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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ORPHEE DANIELLE DOUGLAS,

Defendant and Appellant.

A144896

(Solano County
Super. Ct. No. FCR 299451)

Orphee Danielle Douglas appeals from the trial court’s order denying her petition for redesignation of her 2013 felony conviction to a misdemeanor pursuant to Proposition 47, as codified in Penal Code section 1170.18, subdivision (f).¹ The parties extensively debate two legal issues, each of which is the same as or similar to an issue currently pending before our high court.² However, the People raise a more basic factual issue that is dispositive and, therefore, we do not resolve those two legal issues.

¹ All further section references are to the Penal Code.

² These legal issues are: (1) whether a person convicted of commercial burglary for obtaining prescription drugs from a pharmacy by means of a forged prescription committed what is now defined as “shoplifting” within the meaning of section 459.5, subdivision (a) and is therefore eligible to seek redesignation of her offense as a misdemeanor under Proposition 47 (see *People v. Gonzales*, S231171 [reviewing 242 Cal.App.4th 35 and addressing whether cashing forged checks to obtain money from bank constituted larceny such that offense could be redesignated from felony commercial burglary to misdemeanor shoplifting]) and, if so, (2) whether a person who, as part of a plea bargain, pled guilty to a felony that Proposition 47 has redefined as a misdemeanor is eligible for resentencing without forfeiting the benefits of her plea agreement (see *Harris v. Superior Court*, S231489 [reviewing 242 Cal.App.4th 244 and addressing

That is, the People contend as an independent ground for affirmance that Douglas did not meet her burden of proving the value of the prescription medications she illegally obtained was \$950 or less, the amount that demarcates the boundary between felony commercial burglary and misdemeanor shoplifting. (See § 459.5, subd. (a).) We agree. Douglas presented no evidence with her petition. At the time, no appellate court had held that under Proposition 47 petitioners have the burden of proving they qualify for resentencing or redesignation of an offense and, perhaps because of this lack of clarity, the parties and the court disregarded the issued below. Subsequently, the court in *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*) made clear that a petitioner seeking such relief has the burden of proof. Therefore, we follow the disposition ordered in *Sherow* and affirm the court's denial of Douglas's petition without prejudice to subsequent consideration of an appropriately supported petition.

BACKGROUND

The record indicates that Douglas entered the Kaiser Permanente Pharmacy in Vacaville, California during business hours and presented forged prescriptions to the pharmacist. She received 28 Norco pills and 56 Dilaudid pills from the pharmacy. She was apprehended and charged with five felonies, including one count of second degree burglary, two counts of forging prescriptions, and two counts of possessing drugs secured by forged prescriptions. On May 20, 2013, pursuant to a negotiated disposition, she pled no contest to the burglary count³ and the other counts were dismissed subject to a *Harvey* waiver.⁴ In August 2013, the court suspended imposition of judgment and sentence and placed Douglas on probation for three years subject to various conditions.

whether People may withdraw from plea agreement and reinstate dismissed charges if defendant seeks reduction of conviction to misdemeanor]).

³ The burglary count alleged that Douglas committed felony commercial burglary in violation of section 459 in that she “did unlawfully enter a commercial building occupied by KAISER HOSPITAL with the intent to commit larceny and any felony.”

⁴ This is a waiver of a defendant's right to be sentenced without consideration of charges dismissed in a negotiated disposition, as held in *People v. Harvey* (1979) 25 Cal.3d 754. (See *People v. Myers* (1984) 157 Cal.App.3d 1162, 1166–1167.)

In March 2015, Douglas filed a “Petition for Reduction to Misdemeanor” pursuant to section 1170.18, subdivision (f), which permits “[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [it] been in effect at the time of the offense” to “file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” Douglas sought to have her conviction for second degree commercial burglary under section 459 reduced to misdemeanor shoplifting under section 459.5. Section 459.5 states in relevant part: “Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). . . . Shoplifting shall be punished as a misdemeanor” (§ 459.5, subd. (a).)

The record indicates Douglas did not provide any evidence with her petition to establish the value of the medications she had illegally obtained; nor is the value indicated elsewhere in the record. A police report containing statements regarding Douglas’s crime is referenced in a document, but the report is not in the record. There is no indication anyone sought or that the trial court imposed any restitution requirement on Douglas.

The People’s brief below merely states that Douglas illegally obtained “28 Norco pills and 56 Dilaudid pills,” without stating their value. The People did not contend the pills’ value exceeded \$950 or that Douglas did not meet her burden to demonstrate their value was \$950 or less. Instead, the People argued Douglas’s actions did not constitute shoplifting. They contended the intent to obtain prescription medications through the use of forged prescriptions is not “intent to commit larceny” within the meaning of section 459.5’s definition of shoplifting and, therefore, that Douglas was not eligible for redesignation. The People also argued below that the court should deny redesignation because the People would otherwise be deprived of the benefits of their negotiated

disposition or that, if it granted redesignation, they should be permitted to withdraw from the plea agreement and reinstate the dismissed charges.

Douglas responded to both of these legal arguments in her reply below. However, she again did not address the threshold eligibility requirement that the value of the medications she illegally obtained was \$950 or less.

The trial court did not address this valuation issue either, and instead denied the petition based on the two legal arguments the People asserted.

DISCUSSION

Section 1170.18 creates a process by which persons previously convicted of felonies that would be misdemeanors under the new definitions contained in Proposition 47 may petition for resentencing if still serving their sentence (§ 1170.18, subd. (a)), or for redesignation if the sentence has been completed. (*Id.*, subd. (f).) Section 1170.18, subdivision (g) provides: “If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.”

In March 2015, when Douglas petitioned for redesignation under section 1170.18, subdivision (f), no appellate decision had squarely addressed who has the burden of proof to establish eligibility or ineligibility for such relief. In August 2015, the Fourth Appellate District, in an opinion authored by Justice Huffman, addressed the issue in *Sherow, supra*, 239 Cal.App.4th 875. Sherow petitioned pursuant to section 1170.18, subdivision (a) for resentencing of five counts of second degree burglary. (*Sherow*, at p. 877.) The prosecutor opposed Sherow’s petition, contending the loss exceeded \$950, and the trial court denied the petition. (*Ibid.*) Sherow appealed as to two counts, contending the record did not show the loss as to each exceeded \$950. (*Ibid.*) The *Sherow* court affirmed. It held that Sherow, whose petition had “no reference to facts or evidence and no argument,” had the burden of proof under section 1170.18 to show that the losses did not exceed \$950. (*Ibid.*)

The *Sherow* court relied on two sources for its holding. First, it cited an article by two authors of the leading treatise on criminal sentencing, Judge J. Richard Couzens and Presiding Justice Tricia A. Bigelow, which stated: “ ‘The petitioner will have the initial

burden of establishing . . . whether the petitioner is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. If the crime under consideration is a theft offense under section[] 459.5 . . . the petitioner will have the additional burden of proving the value of the property did not exceed \$950.’ ” (*Sherow, supra*, 239 Cal.App.4th at p. 879.) The *Sherow* court also invoked the “ordinary proposition” that “ “[a] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.” ’ ” (*Id.* at p. 879.)

The court rejected *Sherow*’s argument that “it would violate due process to place the initial burden of proof on him to show eligibility for resentencing,” finding inapposite “principles regarding proof of guilt of an alleged crime.” (*Sherow, supra*, 239 Cal.App.4th at pp. 879–880.) Proposition 47’s resentencing and redesignation provisions “deal with persons who have already been proved guilty of their offenses beyond a reasonable doubt” and are part of a “remedial statute,” under which the petitioner is claiming the crime for which he or she was convicted would be a misdemeanor if tried after the enactment of the proposition. (*Sherow*, at p. 880.) In these circumstances, the court thought it “entirely appropriate to allocate the initial burden of proof to the petitioner.” (*Ibid.*) Applying the burden to *Sherow* “would not be unfair or unreasonable,” because the petitioner knew “what kind of items he took from the stores.” (*Ibid.*) Further, “[a]t the time of trial it was not necessary for the prosecution to prove the value of the loss to prove second degree burglary. Thus there [was] apparently no record of value in the trial record.” (*Ibid.*) The court observed that “[a] proper petition could certainly contain at least *Sherow*’s testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination.” (*Ibid.*)

The court affirmed the order denying resentencing. However, it noted that “[o]n a proper petition *Sherow* may be able to show eligibility on count 1 or 2 or both” (*Sherow, supra*, 239 Cal.App.4th at p. 880.) Accordingly, its affirmance was “without prejudice to subsequent consideration of a properly filed petition.” (*Id.* at p. 881.)

Sherow was the first appellate decision to hold that a petitioner seeking resentencing or redesignation relief under section 1170.18 has the burden of proof regarding his or her eligibility for such relief. It was issued five months after Douglas submitted her petition.⁵

Douglas contends that “the record implicitly demonstrates the value [of the medications she stole] did not exceed \$950,” because if it had “the prosecutor quickly would have brought that fact to the court’s attention.” She further argues that “the People implicitly concede the value did not exceed \$950” in their request that her petition be denied because “ ‘the conduct is outside the scope of Proposition 47’ ” and because granting the petition “ ‘would violate the negotiated plea agreement in this case.’ ” Douglas has a point: the People never argued below that the stolen medications exceeded \$950 in value, and the arguments they did advance would have been beside the point and unnecessary if that were the case.⁶ Nonetheless, Douglas’s reasoning places the burden of proof on the People rather than on her as the party seeking Proposition 47 relief. Regardless of the People’s arguments, it was Douglas’s initial burden to provide some evidence of the value of the pills. She cannot prevail without doing so.⁷

DISPOSITION

We affirm the trial court’s denial of Douglas’s petition without prejudice to subsequent consideration of a new, properly supported petition. We do not reach the other issues raised by this appeal, and neither approve nor disapprove of those aspects of

⁵ Two months after the Fourth District issued its opinion in *Sherow*, this district followed it in *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448–450.

⁶ Douglas also argues that the burden of proof should be altered under Evidence Code section 500 because the evidence necessary to establish value “ ‘lies peculiarly within the knowledge and competence of’ ” the People. “It would be ludicrous,” she contends, to claim that she could successfully contact the victim, Kaiser Permanente, to obtain this information. This conclusory argument is unconvincing. Douglas does not explain why she could not obtain estimates of the value from other sources.

⁷ We note that if, as the People state, Douglas obtained 84 pills, 28 of Norco and 56 of Dilaudid, those pills would have to have cost approximately \$11.31 per pill to exceed \$950. This would seem unlikely, but more is required to support a Proposition 47 petition than speculation.

the trial court's ruling. Those issues may be revisited in the trial court and/or on appeal if Douglas files a new petition with the requisite showing.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

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