactively, as if the conviction always had been a misdemeanor.” (*Id.* at p. 817.) Therefore, the reclassification of a felony conviction as a misdemeanor after the original sentence does not preclude its use to support a section 667.5, subdivision (b) enhancement. (*Ibid.*) We adhere to that holding and need not repeat our reasoning at length. We briefly observe that in *Diaz*, we reasoned that the language and purpose of Proposition 47 show that reclassification of an offense should be given only prospective effect (8 Cal.App.5th at p. 820), and the decisions in *People v. Flores* (1979) 92 Cal.App.3d 461, *In re Estrada* (1965) 63 Cal.2d 740 do not compel the conclusion that reclassification of an offense under Proposition 47 should be given retroactive effect (8 Cal.App.5th at p. 821). Moreover, as defendant notes in his opening

brief on appeal in the instant case, most courts have taken the position, as we did in *Diaz*, that section 1170.18 does not apply retroactively to invalidate section 667.5, subdivision (b) enhancements. (See *People v. Johnson* (2017) 8 Cal.App.5th 111, 115, review granted April 12, 2017, S240509; *People v. Jones* (2016) 1 Cal.App.5th 221, 228-229, review granted Sept. 14, 2016, S235901; *People v. Valenzuela, supra*, 244 Cal.App.4th 692; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201.) We agree with those decisions, adhere to our holding in *Diaz*, and conclude that the trial court did not err in denying defendant's motion to modify his sentence.

### **DISPOSITION**

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.