Filed 12/16/15 P. v. Tran CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LUON QUON TRAN, Defendant and Appellant.	B261070 (Los Angeles County Super. Ct. No. KA075107)

APPEAL from an order of the Superior Court of Los Angeles County, Jack P. Hunt, Judge. Affirmed.

Patricia S. Lai, 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, Assistant Attorney General, Mary Sanchez and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Luon Quon Tran appeals from an order denying his petition for recall of sentence and request for resentencing pursuant to Proposition 47. The trial court denied the motion, concluding that Proposition 47 did not apply to appellant's convictions. Appellant contends the trial court's interpretation of Proposition 47 was erroneous. After independently reviewing the relevant statutes, we conclude appellant failed to produce sufficient evidence to demonstrate he was entitled to relief. Accordingly, we affirm the trial court's order denying appellant's petition without prejudice to subsequent consideration of a properly filed petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 3, 2014, appellant filed a verified petition for recall of sentence pursuant to Penal Code section 1170.18.[1] The petition alleged that on November 7, 2006, appellant was sentenced to a term of 11 years and 8 months for two counts of driving without the owner's consent (Veh. Code, § 10851, subd. (a)) and two counts of eluding a pursuing officer (Veh. Code, § 2800.2, subd. (a)). It further alleged that the two Vehicle Code section 10851 counts were based on appellant's "obtaining property by theft where the value of the property taken did not exceed nine hundred fifty dollars." It was also alleged that the offenses were charged as felonies because appellant had suffered a prior strike conviction. The petition asserted that appellant was eligible for resentencing on those counts pursuant to section 490.2, subdivision (a) which provides: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any

---

[1] All further statutory citations are to the Penal Code, unless otherwise stated. Section 1170.18, subdivision (a) provides that a person currently serving a sentence for a felony conviction who would have been guilty of a misdemeanor under Proposition 47 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.

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 . . . ."

On December 15, 2014, the trial court denied the petition. It determined that "[t]he charges in this case cannot be reduced pursuant to . . . Proposition 47." Appellant filed a timely appeal.

DISCUSSION

On November 4, 2014, the voters enacted Proposition 47, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. . . . Proposition 47 (1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377." (*Id*. at p. 1091.) As stated above, section 490.2, subdivision (a) generally provides that "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.)

Appellant contends his felony convictions under Vehicle Code section 10851 fall within the purview of section 490.2, as they were based on obtaining property (an automobile) by theft. In support, he cites, among other things, section 666, as amended by Proposition 47. Section 666, subdivision (a) provides: "Notwithstanding Section 490, any person . . . who, having been convicted of petty theft, grand theft, a conviction pursuant to subdivision (d) or (e) of Section 368, *auto theft under Section 10851 of the Vehicle Code*, burglary, carjacking, robbery,

or a felony violation of Section 496, and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, and who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison." (Italics added.)

Vehicle Code section 10851, subdivision (a) provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, 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 . . . is guilty of a public offense. . . ." (Italics added.) Thus, under its plain language, a conviction under Vehicle Code section 10851 may or may not be a theft offense. As our Supreme Court has explained: "Subdivision (a) of Vehicle Code section 10851 (hereafter section 10851(a)), defines the crime of unlawful driving or taking of a vehicle. Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft . . . . 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 (for convenience, we will refer to this as posttheft driving). Therefore, a conviction under section 10851(a) for posttheft driving is not a theft conviction . . . ." (*People v. Garza* (2005) 35 Cal.4th 866, 871, italics omitted; see also *People v. Allen* (1999) 21 Cal.4th 846, 851 ["Vehicle Code section 10851 can 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)."].)

"[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878; see also Evid. Code, § 500 ["party has the burden of proof as to each fact

the existence or nonexistence of which is essential for the claim for relief"].) Here, it cannot be determined from appellant's petition whether his Vehicle Code section 10851 convictions are misdemeanors under section 490.2. No allegations were made about the nature of the charged offenses, and the conclusory allegation that the property taken was worth $950 or less is insufficient. Thus, the trial court properly denied the petition.[2]

DISPOSITION

The order denying appellant's petition for resentencing is affirmed without prejudice to subsequent consideration of a properly filed petition.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

---

[2] As we conclude that the petition was inadequate, we need not address appellant's Equal Protection claim.