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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTIAN ACOSTA GARCIA,

Defendant and Appellant.

2d Crim. No. B261447
(Super. Ct. No. 2014025693)
(Ventura County)

OPINION ON REHEARING

Christian Acosta Garcia appeals the denial of his petition to reduce his conviction of second degree burglary (Pen. Code,¹ §§ 459, 460) to a misdemeanor "shoplifting" pursuant to section 459.5, which was enacted pursuant to Proposition 47. We agree that the trial court erred in refusing to reduce the conviction and accordingly reverse.

FACTS AND PROCEDURAL HISTORY

Because appellant pled guilty prior to a preliminary hearing, the relevant facts are derived from the probation report. On or about July 28, 2014, Lane Magana's checkbook for his account at Chase Bank was lost or stolen. The following day, appellant entered the bank and cashed one of Magana's checks,

¹ All further undesignated statutory references are to the Penal Code.

which had been made payable to appellant in the amount of \$500. When appellant was arrested a few weeks later, he had possession of another check from Magana's account that Magana had made payable to a third party in the amount of \$200. He was also implicated in his cousin Richard Ruiz's unsuccessful attempts to cash additional stolen and forged checks.

Appellant was charged with second degree burglary, forgery (§ 470, subd. (d)), receiving stolen property (§ 496, subd. (a)), and other crimes. He later pled guilty to second degree burglary and receiving stolen property pursuant to a plea agreement. He was placed on probation and ordered to serve 180 days in county jail. The remaining charges were dismissed.

On December 5, 2014, the People filed a notice of probation violation. Three days later, appellant petitioned the court to reduce both of his convictions to misdemeanors pursuant to section 1170.18, which was enacted as part of Proposition 47. The court granted the petition as to the crime of receiving stolen property, but declined to reduce the burglary to a misdemeanor. After reviewing the probation report, the court stated, "It looks like the 459 in Count 2 has to do with the use of a fraudulent check which, in my view, is not involved with Prop. 47." The court then added, "[b]ased on the summary of the event which was used as a factual basis for the defendant's plea, [the burglary charged in] Count 2 was entering a Chase Bank in Moorpark with a fraudulent check."

When appellant's attorney asked for further clarification, the court explained: "It's a burglary charge, it's not a theft charge so the amount is irrelevant. . . . [I]t wasn't a burglary associated with a reclassification or a renumbering [of sections] 666 or 459 situation. [¶] And it looks to me that, in terms of [the receiving stolen property charged in] Count 3, it has to do with a \$200 check and so Count 3 would appropriately, in my view, be reclassified under Proposition 47. And I'll make that order now." Appellant admitted the probation violation and probation was reinstated.

DISCUSSION

Appellant contends the court erred in declining to reclassify his felony second degree burglary conviction as a misdemeanor "shoplifting" under section 459.5, which was enacted as part of Proposition 47. We agree.

Under Proposition 47, certain drug and theft-related offenses that were previously designated as felonies or "wobblers" are now punishable only as misdemeanors. A defendant serving a felony sentence for a crime that is now a misdemeanor under Proposition 47 may petition for recall of that sentence and request resentencing pursuant to the statutes that were added or amended by the proposition. (§ 1170.18; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092.)

Appellant was convicted of second degree burglary and receiving stolen property, both of which were treated as felonies for purposes of sentencing. The latter crime is now a misdemeanor under Proposition 47. Second degree burglary, which is defined in relevant part as the entering of a building other than a residence "with intent to commit grand theft or petit larceny or any felony," remains punishable as either a misdemeanor or a felony. (§§ 459, 461, subd. (b).) Proposition 47, however, also added the "new" crime of "shoplifting," which is defined as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours" and where the value of the property taken or intended to be taken does not exceed \$950. (§ 459.5, subd. (a).) The crime of shoplifting, with certain exceptions not relevant here, is punishable only as a misdemeanor. The new law also provides that any act of shoplifting as defined in the statute "shall be charged as shoplifting" and that "[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5, subd. (b).)

Count 2 of the information alleged that appellant committed second degree burglary when he "unlawfully entered a commercial building . . . with the intent to commit larceny and any felony." That is the crime to which appellant pled

guilty. In declining to resentence appellant on this count, the court reasoned that he was "entering a Chase Bank in Moorpark with a fraudulent check." According to the People, we can thus infer the court found that appellant was not convicted of entering the bank to commit larceny, but rather to commit identity theft (§ 530.5), which remains punishable as a misdemeanor or a felony. (See, e.g., *People v. Walker* (1969) 272 Cal.App.2d 252, 254.)

Even if we could reasonably make such an inference, the record does not support a finding that appellant's plea included an admission that he intended to commit identity theft. He was not charged with identity theft, nor was that crime ever referred to at any point in the proceedings. Although he was separately charged with forgery, that charge was dismissed pursuant to his plea agreement. In any event, under Proposition 47 a forgery involving \$950 or less is also now a misdemeanor. (§ 472, subd. (b).) The crime thus cannot provide the basis for a second degree burglary conviction, which requires the intent to commit a felony.

Section 459.5 makes clear that any act defined as shoplifting must be so charged, and that any person charged with that crime cannot be charged with burglary of the same property. Because appellant was charged with and pled guilty to entering the bank "with the intent to commit larceny" and no reference was made to any specific felony other than larceny, appellant was entitled to be resentenced under section 459.5.²

After we filed our original opinion in this case, we granted the People's petition for rehearing to address *People v. Gonzales* (2015) 242 Cal.App.4th 35 (*Gonzales*). In *Gonzales*, the court concluded that a theft by false

² The People do not assert any basis for the court to have concluded that appellant was ineligible for resentencing under Proposition on the ground it "would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Moreover, the fact that appellant was granted probation would dictate against such a finding. Accordingly, remand for a public safety analysis under section 1170.18 is unnecessary.

pretenses cannot provide the basis for a conviction of shoplifting under section 459.5 because the latter crime requires an intent to commit theft by larceny, i.e., a theft by trespassory taking. (*Id.* at p. 40.) Our colleagues in Division Eight recently issued an opinion disagreeing with *Gonzales* (*People v. Vargas* (Jan. 19, 2016) ___ Cal.App.4th ___, 2016 WL 229432 (*Vargas*).)

We reject *Gonzales* and agree with *Vargas*, which persuasively reasons: "Certainly, the lay person might understand 'shoplifting' to mean entering a retail store during regular business hours with the intent to steal displayed merchandise, as respondent urges. But that is not how the voters defined 'shoplifting' in section 459.5; instead, they defined it as entering a commercial establishment during business hours with the 'intent to commit larceny.' Accepting respondent's narrow interpretation would require us to rewrite the statute, which we cannot do. Similarly, we disagree with *Gonzales* that the phrase 'intent to commit larceny' excludes the intent to commit theft by false pretenses. Larceny is statutorily equated with 'theft' (§ 490a), and 'theft' is defined to include theft by false pretenses, that is, 'knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money, labor or real or personal property.' (§ 484, subd. (a).)" (*Vargas, supra*, 2016 WL 229432, *1.). The court also correctly recognized that the court in *Gonzales* had misplaced its reliance on *People v. Williams* (2013) 57 Cal.4th 776, because *Williams* "involved the interpretation of the 'felonious taking' element of robbery, not burglary. Instead, section 459.5 redefined certain second degree burglaries, and our high court has held "[a]n intent to commit theft by a false pretense or a false promise without the intent to perform will support a burglary conviction.'" (*Ibid.*, quoting *People v. Parson* (2008) 44 Cal.4th 332, 354.)

The defendant in *Vargas* was convicted of second degree burglary after she entered a check cashing business and tried to cash a forged check for \$148. (*Vargas, supra*, WL 229432, *1.) The court correctly recognized she could qualify

for resentencing under section 459.6 (subject to the determination whether resentencing her would not pose an unreasonable risk to public safety) because it was undisputed she "entered the check cashing establishment with the intent to commit theft by false pretenses." (*Ibid.*) Appellant was convicted of second degree burglary for entering a bank with the intent to cash a forged check for \$500. It is undisputed that he, like the defendant in *Vargas*, entered a commercial establishment with the intent to commit theft by false pretenses. He is thus eligible for restentencing under section 459.5. (*Ibid.*)

The order denying appellant's petition to be resentenced under section 459.5 on his second degree burglary conviction is reversed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Patricia M. Murphy, Judge
Superior Court County of Ventura

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