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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE ALBERT LUNDQUIST,

Defendant and Appellant.

B282882

(Los Angeles County
Super. Ct. No. YA093411)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed as modified.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill, and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

George Albert Lundquist appeals from the judgment entered following his conviction by plea of driving or taking a vehicle without the owner's consent. His sole challenge on appeal is to the five of the 11 one-year prior prison term enhancements he admitted, which were based on earlier drug convictions. (Pen. Code, § 667.5, subd. (b).)¹ The trial court had reduced the drug convictions to misdemeanors under Proposition 47 before defendant entered his plea in this case. (§ 1170.18.) Defendant contends, and the Attorney General acknowledges, that the reduced drug convictions will no longer support the five section 667.5, subdivision (b) enhancements. We agree and modify the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2016, in the presence of his counsel, defendant entered an open plea of no contest to driving or taking a vehicle in violation of Vehicle Code section 10851, subdivision (a), and admitted he had suffered one prior serious or violent felony conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(j), 1170.12) and had served 11 separate prison terms for felonies (§ 667.5, subd. (b)). Five of these prior felony convictions were for possession of a controlled substance, one for violating Health and Safety Code section 11350, and four for violating Health and Safety Code section 11377, subdivision (a).

During the plea hearing, defense counsel mentioned that “a lot” of defendant's prior felony convictions had been reclassified as misdemeanors under Proposition 47. In fact, the five prior drug convictions had all been reduced to misdemeanors in either 2015 or early 2016. The trial court stated its view that reclassification would not preclude using the prior convictions as section 667.5, subdivision (b) enhancements. The court subsequently imposed a

¹ Statutory references are to the Penal Code, unless otherwise indicated.

state prison sentence of 19 years: eight years (the four-year upper term doubled under the Three Strikes law) for driving or taking a vehicle, plus one year for each of the 11 prior prison term enhancements. Defendant filed a timely notice of appeal.

DISCUSSION

The defendant contends, the Attorney General concedes, and we agree that five of the 11 section 667.5, subdivision (b) enhancements must be stricken because the underlying drug convictions were reclassified as misdemeanors under Proposition 47 prior to the sentencing hearing.

Section 667.5, subdivision (b) provides that when the current offense is a felony, the trial court must impose a one-year enhancement for each prior prison term. The prior prison term enhancement “ ‘requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.’ ” (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.)

Proposition 47, enacted in 2014, reduced certain drug and theft-related offenses from felonies or wobblers (crimes punishable as either felonies or misdemeanors) to misdemeanors. Under section 1170.18, subdivisions (a) and (b), a person serving a sentence for a felony conviction who would have been guilty of a misdemeanor under Proposition 47 may petition for recall of the sentence. Under subdivisions (f) and (g), a person who has completed a sentence for a felony conviction may apply to have the felony designated as a misdemeanor. Any felony conviction that is reduced to a misdemeanor under these provisions “shall be considered a misdemeanor for all purposes.” (§ 1170.18, subd. (k).)

The issue whether section 1170.18, subdivision (k) invalidates a prior prison term enhancement where the underlying felony conviction has been reduced to a misdemeanor is pending before the California Supreme Court. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.) Although the Supreme Court has granted review in such cases, Courts of Appeal have generally refused to apply Proposition 47 retroactively to a prior prison term enhancement for a felony offense reduced to a misdemeanor after the enhancement is imposed, especially where an enhancement is challenged after the judgment has become final. (See, e.g., *In re Diaz* (2017) 8 Cal.App.5th 812, 817-818, review granted May 10, 2017, S240888; *People v. Johnson* (2017) 8 Cal.App.5th 111, 115, review granted Apr. 12, 2017, S240509; *People v. Jones* (2016) 1 Cal.App.5th 221, 228-229, review granted Sept. 14, 2016, S235901; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201.)

However, appellate courts have applied Proposition 47 prospectively to a prior prison term enhancement, where the underlying felony offense had been reclassified as a misdemeanor before the enhancement was imposed. (See, e.g., *People v. Call* (2017) 9 Cal.App.5th 856, 863-864 (*Call*); *People v. Evans* (2016) 6 Cal.App.5th 894, 902-903, review granted Feb. 22, 2017, S239635, citing *In re Estrada* (1965) 63 Cal.2d 740; cf. *People v. Abdallah* (2016) 246 Cal.App.4th 736, 739-740, 743, 747 (*Abdallah*), citing *People v. Park* (2013) 56 Cal.4th 782, 802.) The same logic in those decisions pertains here. Because defendant's prior felony drug convictions were reclassified as misdemeanors before the section 667.5, subdivision (b) enhancements were imposed, indeed

before the plea was entered, they no longer met the first requirement for imposition of the enhancement—that the prior conviction be a felony. (See *Call, supra*, 9 Cal.App.5th at p. 864; *Abdallah, supra*, 246 Cal.App.4th at p. 746.) Moreover, imposing the enhancements based on the prior drug convictions was contrary to the voters’ intent that certain “ ‘nonserious, nonviolent crimes,’ ” like drug possession, should not have been felonies. (*Call, supra*, 9 Cal.App.5th at p. 863.) The trial court’s imposition of the challenged section 667.5, subdivision (b) enhancements was improper.

DISPOSITION

The five section 667.5, subdivision (b) enhancements based on the misdemeanor drug convictions in Los Angeles County Superior Court case Nos. YA089118, SA076493, 08WF1856, HEF001627 and SWF022959 are ordered stricken. The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment reflecting the modification and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.