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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HUMBERTO ENRIQUE NIETO,

Defendant and Appellant.

A146708

(Contra Costa County
Super. Ct. No. 51409234)

Defendant Humberto Enrique Nieto appeals from an order denying his petition to have felony convictions for second degree burglary and receiving stolen property reduced to misdemeanors under Proposition 47. As the Attorney General concedes, although defendant was ineligible for resentencing on his second degree burglary conviction, the court should have considered whether defendant's conviction for receiving stolen property should be redesignated as a misdemeanor. Accordingly, we shall reverse and remand for the purpose of allowing the trial court to determine whether defendant should be resentenced on his conviction for receiving stolen property.

PROCEDURAL BACKGROUND

In May 2014, the Contra Costa County District Attorney filed a four-count information charging defendant with second degree burglary (Pen. Code,¹ §§ 459, 460, subd. (b)), receiving stolen property (§ 496, subd. (a)), false personation (§ 529), and giving false information to a police officer (§ 148.9, subd. (a)). Defendant entered a plea

¹Further statutory references are to the Penal Code.

of no contest to each of the four counts alleged in the information. The court suspended imposition of sentence and placed defendant on formal probation for a period of three years.

In September 2015, defendant filed a petition for resentencing under Proposition 47 (§ 1170.18, subd. (a)) in which he sought to redesignate his felony convictions for second degree burglary and receiving stolen property as misdemeanors. At a hearing on September 11, 2015, the prosecutor objected to redesignating the second degree burglary conviction as a misdemeanor. The prosecutor did not discuss or otherwise mention the conviction for receiving stolen property. In response to the prosecutor's objection, the court stated: "Yep, so denied. Not eligible." Accordingly, the petition was denied in its entirety. This timely appeal followed.

DISCUSSION

Defendant's sole claim on appeal is that the trial court erred in denying his petition for resentencing with respect to his conviction for receiving stolen property. The Attorney General concedes that the matter should be remanded for the trial court to rule on whether defendant should be resentenced under Proposition 47 on the conviction for receiving stolen property. We agree that such a remand is appropriate.

In November 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug or theft offenses to misdemeanors unless an offense was committed by an otherwise ineligible defendant. (*Id.* at p. 1091.) Among other things, Proposition 47 amended section 496, the statute that makes it a crime to receive stolen property, to provide that the offense is a misdemeanor "if the value of the property does not exceed nine hundred fifty dollars (\$950)," unless the offense was committed by a defendant who was required to register as a sex offender (§ 290) or had previously been convicted of one or more serious or violent felonies listed in section 667, subdivision (e)(2)(C)(iv). (§ 496, subd. (a).) Second degree burglary is not one of the offenses that was reduced to a misdemeanor under Proposition 47. (See §§ 459, 460, subd. (b), 461, subd. (b), 1170.18, subd. (a).)

Proposition 47 also added a new resentencing provision, section 1170.18, which permits “a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47 [to] petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47.” (*People v. Rivera, supra*, 233 Cal.App.4th at p. 1092; § 1170.18, subd. (a).) Thus, section 1170.18 permits the court to resentence a felony as a misdemeanor if the offense was reclassified as a misdemeanor under Proposition 47, “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).) “ ‘[U]nreasonable risk of danger to public safety’ means an unreasonable risk that the petitioner will commit a new violent felony” listed in section 667, subdivision (e)(2)(C)(iv). (§ 1170.18, subd. (c).) A person who is required to register as a sex offender (§ 290) or who has suffered one or more prior convictions for a serious or violent felony (§ 667, subd. (e)(2)(C)(iv)) is not eligible for resentencing under section 1170.18. (§ 1170.18, subd. (i).)

In this case, defendant filed a petition to redesignate his felony convictions as misdemeanors under section 1170.18. His conviction for receiving stolen property is potentially eligible for reduction to a misdemeanor under Proposition 47. (§ 1170.18, subd. (a).) The record contains no indication that defendant is required to register as a sex offender or has suffered prior disqualifying convictions. Further, the record on appeal does not affirmatively show that the value of the stolen property exceeds \$950. While the second degree burglary conviction may not itself be eligible for reduction to a misdemeanor under Proposition 47, the existence of that conviction does not preclude defendant from seeking relief under Proposition 47 with respect to his conviction for receiving stolen property. Moreover, second degree burglary is not a serious or violent felony (see § 667, subd. (e)(2)(C)(iv)), and a conviction for that offense does not tend to show that defendant will pose an unreasonable risk of danger to public safety. (See *People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1310.)

Consequently, the mere fact defendant was convicted of second degree burglary does not preclude him from seeking relief under Proposition 47 with respect to his

conviction for receiving stolen property. The trial court erred in concluding otherwise. On remand, the court must consider whether defendant is eligible to have his conviction for receiving stolen property reduced to a misdemeanor, and, if so, whether resentencing him for that offense would present an unreasonable risk of danger to public safety. We express no view regarding the resolution of these issues on remand.

DISPOSITION

The order of September 11, 2015 denying defendant's section 1170.18 petition for resentencing is reversed insofar as it applies to the conviction for receiving stolen property. On remand, the trial court is directed to determine whether defendant is eligible to have his conviction for receiving stolen property reduced to a misdemeanor and, if so, resentence defendant accordingly unless the court determines that resentencing would pose an unreasonable risk of danger to public safety.

McGuinness, P.J.

We concur:

Siggins, J.

Jenkins, J.

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