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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS P. DYE,

Defendant and Appellant.

D068822

(Super. Ct. No. SCD172719)

APPEAL from a judgment of the Superior Court of San Diego County,

David J. Danielsen, Judge. Reversed in part; affirmed in part.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Thomas P. Dye appeals from an order denying, in part, his petition for resentencing under Penal Code section 1170.18, subdivision (a).<sup>1</sup> Section 1170.18 was adopted as part of Proposition 47, the Safe Neighborhoods and Schools Act (the Act).

On appeal, Dye contends that the trial court erred in concluding that he is ineligible for resentencing on two counts of second degree burglary (§ 459) (counts 4 and 6). Dye maintains that the trial court erred in concluding that his conduct in committing these offenses did not qualify as shoplifting under section 459.5<sup>2</sup> and that he was therefore ineligible for resentencing under the Act on these counts. We conclude that the trial court erred in determining that Dye is ineligible for resentencing on these counts.

Dye also contends that the trial court erred in denying his petition with respect to four other counts, count 2 (§ 487, subd. (a)), count 9 (§ 487, subd. (a)), count 10 (§ 487, subd. (d)(1)), and count 11 (Veh. Code, § 10851). We conclude that the trial court properly denied Dye's petition because Dye failed to carry his initial burden of establishing eligibility for resentencing under the Act on these counts.

Accordingly, we reverse the trial court's order in part, affirm the order in part, and remand for further proceedings.

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<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Penal Code.

<sup>2</sup> Section 459.5 was enacted as part of the Act.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

#### A. *Factual background*

In February 1999, Dye introduced himself to Emily Phillips under a false name. Within a short period of time, Dye moved into Phillips's home and offered to help reduce her substantial credit card debt. Phillips gave Dye \$4,700, believing his statement that he would give the money to an attorney who would work on reducing her credit debt. One day, Dye dropped Phillips off at her place of employment and borrowed her car to meet the attorney, but failed to pick up Phillips as previously arranged. When Phillips returned home, she found that all of Dye's belongings were gone, as well as her car, social security card, passport, credit cards, driver's license, money and other items. Phillips immediately called the police and reported the theft.

In November 2002, Dye began dating Lilia Antillon. Antillon moved enough clothing into Dye's room at the Island Inn to enable her to stay there for a couple of days at a time. In December 2002 and January 2003, Dye forged two checks from Antillon's account without her permission and presented them to the Island Inn to pay his rent.<sup>4</sup>

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<sup>3</sup> While this appeal was pending, we granted Dye's motion to take judicial notice of the record in two prior appeals in this matter. Our factual background is limited to the offenses at issue in this appeal and is based on this court's opinion in *People v. Dye* (April 14, 2006, D045271) [nonpub. opn.].

<sup>4</sup> Although our prior opinion did not state the dollar amounts of the two checks at issue in counts 4 and 6, the information alleged that the checks were written for \$350 and \$450, respectively.

The checks were written for more than the amount due and Dye received a total of \$300 in cash back. One day, Dye disappeared after stealing several items belonging to Antillon, including an expensive gold chain.

*B. Procedural background*

After a bench trial, the trial court found Dye guilty of two counts of grand theft of personal property (counts 2, 9) (§ 487, subd. (a)), two counts of forgery (counts 3, 5) (§ 470, subd. (d)), two counts of second degree burglary (counts 4, 6) (§ 459), failure to appear while on bail (count 7) (§ 1320), residential burglary (count 8) (§§ 459, 460), grand theft of an automobile (count 10) (§ 487, subd. (d)), and unlawfully taking and driving a vehicle (count 11) (Veh. Code, § 10851). The trial court also found that Dye had suffered five prison priors, two serious felony priors and two strikes.

On remand from a prior appeal (*People v. Dye, supra*, D045271), the trial court sentenced Dye to an aggregate term of 150 years to life in prison, plus 17 years.

In October 2014, Dye filed a petition for recall of sentence under the Three Strikes Reform Act of 2012 (Reform Act). The following day, the trial court issued an order staying Dye's petition pending the California Supreme Court's determination of an issue raised by Dye's petition.<sup>5</sup>

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<sup>5</sup> Dye raises no claim on appeal with respect to his request for resentencing under the Reform Act.

In 2015, Dye filed a joint memorandum in support of recall of sentence under the Reform Act and a petition for resentencing under the Act. Dye sought resentencing under the Reform Act on numerous counts, as well as resentencing under the Act with respect to counts 2, 3, 4, 5, 6, 9, 10, and 11.

The trial court held a hearing on Dye's petition. The court granted Dye's petition under the Reform Act with respect to counts 2, 4, 6, 7, 9, 10, and 11.

With respect to Dye's request for resentencing under the Act, the court granted the petition as to two forgery convictions (§ 470, subd. (d)) (counts 3, 5) that were based on Dye's presenting checks drawn on Antillon's account to the Island Inn. However, the court denied Dye's request for resentencing under the Act on Dye's burglary convictions (§ 459) (counts 4, 6) based on the same conduct. The court reasoned:

"I believe that counts 3 and 5 would be granted under [Proposition] 47. Those are [section] 470[, subdivision] (d)'s, forgeries of checks under \$950. The question then is whether or not burglary — and burglary is associated with coming in and attempting to pass a [section] 470[, subdivision] (d) check — would be reducible under [Proposition] 47. I'm sure the defense is taking a position that it is. I would rule that it is not. The burglary is not the type of shoplifting burglary when somebody enters with a forged check and attempts to steal money. So that would be denied."

The court also implicitly denied Dye's request for resentencing under the Act on counts 2, 9, 10 and 11. The court resentenced Dye to an aggregate term of 51 years and four months to life in prison.

### III.

#### DISCUSSION

A. *Dye is eligible for resentencing on counts 4 and 6 because his conduct qualifies as shoplifting within the meaning of section 459.5*

Dye claims that the trial court erred in concluding that his conduct did not qualify as shoplifting under section 459.5 and that he was therefore ineligible for resentencing on counts 4 and 6. Specifically, Dye contends that the term "larceny" in section 459.5 should be interpreted as referring to all forms of theft, including committing theft by false pretenses by means of passing a forged check. Since Dye's claim raises an issue of statutory interpretation, we apply the de novo standard of review. (See, e.g., *Doe v. Brown* (2009) 177 Cal.App.4th 408, 417.)

#### 1. *Governing law*

##### a. *Relevant provisions of the Act*

The Act added section 459.5, which defines the new offense of shoplifting.

Section 459.5 provides in relevant part:

"(a) Notwithstanding Section 459,[<sup>6</sup>] shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor . . . .

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<sup>6</sup> Section 459 defines the offense of burglary and provides in relevant part: "Every person who enters any . . . building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." Section 459 was not amended by the Act.

"(b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property."

The Act also added section 1170.18, subdivision (a), which authorizes the filing of a petition for recall of sentence and provides in relevant part:

"A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with . . . Section 459.5 . . . [among other sections], as those sections have been amended or added by this act."

A person who satisfies the statutory criteria shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

b. *Relevant case law*

In *People v. Fusting* (2016) 1 Cal.App.5th 404 (*Fusting*), this court concluded that the " 'intention to commit larceny' requirement of section 459.5 can be satisfied by the broader sense of an intent to commit theft."<sup>7</sup> (*Id.* at p. 411.) In support of this conclusion, we noted that section 490a provides, " '[W]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall

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<sup>7</sup> The California Supreme Court is currently considering whether a defendant convicted of second degree burglary (§ 459) who cashed forged checks at a bank in an amount less than \$950 is entitled to resentencing under section 1170.18 because his conduct qualifies as shoplifting under section 459.5. (See *People v. Gonzales*, review granted Feb. 17, 2015, S231171.)

hereafter be read and interpreted as if the word "theft" were substituted therefor.' " (*Fusting, supra*, at p. 408, quoting § 490a; see also *People v. Vidana* (2016) 1 Cal.5th 632, 648 ["the obvious intent of [section 490a] . . . was to create a single crime of theft"].) The *Fusting* court also observed that courts have relied on section 490a in concluding that "the term 'larceny' as used . . . in the burglary statute . . . include[s] all thefts, including theft by false pretenses." (*Fusting*, at p. 409, citing *People v. Dingle* (1985) 174 Cal.App.3d 21, 30; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 31; *People v. Parson* (2008) 44 Cal.4th 332, 353-354.) We reasoned that the fact that, at the time of the adoption of the Act, the term "larceny" in section 459 had been interpreted to include all thefts, supported the conclusion that the voters intended the term larceny in 459.5 to have the same meaning:

"[Section 459.5] was worded substantially similar[ly] to the burglary statute (§ 459), which has been judicially interpreted to encompass all thefts. . . . ' "[W]hen legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature [or the voters] intended the same construction, unless a contrary intent clearly appears." ' [Citation.] We find no indication that a distinction was intended to be made between sections 459 and 459.5 in regard to the interpretation of the term 'larceny.' " (*Fusting*, at p. 410; accord *People v. Garner* (2016) 2 Cal.App.5th 768 (*Garner*).)

A defendant who demonstrates that he suffered a conviction for a felony that meets the definition of shoplifting under the Act may be eligible for resentencing relief under section 1170.18. (See *Garner, supra*, 2 Cal.App.5th at p. 771 [concluding appellant's second degree burglary conviction which was premised on using \$100 forged

check at store was eligible for resentencing under section 1170.18 because crime amounted to shoplifting under the Act].)

## 2. *Application*

While reasonable arguments can be made in support of a narrower interpretation of the term "larceny" in section 459.9, we agree with the *Fusting* court that the term "intent to commit larceny," means "intent to commit theft."<sup>8</sup> The People do not dispute that Dye committed a theft. (See § 484, subd. (a) [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"].) The People also do not argue that Dye failed to carry his initial burden of demonstrating that he entered "a commercial establishment . . . while that establishment is open during regular business hours," and that the "property . . . taken . . . [did] not exceed nine hundred fifty dollars (\$950)." (§ 459.5.) The People's sole argument is that "entry into a hotel with the intent to commit theft by some other means [apart from larceny], such as the intent to commit theft by false pretenses, does not qualify for relief under Proposition 47." We reject that argument for the reasons stated in *Fusting*.

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<sup>8</sup> As the *Fusting* court stated, "We are aware our Supreme Court has granted review in numerous cases including opinions on opposing interpretations of the statute. Ultimately our high court will provide guidance on the interpretation and application of the statute. In the interim, it is our obligation to make our best efforts to correctly interpret and apply the section." (*Fusting, supra*, 1 Cal.App.5th at pp. 406-407.)

Accordingly, we conclude that the trial court erred in determining that Dye's conduct did not qualify as shoplifting under section 459.5 and that he was therefore ineligible for resentencing on counts 4 and 6.<sup>9</sup>

B. *Dye failed to carry his initial burden of establishing eligibility for resentencing under the Act on counts 2, 9, 10, and 11 by demonstrating that the value of the property taken with respect to each of these counts was less than \$950*

Dye claims that the trial court erred in denying his petition for recall of sentence with respect to count 2 (§ 487, subd. (a)), count 9 (§ 487, subd. (a)), count 10 (§ 487, subd. (d)(1)), and count 11 (Veh. Code, § 10851) because such offenses may have amounted to misdemeanor petty thefts under section 490.2. Dye argues that the matter should be remanded to the trial court with directions to determine whether the value of the property taken in each count was less than \$950. (See § 490.2, subd. (a) [providing that obtaining property by theft where the value of the property taken does not exceed \$950 shall be punished as a misdemeanor under specified circumstances].)

The People contend that the trial court's order denying Dye's petition on these counts may be affirmed on the ground that Dye failed to carry his initial burden of establishing eligibility for resentencing under the Act by demonstrating that the value of

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<sup>9</sup> Since the trial court determined that Dye was ineligible for resentencing on counts 4 and 6 because his conduct did not amount to shoplifting, the court did not consider whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) The trial court may consider this issue on remand.

the property taken with respect to each of these counts was less than \$950. We agree with the People.<sup>10</sup>

1. *Governing law*

a. *Relevant provisions of the Act*

As discussed in part III.A.1, *ante*, the Act created a new resentencing provision pursuant to which individuals "who would have been guilty of a misdemeanor under [the Act] had [the Act] been in effect at the time of the offense," may petition the superior court for a recall of sentence and request resentencing. (§ 1170.18, subd. (a).)

The Act also added section 490.2, subdivision (a), which provides in relevant part:

"(a) 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 . . . ."

b. *Relevant case law*

In *People v. Hudson* (2016) 2 Cal.App.5th 575, 583-584 (*Hudson*), this court reaffirmed that "the defendant bears the burden of demonstrating eligibility for relief under the Act." (Citing *People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*); *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448-449 (*Rivas-Colon*); see also *People v. Johnson* (2016) 1 Cal.App.5th 953, 961 (*Johnson*) ["Within the last year, at

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<sup>10</sup> In light of our conclusion, we need not consider the People's argument that Dye is not eligible for resentencing on count 11 for the additional reason that convictions for Vehicle Code section 10851 are not eligible for resentencing under the Act. The Supreme Court is currently considering the issue. (See *People v. Page*, review granted Jan. 27, 2016, S230793.)

least four final appellate opinions have interpreted and applied section 1170.18, subdivision (a)—each holding that this initial burden [of establishing whether a petitioning defendant is eligible for resentencing] is borne by the petitioning defendant"].) Thus, where a defendant's eligibility for relief under the Act is dependent upon the value of the property taken by the defendant, it is the defendant who must demonstrate the value of the stolen property. (See, e.g., *Johnson, supra*, at p. 969 [concluding defendant failed to carry his initial burden of establishing eligibility under the Act because "the petitioning defendant failed to present *evidence* that he 'would have been guilty of a misdemeanor' (§ 1170.18, subd. (a))—namely, that the value of the stolen property did not exceed \$950".])

## 2. *Application*

It is undisputed that Dye presented no evidence in the trial court demonstrating that the value of the property taken with respect to counts 2, 9, 10, and 11 was less than \$950. Thus, Dye failed to carry his initial burden of establishing eligibility for resentencing under the Act on counts 2, 9, 10, and 11 by demonstrating that the value of the property taken with respect to each of these counts was less than \$950. (See, e.g., *Johnson, supra*, 1 Cal.App.5th at p. 969.)

Dye acknowledges that this court in *Sherow* and the First District in *Rivas-Colon* concluded that "the petitioner in a Proposition 47 proceeding bears the initial burden of proving eligibility for reduction of a felony offense to a misdemeanor," but asserts that *Sherow* and *Rivas-Colon* are wrongly decided. We endorsed the holdings in *Sherow* and *Rivas-Colon* in both *Johnson, supra*, 1 Cal.App.5th at page 971, and *Hudson, supra*,

2 Cal.App.5th at pages 584-585, and adhere to those holdings here.

Accordingly, we conclude that the trial court did not err in denying Dye's petition on counts 2, 9, 10, and 11 because Dye failed to carry his initial burden of establishing eligibility for resentencing under the Act by demonstrating that the value of the property taken with respect to each of these counts was less than \$950.<sup>11</sup>

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<sup>11</sup> In *Johnson*, this court affirmed an order denying defendant's petition for resentencing under the Act without prejudice to the defendant filing a new petition that offered evidence of his eligibility. (*Johnson, supra*, 1 Cal.App.5th at pp. 970-971.) In determining that the defendant was entitled to file a new petition demonstrating that the value of the property at issue did not exceed \$950, this court relied on case law concluding that an affirmance *without prejudice* is proper because "neither at the time the petitioning defendant filed his petition nor at the time the trial court ruled on the petition had any appellate court provided guidance to the trial courts or the litigants as to the burden of establishing eligibility." (*Ibid.*)

In contrast, this court decided *Sherow* prior to Dye's filing of his petition for resentencing. Thus, Dye was on notice of his initial burden of proof in establishing his eligibility for resentencing under the Act. Accordingly, the trial court's order denying Dye's petition on counts 2, 9, 10, and 11 is affirmed *with* prejudice.

IV.

DISPOSITION

With respect to counts 4 and 6, the trial court's order denying Dye's petition is reversed insofar as the court concluded that Dye is ineligible for resentencing under the Act. With respect to counts 2, 9, 10, and 11, the order denying Dye's petition for resentencing under the Act is affirmed. The matter is remanded to the trial court for consideration of whether to resentence Dye on counts 4 and 6 under the remaining provisions of section 1170.18. At the conclusion of the proceedings on Dye's petition with respect to counts 4 and 6, the trial court shall resentence Dye.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.