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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

BRETT MATTHEW SILVA-DELUCA-TOSCHI,

C078003

(Super. Ct. No. CM038070,  
CM039386, CM039954)

Defendant Brett Matthew Silva-DelUCA-Toschi appeals from the trial court's denial of his Penal Code<sup>1</sup> section 1170.18 petition for resentencing on his conviction for unlawful driving or taking of a vehicle (Veh. Code, § 10851). The trial court denied the petition because it determined the crime was not eligible for resentencing. On appeal, defendant contends his offense does qualify for reduction to a misdemeanor under section 1170.18 and, further, that he is entitled to resentencing as a matter of equal protection. We find it unnecessary to reach the merit of either contention because defendant has

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

failed to carry his burden of proving the car in question was worth \$950 or less. We therefore affirm.

## **I. BACKGROUND<sup>2</sup>**

In case No. CM039386, on August 17, 2013, a stolen 2009 Chevrolet HHR was recovered from an Oroville residence. The occupants told officers that the vehicle belonged to defendant, who was asleep in the home. Defendant was found hiding under a bed in the rear of the home and arrested after a brief struggle. Keys to the stolen car were found on defendant. Defendant told an officer that his friend loaned him the vehicle and provided two false names when asked to identify himself.

Defendant pleaded no contest to unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)), false personation (§ 529, subd. (a)(3)), and admitted an on-bail allegation (§ 12022.1). On January 8, 2014, the trial court sentenced defendant in case No. CM039386, in case No. CM038070 on his convictions for false personation, in case No. CM039954 on his conviction of possession of metal knuckles, a misdemeanor (§ 21810), and in case No. CM037808 on his misdemeanor conviction of possession of marijuana (Health & Saf. Code, § 11357, subd. (c)), to three years of formal probation.

On March 20, 2014, defendant admitted violating probation and was reinstated on probation. On June 19, 2014, defendant admitted a second probation violation and was reinstated again. After defendant admitted violating probation a third time, on October 16, 2014, the trial court terminated probation and sentenced defendant to a total term of five years four months in county jail. On October 30, 2014, the trial court corrected the sentence to a six-year county jail term.

On November 10, 2014, defendant filed a petition for resentencing pursuant to section 1170.18, seeking resentencing on his convictions for possession of metal

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<sup>2</sup> We summarize the facts and procedures relevant to this appeal, omitting detailed description of the facts and procedures relevant to defendant's other offenses.

knuckles and possession of marijuana. The trial court denied the petition, finding defendant's crimes were already misdemeanors or otherwise not eligible for resentencing.

Defendant filed a notice of appeal on December 10, 2014.

## **II. DISCUSSION**

The passage of Proposition 47 created section 1170.18, which provides for any defendant "currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [it] been in effect at the time of the offense [to] petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . ." under the statutory framework as amended by the passage of Proposition 47. (§ 1170.18, subd. (a); see Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 14, pp. 73-74.)

Among the crimes amended by Proposition 47 is grand theft, section 487. The crime of grand theft includes theft of an automobile. (§ 487, subd. (d)(1).) Proposition 47 effectively amended the grand theft statute by adding section 490.2, which provides that, subject to exceptions not relevant here, a "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 . . . ." (§ 490.2, subd. (a).) Unlawful theft or taking of a vehicle is not among the crimes expressly listed by Proposition 47 as being reduced to a misdemeanor. (§ 1170.18, subd. (a).)

Defendant contends that the proposition should be construed liberally so that this offense is punishable only as a misdemeanor when the value of the vehicle taken or driven does not exceed \$950.<sup>3</sup> He additionally asserts that this result is necessary to

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<sup>3</sup> Although defendant did not include the Vehicle Code section 10851 offense in his section 1170.18 petition, we find the issue is not forfeited because defendant's petition

preserve his equal protection rights. The basis of both contentions is that following Proposition 47, theft of an automobile is punished as a misdemeanor when the vehicle's value does not exceed \$950. (§§ 487, 490.2, subd. (a).) Since the value of the vehicle he stole was never pled or proven, defendant contends the offense should be resentenced as a misdemeanor as a matter of statutory interpretation or equal protection.

We need not address either contention. As the text of section 1170.18, subdivision (a) makes clear, defendant is the petitioner in a resentencing hearing under this statute. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) Therefore, "a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878.)

Since the petty theft provision in Proposition 47 applies only to thefts of \$950 or less in value, defendant must show that the value of the car was \$950 or less before the provisions of the statute could apply. The record does not mention the value of the Chevrolet HHR in question. Therefore, defendant has failed to carry his burden of establishing that his conviction meets the requirements for resentencing and his statutory claims fail. Likewise, the failure to prove that defendant stole a vehicle that would allow him to be punished under the petty theft statute, if it applied, deprives him of standing to

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was made in propria persona and both the prosecutor's response and the trial court's denial addressed the potential eligibility for resentencing on all of defendant's offenses.

We also find the ruling on the section 1170.18 petition properly before us even though defendant filed his resentencing petition before his conviction was final. (See *People v. Noyan* (2014) 232 Cal.App.4th 657, 672 [section 1170.18 petition available only after judgment of conviction is final].) Since it is now more than 60 days from the judgment of conviction and defendant's brief addresses only the petition for resentencing, we consider him to have abandoned his appeal as to the underlying judgment of conviction, rendering it final and therefore allowing us to consider his contentions.

raise his equal protection claim. (See *People v. Superior Court (Manuel G.)* (2002) 104 Cal.App.4th 915, 934 [person raising equal protection claim must be member of aggrieved class or no standing to raise equal protection claim]; *People v. Garcia* (1999) 21 Cal.4th 1, 11 [defendant lacks standing to assert the equal protection claims of hypothetical felons].) Since defendant lacks standing to raise the equal protection claim, we also reject that contention.

### III. DISPOSITION

The order denying the petition for resentencing is affirmed.

/S/

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RENNER, J.

We concur:

/S/

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RAYE, P. J.

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HOCH, J.