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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. AMANDA VARGAS, Defendant and Appellant.	B261115 (Los Angeles County Super. Ct. No. LA072874)

APPEAL from an order of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Reversed.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Michael R. Johnsen, Deputy Attorney General, for Plaintiff and Respondent.

In May of 2013, appellant Amanda Vargas was convicted of four counts of possessing access card information with the intent to defraud, which was then classified as a felony. (See Pen. Code, § 484e, subd. (d).) After the passage of Proposition 47, Vargas filed a petition pursuant to Penal Code section 1170.18 requesting that the court reclassify each of her offenses as misdemeanors, and resentence her accordingly. The trial court denied the petition, concluding that the offense described in section 484e, subdivision (d) was not eligible for reclassification under Proposition 47. During the pendency of Vargas's appeal, the California Supreme Court decided *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), which held that possessing access card information is subject to reclassification under Proposition 47. We therefore reverse the trial court's order, and remand for further proceedings.

FACTUAL BACKGROUND

In 2012, defendant Amanda Vargas was arrested after being found in possession of several credit card numbers that belonged to a third party. Vargas was subsequently charged with four counts of violating Penal Code section 484e, subdivision (d),[1] which provides that any person who "acquires or possesses access card account information" belonging to another person with "the intent to use it fraudulently, is guilty of grand theft."[2] Vargas pleaded no contest and received a suspended sentence of 270 days in county jail, and 27 months of supervised probation.

After the passage of Proposition 47, Vargas filed a petition requesting that her section 484e offenses be reclassified as misdemeanors, and that she be resentenced accordingly. In support, Vargas cited section 490.2 (enacted as part of Proposition 47), which states that notwithstanding "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

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[1] All further statutory references are to the Penal Code.

[2] Vargas was also charged with a misdemeanor count of acquiring or retaining personal identity information. (§ 530.5, subd. (c)(1).) That count is not at issue in this appeal.

[$950] shall be considered petty theft and shall be punished as a misdemeanor. . . ."

The court denied the petition, concluding that section 490.2 does not apply to the type of offense described in section 484e, subdivision (d).

DISCUSSION

A. Summary of Relevant Provisions of Proposition 47

"'On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)' [Citation.]" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) "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). . . ." (*Id.* at p. 1091.) Relevant here, Proposition 47 added section 490.2, which provides in relevant part: "Notwithstanding . . . 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. . . ." (§ 490.2, subd. (a).).

"Proposition 47 also created a new resentencing provision: section 1170.18." (*Rivera, supra,* 233 Cal.App.4th at p. 1092.) Under subdivision (a) of this provision, any person who is "'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 were added or amended by Proposition 47." (*Ibid.*) If the petitioner falls within the category of persons described in subdivision (a), subdivision (b) requires the trial court to recall the petitioner's felony sentence, and resentence him or her 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).)

B. Section 490.2 Applies to the Offense Described in Section 484e, Subdivision (d)

Vargas argues the trial court erred in concluding that section 490.2 does not apply to the type of offense described in section 484e, subdivision (d). At the time Vargas filed her appeal, the issue was pending before the California Supreme Court. On March 27, 2017, the Court issued *Romanowski, supra*, 2 Cal.5th 903, which held that section 490.2 applies to convictions under section 484e, subdivision (d) if the value of the stolen access card information is "less than $950." *Id*. at p. 914 ["we hold that that section 490.2 reduces the punishment for theft of access card information valued at less than $950"].)[3]

Romanowski also held that courts should use the "reasonable and fair market value test" set forth in section 484, subdivision (a), to "determine whether the value of stolen access card information exceeds $950." (*Romanowski, supra*, 2 Cal.5th at p. 914.) The Court further explained that under this test, the trial court must "identify how much stolen access card information would sell for. [Citations.] The fact that stolen access card information is not sold legally does not relieve courts of this duty. . . . When a defendant steals property that is not sold legally, evidence related to the possibility of illegal sales can help establish 'reasonable and fair market value.' Only in cases where stolen property would command no value on any market (legal or illegal) can courts presume that the value of stolen access information is de minimis." (*Id*. at p. 915.)

Finally, *Romanowski* clarified that "in the context of a section 1170.18 petition to recall a sentence," the petitioner has "the ultimate burden of proving" any "newly relevant facts" that are necessary to establish his or her "eligibility" for relief. (*Romanowski, supra*, 2 Cal.5th at p. 916) According to the Court, "[i]n some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. When eligibility is established in this fashion, 'the petitioner's felony sentence shall be recalled and the petitioner sentenced to a misdemeanor . . . unless the court, in its discretion, determines that

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[3] After the Court issued *Romanowski*, we requested the parties to file supplemental briefs addressing the effect of the decision on this case.

resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.] But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' [Citations.]" (*Ibid.*)

In light of *Romanowski*, the trial court erred in concluding Vargas's offenses under section 484e, subdivision (d) were categorically ineligible for reclassification and resentencing under Proposition 47. We therefore reverse the court's order, and remand the matter for a new section 1170.18 hearing to determine: (1) whether the value of access card information at issue in this case does not exceed $950; and (2) if so, whether resentencing appellant would pose an unreasonable risk of danger pursuant to section 1170.18, subdivision (b).

DISPOSITION

The order is reversed and the case remanded for further proceedings consistent with this opinion.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.