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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA DORVAL,

Defendant and Appellant.

D068961

(Super. Ct. No. SCE333970)

APPEAL from an order of the Superior Court of San Diego County,

David J. Danielsen, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

In July 2015, Joshua Dorval filed a motion to designate a 2002 conviction for grand theft of a firearm (Pen. Code, § 487, subd. (d))¹ a misdemeanor pursuant to section 1170.18, subdivision (f). Dorval also requested that the court resentence him pursuant to section 1170.18, subdivision (a) on a 2014 case by dismissing a strike (§ 667, subds. (b)-(i)) that was premised on the 2002 conviction.² The trial court designated the 2002 conviction a misdemeanor, but denied Dorval's request to dismiss the strike and resentence him.

On appeal, Dorval contends that the trial court erred in denying his request to dismiss the strike. Dorval claims that section 1170.18 mandated that the trial court give "retroactive effect," to its designation of the 2002 offense as a misdemeanor.³ Dorval also maintains that he is entitled to "retroactive relief" under the rule of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and principles of equal protection. We reject Dorval's contentions and affirm the trial court's order.⁴

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

² Section 1170.18 was added through the enactment of Proposition 47 on November 4, 2014 (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 1, p. 70), and became effective the next day (Cal. Const., art. II, § 10, subd. (a)).

³ A related issue is currently pending before the California Supreme Court. (See *People v. Valenzuela*, review granted March 30, 2016, S232900.)

⁴ Dorval also filed a petition for habeas corpus (*In re Dorval*, D069314) in which he raised nearly the identical issue that he raises in this appeal. We summarily deny Dorval's petition by way of a separate order filed today.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Dorval's 2002 conviction for grand theft of a firearm*

In October 2002, in San Diego County Superior Court case No. SCE223982 (2002 case), Dorval pled guilty to grand theft of a firearm (§ 487, subd. (d)).

B. *Dorval's 2014 residential burglary conviction and sentence*

In March 2014, in San Diego County Superior Court case No. SCE333970 (2014 case), Dorval pled guilty to first degree residential burglary (§§ 459, 460) (count 1) and admitted suffering a prior strike (§ 667, subds. (b)-(i)) based on the 2002 conviction for grand theft of a firearm.

At sentencing, in May 2014, the trial court imposed a stipulated sentence of four years, consisting of the low base term of two years on count 1, doubled under the Three Strikes law due to the prior strike.

C. *Dorval's motion for designation of the 2002 theft conviction as a misdemeanor and recall and resentencing on the 2014 case by dismissing the strike*

In July 2015, Dorval filed a motion to designate the 2002 conviction for grand theft of a firearm (§ 487, subd. (d)) a misdemeanor, pursuant to section 1170.18, subdivision (f), on the ground that the value of the firearm was less than \$950. (See § 490.2, subd. (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".])

Dorval also requested that the court resentence him on the 2014 case by dismissing the strike (§ 667, subds. (b)-(i)) that was premised on the 2002 conviction.

In August 2015, the court held a hearing and granted Dorval's request to have his 2002 theft conviction designated a misdemeanor. The court took under submission Dorval's request to dismiss the strike and recall and resentence him on the 2014 case. On September 22, 2015, the trial court entered a written order denying Dorval's request to dismiss the strike and recall and resentence him in the 2014 case.

Dorval appeals the trial court's September 22 order.

III.

DISCUSSION

A. *The trial court did not err in refusing to apply section 1170.18 to dismiss the 2014 strike in light of the 2015 designation of the 2002 theft conviction as a misdemeanor*

Dorval contends that section 1170.18 required the trial court "to give retroactive effect to the reduction of Dorval's prior strike felony to a misdemeanor and recall and resentence Dorval for residential burglary in [the 2014 case]."

Dorval's claim raises an issue of statutory interpretation. Accordingly, we apply the de novo standard of review. (See, e.g., *Doe v. Brown* (2009) 177 Cal.App.4th 408, 417 ["We apply the de novo standard of review to this claim, since the claim raises an issue of statutory interpretation"].)

1. *Governing law*

a. *The Three Strikes law*

The Three Strikes law (§ 667 et. seq.) is an alternative sentencing scheme that applies where a defendant has a qualifying prior conviction for a "serious and/or violent felony." (§ 667, subd. (e).) Such qualifying convictions are commonly referred to as "strikes."

Section 667, subdivision (d) defines the offenses that qualify as strikes and specifies the time at which the determination of whether a prior conviction shall constitute a strike is to be made:

"(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a serious and/or violent felony shall be defined as:

"(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor."

Section 1192.7, subdivision (c) lists "grand theft involving a firearm," as a serious felony.

Section 667, subdivision (e)(1) specifies the manner in which a defendant who has suffered one prior serious and/or violent felony is to be sentenced and provides as follows:

"(1) If a defendant has one prior serious and/or violent felony conviction as defined in subdivision (d) that has been pled and

proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction."

b. *Proposition 47 and section 1170.18*

Among numerous other provisions, Proposition 47 designated as misdemeanors certain theft crimes that were previously felonies. (See, e.g., § 490.2 [petty theft].) In addition, Proposition 47 created provisions permitting the resentencing of certain defendants (§ 1170.18, subds. (a), (b)) and authorizing the designation of certain prior convictions as misdemeanors (*id.*, subds. (f)-(h)). Under section 1170.18's resentencing mechanism, "[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 the reduced penalties provided for various crimes contained in the statute. (*Id.*, subd. (a).) 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." (*Id.*, subd. (b).)

Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application to have their felony convictions "designated as misdemeanors." (§ 1170.18, subds. (f)-(h).) Section 1170.18, subdivision (k) provides that convictions that are

resentenced or designated pursuant to section 1170.18 "shall be considered a misdemeanor for all purposes," except that such resentencing shall not permit the person to possess firearms. Section 1170.18, subdivision (k) provides:

"(k) 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 that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."⁵

Section 1170.18, subdivision (n) states: "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act."

2. *Application*

Dorval contends that section 1170.18, subdivision (k) should be interpreted to provide that once a conviction is designated a misdemeanor (*id.*, subd. (g)), the conviction becomes a "misdemeanor for all purposes," (*id.*, subd. (k)) and thus, a previously imposed Three Strikes law sentence based on the prior conviction becomes invalid. However, there is nothing in the language of section 1170.18 or the ballot materials related to Proposition 47 that demonstrates that the voters intended that a designation of an offense as a misdemeanor pursuant to section 1170.18, subdivision (g) have such retroactive effect.

⁵ Section 29800 et. seq. define various crimes pertaining to the illegal possession of firearms.

Further, while Dorval was entitled to have his 2002 theft conviction *designated* as a misdemeanor pursuant to section 1170.18, subdivision (g), Dorval does not qualify for the *resentencing* that he seeks under section 1170.18, subdivisions (a) and (b). Section 1170.18, subdivisions (a) and (b) permits the recall and resentencing of a defendant "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" (*Id.*, subd. (a).) Dorval is currently serving a sentence premised on a conviction for first degree burglary (§§ 459, 460), which is not a qualifying felony under the statute. Thus, Dorval is not "[a] person currently serving a sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor" under section 1170.18 had the statute "been in effect at the time of the offense." (§ 1170.18, subd. (a).) Moreover, there is no provision in section 1170.18 that permits a court to *dismiss a strike* in the course of resentencing a defendant. Further, section 1170.18, subdivision (n) expressly precludes applying the section so as to "diminish or abrogate the finality of judgments in any case," in any manner not provided for in the statute.

The Supreme Court's decision in *People v. Park* (2013) 56 Cal.4th 782, 796 (*Park*) strongly supports the rejection of Dorval's argument that the "misdemeanor for all purposes" language in section 1170.18, subdivision (k) required the trial court to dismiss the strike. In *Park*, the California Supreme Court considered the collateral effect of a trial court's reduction of an offense to a misdemeanor pursuant to section 17, subdivision (b). Like section 1170.18, subdivision (k), section 17, subdivision (b) provides that once

the offense in question has been reduced to a misdemeanor, the offense shall be a "misdemeanor for all purposes," under certain circumstances. In *Park*, the court considered whether a conviction for a serious felony that was reduced to a misdemeanor under section 17, subdivision (b)(3),⁶ *before* the defendant committed a later offense could serve as the basis for a felony enhancement under section 667, subdivision (a). (*Park, supra*, at p. 799.)

The *Park* court concluded that *once* the conviction was reduced to a misdemeanor, it could no longer serve as the basis for the enhancement. (*Park, supra*, 56 Cal.4th at p. 799.) Significantly, the court noted that "[t]here is no dispute that . . . defendant would be subject to the section 667(a) enhancement had he committed and been convicted of the present crimes *before* the court reduced the earlier offense to a misdemeanor." (*Park*, at p. 802, italics added.)

Indeed, in applying section 17, subdivision (b), the California Supreme Court has repeatedly concluded that the reduction of the offense to a misdemeanor does *not* apply retroactively. (See, e.g., *People v. Feyrer* (2010) 48 Cal.4th 426, 439 ["If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively"]; *Park, supra*, 56 Cal.4th at p. 795 ["From the decisions addressing the

⁶ The *Park* court quoted section 17, subdivision (b)(3) as follows: "As relevant to the issue here, section 17[, subdivision](b)(3) provides that '[w]hen a crime is punishable, in the discretion of the court, either by imprisonment in the state prison . . . or by fine or imprisonment in the county jail, it is a *misdemeanor for all purposes* under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.'" (*Park, supra*, 56 Cal.4th at p. 790, italics added.)

effect and scope of section 17[, subdivision](b), we discern a long-held, uniform understanding that when a wobbler is reduced to a misdemeanor in accordance with the statutory procedures, the offense *thereafter* is deemed a 'misdemeanor for all purposes' " (italics added).) Thus, because Dorval's 2002 conviction for grand theft of a firearm was a serious felony at the time he was sentenced in this case, under the logic of *Park*, that conviction properly served as the basis for the trial court's imposition of a Three Strikes law sentence.

Dorval's attempt to distinguish *Park* is unconvincing. Dorval contends that *Park* is "not controlling" because the reduction provided for by section 17, subdivision (b) is discretionary, whereas, according to Dorval, "if the petitioner satisfies the criteria for reduction under [section 1170.18,] subdivision (a)," a court, under section 1170.18, subdivision (b), "has no discretion but to grant the petition thereby rendering the offense a misdemeanor for all purposes." Dorval's argument is factually incorrect because a trial court need not recall and resentence an otherwise qualified defendant if "the court, *in its discretion*, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f), italics added.) Thus, section 1170.18, subdivision (b) is clearly not mandatory, as Dorval suggests. In any event, even with respect to the designation of an offense as a misdemeanor under section 1170.18, subdivisions (f) through (h), which does appear to be mandatory,⁷ an offense remains a

⁷ Certain defendants are disqualified from using either the resentencing or designation provisions of section 1170.18. (See § 1170.18, subd. (i) ["The provisions of this section shall not apply to persons who have one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of

felony *until* the offense is designated as a misdemeanor pursuant to section 1170.18, subdivision (g) and, as with section 17, subdivision (b) at issue in *Park*, there is nothing in the language of section 1170.18 that suggests that such designation is to have a retroactive effect.

None of Dorval's other arguments in support of his contention that the trial court erred is persuasive. Particularly unconvincing is Dorval's contention that section 1170.18's use of the phrase "had this act been in effect at the time of the offense" (quoting § 1170.18, subs. (a), (f)), indicates that "the voters intended a misdemeanor reduction to be retroactive to the date of the offense." The fact that the voters intended the statute to have some retroactive effect *provided for* in the statute (i.e., by permitting recall and resentencing under § 1170.18, subs. (a), (b) and designation of an offense as a misdemeanor under § 1170.18, subs. (f)-(h)), does not demonstrate that the voters intended for section 1170.18 to be retroactively applied in a manner *not* provided for in the statute. This is particularly true in light of the fact that the voters specified that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (*Id.*, subd. (n).)

Accordingly, we conclude that the trial court did not err in refusing to apply section 1170.18 to dismiss the 2014 strike premised on the 2002 conviction for grand

Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290"].)

theft of a firearm, in light of the 2015 designation of the theft conviction as a misdemeanor.⁸

B. *Dorval is not entitled to "retroactive relief" under the rule of Estrada*

Dorval contends that he is entitled to "retroactive relief" under the rule of *Estrada*, *supra*, 63 Cal.2d 740. Dorval's claim raises a question of law. We review questions of law de novo. (See e.g., *People v. Butler* (2003) 31 Cal.4th 1119, 1127.)

Under section 3, it is the general rule that new Penal Code statutes apply prospectively only. (§ 3; *People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) In *Estrada*, the California Supreme Court created a limited exception to this general rule. (*Brown, supra*, at p. 323.) *Estrada* held that a "legislative amendment that lessens criminal punishment is presumed to apply to all cases not yet final (the [enacting legislative body] deeming its former penalty too severe), unless there is a 'saving clause' providing for prospective application." (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 (*Smith*), italics omitted; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195-1196 [courts assume, absent contrary evidence, that the legislative body intended that an amended statute reducing punishment for a particular offense apply to all defendants whose judgments are not yet final on the operative date of the amended statute].)

⁸ In light of our conclusion that section 1170.18 does not provide that a judicial act in designating an offense as a misdemeanor pursuant to section 1170.18, subdivision (g) has retroactive effect, we need not consider whether any such retroactive effect would be limited in the case of the determination of whether an offense is a strike pursuant to the text of the Three Strikes law. (See § 667, subdivision (d)(1) ["The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, *shall be made upon the date of that prior conviction*" (italics added)].)

In *Brown*, the California Supreme Court stated that "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a *specific context* by articulating the reasonable presumption that a legislative act *mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments.*" (*Brown, supra*, 54 Cal.4th at p. 324, first italics in original, second & third italics added.) The *Brown* court rejected a defendant's argument that, under *Estrada*, a statute that increased the rate at which eligible defendants could earn conduct credits (thereby reducing the amount of time that such defendants were required to spend in custody) applied retroactively. (*Id.* at p. 325.) The *Brown* court reasoned that the "holding in *Estrada* was founded 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" (*ibid.*), and concluded that the statute at issue did "not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*Ibid.*)

In this case, Dorval seeks to apply *Estrada* so as "to eliminate the collateral effects of felonies that are redesignated misdemeanors." However, as *Brown* makes clear, *Estrada* applies only where the Legislature has adopted a statute "*mitigating the punishment for a particular criminal offense.*" (*Brown, supra*, 54 Cal.4th at p. 324, italics added.) Applying section 1170.18 in the fashion that Dorval urges would not constitute the retroactive application of a legislative act "mitigating the punishment for a

particular criminal offense." (*Brown, supra*, at p. 324.) Rather, to apply section 1170.18 as Dorval requests would be to conclude that a judicial act in designating an offense a misdemeanor pursuant to section 1170.18, subdivision (g) has the collateral consequence of rendering void a sentence imposed prior to such designation based on the offense later designated. We decline to extend *Estrada* in such an illogical fashion, particularly in light of the Supreme Court's decision in *Brown* rejecting a defendant's argument that *Estrada* "should be understood to apply . . . to any statute that reduces punishment in any manner" (*Brown*, at p. 325.)

Accordingly, we conclude that *Estrada* does not require that the trial court apply section 1170.18 to strike Dorval's prior strike.

C. *The trial court's refusal to apply section 1170.18 to resentence Dorval on the 2014 burglary conviction in light of the 2015 designation of the 2002 theft conviction as a misdemeanor does not constitute a violation of the equal protection clauses of the state or federal constitutions*

Dorval contends that the trial court's refusal to apply section 1170.18 to resentence him on his burglary conviction in light of the designation of the theft conviction as a misdemeanor constitutes a violation of the equal protection clauses of both the state and federal constitutions. Dorval's claim raises a question of law that we review de novo. (See *Yohner v. California Dept. of Justice* (2015) 237 Cal.App.4th 1, 11-12 [applying de novo standard of review to claim that law violated " 'equal protection principles' " (*id.* at p. 11)].)

Both the United States and California Constitutions guarantee the equal protection of the laws. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7; see *In re Evans*

(1996) 49 Cal.App.4th 1263, 1270 [noting that "(t)he scope and effect of the two clauses is the same"].) "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citation.] "This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." " (*Brown, supra*, 54 Cal.4th at 328.)

Dorval argues that refusing to give a section 1170.18, subdivision (g) designation retroactive effect sets up two classes of defendants: (1) defendants, such as Dorval, who are serving a Three Strikes law sentence based on a prior conviction that has been designated as a misdemeanor and who are ineligible for a reduction in that sentence because the designations they obtain on those prior convictions do not apply to sentences imposed prior to such designations; and (2) those defendants sentenced *after the effective date of section 1170.18*, who are able to avoid a Three Strikes law sentence based on a prior felony conviction because the designations they obtain on those convictions apply prospectively.⁹

⁹ Specifically, Dorval contends that there are two similarly situated groups of defendants, "those defendants, such as Dorval, who already are serving a sentence doubled by a prior serious and/or violent felony conviction that has been reduced to a misdemeanor, and those felony defendants who have been sentenced since Proposition 47 or who will be sentenced in the future and who also have had a prior serious and/or violent felony conviction reduced to a misdemeanor under Proposition 47."

These two groups are not similarly situated for equal protection purposes. As the italicized portion of the previous paragraph indicates, what distinguishes these two classes of defendants is whether the defendants were able to seek designation of the offenses as misdemeanors before or after the current sentence was imposed, which in turn is a function of the effective date of section 1170.18. It is well settled that "[a] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection." (*People v. Floyd* (2003) 31 Cal.4th 179, 188-189; see also, *Smith, supra*, 234 Cal.App.4th at p. 1468 ["a statute ameliorating punishment for particular offenses may be made prospective only without offending equal protection"].) This makes sense because a classification defined by the date an ameliorative statute takes effect rationally furthers the state's legitimate interest in "assur[ing] that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*In re Kapperman* (1974) 11 Cal.3d 542, 552.)

Our decision is fully consistent with the Supreme Court's decision in *People v. Morales* (2016) 63 Cal.4th 399. The *Morales* court concluded that principles of equal protection do not require treating those sentenced under Proposition 47 the same as those sentenced under section 2900.5, which provides that presentence custody credit shall be credited to reduce a period of parole. In rejecting the defendant's equal protection challenge, the *Morales* court reasoned in part:

"Persons resentenced under Proposition 47 were serving a proper sentence for a crime society had deemed a felony (or a wobbler) when they committed it. Proposition 47 did not have to change that sentence at all. Sentencing changes ameliorating punishment need not be given retroactive effect." (*Morales, supra*, at pp. 408-409.)

Accordingly, we conclude that the trial court's refusal to apply section 1170.18 to resentence Dorval on the burglary conviction in light of the designation of the theft conviction as a misdemeanor does not constitute a violation of the equal protection clause of either the state or federal constitution.

IV.

DISPOSITION

The trial court's September 22, 2015 order is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.