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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN WAYNE MUIR,

Defendant and Appellant.

B276957

(Los Angeles County
Super. Ct. No. PA083919)

APPEAL from an order of the Superior Court of
Los Angeles County, David B. Gelfound, Judge. Reversed and
remanded with directions.

Joy A. Maulitz, under appointment by the Court of Appeal,
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Sheriff's deputies conducted a traffic stop and found Justin Wayne Muir driving a vehicle that had been reported stolen. The deputies discovered Muir had a driver's license with Muir's photograph but not his name, forged and counterfeit access cards, and a credit card embosser and scanner. An identification card used to purchase the stolen vehicle also contained Muir's photograph, but with yet another name.

On January 7, 2016 Muir pleaded guilty to access card forgery (Pen. Code, § 484f, subd. (a)),¹ unlawful access card activity (§ 484i, subd. (c)), and driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)). Muir admitted he had served a prison term for a felony within the meaning of section 667.5, subdivision (b). The trial court sentenced Muir to two years four months in any penal institution.

On June 27, 2016 Muir filed a petition for resentencing under Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18). The trial court denied the petition, ruling Muir did "not qualify for the requested relief."² The trial court ruled a person convicted of violating Vehicle Code section 10851 is ineligible for resentencing under Proposition 47. Muir filed a timely notice of appeal.

¹ Undesignated statutory references are to the Penal Code.

² Although Muir's Proposition 47 petition referred only to his forgery conviction, the trial court considered the petition as a request for resentencing on all three felony convictions.

We appointed counsel to represent Muir on appeal. After reviewing the record, counsel filed an opening brief raising no issues. On May 31, 2017 we gave Muir notice he had 30 days to submit a brief or letter raising any grounds of appeal, contentions, or arguments he wanted us to consider. We did not receive a response.

While Muir's appeal was pending, the Supreme Court decided *People v. Page* (2017) 3 Cal.5th 1175 (*Page*). We asked the parties for supplemental briefing on whether under *Page* Muir was entitled to relief on his conviction for driving or taking a vehicle without consent. Muir filed a supplemental brief; the People did not. We then asked the parties for supplemental briefs on whether Muir was entitled to relief under Proposition 47 on his convictions for access card forgery and unlawful access card activity. Muir and the People submitted supplemental briefs. We now reverse the trial court's order denying Muir's petition for resentencing on his conviction for driving or taking a vehicle without the owner's consent, remand with directions for the court to determine whether Muir qualifies under *Page* for Proposition 47 relief on that conviction, and otherwise affirm.

DISCUSSION

In *Page, supra*, 3 Cal.5th 1175 the Supreme Court considered whether a defendant serving a felony sentence for taking or driving a vehicle in violation of Vehicle Code section 10851 qualified for misdemeanor sentencing under Proposition 47. The Supreme Court acknowledged there are multiple ways of violating Vehicle Code section 10851. A

defendant can violate the statute by committing a theft, i.e., taking or driving away a vehicle with the intent to permanently deprive the owner of possession, or without committing a theft, i.e., taking or driving away a vehicle with the intent to temporarily deprive the owner of possession or driving or continuing to drive the vehicle after the theft is complete. (*Page*, at pp. 1180, 1182.) Where the defendant violates Vehicle Code section 10851 by obtaining by theft a vehicle valued at \$950 or less, the defendant qualifies for misdemeanor sentencing under section 490.2, the new petty theft provision of Proposition 47, and may be eligible for Proposition 47 relief. (*Page*, at pp. 1182-1183.) On the other hand, where the defendant violates Vehicle Code section 10851 by taking a vehicle without the intent to permanently deprive the owner of possession or by driving the vehicle after completing the theft, the defendant is not eligible for Proposition 47 relief, regardless of the value of the vehicle. (*Page*, at p. 1183.)³

The defendant seeking resentencing under section 1170.18 has the burden of establishing eligibility, including the facts necessary to establish the vehicle was stolen and, if so, the value of the stolen vehicle. (*Page, supra*, 3 Cal.5th at p. 1188.) Where

³ The Supreme Court in *People v. Bullard*, review granted and briefing deferred February 22, 2017, S239488, has ordered the parties to brief the following question: ““Does equal protection or the avoidance of absurd consequences require that misdemeanor sentencing under . . . sections 490.2 and 1170.18 extend not only to those convicted of violating Vehicle Code section 10851 by theft, but also to those convicted for taking a vehicle without the intent to permanently deprive the owner of possession?”” (See *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 856, fn. 9.)

the evidence “shows posttheft driving—that is, driving the vehicle following a ‘substantial break’ after the vehicle had initially been stolen—the defendant cannot establish eligibility [for resentencing] under section 1170.18 by declaring or testifying that he or she also stole the vehicle: such testimony would not prove the conviction was *based on* theft rather than on posttheft driving, and therefore would fail to establish that the defendant would only have been guilty of a misdemeanor (petty theft under § 490.2, subd. (a)) had Proposition 47 been in effect at the time of the offense.” (*Page*, at p. 1189.)

Here, the record is insufficient to determine whether Muir violated Vehicle Code section 10851 by stealing a vehicle and, if he did, whether the vehicle was worth \$950 or less. Therefore, we reverse the order denying Muir’s Proposition 47 petition and remand for the trial court to determine whether Muir is eligible for Proposition 47 relief on that conviction.

Muir, however, is not eligible for relief under Proposition 47 on his conviction for access card forgery in violation of section 484f, subdivision (a). Proposition 47 amended section 473 to add subdivision (b), which provides in relevant part: “Notwithstanding subdivision (a), any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950), shall be punishable by imprisonment in a county jail for not more than one year.” The new subdivision “provides forgery will be classified as a misdemeanor when a defendant has used one of seven specific instruments (check, bond, bank bill, note, cashier’s

check, traveler's check, or money order) valued at \$950 or less.” (*People v. Bloomfield* (2017) 13 Cal.App.5th 647, 652.)

“Under the maxim of statutory construction ‘*expressio unius est exclusio alterius*,’” or ““where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed,”” the “specific language used in section 473(b) means forgery crimes are classified as straight misdemeanors *only* when one of the seven listed instruments is used to commit the crime.” (*People v. Bloomfield, supra*, 13 Cal.App.5th at p. 652.; see *People v. Martinez* (2016) 5 Cal.App.5th 234, 242 [“[t]he express identification of those seven instruments in section 473, subdivision (b) excludes from misdemeanor designation forgeries committed with all other instruments”]; see also *People v. Gollardo* (2017) 17 Cal.App.5th 547, 557 [“the intent of the electorate [was] *not to include* all types of forgery under Proposition 47’s ameliorative scope”].) Thus, of the over 50 instruments listed in section 470, subdivision (d), the “general forgery statute” (*People v. Murphy* (2011) 52 Cal.4th 81, 87), Proposition 47 applies only to convictions involving the seven instruments listed in section 473, subdivision (b), which correspond to the first seven instruments listed in section 470, subdivision (d). “Had the drafters of Proposition 47 intended to redesignate *all* forgery offenses valued at less than \$950 as misdemeanors, they could have listed each of the instruments identified in section 470(d), rather than only the first seven; or more, simply, they could have referred to ‘forgery’ as defined in section 470.” (*Bloomfield*, at p. 653.)

Nor is Muir eligible for resentencing under Proposition 47 for his conviction for unlawful access card activity in violation of section 484i, subdivision (c). Section 484i, subdivision (c),

provides: “Every person who designs, makes, possesses, or traffics in card making equipment or incomplete access cards with the intent that the equipment or cards be used to make counterfeit access cards, is punishable by imprisonment in a county jail for not more than one year, or by imprisonment” A violation of the statute is not a theft offense, and it is not listed as one of the seven forgery offenses subject to Proposition 47.

DISPOSITION

The order is reversed. The matter is remanded for the trial court to determine whether Muir is eligible for resentencing under Proposition 47 on his conviction for violating Vehicle Code section 10851. In all other respects, the order is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

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