Filed 10/23/15 P. v. Aguirre CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FIDEL ANDREW AGUIRRE, Defendant and Appellant.	B256253 (Los Angeles County Super. Ct. No. VA133580)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Mark J. Shusted, 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, Zee Rodriguez and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

DISCUSSION

Appellant asks this court to decide whether he is entitled to have his felony conviction for a violation of former Health and Safety Code section 11377, subdivision (a) reduced to a misdemeanor under Proposition 47. Although Proposition 47 establishes a clear process by which eligible defendants can request that their felony convictions be reduced to a misdemeanor in the trial court during the pendency of an appeal, appellant argues that he is not required to exhaust that option. We disagree.

Appellant Fidel Andrew Aguirre was convicted by jury of carjacking (Pen. Code, § 215, subd. (a)), possession of a controlled substance (Former Health & Saf. Code, § 11377, subd. (a)), and misdemeanor petty theft (Pen. Code, § 484, subd. (a)). In a bifurcated proceeding, appellant admitted serving a prior prison term within the meaning of Penal Code, section 667.5, subdivision (b).

On May 8, 2014, the court sentenced appellant to prison for six years eight months. On that same day, appellant filed his notice of appeal.

While the appeal was pending, the voters, on November 4, 2014, passed Proposition 47, the Safe Neighborhood and Schools Act (the Act or Proposition 47). The Act was effective on November 5, 2014. (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.) The Act reduced certain drug-related and theft-related offenses that previously were felonies, unless they were committed by certain ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Among the enumerated offenses set forth in Proposition 47 is possession of a controlled substance, a violation of Health and Safety Code section 11377, subdivision (a).

The Act also created Penal Code Section 1170.18, which states in relevant part: "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." (Pen. Code, § 1170.18, subd. (a).)

Appellant's conviction for a violation of former Health and Safety Code section 11377, subdivision (a) would appear to be eligible under Proposition 47. However, the determination of appellant's eligibility is not so straightforward. Upon the filing of a petition for recall of sentence under Proposition 47, the trial court must also determine whether the petitioner has suffered any disqualifying prior convictions. In addition, even if the defendant is eligible for resentencing, the trial court has the discretion to deny resentencing upon a determination that it "would pose an unreasonable risk of danger to public safety." (Pen. Code, § 1170.18, subd. (b).)

Appellant did not petition the trial court for a recall of his sentence. Rather, he argues that he is not required to do so and can, instead, seek relief under Proposition 47 directly on appeal. Appellant argues that the procedures set forth for recall and resentencing under Penal Code section 1170.18, subdivision (a) are not exclusive. Rather, he asserts that because Proposition 47 applies retroactively to cases like his that were not yet final on appeal, he is automatically entitled to have this court resentence him to a misdemeanor on count 2. In addition, appellant asserts that the Court of Appeal should not exercise its discretion to consider whether a resentencing would pose an unreasonable risk of danger as that additional requirement violates equal protection.

A number of appellate courts have answered the question of whether a defendant can seek relief under Proposition 47 in the Court of Appeal without first filing and obtaining an adjudication of that issue at the trial court. All have rejected that contention.

In *People v. Lopez* (2015) 238 Cal.App.4th 177, 182, the Sixth Appellate District declined appellant's invitation to reverse and remand the matter with instructions to resentence him. As noted by that court, "[w]e find no grounds for reversing or even modifying the judgment." (*Ibid.*) To secure relief under Proposition 47, a "petitioner must file a petition for a recall of sentence in the trial court" (*ibid*.) and the trial court must "decide the threshold question of whether he is eligible for resentencing." (*Ibid*.)

In *People v. Diaz* (2015) 238 Cal.App.4th 1323 (*Diaz*), Division Four of this district discussed Penal Code section 1170.18 and whether the appellate court should reduce the predicate felony to a misdemeanor under Proposition 47 and strike the enhancement even though the defendant had not filed a petition in the trial court. (*Diaz*, at pp. 1327-1328, 1330-1331.) Division Four declined the invitation and, instead, rejected appellant's arguments on appeal as "premature." (*Id.* at p. 1331.) *Diaz* noted that the plain language of Penal Code section 1170.18 requires the appellant first to file "a petition to recall (if currently serving the sentence) or an application to redesignate (if the sentence is completed) in the superior court of conviction." (*Diaz*, at pp. 1331-1332.) *Diaz* also concluded "the voters did not intend to permit an appellate court to declare in the first instance that a felony conviction for a crime reduced by Proposition 47 is a misdemeanor." (*Id*. at p. 1332.)

Other recent decisions similarly have rejected arguments on appeal that appellate courts are required to reduce offenses predating Proposition 47 when the judgments are not yet final, and the decisions instead require defendants to utilize the procedures specified in Penal Code section 1170.18. (*People v. Delapena* (2015) 238 Cal.App.4th 1414, 1421, 1426-1428; see *People v. Awad* (2015) 238 Cal.App.4th 215, 221-222 [finding the task of reducing a conviction from a felony to a misdemeanor under Proposition 47 "[m]anifestly" vested with the trial court].)

We have found no published case concluding that if, on the effective date of Proposition 47, a defendant is currently serving a sentence for a felony proscribed by a statute later amended under Proposition 47, and the defendant's appeal from the judgment is not yet final, an appellate court should, in the first instance, reduce the felony to a misdemeanor pursuant to Proposition 47.

We hold that because appellant has not filed a petition as required by Penal Code section 1170.18, subdivision (a), any arguments on appeal that Proposition 47 should be applied retroactively or that the public safety hearing requirement of Penal Code section 1170.18 violates equal protection guarantees are premature.

DISPOSITION

The judgment is affirmed.

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JONES, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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