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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A143484

v.

ROBERT BARRY ROBERTS,

(Humboldt County

Super. Ct. Nos.

CR1007331, CR1101730,

CR1206025, CR1304138B)

Defendant and Appellant.

Appellant Robert Barry Roberts pled guilty to second degree commercial burglary (Pen. Code, § 459)¹ and guilty or no contest to several counts of felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and the trial court sentenced him to state prison. Roberts appealed. While his appeal was pending, California voters enacted Proposition 47 (§ 1170.18), which reclassifies certain felonies as misdemeanors.

On appeal, Roberts contends his felony convictions are now misdemeanors under section 1170.18. He urges this court to “remand his case to the trial court to hold a sentencing hearing and to apply” section 1170.18. We decline to do so. To obtain relief pursuant to Proposition 47, Roberts must file the appropriate petition or application

¹ Unless noted, all further statutory references are to the Penal Code.

pursuant to section 1170.18 in the trial court. We therefore affirm the judgment without prejudice to any remedies Roberts may have under section 1170.18.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying Roberts's convictions are not relevant on appeal.

In 2011, in case No. CR1007331, Roberts pled guilty to felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and admitted a prior prison term (§ 667.5). In 2011, in case No. CR1101730, Roberts pled no contest to felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). In 2012, in case No. CR1206025, Roberts pled no contest to felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). In 2014, in case No. CR1304138B, Roberts pled guilty to second degree commercial burglary (§ 459) and admitted violating probation and mandatory supervision in the other cases.

On October 22, 2014, the court sentenced Roberts in case No. CR1007331 to six years and four months in state prison. In the other three cases, the court imposed and stayed sentence or deemed the sentence served in the interests of justice. On October 24, 2014, Roberts filed his notice of appeal in all four cases.

DISCUSSION

In November 2014 — and after Roberts appealed — California voters enacted Proposition 47, which “created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be ‘resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.18, subd. (b).)” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108-1109.)

Relying on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), Robert contends “the reduced punishments established by Proposition 47” apply to him because his “case is not final on appeal” and because Proposition 47 does not contain a savings clause. He urges us to remand his case to the trial court to hold a sentencing hearing and to reduce his felony convictions to misdemeanors. Several courts have rejected the argument Roberts makes here and have concluded Proposition 47 does not apply retroactively.² (See *People v. Shabazz* (2015) 237 Cal.App.4th 303, 314 [Proposition 47 is not retroactive and a defendant “must file an application in the trial court to have his felony convictions designated as misdemeanors”]; *People v. Noyan* (2014) 232 Cal.App.4th 657, 672 [a “[d]efendant is limited to the statutory remedy of petitioning for recall of sentence in the trial court once his judgment is final, pursuant to Penal Code section 1170.18”].)

For example, in *People v. Diaz* (2015) 238 Cal.App.4th 1323 (*Diaz*), the appellate court declined to apply *Estrada* and concluded “the plain language of Proposition 47 and the extrinsic evidence surrounding its passage demonstrate that neither persons currently serving a sentence for a listed offense, nor those who have completed such a sentence, are automatically entitled to reduction in punishment.” (*Diaz, supra*, at p. 1336; see also *People v. Yearwood* (2013) 213 Cal.App.4th 161, 168 [defendant not entitled to retroactive application of changes to analogous statute, Three Strikes Reform Act of 2012, without first petitioning trial court].) We agree with the above cases and conclude Proposition 47 is not retroactive. Roberts must pursue his statutory remedy under section 1170.18 by filing the appropriate petition or application in the trial court.

² Whether Proposition 47 applies retroactively is before the California Supreme Court. (See, e.g., *People v. Dehoyos*, review granted Sept. 30, 2015, S228230; *People v. Lopez*, review granted Oct. 14, 2015, S228372; *People v. Delapena*, review granted Oct. 28, 2015, S229010.) Our high court is also considering whether the Three Strikes Reform Act of 2012 applies retroactively to a defendant sentenced before the Act’s effective date and whose judgment was not final until after that date. (See, e.g., *People v. Conley*, review granted Aug. 14, 2013, S211275; *People v. Lewis*, review granted Aug. 14, 2013, S211494).

DISPOSITION

The judgment is affirmed without prejudice to any remedies Roberts may have under section 1170.18.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.