Filed 11/7/16 P. v. Garcia CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CLAUDIA T. GARCIA,<br><br>Defendant and Appellant. | B264655<br><br>(Los Angeles County Super. Ct. No. GA075903) |

APPEAL from an order of the Superior Court of Los Angeles County, Terry Lee Smerling, Judge. Reversed and remanded.

Michelle T. LiVecchi-Raufi, 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, Senior Assistant Attorney General, Steven D. Matthews, Supervising

Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant and appellant Claudia T. Garcia (defendant) was convicted of four felony counts: two counts of forgery (Pen. Code, § 475, subd. (b) and (c)[1]); one count of theft (§ 484e, subd. (d)); and one count of receiving stolen property (§ 496, subd. (a)). On appeal, defendant contends the trial court erred in denying her application to designate her four felony convictions as misdemeanor convictions. We reverse the order as to all counts, and remand the matter to the trial court to determine whether resentencing defendant on those counts would pose an unreasonable risk of danger pursuant to section 1170.18, subdivision (b).

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[1] All statutory citations are to the Penal Code unless otherwise noted.

## BACKGROUND

### A. Facts[2]

On January 29, 2009, one of the occupants of defendant's vehicle "was seen taking something out of the mailbox of [a] residence." Police officers searched the vehicle and found a wallet under the front passenger seat where defendant was sitting. Two checkbooks in the name of "Steven Gutierrez" and "Bashir and Mahmuda Ahmad" were found in the wallet. Defendant initially told the police that the wallet belonged to her, then stated she did not know to whom the wallet belonged. Then she told one of the other occupants of the vehicle that her friend gave it to her. She also told the occupant that she had not cashed the checks yet. Gutierrez's checkbook in defendant's possession had previously been taken in a vehicle burglary.

The police report attached the following checks: (1) a $14.56 check written on Gutierrez's checking account, dated December 9, 2008, made payable to Wal-Mart; (2) a $17.30 check written on Gutierrez's checking account, dated December 16, 2008, made payable to Walgreens; (3) a $2,871.76 check written on Mr. & Mrs. William Barbus's checking account, dated January 27, 1971, made payable to Mary (last name is illegible); and (4) a $651 check written on an unknown person's checking account,

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[2] The facts are from the Pasadena Police Department Crime Report, number 09005214, dated January 29, 2009 (police report).

dated May 1, 1975, made payable to Rosemary Barbus. The police report states that these last two checks had been cashed, but does not indicate when.

### B. Procedure

In 2010, defendant pleaded nolo contendere to four felony counts: violating section 475, subdivision (b) (forgery; count 1), violating section 475, subdivision (c) (forgery; count 2), violating section, section 484e, subdivision (d) (theft; count 3), and violating section 496, subdivision (a) (receiving stolen property; count 4). Defendant stipulated that the factual basis for her plea was reflected in the police report.

Defendant was placed on three years of formal probation, and ordered to serve 90 days in county jail and six months in a residential drug treatment program. The trial court awarded defendant custody credit, and ordered her to pay various fees, fines, and penalties. The trial court imposed $600 in restitution based on two checks written on Gutierrez's account.

In 2015, defendant filed an application pursuant to section 1170.18 to designate her four felony convictions as misdemeanor convictions, and defendant subsequently filed additional points and authorities in support of the application.

The trial court denied defendant's application. Defendant filed a timely notice of appeal.

## DISCUSSION

### A. Applicable Law

"California voters approved Proposition 47 on November 4, 2014, and it became effective the next day. [Citations.] Proposition 47 added section 1170.18, which reduced punishment for the specified drug and theft offenses from straight felonies and wobblers to misdemeanors. [Citation]" (*People v. Bush* (2016) 245 Cal.App.4th 992, 1000.) Section 1170.18 provides in part, "(a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act. [¶] (b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of

the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. . . . [¶] . . . [¶] (f) 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 entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors. [¶] (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

Proposition 47 also added section 490.2 (*People v. Bush*, *supra*, 245 Cal.App.4th at p. 1000), which provides, "(a) Notwithstanding Section 487 or any other provision of law defining grand theft, 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, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of

paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

"'In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.] In other words, 'our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)

### B. Count 3 (Violation of section 484e, subdivision (d))

Defendant contends that the trial court erred in denying her application to designate her felony conviction in count 3 for the violation of section 484e, subdivision (d) (section 484e(d)),[3] as

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[3] Section 484e(d) provides, "Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person,

a misdemeanor conviction pursuant to Proposition 47, because her felony conviction was for a theft offense and the property taken—the access card[4] account information—did not exceed $950.

Several Court of Appeal decisions concerning whether the reclassification statute enacted by Proposition 47 applies to section 484e(d) are currently pending review in the Supreme Court. (See *People v. Thompson*, review granted Mar. 9, 2016, S232212 [Proposition 47 relief applies]; *People v. King*, review granted Feb. 24, 2016, S231888 [Proposition 47 relief does not apply]; *People v. Romanowski*, review granted Jan. 20, 2016, S231405 [Proposition 47 relief applies]; *People v. Grayson*, review granted Jan. 20, 2016, S231757 [Proposition 47 relief does not apply]; and *People v. Cuen*, review granted Jan. 20, 2016, S231107 [Proposition 47 relief does not apply].) We conclude that Proposition 47 relief applies to section 484e(d).

The plain language of subdivision (a) of section 490.2 demonstrates an intent to encompass all Penal Code sections

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without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft."

[4] "Access card" is defined as "any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access card, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by a paper instrument." (§ 484d, subd. (2).)

defining grand theft, as it provides that it is applicable "[n]otwithstanding section 487 or *any other provision of law defining grand theft* . . . ." (Italics added.) The italicized phrase makes sufficiently clear that the use of the term "theft" in section 490.2 includes the acquisition and retention of access card account information, which is defined in section 484e(d) as "grand theft."

The trial court denied defendant's application as to count three on the ground that section 484e(d) criminalized fraud rather than theft.[5] Likewise, the People's appellate argument is based on a claim that, even though section 484e(d) "is punished as grand theft, it does not primarily define a 'theft' crime." These arguments implicitly rely upon a common law conception of theft and then conclude correctly that section 484e(d) criminalizes fraudulent conduct outside of that conception. The problem with this argument is that, at least since 1927, California statutory law has defined "theft" to include crimes beyond common law theft. (*People v. Vidana* (2016) 1 Cal.5th 632, 639-644.) Indeed, under our statutory law, "fraud is a species of theft." (*People v. Sanchez* (2003) 113 Cal.App.4th 325,

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[5] The trial court stated, "It's my reading that 490.2 pertains to theft. 484(e) pertains to fraudulent conduct, mainly with regard to access cards, and any taking is not an element of the crime. So I would conclude that 490.2 does not render 484(e) a misdemeanor. [¶] . . . [¶] I read 484(e) sub (d), the amount is irrelevant. It's the nature of the conduct."

333). Thus, it is consistent with California law to take at face value the Legislature's defining the conduct underlying section 484e(d) as grand theft.

Moreover, Proposition 47 directs that its provisions shall be liberally construed to effectuate its purposes. (*People v. Zamarripa* (2016) 247 Cal.App.4th 1179, 1182; Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 18, p. 74 ["act shall be broadly construed to accomplish its purposes"].) One of the purposes of Proposition 47 was to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft." (Voter Information Guide, *supra*, text of Prop. 47, § 3, p. 70.) If there were doubt based on the text of section 490.2 itself, this indicia of the voter's intent supports reclassifying a section 484e(d) offenses as misdemeanors, where the value of the property taken did not exceed $950.

Defendant's felony conviction on count 3 is subject to being reduced to a misdemeanor conviction if the value of the property taken does not exceed $950. There is no evidence in the record of defendant being in possession of access card account information. Also, the value of an access card itself is slight, as is the value of the information it contains, which acquires significant worth only when used. (See *People v. Cuellar* (2008) 165 Cal.App.4th 833, 839 [a "fictitious check . . . had slight intrinsic value by virtue of the paper it was printed on"]; *United States Rubber Co. v. Union*

*Bank & Trust Co.* (1961) 194 Cal.App.2d 703, 709 [finding value of forged check is "a nullity" because it is "merely an order to pay . . . and is of no value unless accepted"]; *People v. Caridis* (1915) 29 Cal.App. 166, 169.) We therefore reverse the order denying defendant's application as to count 3. We remand the matter to the trial court to determine whether resentencing defendant to a misdemeanor on that count poses an unreasonable risk of danger pursuant to section 1170.18, subdivision (b).

### C. Counts 1, 2, and 4 (forgery and receipt of stolen property)

Defendant contends that the trial court erred in denying her application filed pursuant section 1170.18 to designate as misdemeanors her felony convictions in counts 1 (§ 475, subd. (b)[6]), 2 (§ 475, subd. (c)[7]), and 4 (§ 496, subd. (a)[8]), which all

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[6] Section 475, subdivision (b), provides, "Every person who possesses any blank or unfinished check, note, bank bill, money order, or traveler's check, whether real or fictitious, with the intention of completing the same or the intention of facilitating the completion of the same, in order to defraud any person, is guilty of forgery."

[7] Section 475, subdivision (c), provides, "Every person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery."

involved stolen checks found in her possession at the time of her vehicle stop. Her application argued that "the value of the property stolen [regarding counts 1-4] was less than $950."

There is no dispute that defendant's convictions on counts 1, 2, and 4, are subject to reclassification as misdemeanors under Proposition 47 if the value of the property taken does not exceed $950. The trial court did not make an individual determination as to the value taken as to each count.

As to count 1, which charged the taking of blank checks, we conclude that the value of the stolen property does not exceed $950. Defendant therefore is entitled to have count 1 designated as a misdemeanor under section 1170.18 unless the trial court, upon remand, finds that defendant would pose an unreasonable risk of danger pursuant to section 1170.18, subdivision (b). Like count 1, we also hold that defendant is entitled to have counts 2 and 4 designated as misdemeanors under section 1170.18 unless the trial court, upon remand, finds that defendant would pose an

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[8] Section 496, subdivision (a), provides in part, "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment . . . ." The information charging defendant with violating this section alleged that the property were "checks, Steven Gutierrez."

unreasonable risk of danger pursuant to section 1170.18, subdivision (b).

*1. Facts*

As to 1, 2, and 4, the following exchange occurred at the hearing on the application:

"[The Prosecutor:] Counts 1 and 2 and 4 are reducible, that's forgeries and possession of stolen property.

[¶] . . . [¶]

"[I]n her possession she had multiple checks. One was $2871. Another was [$]1120. My position [is] that it exceeds the value.[9]

"[Defendant's counsel:] My position is that it does not exceed $950 because a check is merely a piece of paper with ink on it. It has no intrinsic value.

"[The Court:] [After looking at the reporter's transcript of defendant's plea to the charges:[10] Yeah, there was a stipulation,

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9 As defendant argues, "statements by counsel are not evidence . . . . [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 814, fn. 10.)

10 The reporter's transcript of defendant's plea to the charges states that defendant was ordered to pay $600 in restitution to Gutierrez for two checks written on his account. Checks totaling that amount are not in the police report, but checks in that amount do not change our analysis of any count because they do not cause the property taken to exceed $950.

factual stipulation basis a based in the police report. So my position is then I need to look at the police report to find out what the underlying facts are, and apparently that's going to be provided to me.

"[Defendant's counsel:] Your Honor, I have a copy of the police report which has been handed to me by the District Attorney. The defense will stipulate that court may look at this.

[¶] . . . [¶]

"[The Court:] . . . I've reviewed the police report. Based upon my reading of the report, I'm inclined to deny the Prop. 47 Petition as to counts 1, 2, and 4 because the checks involved well exceeded $950 in value."

The trial court denied the application as to counts 1, 2, and 4.

*2. Analysis*

a) Count 1

At the time of defendant's arrest, the police determined that she was in possession of two checkbooks. Defendant was convicted under count 1 of violating section 475, subdivision (b), which provides that it is forgery for someone to possess a "blank or unfinished check," or other specified financial document, with

the intention of completing it or facilitating the completion of it, to defraud another.

Defendant argued at the hearing on her application that the checks have "no intrinsic value" because they are merely "piece[s] of paper with ink on [them]." Despite the Attorney General's contention to the contrary, defendant met her burden of demonstrating the amount of the property taken was less than $950.

The value of the blank or unfinished checks is necessarily less than $950; the intrinsic value of those checks is minimal. (See *People v. Cuellar*, *supra*, 165 Cal.App.4th 833, 839; *United States Rubber Co. v. Union Bank & Trust Co.*, *supra*, 194 Cal.App.2d 703, 708-709; *People v. Caridis*, *supra*, 29 Cal.App.166, 169.) We therefore reverse the order denying defendant's application as to count 1, and remand the matter to the trial court to determine whether resentencing defendant on that count would pose an unreasonable risk of danger pursuant to section 1170.18, subdivision (b).

b) Count 2

Defendant was convicted under count 2 of violating section 475, subdivision (c), which provides that it is forgery for someone to possess "any completed check," or other specified financial document, with the intention of uttering or passing it, or

facilitating the utterance or passage of it, to defraud another. The value of the completed checks is the dollar amount listed on them. Section 492 provides, "If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen."

There is no indication what checks were charged in, or concerned, count 2. The trial court did not make a determination as to the value taken as to this count only, and the record discloses two completed checks but they were about 40 years old—dated January 27, 1971, and May 1, 1975, that had been cashed. The record does not contain completed checks in an amount totaling at least $950 that defendant could have intended to cash.

We reverse the order denying defendant's application as to count 2, and we remand the matter to the trial court to determine whether resentencing defendant on that count would pose an unreasonable risk of danger pursuant to section 1170.18, subdivision (b).

c) Count 4

Defendant was convicted under count 4 for violating section 496, subdivision (a), which generally provides that a person who obtains stolen property, here Gutierrez's checks, knowing the checks have been stolen shall be punished by imprisonment. The value of those checks is less than $950.

The record reflects two categories of Gutierrez checks. Defendant was found with having Gutierrez's checkbook in the in her wallet. As noted above, the value of those blank or unfinished checks is necessarily less than $950. (See *People v. Cuellar*, *supra*, 165 Cal.App.4th 833, 839; *United States Rubber Co. v. Union Bank & Trust Co.*, *supra*, 194 Cal.App.2d 703, 708-709; *People v. Caridis*, *supra*, 29 Cal.App.166, 169.)

The record also refers to, as an attachment to the police report, two checks made on Gutierrez's checking account: one for the amount of $14.56, and the other for $17.30. These two checks total $31.86, substantially less than the $950 threshold.

We therefore reverse the order denying defendant's application as to count 4. As with the prior counts, we remand the matter to the trial court to determine whether resentencing defendant on that count would pose an unreasonable risk of danger pursuant to section 1170.18, subdivision (b).

## DISPOSITION

We reverse the order as to all counts, and remand the matter to the trial court to determine whether resentencing defendant on those counts would pose an unreasonable risk of danger pursuant to section 1170.18, subdivision (b).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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