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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. RICKY EDWARD KING, Defendant and Appellant.	C078991 (Super. Ct. No. CM027301, CM030740, CM035962)

Defendant Ricky Edward King appeals from the trial court's denial of his petition to resentence him on a prior prison term enhancement (Pen. Code, § 667.5, subd. (b))[1] pursuant to section 1170.18. He contends that because the court reduced his prior felony conviction to a misdemeanor, the conviction can no longer support the prior prison term enhancement. We find that section 1170.18 does not retroactively invalidate a previously imposed enhancement when the conviction that supported the enhancement is later reduced to a misdemeanor. Accordingly, we affirm the trial court's orders.

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[1] Undesignated statutory references are to the Penal Code.

I. BACKGROUND

We dispense with the facts of defendant's crime as they are unnecessary to resolve this appeal.

In May of 2012, a jury convicted defendant of first degree burglary. (§ 459) The trial court sustained a prior prison term allegation (§ 667.5, subd. (b)) and, in January 2013, sentenced defendant to five years in state prison. The information alleged two prior prison terms, based on two separate prior convictions for possession of a controlled substance. (Health & Saf. Code, §§ 11350, 11377.) The record does not indicate which of the prior prison term allegations was sustained by the trial court.

In December of 2014, defendant filed a section 1170.18 petition, requesting resentencing on his current conviction and enhancement and designation of the two drug priors as misdemeanors. The trial court granted the petition as to the two priors but denied it regarding resentencing on the burglary conviction and the prior prison term.

II. DISCUSSION

Defendant contends that he is entitled to resentencing on the prior prison term enhancement because the offense that supports the prior prison term enhancement was designated a misdemeanor by the trial court pursuant to Proposition 47. We disagree.

Proposition 47, the Safe Neighborhoods and Schools Act (the Act) requires "misdemeanors instead of felonies for nonserious, nonviolent crimes . . . unless the defendant has prior convictions for specified violent or serious crimes." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 70.) Among the affected crimes are the two possession of a controlled substance offenses, one of which supports the prior prison term allegation here, which are now misdemeanors barring certain exceptions not relevant here. (See Health & Saf. Code, § 11377.) Since the prior prison term enhancement requires that defendant be convicted of a felony and served a prison term for that conviction (§ 667.5, subd. (b)), this raises the question of whether a prior prison term enhancement based on what is now a misdemeanor conviction survives the Act.

The Act also created section 1170.18, which provides that any person currently serving a sentence for a conviction of a felony who would have been guilty of a misdemeanor under the Act may petition for a recall of sentence before the trial court to request resentencing under the statutory framework as amended by the Act. (§ 1170.18, subd. (a).) The Act also allows a person who has completed a sentence for a felony that would now be a misdemeanor under the Act to file an application with the trial court to have that felony conviction designated as a misdemeanor. (§ 1170.18, subd. (f).) "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).) Importantly for this appeal, section 1170.18, subdivision (k), provides: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered *a misdemeanor for all purposes*, except [specified firearm laws]." (Italics added.)

This language, which is very close to language from section 17 regarding the reduction of wobblers to misdemeanors, is not necessarily conclusive.[2] (*People v. Park* (2013) 56 Cal.4th 782, 793-794 (*Park*).) It has not been read to mean a defendant could avoid a sentence enhancement by having the prior offense reduced to a misdemeanor after he committed and was convicted of the present crimes. (*Id*. at p. 802.) The question is one of timing.

In the context of felony jurisdiction over criminal appeals, *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*), held that section 1170.18, subdivision (k) should be interpreted in the same way as section 17—rendering the offense a misdemeanor going

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[2] Section 17, subdivision (b) states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . ."

forward from the date the trial court reduced it, but not retroactively. (*Rivera*, *supra*, at pp. 1095, 1100; see also *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [rejecting assertion that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) We see no reason to depart from *Rivera*. Although *Rivera* addressed section 1170.18, subdivision (k) in a different context, its analysis of section 1170.18, subdivision (k) is equally relevant here.

Defendant relies primarily on *Park*, *supra*, 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*). In *Park*, the Supreme Court held the defendant's sentence could not be enhanced under section 667, subdivision (a), because the past felony conviction had been reduced to a misdemeanor pursuant to section 17, subdivision (b) before the commission of the instant offense. (*Park*, *supra*, at p. 798.) It stated: "[W]hen a wobbler is reduced to a misdemeanor in accordance with the statutory procedures, the offense *thereafter* is deemed a 'misdemeanor *for all purposes*,' except when the Legislature has specifically directed otherwise." (*Id*. at p. 795, italics added.) Here, defendant committed his current felonies *before* his prior convictions could be reduced to a misdemeanor, and the Act directs no differently than section 17. This distinction between retroactive and prospective application was recognized by the Supreme Court in *Park*: "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park*, *supra*, at p. 802.) Thus, defendant's reliance on *Park* is misplaced.

Defendant's reliance on *Flores* fails for the same reasons. In *Flores*, the defendant was sentenced to prison following his conviction of selling heroin (Health & Saf. Code,

§ 11352), and his state prison sentence was enhanced by one year under section 667.5. (*Flores*, *supra*, 92 Cal.App.3d at pp. 464, 470.) The enhancement was based on a prior felony conviction for possession of marijuana under Health and Safety Code section 11357. (*Flores*, at p. 470.) Before the defendant was convicted of selling heroin, the Legislature had reduced the crime of possession of marijuana to a misdemeanor. (*Id.* at p. 471.) The *Flores* court recognized that the legislative changes prevented old marijuana convictions from being used to support enhancements on later convictions. The changes operated "to prevent the enhancement of a new sentence." (*Ibid*.) Unlike the facts of *Flores*, defendant's sentence was enhanced before Proposition 47 took effect and before the conviction supporting the enhancement was reduced to a misdemeanor.

When a trial court imposes an enhancement for having served a prior prison term, the subsequent reduction of the conviction supporting the enhancement to a misdemeanor does not render the enhancement invalid.

III. DISPOSITION

The order denying defendant's resentencing petition is affirmed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

ROBIE, J.