Filed 9/26/18 P. v. Mosqueda 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID OSUNA MOSQUEDA,

Defendant and Appellant.

2d Crim. No. B268834
(Super. Ct. No. 2015008766)
(Ventura County)

David Osuna Mosqueda appeals his conviction by jury of unlawful driving or taking a vehicle (count 1; Veh. Code, § 10851, subd. (a)), possession of a controlled substance (count 2; Health & Saf. Code, § 11350, subd. (a)), evading a police officer (count 3; Veh. Code, § 2800.1, subd. (a)), and driving while under the influence of a drug (count 4; Veh. Code, § 23152, subd. (e)). In a bifurcated proceeding, appellant admitted a prior strike

conviction (Pen. Code, §§ 667, subds. (c)(1) & (e)(1); 1170.12, subds. (a)(1) & (c)(1))[1] and six prior prison term enhancements (§ 667.5, subd. (b)). The trial court sentenced appellant to three years on count 1 for unlawful driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), doubled the sentence based on the prior strike, and imposed a one-year prior prison term enhancement for an aggregate sentence of seven years state prison. On counts 2 through 4, the court imposed one-year concurrent terms.

Appellant contends that the trial court erred in not treating the Vehicle Code section 10851 conviction as a theft-related misdemeanor pursuant to Proposition 47. We affirm the judgment of conviction. (*People v. Page* (2017) 3 Cal.5th 1175, 1179-1180 (*Page*); *People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) Appellant also argues that the trial court erred in imposing a one-year prior prison term enhancement. (§ 667.5, subd. (b).) We reverse and remand with directions to strike the one-year prison prior term enhancement. (See *People v. Buycks* (2018) 5 Cal.5th 857, 889-890 (*Buycks*).)

Facts

On January 12, 2015, Norma Wright reported that her 1991 Ford Aerostar van, worth $800, was stolen. The Oxnard Police observed appellant driving the van six days later and gave chase. Inside the van, officers found the van license plate folded in half, several baggies of heroin, and a syringe loaded with heroin. Appellant was under the influence of a controlled substance and had methamphetamine in his blood. The officers determined that appellant had switched the rear license plate ("cold plated" the vehicle), with a different license plate.

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[1] All statutory references are to the Penal Code unless otherwise stated.

Conviction for Unlawful Taking or Driving a Vehicle

Appellant contends that section 490.2 requires that the conviction for taking or driving a vehicle without the owner's permission (Veh. Code, § 10851, subd. (a)) be treated as a Proposition 47 misdemeanor theft. Effective November 5, 2014, Proposition 47 reclassified certain drug and theft related offenses from felonies or wobblers to misdemeanors. (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 308; see § 1170.18, subd. (a).) Proposition 47 added section 490.2 which provides in relevant part: "(a) Notwithstanding Section 487 *or any 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 . . . ." (Italics added.)

Appellant contends that section 490.2 should be broadly construed to include Vehicle Code section 10851 offenses but section 490.2 references only the grand theft statute (§487) and requires that the value of the property taken not exceed $950. The value of the vehicle is not an element of Vehicle Code section 10851 which "'proscribes a wide range of conduct'" and may be violated "'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*Garza*, *supra*, 35 Cal.4th at p. 876.)

In *Page*, *supra*, 3 Cal.5th 1175, our Supreme Court held that "Vehicle Code section 10851 differs in two important ways from Penal Code section 487, subdivision (d)(1). For one thing, the Vehicle Code section does not expressly designate the offense as 'grand theft.' And for another, its prohibitions sweep

more broadly than 'theft,' as the term is traditionally understood. Vehicle Code section 10851 punishes not only taking a vehicle, but also driving it without the owner's consent, and 'with intent *either* to permanently *or temporarily* deprive the owner thereof of his or her title to or possession of the vehicle, *whether with or without intent to steal the vehicle.*' (Veh. Code, § 10851, subd. (a), italics added.)" (*Id.* at p. 1182.)

Citing *Garza*, *supra*, 35 Cal.4th 866, the court in *Page* held there is a distinction between the theft and non-theft forms of a Vehicle Code section 10851 violation: "'Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. . . . On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete. . . . Therefore, a conviction under section 10851(a) for posttheft driving is not a theft conviction . . . .' ([*People v.*] *Garza*, at p. 871, italics omitted.) . . . [¶] By its terms, Proposition 47's new petty theft provision, section 490.2, covers the theft form of the Vehicle Code section 10851 offense." (*Page*, *supra*, 3 Cal.5th at p. 1183.) Simply stated, joyriding, i.e., the "unlawful *driving* of a vehicle[,] is not a form of theft when the driving occurs or continues after the theft is complete (for convenience, we will refer to this as posttheft driving)." (*Garza* at p. 871.)

Appellant's conviction is based on the posttheft driving of a van that was stolen six days earlier. Assuming, arguendo, that appellant was the actual thief, the theft was completed after appellant reached a place of temporary safety and switched out the rear license plate, i.e., cold-plated the van. (See, e.g., *Garza*, *supra*, 35 Cal.4th at p. 880.) Pursuant to

Proposition 47, theft of a vehicle worth $950 or less is a misdemeanor theft but "[w]here the evidence shows a 'substantial break' between the taking and the driving, posttheft driving may give rise to a conviction under Vehicle Code section 10851 distinct from any liability for vehicle theft. [Citations.]" (*Page*, *supra*, 3 Cal.5th at pp. 1188-1189.)

We conclude that appellant's Vehicle Code section 10851 conviction is for posttheft driving and is not a theft conviction eligible for Proposition 47 relief. The exclusion of Vehicle Code section 10851 from section 490.2 confirms that there was no voter intent to modify the punishment for the crime of unlawfully driving or taking a vehicle. As a matter of statutory construction, the more specific statute (Veh. Code, § 10851, subd. (a)) prevails over a general statute on the same subject (§§ 490.2; 487, subd. (d)(1)). (See, e.g., *People v. Betts* (2005) 34 Cal.4th 1039, 1058; *People v. Park* (2013) 56 Cal.4th 782, 796 [ballot initiatives are governed by the rules governing construction of statutes enacted by Legislature].)

Prior Prison Term Enhancement

Appellant contends that the one-year prior prison term enhancement must be stricken because his 2012 felony drug conviction (case no. 2012032899) was designated a Proposition 47 misdemeanor prior to sentencing.[2] (§ 1170.18, subd. (k); see

[2] The probation report states that the 2012 felony conviction was "[R]educed to misd per 1170.18 PC." We grant appellant's request for judicial notice of the Ventura County Superior Court docket in case no. 2012032899 which reflects that the felony conviction was designated a misdemeanor conviction on February 9, 2015, approximately nine months before appellant was sentenced.

People v. Kindall (2016) 6 Cal.App.5th 1199, 1201; *People v. Call* (2017) 9 Cal.App.5th 856, 858.) The trial court struck the 2012 prison prior (Special Allegation 8) and imposed a one-year prior prison term enhancement based on the 1988 prior (Special Allegation 4) for hit and run. (Veh. Code, § 20001, subd. (a).) The trial court explained: "As far as the (b) priors, I'm going to strike . . . [Special Allegation] 5, 6, 7, and 8. That just leaves [Special Allegation] 4."[3]

Appellant argues that the prison prior enhancement is subject to a five-year washout because the most recent prior (i.e., the 2012 drug conviction) was redesignated a misdemeanor before sentencing. In *Buycks, supra,* 5 Cal.5th 857, our Supreme Court recently held that "Proposition 47 and the *Estrada* rule [*In re Estrada* (1965) 63 Cal.2d 740] authorize striking th[e prison prior term] enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor." (*Id*. at p. 888.) Where, as here, a prior felony conviction is redesignated a misdemeanor conviction, it becomes a misdemeanor for all purposes. (§ 1170.18, subd. (k).) The sentencing court must assume that no prison term was served for purposes of the five-year washout rule which requires that the defendant remain free for a period of five years of both prison

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[3] Before sentencing, appellant admitted a 2000 prior (Veh. Code, § 10851, subd. (a); Special Allegation 3), a 1998 prior (Veh. Code, § 20001, subd. (a); Special Allegation 4), a 2000 prior (Veh. Code, § 10851, subd. (a); Special Allegation 5), a 2002 prior (§ 211; Special Allegation 6), a 2006 prior (Veh. Code, 2800.2, subd. (a); Special Allegation 7), and the 2012 prior (Health & Saf. Code, § 11377, subd. (a); Special Allegation 8), all charged as prior prison term enhancements.

custody and the commission of a new offense resulting in a felony conviction. (§ 667.5, subd. (b); *People v. Tenner* (1993) 6 Cal.4th 559, 563.) As discussed in *Buycks, supra,* at page 889, the reference in section 667.5, subdivision (b) "to a prior 'prison term' necessarily must subsume the existence of a prior felony conviction that justified the imposition of that prison term."

Appellant admitted that he was convicted of a felony in 1998 and served a prison term, but the prior prison term was washed out when the 2012 felony drug conviction (case no. 2012032899) was redesignated a Proposition 47 misdemeanor. The trial court erred in imposing the one-year prior prison term enhancement. (*Buycks*, *supra*, 5 Cal.5th at pp. 889-890.)

Disposition

We reverse and remand with directions to strike the one-year prison prior term enhancement. (§ 667.5, subd. (b).) The judgment of conviction is affirmed.

NOT TO BE PUBLISHED.

YEGAN, A.P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Gilbert Romero and Nancy Ayers, Judges

Superior Court County of Ventura

Stephen P. Lipson, Todd W. Howeth, Public Defenders, Michael C. McMahon, Chief Deputy, Benjamin W. Maserang, Russell L. Baker, and William M. Quest, Sr. Deputy Public Defenders for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.