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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SILVIO HERNANDEZ,

Defendant and Appellant.

B263443

(Los Angeles County  
Super. Ct. No. KA068934)

APPEAL from a post-judgment ruling of the Superior Court of Los Angeles County, Wade D. Olson, Commissioner. Affirmed.

Anthony J. Patti, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Silvio Hernandez challenges the denial of his petition for resentencing under Proposition 47. (Pen Code, § 1170.18, subd. (a).)<sup>1</sup> We affirm.

### **BACKGROUND**

According to the probation report, when Hernandez was arrested on suspicion of burglary, he had in his possession a plastic baggie that contained methamphetamine, a Play Station Joy Box, an electronic gram scale, a cell phone charger, a gun holster, several shaved keys, several driver's licenses and social security cards, and a Ruger semi-automatic .22-caliber handgun. The victim told a probation officer that some of his property had been recovered and he estimated the total loss to him and his family to be more than \$5,000.

On March 22, 2005, Hernandez pled no contest to grand theft and possession of a controlled substance, and admitted prior serious felony conviction and prior prison term allegations. (§ 487; Health & Saf. Code, § 11377.) He was sentenced to a prison term of eight years and four months.

Following the enactment of Proposition 47, Hernandez petitioned on December 11, 2014, to have his convictions redesignated as misdemeanors. On January 6, 2015, the trial court granted Hernandez's application as to the drug conviction (count 3), but denied it as to the grand theft conviction (count 1). The trial court then vacated Hernandez's 16-month prison term on count 3, redesignated that count as a misdemeanor conviction, and sentenced Hernandez to one year in county jail, to be served consecutive to the seven-year prison term on count 1. Hernandez's motion for reconsideration of this ruling was denied by the trial court on February 27, 2015 because, "The amount of loss suffered in count 1 is in excess of \$950.00."

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<sup>1</sup> All further references are to the Penal Code unless otherwise specified.

## CONTENTION

Hernandez contends the trial court erred by refusing to redesignate the count 1 grand theft conviction as a misdemeanor.

## DISCUSSION

Contrary to Hernandez's claim on appeal, we conclude he was not eligible for relief under Proposition 47 as to his count 1 conviction for grand theft because he failed to make any showing that the value of the stolen property did not exceed \$950.

Proposition 47, enacted by voters on November 4, 2014 and effective the following day, reduces certain drug and theft offenses to misdemeanors unless committed by ineligible defendants. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47 provides, in pertinent part: "(a) A person currently serving a sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor under the act . . . had this act been in effect at the time of the offense may petition for a recall of sentence . . . to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) Section 490.2, subdivision (a), provides, in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor . . . ."

At the hearing on his petition, Hernandez did not present any evidence regarding the value of the stolen property, let alone that it was less than \$950. On appeal, Hernandez contends he was still entitled to Proposition 47 relief on count 1 because it was the People's burden to prove the property's value. Hernandez is wrong. It was his burden, not the People's, to prove his eligibility for relief under Proposition 47, including the \$950 valuation cut-off. (See *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.)

Under well-established authority, Hernandez had the burden to establish “ ‘the facts, upon which his . . . eligibility [was] based[,]’ ” i.e. that the value of the property he stole did not exceed \$950. (*People v. Rivas-Colon, supra*, 241 Cal.App.4th at pp. 449-450, quoting *People v. Sherow, supra*, 239 Cal.App.4th at p. 880.) Hernandez did not satisfy that burden. His petition was completely “ ‘devoid of any information about the offense[]’ ” for which he sought resentencing. (*People v. Rivas-Colon*, at pp. 449-450.) At the hearing on the petition, Hernandez offered no evidence—and no argument—demonstrating he was eligible for resentencing. The court therefore properly denied Hernandez’s resentencing petition because he failed to satisfy his burden to prove the value of the property he stole did not exceed \$950. (§ 1170.18, subd. (b) [“the court shall determine whether the petitioner satisfies the criteria in subdivision (a)”] and § 1170.18, subd. (g) [court must designate the offense as a misdemeanor “[i]f the application satisfies the criteria”]; Evid. Code, § 500 [“a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . that he is asserting”].)

Having so concluded, we need not reach Hernandez’s alternative contentions that the prosecution is limited to the record of conviction in rebutting his “presumptive eligibility” for Proposition 47 relief; that the probation report, police report, and inadmissible hearsay are not part of the record of conviction; and that Hernandez received ineffective assistance of counsel because his counsel failed to raise these issues.

**DISPOSITION**

The trial court's post-judgment ruling is affirmed.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.