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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.

RICHARD G. HALEY,

Defendant and Appellant.

A145175

(Sonoma County
Super. Ct. No. SCR656818)

Defendant Richard G. Haley pled no contest to one felony count of burglary, for an agreed upon maximum sentence of five years in prison. He later petitioned the court to resentence him to a misdemeanor sentence for shoplifting, pursuant to Penal Code section 1170.18, subdivision (a)¹, commonly known as Proposition 47.² The trial court denied his request to be resentenced. Defendant timely appealed from that order. Defendant's court-appointed counsel has filed a brief seeking our independent review of the record, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, to determine whether there are any arguable issues for review. Defendant was informed of his right to file supplemental briefing, and filed a one-page handwritten letter on September 16, 2015,

¹ All statutory references are to the Penal Code unless otherwise stated.

² "On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*)). Section 1170.18 "was enacted as part of Proposition 47." (*Rivera*, at p. 1089.)

which we acknowledge and consider. After our independent review of the record, we find no errors or other issues requiring further briefing, and we affirm.

DISCUSSION

In a consolidated information filed March 3, 2015, defendant was charged with one felony count of burglary (§ 459); one felony count and five misdemeanor counts of possessing, receiving or uttering a forged check (§ 475); and five misdemeanor counts of shoplifting (§ 459.5). The information alleged three prior convictions (§ 667.5, subd. (b)).

Change of Plea

Defendant and his counsel signed a written Advisement of Rights, Waiver and Plea Form for Felonies, filed March 9, 2015. Defendant pled no contest to count 1, a felony violation of section 459, admitting that he “enter[ed] a commercial building occupied by Ireko . . . with the intent to commit larceny or any felony therein,” and stipulated that the amount of the check that was passed exceeded \$950.00. Defendant also stipulated to two prison priors, all with the understanding that the maximum punishment was five years. The trial court accepted the change of plea after finding that defendant had voluntarily and intelligently waived his constitutional rights; that his plea and admissions were freely, voluntarily, knowingly and intelligently made; that he understood the nature of the charges and consequences of the pleas and admissions; and that there was a factual basis for the plea.

Sentencing

According to the presentence report prepared by the Sonoma County Probation Office, on September 24, 2014, an officer responded to a store called Ireko with a report of check forgery. The store co-owner told police that on September 21, 2014, defendant had purchased \$1,204.70 of merchandise with a personal check. Defendant provided a driver’s license with an address on Horseshoe Drive in Santa Rosa. He took \$167.47 worth of merchandise with him and said he would return for the rest. The check had the company name “Apex Holdings Ltd.” with an address in San Francisco as well as defendant’s name and California identification number. The officer went to the

Horseshoe Drive address, where he contacted defendant's father. The father told the officer that defendant was homeless and went to the residence every few days to change clothes. Defendant's father showed the officer the garage where defendant stayed when he is at his father's residence. The officer found 16 sheets of paper with three blank checks on each paper; there was no information on the checks except the label "[w]arning: [t]his document has security features in the paper." The officer also found copies of checks with the same information as the checks used at Ireko. The store co-owner identified defendant from a photographic lineup. The officer could not locate an "Apex Holdings Ltd." Defendant was arrested. Further investigation, based on store receipts found in defendant's property, revealed other bad checks that defendant had passed. These were the subject of counts later dismissed as part of the plea agreement.

Defendant was sentenced on April 9, 2015, to the aggravated term of three years on count 1, plus an additional year for a statutory prison term. The trial court gave its statement of reasons for the sentence, including that it was a sophisticated scheme and defendant's prior performances on probation, parole and mandatory supervision and conditional sentence had all been unsatisfactory. The remaining charges were dismissed with a *Harvey*³ waiver. Defendant was awarded 195 actual days of custody credit and 194 days conduct credit. The court imposed various fines and fees.

Petition for Resentencing

Defendant filed a petition for resentencing pursuant to section 1170.18, subdivision (a)) on April 15, 2015. It appears that defendant himself completed the form petition; he listed his own name and address on the document. Defendant checked the box on the form signifying that the crime for which he had been convicted, section 459, had been reclassified as a misdemeanor. Defendant also filed a separate document entitled "Motion to [R]educe Pursuant to [P]enal Code Section 995," which sought the same relief of recalling his felony sentence for violating section 459 and resentencing him for a misdemeanor violation of section 459.5 (shoplifting).

³ *People v. Harvey* (1979) 25 Cal.3d 754

Defendant's petition for resentencing pursuant to section 1170.18, subdivision (a) came on for hearing on May 1, 2015, as well as his motion for return of property. Defendant was represented by counsel at the hearing. His counsel was the same attorney who had represented him in connection with this matter, including his preliminary hearing, an earlier section 995 motion, the change of plea, and sentencing. As to defendant's petition for resentencing, the following brief colloquy occurred:

"MS. ANDREWS [defense counsel]: The case actually came on calendar because Mr. Haley filed a Prop 47 petition relating to this case so it's technically on for ruling on that issue. It relates only to Count 1—

"THE DEFENDANT: The burglary.

"MS. ANDREWS: —which was the charge where the check exceeded \$950, but the actual loss taken from the loss was under \$950.

"THE COURT: And that was Ireko is the alleged victim?

"THE DEFENDANT: And, your honor, earlier in the case, it was ruled that the taking was less than \$950. It was statutorily a misdemeanor.

"THE COURT: I didn't rule that. That is not what I ruled.

"THE DEFENDANT: On all the other cases, that is what the specific wording of the motion is, the specific wording of the motion says that the taking—

"MS. ANDREWS: That was the ruling as it relates to other counts—

"THE COURT: One at a time.

"THE DEFENDANT: The specific wording in the motion that was affirmed by the Court was if the taking is less than \$950 theft and formally is a misdemeanor under Prop 47 mandate and it states in the Penal Code Section 459.5—

"THE COURT: Mr. Haley, I don't need you to read me the Penal Code section and 1170.18 and 459.5. This motion has already been ruled on on 3/9/15. It was a stipulated amount of over \$950. This petition is denied.

“MS. ANDREWS: Thank you.”⁴

This appeal followed.

REVIEW

We have reviewed the record on appeal and conclude that there are no meritorious issues to be argued. Defendant’s petition for resentencing was filed pursuant to section 1170.18, subdivision (a). That section lists certain crimes for which a defendant may be eligible to be resentenced, including requesting resentencing in accordance with section 459.5.

Section 459.5 is a new crime of “shoplifting” that was created as part of Proposition 47. Section 459.5, subdivision (a) provides in 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). Any other entry into a commercial establishment with intent to

⁴ The earlier “motion” defendant appears to have been referring to was a section 995 motion that had been argued and granted on March 2, 2015, the day before the consolidated information was filed. Before the section 995 motion was granted, the five misdemeanor shoplifting counts alleged in violation of section 459.5 had been charged as felony violations of section 459, and the five misdemeanor counts of passing bad checks in violation of section 475 had also been charged as felonies. These counts were all reduced to misdemeanors as the result of the successful section 995 motion made by defense counsel, who argued that Proposition 47 made the acts alleged statutory misdemeanors because the amount in question was less than \$950 per count. Notably however, count 1, the count to which defendant eventually pleaded no contest—a felony violation of section 459—had *not* been the subject of the section 995 motion. This was stated explicitly both in the papers filed in support of the 995 motion, and at the hearing on the motion on March 2. (The judge referred to having ruled on the section 995 motion on “3/9/15,” but the ruling was actually on March 2. The change of plea was March 9.)

Further, defendant’s reference to the section 995 motion at the May 1, 2015, hearing may explain why, in addition to filing his form petition for resentencing pursuant to section 1170.18, subdivision (a), defendant filed a document entitled Motion to Reduce Pursuant to Penal Code Section 995 that sought the same relief. Of course, a section 995 motion is to set aside an indictment or information, and is not available as a post-sentence remedy.

commit larceny is burglary. Shoplifting shall be punished as a misdemeanor . . .” with certain exceptions not applicable here. Section 459.5, subdivision (b) provides in part “Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting.”

Defendant entered into a plea agreement on March 9, 2015. By this time, Proposition 47 and the newly enacted shoplifting statute (section 459.5) were already in effect. As part of the negotiated disposition of his case, defendant stipulated that the check amount in count 1 was greater than \$950.00.

Defendant contends in his letter to the court filed September 16, 2015, that the “stipulation . . . was made without complying with procedural safeguards to assure defendant’s full understanding of the stipulation.” There is nothing in the record before us to support this contention.

We conclude there are no arguable issues within the meaning of *People v. Wende*, *supra*, 25 Cal.3d 436. The order denying the petition for resentencing is affirmed.

Miller, J.

We concur:

Kline, P.J.

Richman, J.

A145175, *People v. Haley*