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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MENDOZA,

Defendant and Appellant.

E062577

(Super.Ct.No. FWV1402960)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

On December 17, 2014, the court granted defendant and appellant David Mendoza’s motion¹ to have his felony conviction for petty theft with three priors (count 1; Pen. Code § 666)² reduced to a misdemeanor pursuant to section 1170.18, the statutory enactment of Proposition 47.³ The court additionally struck two terms of defendant’s probation, but declined to strike defendant’s *Bravo*⁴ search terms. On appeal, defendant contends the court erred in declining to strike the search term of defendant’s probation. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On July 29, 2014, the People charged defendant with petty theft with priors (count 1; § 666) alleging defendant had suffered convictions for four previous thefts. On

¹ No formal written motion or petition appears in the record.

² All further statutory references are to the Penal Code unless otherwise indicated.

³ The minute order reflects that the court reduced the conviction pursuant to section 17, subdivision (b); however, at the beginning of the hearing, the following colloquy between the court and defense counsel occurred: “THE COURT: Is this a prop 47 case or no? [¶] [DEFENSE COUNSEL]: Yes, Your Honor. It is a prop 47 case.” (*People v. Contreras* (2009) 177 Cal.App.4th 1296, 1300, fn. 3 [“When there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.”].)

⁴ *People v. Bravo* (1987) 43 Cal.3d 600, 611 [“[A] search condition of probation that permits a search without a warrant also permits a search without ‘reasonable cause,’ as the former includes the latter.”].)

September 25, 2014, defendant entered a plea of guilty to the count 1 offense and admitted he had suffered three prior theft offenses.⁵

On October 24, 2014, the court dismissed the remaining allegations.⁶ The court sentenced defendant to three years' supervised probation on various terms and conditions, including that he serve 365 days in jail with credit for 40 days (term 1); that he report to his probation officer immediately upon release and every 14 days thereafter or as directed (term 3); that he keep the probation officer informed of his place of residence, cohabitants, and pets and give written notice within 24 hours of any change (term 7); and that he submit to a search of his person at any time by law enforcement (term 10). Defendant accepted the terms of his probation.

On December 17, 2014, the court reduced defendant's conviction to a misdemeanor. The court modified term 1 to provide for 120 days of total incarceration. The court struck terms 3 and 7.

Defense counsel asked the court if "the search terms still abide with someone on misdemeanors?" The court responded: "Yes. That's a bargain. I'm not going to adjust that. The reporting requirements are eliminated. He's on summary probation. [¶] If the cops stop him and they want to search him, you got to tell them you're on probation and let them search you." Defendant himself noted: "That's correct."

⁵ The minute order reflects defendant pled no contest while the oral proceedings indicate defendant pled guilty.

⁶ It is unclear from the record just what the remaining "allegations" would have been, unless it was the allegation in the complaint that defendant had suffered four, rather than just the three, admitted prior theft convictions.

II. DISCUSSION

Defendant contends the court erred in relying on the fact of defendant's prior felony guilty plea in declining to strike the search term because section 1170.18 requires that a felony conviction reduced to a misdemeanor be treated as a misdemeanor "for all purposes." (§ 1170.18, subd. (k).) Thus, defendant maintains the matter must be remanded to the court for reconsideration. The People argue defendant forfeited the issue by failing to raise it below. We hold defendant did not forfeit the issue but that the court acted within its discretion in declining to strike the search term.

"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 . . . 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] 666 of the Penal Code, as [that] section[] [has] been amended" (§ 1170.18, subd. (a).) "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" (§ 1170.18, subd. (k).) To preserve a claim for appeal, a defendant must make a timely objection below. However, a failure to timely object will be excused if doing so would have been futile. (*People v. Jackson* (2014) 58 Cal.4th 724, 762.)

Here, defense counsel posed the possibility of the elimination of the search term of defendant's probation based upon the reduction of the conviction from a felony to a

misdemeanor as a question rather than a request or assertion. Moreover, defense counsel never actually objected to the court's contention that the search term should not be stricken. However, we hold defense counsel sufficiently raised the issue below because the court addressed and rejected the issue. Furthermore, it is apparent from the court's reasoning that even if defense counsel had more forcefully raised the issue or objected to the court's reasoning, the court would have rejected defense counsel's contention. Thus, any more formal objection would have been futile. Therefore, defendant has not forfeited the issue on appeal.

Nevertheless, we disagree with defendant's fundamental contention that the court rejected the suggestion of striking the search term based on defendant's conviction of a felony offense. Nowhere does the court elucidate defendant's initial felony conviction as a reason for declining to strike the search condition. On the contrary, the court merely said the search term was part of defendant's bargain and it would not strike it. Thus, the court properly exercised its discretion to condition defendant's misdemeanor probation with a search term. (*People v. Guerrero* (1978) 85 Cal.App.3d 572, 583 [imposition of search term for misdemeanor burglary conviction vested in the discretion of the trial court]; *People v. Woods* (1999) 21 Cal.4th 668, 675; *In re Tyrell J.* (1994) 8 Cal.4th 68, 74 [delinquent minor placed on misdemeanor probation with search term for commission of battery on school grounds]; *People v. Lazalde* (2004) 120 Cal.App.4th 858, 861 [defendant on misdemeanor probation for being under the influence of a controlled substance and giving false identification].)

Even if we were to somehow find the court’s refusal to strike defendant’s search term was based upon his initial charge and conviction for a felony offense, we would still hold the court acted within its discretion. Proposition 47 “did not purport to exercise a power to go back in time and alter the felony status of every affected offense in every context.” (*People v. Eandi* (2015) 239 Cal.App.4th 801, 805.) ““Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanor status would not be given retroactive effect.” [Citation.] Thus, *at the time the defendant committed the act . . . the underlying offense was a felony.* [Citation.]” (*Id.* at p. 806, fn. 7, italics added, quoting *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [Fourth Dist., Div. Two].) Since, at the time defendant committed and was convicted of the offense it remained a felony, any reliance upon those factors by the court in declining to strike the search condition would be within its discretion.

Moreover, as the People point out, the court also had before it the fact that defendant had admitted convictions for three prior theft offenses, another legitimate basis for requiring the search term to remain in place. Finally, were we to take defendant’s assertion to its logical extreme, we would have no choice but to dismiss the instant appeal rather than address the merits, because this court has no jurisdiction over misdemeanor appeals. (*People v. Eandi, supra*, 239 Cal.App.4th at p. 806; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1095-1096 [Court of Appeal has appellate jurisdiction over case in which the defendant was convicted of a felony which was later reduced to a misdemeanor because case remained a “felony case.”].)

III. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.