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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. ELGIN L. TIPLER, Defendant and Appellant.	B270253 (Los Angeles County Super. Ct. No. MA009683)

APPEAL from an order of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed with directions.

John L. Staley, 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, Assistant Attorney General, Mary Sanchez and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In this Proposition 47 resentencing case, appellant challenges the holding in *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*) that a petitioner who seeks resentencing has the initial burden of showing eligibility for relief, which in the case of an application to have a grand theft felony conviction reclassified as misdemeanor petty theft would include showing that the amount stolen did not exceed $950. In the underlying proceedings, the trial court denied appellant's petition to have his felony conviction for grand theft by embezzlement reclassified as misdemeanor petty theft, impliedly ruling that he had failed to demonstrate that the value of the property embezzled did not exceed $950. For the reasons set forth below, we agree with *Sherow* and affirm the court's order denying appellant's petition. We will remand with directions to permit appellant to amend his application or file a new one showing the value of the stolen property.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On February 9, 1995, appellant was charged with grand theft by embezzlement (Pen. Code, § 487, subd. (a)).[1] On February 10, 1995, he pled no contest to the charge.

On December 22, 2015, after completing his sentence, appellant filed a form petition/application for resentencing pursuant to section 1170.18, subdivision (f) to reduce his grand theft felony conviction to a misdemeanor under Proposition 47. On January 27, 2016, the district attorney filed a response, contending that appellant was ineligible for the relief requested because the amount appellant embezzled totaled "$6,000 +/-."

At the hearing on the petition, the district attorney reiterated that the People objected to the petition based on the "issue of value." The trial court asked defense counsel whether "the defense [was] aware of any evidence, competent or otherwise, that would indicate that the value falls with the purview [of] Prop. 47?" Counsel responded, "The only evidence I know of is I believe the People were able to discover the approximate value." The district attorney followed up, stating, "There was a probation report that was retrieved in this case, and it does show that the value

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

involved, what was stolen, was estimated to be [$]6,000 to $8,000."[2]

The trial court denied the petition for resentencing on the basis that "the value at issue exceeds the limit set forth by Prop. 47." This appeal followed.

DISCUSSION

Proposition 47, the Safe Neighborhoods and Schools Act, was enacted by voters on November 4, 2014, and became effective the following day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants." (*Id.* at p. 1091.) It added section 490.2, which provides that "obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor."

Proposition 47 also added section 1170.18, a statutory resentencing scheme. Section 1170.18, subdivision (f) provides that "[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that

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[2] Although appellate counsel requested a copy of the probation officer's report, no copy was found in the case file.

entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." Here, appellant filed a petition/application to have his felony grand theft conviction (§ 487) reclassified as misdemeanor petty theft (§ 490.2).

In *Sherow*, the appellate court held that "a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*Sherow*, *supra*, 239 Cal.App.4th at p. 878.) There, the court determined that the petitioner had the burden of proof to show he was entitled to have his second degree burglary convictions reclassified as shoplifting, as that offense is defined in section 459.5. For shoplifting, such a showing would include evidence the property stolen did not exceed $950. (*Id*. at pp. 879-880.) *Sherow* has been followed by numerous appellate courts. (See, e.g., *People v. Sweeney* (2016) 4 Cal.App.5th 295, 302; *People v. Johnson* (2016) 1 Cal.App.5th 953, 968-969; *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.)

This court followed *Sherow* in *People v. Pak* (2016) 3 Cal.App.5th 1111, 1117 (*Pak*). There, the appellant was convicted of felony burglary under section 459, served her sentence, and filed in the trial court an application to designate her burglary conviction as misdemeanor shoplifting. We held that appellant had the burden of proving to the trial court that she was eligible for relief under section 1170.18, i.e., producing evidence showing her

offense satisfied all the statutory elements of shoplifting, including the fourth element -- that "'the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).'" (*Id.* at pp. 1117-1118.)

Similarly, here, appellant sought to have his felony grand theft conviction reclassified as misdemeanor petty theft. Thus, he had the burden to show that the subject offense could be reclassified, i.e., that it satisfied all the statutory elements for petty theft under section 490.2, including that the value of the property not exceed nine hundred fifty dollars ($950). Appellant produced no evidence of valuation, and the district attorney asserted that the probation officer's report estimated that appellant embezzled between $6,000 and $8,000. On this record, appellant failed to satisfy his burden to show eligibility. Accordingly, the trial court properly denied the application for resentencing.

Having determined that the denial of the application for resentencing was correct, we examine whether appellant should be permitted to amend the application or file a new one. (See *Pak*, *supra*, 3 Cal.App.5th at p. 1121 ["Our determination that appellant's petition was deficient does not prevent her from filing another petition supported by sufficient proof of value."].) Appellant requests this court remand the matter to allow him to present evidence on valuation, while respondent argues that remand would be an idle act, as "appellant appears to have embezzled at least $6,000" based on the probation officer's report. However,

that report is not in the record. There is a possibility that the probation officer's report was not correctly summarized or that the valuation provided was incorrectly determined. Accordingly, a limited remand on the issue of valuation is appropriate.

DISPOSITION

The order denying appellant's petition for resentencing is affirmed without prejudice to subsequent consideration of a properly filed or amended petition. The trial court, in its discretion, may set a reasonable deadline for the filing of any such petition, and shall have discretion to continue that deadline for good cause shown.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J. COLLINS, J.