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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Siskiyou)**

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
EDWARD PAUL LOTZE,  
  
Defendant and Appellant.

C068343  
  
(Super. Ct. No.  
MC YK CR BF 09-0197)

On September 23, 2009, defendant Edward Paul Lotze entered a negotiated plea of guilty to grand theft (Pen. Code, former § 487, subd. (a))<sup>1</sup> and resisting a peace officer, a misdemeanor (§ 148, subd. (a)(1)) and admitted a prior prison term allegation (§ 667.5, subd. (b)) in exchange for dismissal of the remaining count and a grant of summary probation. The court suspended imposition of sentence and granted summary probation for a term of three years.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

After defendant violated probation, on May 26, 2011, the court sentenced defendant to state prison for an aggregate term of four years, that is, the upper term of three years for grand theft plus a one-year enhancement for the prior prison term. For the misdemeanor resisting offense, the court imposed a terminal sentence with informal probation terminated as unsuccessful.

Defendant appeals. He contends that he is entitled to the ameliorative effect of the 2010 amendment to section 487, subdivision (a), which was effective January 1, 2011. While conceding that the amendment to section 487 applies retroactively, the People argue that defendant has failed to establish that he is entitled to the benefit of the amendment. We conclude that the amendment applies retroactively and that the record reflects that defendant is entitled to the reduction of his felony grand theft conviction to a misdemeanor.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Defendant was charged with grand theft, that is, a "cash register and \$566.02 in cash." When defendant committed his offense in December 2008, section 487, subdivision (a) provided, "Grand theft is theft committed in any of the following cases: [¶] (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars (\$400) . . . ." (Stats. 2002, ch. 787, § 12, p. 5000.)

Defendant waived a preliminary hearing. When defendant entered his plea (September 2009), he admitted stealing property

of a value "exceeding \$400, specifically a cash register, and \$566.02 in cash." The parties stipulated to a factual basis for the plea. Defendant's plea form refers to a police report as the factual basis for his plea but the police report is not part of the record on appeal. No probation report was filed at the time of the original sentencing when defendant was granted three years of summary probation. When granted summary probation, defendant was ordered to pay victim restitution to Black Butte Recycling in the amount of \$566.02, an amount with which the prosecutor agreed but noted that the cash register had not been returned "in working condition." The probation report prepared on May 10, 2011, reflects that defendant "stole a cash register filled with cash and [a] can of tobacco" from an office; "[t]he cash register was valued at \$375.00 and the cash inside totaled approximately \$566.00."

At the sentencing hearing on May 24, 2011, defense counsel sought reduction of defendant's felony conviction for grand theft to a misdemeanor pursuant to section 17, subdivision (b) (hereafter section 17(b)), citing the 2010 amendment of section 487. Section 487, subdivision (a) was amended, effective January 1, 2011, to provide, "Grand theft is theft committed in any of the following cases: [¶] (a) When the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars (\$950) . . . ." (Stats. 2010, ch. 693, § 1; Stats. 2010, ch. 694, § 1.5.)

The prosecutor responded that defendant was not entitled to a reduction pursuant to section 17(b), that defendant had forfeited receiving the benefit of the doubt, and that the legislation did not have retroactive application. The trial court denied the motion, addressing defendant, "If you were charged with this matter now, it would not be charged as a felony, it would be charged as a misdemeanor given the monetary amount." The proceedings were continued to May 26, 2011. Defense counsel renewed his argument that had the case been "litigated today it would be a misdemeanor case." The prosecutor noted that "it would be a misdemeanor because the statute was amended, not because it was a good thing to do that day." The court noted that although the statute had changed, defendant's felony conviction did not change.

### **DISCUSSION**

"When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*In re Estrada* (1965) 63 Cal.2d 740, 745;<sup>2</sup> *In re Kirk* (1965) 63 Cal.2d 761, 762-763.) The

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<sup>2</sup> *People v. Brown* (2012) 54 Cal.4th 314 limited *Estrada* but did not reconsider or overrule it. Instead, *Brown* determined that

"amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date." (*People v. Floyd* (2003) 31 Cal.4th 179, 184.) "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira* (2005) 35 Cal.4th 264, 306, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5 (*Nasalga*)). Amendments "that mitigate punishment by increasing the dollar amount for certain crimes or enhancements, should be applied retroactively, in the absence of a saving clause or other indicia of a contrary legislative intent." (*Nasalga, supra*, 12 Cal.4th at p. 793; *Floyd, supra*, 31 Cal.4th at pp. 184-185; *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046; *In re Chavez* (2004) 114 Cal.App.4th 989, 999-1000; *People v. Enlow* (1998) 64 Cal.App.4th 850, 855.)

Defendant contends and the People concede that the 2010 amendment to section 487 raising the threshold amount applies retroactively. We agree. The 2010 amendment does not contain a

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the quoted *Estrada* rule—which applied to all nonfinal judgments and was based on the premise that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" (*Brown*, 54 Cal.4th at p. 323)—did not apply retroactively to a "statute increasing the rate at which prisoners may earn credit for good behavior" (*id.* at p. 325).

saving clause or otherwise reflect a legislative intent that the amendment apply prospectively only. The legislative intent in raising the threshold amount was to account for inflation, conform the threshold amount to other property crimes, and to save the state money on prison commitments. (Assem. Com. on Public Safety, analysis of Assem. Bill No. 2372 (2009-2010 Reg. Sess.) as amended Mar. 11, 2010, pp. 2-3.)

The People concede that "[n]othing in the legislative history indicates an intent to punish more harshly, persons whose theft occurred before the amendments than others whose thefts of the same amounts occurred after the amendments." The People argue, however, that defendant has failed to establish error because the record does not reflect an assessment of the full value of the property taken, claiming the value of the can of tobacco may increase the value of property stolen to an amount over the \$950 threshold for grand theft. We reject this argument.

Here, there was no trial and no preliminary hearing. Defendant entered a plea to grand theft, admitting that he stole property exceeding \$400, "specifically a cash register, and \$566.02 in cash." Defendant was not charged with and did not admit stealing a can of tobacco. When granted probation, defendant was ordered to pay victim restitution in the amount of \$566.02 and the prosecutor noted the cash register had not been returned in working condition and asked to reserve "on that issue." The probation report set a value of \$375 for the cash

register. The prosecution did not dispute the amount in the probation report, that is, \$566.02 in cash and \$375 for the cash register, totaling \$941. Although the probation report referred to a can of tobacco, the prosecutor did not say the can of tobacco added \$10 nor could he. The issue of the value of the property stolen was relevant when defendant entered his plea and remand for purposes of determining the value is not required here. There was "nothing additional to prove under the amended version" of section 487 "that was not already proved" by defendant's plea. (*Nasalga, supra*, 12 Cal.4th at p. 798; cf. *People v. Figueroa* (1993) 20 Cal.App.4th 65, 70-72 [remand required to give prosecution opportunity to prove an element *added* to enhancement by the amendment and there was no evidence introduced at trial to prove the new element].) That the issue of the 2010 amendment's ameliorative effect was raised in a section 17(b) motion is of no moment. The trial court is required to pronounce an authorized sentence and an unauthorized one may be corrected on appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045; *People v. Scott* (1994) 9 Cal.4th 331, 354; *In re May* (1976) 62 Cal.App.3d 165, 167.) We will reduce defendant's offense to a misdemeanor and remand for resentencing.

**DISPOSITION**

Defendant's felony grand theft conviction is reduced to petty theft, a misdemeanor (§ 488). The matter is remanded to the trial court for resentencing.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.