Filed 10/19/16 P. v. Sulitswalley CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DYLAN ABELARDO SULITSWALLEY,<br><br>Defendant and Appellant. | 2d Crim. No. B271266<br>(Super. Ct. No. 1256756)<br>(Santa Barbara County) |

Dylan Abelardo Sulitswalley appeals an order denying his Proposition 47 motion to reduce a 2008 conviction for failure to appear (FTA; Pen. Code, § 1320, subd. (b))[1] to a misdemeanor and vacate a two-year out-on-bail enhancement (§ 12022.1, subd. (b)). We vacate the out-on-bail enhancement because appellant's conviction on the primary offense, possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), was reduced to a misdemeanor pursuant to Proposition 47. (§§ 1170.18, subd. (d); 12022.1, subd. (g).) An out-on-bail enhancement may not be imposed unless the defendant is convicted of felony primary and secondary offenses. (§ 12022.1, subd. (e) &

[1] All statutory references are to the Penal Code unless otherwise stated. Section 12022.1 subdivision (b) provides: "Any person arrested for a secondary offense that was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years, which shall be served consecutive to any other term imposed by the court."

(g); *People v. Walker* (2002) 29 Cal.4th 577, 586.) The matter is remanded for resentencing.

*Procedural History*

In July 2010, appellant was sentenced to 11 years eight months state prison in three cases that were consolidated for sentencing:

In case no. 1332588, appellant was convicted by plea of furnishing a controlled substance (Health & Saf. Code, § 11352, subd. (a)) with a prior strike conviction (§§ 667, subds. (b) -(i); 1170.12). Appellant was sentenced to eight years (four year midterm, doubled based on the prior strike).

In case no. 1256756, appellant was convicted by plea of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and failure to appear (§ 1320, subd. (b)) with an out-on-bail enhancement (§ 12022.1, subd. (b)). Appellant was sentenced to a consecutive two year eight month term (eight months for possession of a controlled substance plus two years on the out-on-bail enhancement), and a concurrent two year term for FTA.

In case no. 1214367, appellant was convicted by plea of assault with a deadly weapon (§ 245, subd. (a)(1)) and sentenced to a consecutive one year term (one-third the three year midterm).

On November 4, 2014, Proposition 47 was enacted by the voters to reduce certain drug and theft-related offenses from straight felonies and wobblers to misdemeanors, unless the offenses were committed by certain ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Proposition 47 added section 1170.18 which governs the application of these changes to defendants sentenced before the enactment of Proposition 47. Section 1170.18, subdivision (a) provides: "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 [the] sentence."

On February 26, 2016, appellant filed a motion for resentencing in case no. 1256756. (§ 1170.18, subd. (a).) The prosecution agreed that the conviction on count 1 for possession of a controlled substance should be reduced to a misdemeanor. Appellant argued that the count 2 conviction (FTA) should be reduced to a misdemeanor (§ 1320, subd. (a)) and the out-on-bail enhancement vacated because the primary offense (count 1) is deemed to be a misdemeanor "for all purposes" pursuant to section 1170.18, subdivision (k).[2] The trial court reduced the drug conviction on count 1 to a misdemeanor and sentenced appellant to 180 days jail with 180 days credit for time served. The court found that "Count 2 (Penal Code § 1320(b)) is a stand-alone crime, and at the time of commission, [appellant] was charged with a pending felony (Count 1). Therefore, reduction of Count 1 to a misdemeanor does not result in the reduction of Count 2 to a misdemeanor." The court denied the request to vacate the out-on-bail enhancement which "remains tied to Count 2." Appellant's total aggregate sentence was reduced by eight months to 11 years state prison.

*FTA Conviction*

Appellant argues that reduction of the count 1 conviction to a misdemeanor requires that the FTA conviction be reduced to a misdemeanor pursuant to section 1320, subdivision (a) which governs punishment for failure to appear on a misdemeanor charge or conviction. The trial court correctly found that count 2 is "a stand-alone crime" and could not be reduced to a misdemeanor. Section 1320, subdivision (b) provides that "[e]very person who is charged with *or* convicted of the commission of a felony who is

[2] Both issues -- how Proposition 47 resentencing retroactively affects a felony FTA conviction and an out-on-bail enhancement -- are currently pending before the California Supreme Court. (See *People v. Eandi* (2015) 239 Cal.App.4th 801, review granted Nov. 18, 2015, S229305 [Proposition 47 reduction of primary offense (drug possession) does not reduce a felony conviction for FTA]; *People v. Perez* (2015) 239 Cal.App.4th 24, review granted Nov. 18, 2015, S229046 [same]; *People v. Buycks* (2015) 241 Cal.App.4th 519, review granted January 20, 2016, S231765 [discussing interplay between Proposition 47 and section 12022.1 out-on-bail enhancement].)

released from custody on his or her own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony." (Italics added.) Failure to appear is a stand-alone offense, similar to the "bail jumping" statute (§ 1320.5), and is grounded on the defendant's breach of a contractual agreement with the People. (*People v. Jenkins* (1983) 146 Cal.App.3d 22, 28.)

A felony conviction for failure to appear remains a felony even when the underlying conviction (i.e., possession of a controlled substance) is reduced to a misdemeanor. (See *People v. Walker*, *supra*, 29 Cal.4th at p. 583 (*Walker*) [discussing section 1320.5 willful failure to appear while on bail].) Regardless of whether the felony conviction on count 1 is downgraded pursuant to Proposition 47, it does not affect the applicability of section 1320. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 748.) "The language and history of section 1320[] . . . reflect the Legislature's view that fulfillment of this purpose requires punishment whether or not the defendant ultimately is convicted of the charge for which he or she was out on bail when failing to appear in court as ordered. [Citation.]" (*Walker*, *supra*, 29 Cal.4th at p. 583.)

When appellant breached his promise to appear in 2008, he was facing a felony charge and later pled guilty to that charge. Reduction of the conviction to a misdemeanor in 2016 did not collaterally affect the FTA conviction. Appellant argues that section 1170.18, subdivision (k) provides that reduction of a felony conviction to a misdemeanor "shall be considered a misdemeanor for all purposes." But nothing in the language of the statute or the Proposition 47 ballot materials indicates that section 1170.18 was intended to have retroactive collateral consequences on non-Proposition 47 offenses. (See *People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1100 [§ 1170.18, subdivision (k) not retroactive].) "[A] felony offense redesignated as a misdemeanor under Proposition 47 retains its character as a felony prior to its redesignation, and is treated as a misdemeanor only after the time of redesignation." (*In re C.H.* (2016) 2 Cal.App.5th 1139, 1147.)

Proposition 47 allows resentencing only if the defendant was convicted of specific drug or theft offenses enumerated in section 1170.18, subdivision (a). Section

1320 is not among those offenses expressly included in the text of Proposition 47 or section 1170.18. "Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [Citation.]" (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

*Out-On-Bail Enhancement*

Appellant argues that reduction of the count 1 conviction to a misdemeanor requires that the out-on-bail enhancement be vacated. We agree. (§ 12022.1, subd. (g).) The out-on-bail enhancement penalizes recidivist conduct but may only be imposed where the defendant is ultimately convicted on both the primary and secondary felony offenses. (*People v. McClanahan* (1992) 3 Cal.4th 860, 869; *Walker*, *supra*, 29 Cal.4th at pp. 583-584; see also *People v. Reyes, In re Reyes* (Oct. 6, 2016) __ Cal.App.5th __ [2016 Cal.App. LEXIS 845].) If, at time of resentencing, the conviction on the primary offense is reduced to a misdemeanor, it eliminates the enhancement. (Couzens et al., Sentencing California Crimes (Rutter Group July 2016) § 25:28, p. 25-108.) "Although section 12022.1, strictly speaking, does not appear to make the defendant's conviction of the primary offense an *element* of the enhancement in order to *prove* the enhancement, the statute makes crystal clear that *imposition of the enhancement* requires conviction of the primary offense at some stage of the proceedings. [Citations.]" (*Walker*, *supra*, 29 Cal.4th at p. 586.) Principles of stare decisis require that we follow *Walker*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

*Disposition*

We vacate the out-on-bail enhancement and remand for resentencing to permit the trial court to recalculate the component parts of the aggregate sentence. (*People v. Navarro* (2007) 40 Cal.4th 668, 681.)

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Jean M. Dandona, Judge

Superior Court County of Santa Barbara

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