Filed 10/22/19 P. v. Howard 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CHARLES HOWARD, Defendant and Appellant.	2d Crim. No. B293360 (Super. Ct. No. 2018006735) (Ventura County)

Charles Howard appeals a judgment following his conviction for unlawful driving a vehicle (Veh. Code, § 10851, subd. (a)), a felony (count 1); receiving stolen property – a motor vehicle (Pen. Code, § 496d, subd. (a)), a felony (count 2); and driving without a license (Veh. Code, § 12500, subd. (a)), a misdemeanor (count 3). For count 2 the trial court did not require the jury to make a finding on whether the value of the vehicle exceeded $950. We conclude, among other things, that the crime involved in count 2 (Pen. Code, § 496d) falls within the purview of Proposition 47. The conviction on count 2 is reversed and reduced to a misdemeanor. We affirm the conviction on

count 1 for unlawful driving a vehicle (Veh. Code, § 10851, subd. (a)), and conclude the exclusion of this posttheft driving crime from the purview of Proposition 47 is not irrational and does not deprive Howard of equal protection of the laws. We remand for resentencing. In all other respects, we affirm.

FACTS

On February 20, 2018, James Lewter reported to police that his 1993 Ford Explorer had been stolen. Howard had no permission to take or drive Lewter's car.

On February 26, 2018, Paul Gibson, a security guard at the Surfer's Point parking lot, saw Howard driving a vehicle near the lot. Howard asked Gibson whether he could park in the lot. Gibson told him he could and it would cost $4 to park there. Howard drove the car into the lot.

On that day Police Officer Michael Marietta and his partner went to Surfer's Point. They had received information about people living in a "suspicious vehicle," the 1993 Ford Explorer. As Marietta approached the vehicle, he saw Howard in the rear passenger seat and a female in the front passer seat. In a "records check," Marietta learned the car was "reported stolen." There were items of property in the car, including blankets and clothing, that indicated someone had been "living in the car."

Howard told Marietta that a man named "Jimmy" was the driver of the car. Howard said Jimmy had gone for a walk. He told Marietta that Jimmy had "picked him" and his girlfriend up "the night prior." Howard was arrested.

At trial the court instructed the jury on the charged felony offense of unlawfully receiving stolen property – a motor vehicle (§ 496d, subd. (a)), *without instructing* jurors to determine the value of the motor vehicle.

After the jury found Howard guilty of unlawful driving a vehicle (Veh. Code, § 10851, subd. (a)) (count 1), receiving stolen property (§ 496d, subd. (a)) (count 2), and driving without a license (Veh. Code, § 12500, subd. (a)) (count 3), the trial court sentenced Howard to the midterm of two years for count 1, with a consecutive one-year term for a Penal Code section 667.5, subdivision (b) "prior" for "a total term of imprisonment of 36 months." It imposed a two-year sentence on count 2, which it stayed under Penal Code section 654, and a 30-day concurrent sentence on count 3. It ordered Howard to spend eight months in custody and "the remaining 28 months on mandatory supervision." The court's minutes reflect that Howard was ordered to pay a total of $695 as "fees." The court ordered him to pay, among other things, a $250 fine to the State Restitution Fund.

DISCUSSION

Penal Code Section 496d and Proposition 47

Howard contends "Penal Code section 496d is covered by Proposition 47." He notes that under Proposition 47 there is a $950 limit that determines whether the theft crime is a felony or misdemeanor. (Pen. Code, § 490.2.) He claims that consequently the failure to make a finding at trial on the value of the vehicle involved in this theft crime requires reversal of his felony conviction for this offense. We agree.

The jury found Howard guilty of the felony of "receiving stolen property," a "motor vehicle, to wit: 1993 Ford Explorer" in "violation of Penal Code section 496d." That offense includes punishment for a person who "receives any motor vehicle" that "has been stolen or that has been obtained in any manner

constituting theft . . . , knowing the property to be stolen." (§ 496d, subd. (a).)

In its instructions to the jury on count 2, the trial court said the jury must decide: 1) if defendant received a stolen automobile; and 2) when he received it, "he knew that the property had been stolen." The court did not instruct the jury to determine the value of the vehicle.

"Proposition 47 . . . added [Penal Code] section 490.2, which states in part: '*Notwithstanding* Section 487 *or any other 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 . . . .' " (*People v. Williams* (2018) 23 Cal.App.5th 641, 646-647, italics added.)

"[T]he overarching purpose of Proposition 47 was to reduce penalties for certain crimes and concomitantly to save costs to the state . . . ." (*People v. Williams*, *supra*, 23 Cal.App.5th at p. 650.) This new law "included the reduction to 'misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft . . . . (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 3, subds. (3) & (6), p. 70.)" (*Ibid.*)

"Proposition 47 directed that the text of the initiative 'shall be broadly construed to accomplish its purposes' and 'shall be liberally construed to effectuate its purposes.' " (*People v. Romanowski* (2017) 2 Cal.5th 903, 909.) Reducing the punishment for theft crimes is consistent with that remedial purpose. (*Ibid.*)

The language "obtaining *any* property" by theft in Penal Code section 490.2 shows a broad and inclusive intent. It

includes an automobile. " '[A]fter the passage of Proposition 47, an offender who obtains a car valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon *under any other criminal provision*.' " (*People v. Page* (2017) 3 Cal.5th 1175, 1183, italics added.)

In *Williams*, the Court of Appeal held that a conviction for receiving a stolen vehicle under Penal Code section 496d is "obtaining property by theft" and falls within the purview of Proposition 47. (*People v. Williams*, *supra*, 23 Cal.App.5th at p. 644.) The court said the absence to a reference to section 496d in Proposition 47 was not dispositive. It said, "Proposition 47 reduced the section 496 offense of receiving stolen property to a misdemeanor in cases in which the property involved is valued under $950. . . . However, Section 496d which applies to a person who buys or receives a stolen vehicle is not explicitly listed . . . . There does not seem to be any logical basis to distinguish between receipt of stolen property and receipt of a stolen vehicle under Proposition 47." (*Id*. at p. 649, fns. omitted.) It ruled the appellant had a right to present "facts to establish his eligibility [for Proposition 47 relief] before the trial court." (*Id*. at p. 651.)

The People disagree with *Williams* and contend Proposition 47 was intended to cover stolen property, but not stolen vehicles. They have not, however. shown support for this distinction and narrow interpretation. In *Romanowski*, our Supreme Court discussed the Legislative Analyst's report on Proposition 47. The court noted that the scope of Proposition 47 was intended to be broad. It said, "Nowhere in this analysis did the Legislative Analyst suggest that only theft of select types of property would be reduced . . . ." (*People v. Romanowski*, *supra*, 2 Cal.5th at p. 910.) The court said Penal Code section 490.2 does not

distinguish "between different forms of theft." (*Romanowski*, at p. 917.)

The parties note that other appellate courts have reached a different conclusion than the *Williams* court. Our Supreme Court granted review in some of those cases. We conclude *Williams* was correctly decided and that decision is consistent with the broad language of Penal Code section 490.2 and remedial purpose of Proposition 47 as described in *Romanowski* and *Page*.

The People suggest there is no need for a remand to determine the value of the vehicle. They note that during his testimony Lewter said the value of the vehicle was $1,500, which is above the $950 limit for Proposition 47 relief. But the value of the vehicle was not an issue for trial and the jury was not instructed to make a finding on that issue. Howard claims Lewter's opinion was "uncorroborated and unfounded."

Because no finding was made regarding the value of the vehicle, the felony conviction must be reversed. (*People v. Page*, *supra*, 3 Cal.5th at p. 1183; *People v. Williams*, *supra*, 23 Cal.App.5th at pp. 651-652; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 857.)

Vehicle Code Section 10851 and Proposition 47

Howard contends "any violation of Vehicle Code section 10851, subdivision (a) is entitled to the benefit of Proposition 47." He claims his conviction for unlawful driving a vehicle under Vehicle Code section 10851 must be reversed. We disagree.

Vehicle Code section 10851, subdivision (a) provides, in relevant part, "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.)

The jury found Howard guilty of the felony crime of "unlawful driving or taking of a vehicle, to wit: 1993 Ford Explorer" in "violation of Vehicle Code section 10851[, subdivision] (a)."

In *Page*, our Supreme Court held Vehicle Code section 10851 involves both theft and non-theft crimes. " 'Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft . . . . [A] defendant convicted under section 10851[, subdivision] (a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction . . . .' " (*People v. Page*, *supra*, 3 Cal.5th at p. 1183.) " '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[, subdivision] (a) for posttheft driving is not a theft conviction . . . .' " (*Ibid.*) Consequently, to be eligible under Proposition 47, the defendant "must show not only that the vehicle he or she was convicted of taking or driving was worth $950 or less [citation], but also that the *conviction was based on theft of the vehicle rather than on posttheft driving* [citation] . . . ." (*Page*, at p. 1188, italics added.) "Where 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." (*Ibid.*)

Howard contends his posttheft driving offense under Vehicle Code section 10851 falls within Proposition 47. But, as shown by *Page*, Vehicle Code section 10851 involves two

categories of crimes – taking a vehicle, a theft offense, and posttheft driving, which is not a theft offense. Because it is outside the scope of Proposition 47, the offense of "posttheft driving . . . does not require proof of vehicle value in order to be treated as a felony." (*People v. Lara* (2019) 6 Cal.5th 1128, 1137.)

The People note they "presented their case solely on [Howard] having engaged in post-theft driving . . . ." The prosecutor told the jury, "I only have to show that he either took or drove. *And in this particular case, it's the People's argument that the defendant drove* that vehicle without the owner's consent." (Italics added.) The People therefore relied on the "nontheft variant of the Vehicle Code section 10851 offense." (*People v. Lara*, *supra*, 6 Cal.5th at p. 1138.) The six-day period between the date of the theft and Howard's arrest shows a substantial break between the theft and the driving. (*Id.* at p. 1137.) Howard has not shown that he falls within the category of being convicted of a theft offense, and consequently his claim that his driving offense falls within Proposition 47 fails. (*People v. Page*, *supra*, 3 Cal.5th at pp. 1187-1188.)

Equal Protection

Howard contends his posttheft driving conviction under Vehicle Code section 10851 makes him "similarly situated to those charged under the exact same section with taking a vehicle" and the difference in treatment violates "equal protection."

" '[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*People v. Brown* (2012) 54 Cal.4th 314, 328.) But the taking and posttheft driving offenses under section

10851 are different crimes – one is a theft offense, the other is not. " ' "Persons convicted of *different* crimes are not similarly situated for equal protection purposes." ' " (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565.)

Moreover, even had Howard shown he was similarly situated, the result would not change. "When an equal protection case does not involve a suspect classification such as race and does not infringe on a fundamental right, the legislative classification will be upheld whenever it has a rational relationship to a legitimate state interest. [Citations.] This is true even if the law seems unwise or works to the disadvantage of a particular group." (*People v. Parker* (2006) 141 Cal.App.4th 1297, 1309.) "A criminal defendant has no vested interest " 'in a specific term of imprisonment or in the designation [of] a particular crime [he or she] receives." ' " (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) Because of "the Legislature's broad discretion in forming criminal justice policy," the courts examine challenges to classifications in this area under the "deferential rational relationship test." (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 897.)

Here there is a rational basis for the distinction in treatment between the two offenses. The electorate or the Legislature often must make categorical "line-drawing" choices between relief for different groups of offenders, and such categorical choices do not constitute unlawful discrimination simply because one group is omitted. (*People v. Chatman* (2018) 4 Cal.5th 277, 283.) "It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment, and to distinguish between crimes in this regard." (*People v. Turnage*, *supra*, 55 Cal.4th at p. 74.) "Courts routinely decline to

intrude upon the 'broad discretion' such policy judgments entail." (*Ibid*.) Absent a showing of arbitrary or invidious discrimination the choice to classify some crimes as felonies and others as misdemeanors generally falls within the legislative prerogative. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 839-841.)

Proposition 47 and Penal Code section 490.2 were adopted to change the law regarding *theft* crimes. Howard's offense is not a theft crime. (*People v. Page*, *supra*, 3 Cal.5th at pp. 1187-1188.) Howard contends the electorate did not intend to exclude his driving offense from the purview of Proposition 47. But he has not cited a portion of Proposition 47 or Penal Code section 490.2 that relates to non-theft driving crimes. The categories of reform in Penal Code section 490.2 involve theft offenses. The absence of Howard's non-theft driving offense from the crimes included in Proposition 47 refutes his position. There is a categorical distinction between theft crimes and driving offenses. Reform legislation that categorically excludes offenses that are not intended to be included within that reform is not unconstitutional. (*People v. Turnage*, *supra*, 55 Cal.4th at p. 74; *People v. Wilkinson, supra*, 33 Cal.4th at pp. 839-841; *People v. Romo* (1975) 14 Cal.3d 189, 196-197; *People v. Dunn* (2016) 2 Cal.App.5th 153, 157-158.)

Moreover, there is a significant difference in conduct between offenders who take vehicles and those who decide to continue driving after the vehicle theft offense ends. The People claim offenders who elect to continue to drive stolen vehicles post theft "are more likely to be distracted by the possibility that they might get caught, and are more likely to lead law enforcement on high-speed pursuits . . . ." The electorate and the Legislature have an interest in prohibiting stolen vehicles from being driven

on streets and highways. The offender who drives a stolen vehicle is in possession of a potentially dangerous lethal weapon – a moving automobile. This difference in the type of crime, conduct, the distinct area of highway safety, and the potential danger to the public and law enforcement for this offense, supports a rational basis to impose a greater punishment here, than for the minor theft offenses in Proposition 47. (*People v. Wilkinson*, *supra*, 33 Cal.4th at pp. 839-841; *People v. Romo*, *supra*, 14 Cal.3d at pp. 196-197; *People v. Dunn*, *supra*, 2 Cal.App.5th at pp. 157-158.)

The Dueñas Decision

Relying on *People v. Dueñas*, *supra,* 30 Cal.App.5th 1157, Howard contends: 1) the "court facilities and court operations assessments" (Pen. Code, § 1465.8; Gov. Code, § 70373) imposed against him "must be reversed because the court did not hold an ability to pay hearing"; and 2) the $250 "restitution fine" must be stayed until the People prove he has the ability to pay it.

In *Dueñas*, the court held a defendant has a due process right not to be assessed certain fines and fees beyond his or her ability to pay. Consequently, the trial court must hold a hearing on the defendant's ability to pay court facilities and court operations assessments before imposing them, and it must stay execution of Penal Code section 1202.4 restitution fines "until the People prove that [the defendant] has the present ability to pay it." (*People v. Dueñas*, *supra*, 30 Cal.App.5th at p. 1173; *id.* at pp. 1167, 1172-1173.)

The People claim Howard forfeited this issue by not raising a due process claim in the trial court and not requesting an ability to pay hearing.

Howard's counsel requested the trial court to reduce the restitution fine (Pen. Code, § 1202.4) "down to the minimum of $250." This request was based on Howard's inability to pay the higher restitution fine. Howard's counsel asked the court to consider "his financial circumstances."

Moreover, the trial court knew the issue before it was Howard's ability to pay fines and fees. The court found Howard did not "have the ability to pay for the cost of the presentence investigation report." It said it would impose the "minimum" of $250 for the restitution fine. At trial the court heard testimony about Howard living in a car. The court said Howard did not "have a job."

Howard's counsel did not mention the due process issue in *Dueñas*. But the sentencing hearing took place on September 20, 2018. *Dueñas* was not decided until January 8, 2019. In *People v. Castellano* (2019) 33 Cal.App.5th 485, 489, the court said, "[N]o California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay." It said, "When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (*Ibid*.)

In *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1155, the court said, "*Dueñas* applied law that was old, not new." It ruled the defendant forfeited a challenge to fees because his trial counsel "failed to object to the assessments or the restitution fine." (*Id.* at p. 1153.) But that is not the case here, and the trial court knew the issue involved ability to pay.

Howard claims the trial court imposed "criminal conviction assessment" (Gov. Code, § 70373) and Penal Code section 1465.8 fees against him. But, as the People note, the minute order reflects these fees, but the reporter's transcript shows that the court did not impose those fees at the sentencing hearing. "The record of the oral pronouncement of the court controls over the clerk's minute order." (*People v. Lopez* (2013) 218 Cal.App.4th Supp. 6, 12; see also *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) Consequently, those fees were not imposed. (*Ibid.*) We strike those fees from the clerk's minute order.

Howard contends under *Dueñas* the court's order that he pay a $250 restitution fine (Pen. Code, § 1202.4) must be stayed because the People did not prove he had the ability to pay it. (*People v. Dueñas*, *supra*, 30 Cal.App.5th at pp. 1172-1173.)

The People contend Howard is not entitled to that relief because the trial court reduced that fine from $750 to $250 "based on his ability to pay" and Howard "agreed to pay" that reduced fine. We agree there is no need to remand regarding fees.

DISPOSITION

The felony conviction on count 2 is reversed and reduced to a misdemeanor. The case is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J. TANGEMAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

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