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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.

MATTHEW RICHARD HUGHES,

Defendant and Appellant.

E062841

(Super.Ct.No. FSB1401940)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Charles R. Khoury, Jr., 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, Arlene A. Sevidal and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

## **FACTUAL AND PROCEDURAL HISTORY**

On November 4, 2014, the voters approved Proposition 47, The Safe Neighborhoods and Schools Act (Proposition 47); it went into effect the following day. Proposition 47 reduced certain nonserious, nonviolent felonies to misdemeanors. It added and amended sections of the Penal Code. Penal Code section 1170.18 was added and provides that a person currently serving a sentence for a felony conviction, whether by trial or plea, who would have been guilty only of a misdemeanor had Proposition 47 been in effect at the time the plea was entered, or at the time of trial, may petition for a recall of the sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing.

Prior to the passage of Proposition 47, on June 27, 2014, defendant and appellant Matthew Richard Hughes pled guilty to the felony offense of unlawful taking or driving a 1992 Honda Accord under Vehicle Code section 10851, subdivision (a). Defendant also admitted a gang enhancement under Penal Code section 186.22, subdivision (b)(1)(A), and two prior convictions under Penal Code sections 1170.12 and 667. Pursuant to the terms of the plea agreement, the court dismissed the remaining counts. Thereafter, the court sentenced defendant to a total term of 20 years in state prison.

On November 26, 2014, defendant petitioned to have his felony conviction reduced to a misdemeanor under Proposition 47. On December 19, 2014, the trial court denied the petition. The court found that defendant did “not satisfy the criteria in Penal Code section 1170.18 and is not eligible for resentencing.”

On January 28, 2015, defendant filed a letter disagreeing with the denial of his petition. We treated defendant's letter as a notice of appeal. After briefing by both parties, on February 19, 2016, defendant filed an additional brief on the recent cases regarding Proposition 47. On March 2, 2016, the People filed a supplemental response.

For the reasons set forth below, we affirm the denial of defendant's Petition without prejudice.

## **DISCUSSION**

### **A. PETITION FOR RESENTENCING**

In essence, defendant claims that Penal Code section 1170.18 should be interpreted to include Vehicle Code section 10851<sup>1</sup> as a felony that can be reduced to a misdemeanor violation of Penal Code section 490.2. We affirm the denial of defendant's Petition because he failed to meet his burden of alleging facts that he was eligible for resentencing under Penal Code section 490.2.

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<sup>1</sup> Vehicle Code section 10851 provides, "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars (\$5,000), or by both the fine and imprisonment." This section "proscribes a wide range of conduct [and may be violated] either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding)." (*People v. Garza* (2005) 35 Cal.4th 866, 876.)

“The voters approved Proposition 47 at the November 4, 2014 general election, and it became effective the next day.” (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328.) “Proposition 47 ‘was intended to reduce penalties “for certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors.”” (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652.) ““In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, “we turn first to the language of the statute, giving the words their ordinary meaning.” [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate’s intent]. [Citation.] When the language is ambiguous, “we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.” [Citation.]’ [Citation.] In other words, ‘our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.’” (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)

Proposition 47 added section 1170.18 to the Penal Code; subdivision (a) provides in pertinent 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 Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.”

Under Penal Code section 1170.18, subdivision (b), the trial court first determines whether the petition has presented a prima facie case for relief under Penal Code section 1170.18, subdivision (a). If the petitioner satisfies the criteria in subdivision (a), then he will be resentenced to a misdemeanor, unless the court, within its discretion, determines the petitioner would pose an unreasonable risk to public safety. (Pen. Code, § 1170.18, subd. (b).)

Section 490.2 was added to the Penal Code. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Penal Code section 490.2 provides in pertinent part, “Notwithstanding [Penal Code s]ection 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.” Penal Code section 487, subdivision (a), provides that if the value of the money, labor, real or personal property taken exceeds \$950, the offense is a felony. Penal Code section 487, subdivision (d)(1), provides that grand theft occurs if the property is an automobile, regardless of the value.

Penal Code section 1170.18 clearly states that a defendant must show that he was convicted of a felony but would have been convicted of a misdemeanor if Proposition 47 had been in effect at the time of the offense. For an offense under Penal Code section 490.2, which was added to the Penal Code, defendant had to allege facts that he would have been guilty of a misdemeanor violation of Penal Code section 490.2 rather than the felony conviction.

As relevant to this case, Vehicle Code section 10851 is not listed in Penal Code section 1170.18; the courts are split on whether Proposition 47 applies to violations under Vehicle Code section 10851 if the value of the vehicle is under \$950. We need not address this issue in this appeal because defendant has failed to prove that the value of the vehicle in this case was under \$950.

Here, defendant had the initial burden of proving that he would have been charged and found guilty of only a violation of Penal Code section 490.2 because the value of the vehicle he took was less than \$950. Defendant failed to meet this burden. The record of conviction does not establish this fact as he entered a guilty plea. Additionally, defendant never stated in the Petition that the 1992 Honda Civic was valued at less than \$950. In the Petition, defendant simply stated he was requesting that his felony violation under Vehicle Code section 10851, subdivision (a), be designated as a misdemeanor under Penal Code section 1170.18. Defendant never alleged facts sufficient for the trial court to determine that he should have been convicted of a misdemeanor violation of Penal Code section 490.2. The Petition was properly denied because defendant failed to establish that he was eligible for resentencing pursuant to Penal Code section 1170.18, subdivision (a). (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137 [“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”].)

In his reply brief, defendant contends that “it is proper to put the burden of proof on the prosecution to determine [the value of the stolen vehicle] since that information is

uniquely in the possession of the prosecution with its access to the victim which access a defendant does not have.” We disagree.

In the recent case of *People v. Sherow* (2015) 239 Cal.App.4th 875, the defendant filed a petition to recall his sentence under Proposition 47. The defendant sought to reduce two of his felony convictions of second degree burglary to misdemeanor violations of Penal Code section 459.5, shoplifting, because he insisted the items taken were valued less than \$950. (*Sherow*, at p. 877.) The appellate court concluded that defendant had the initial burden in his petition to show he was eligible for resentencing under Penal Code section 1170.18, subdivision (a). It referred to background information prepared by “Judge J. Richard Couzens and Presiding Justice Tricia A. Bigelow” on Proposition 47, which provided, ““The petitioner will have the initial burden of establishing eligibility for resentencing under [Penal Code] section 1170.18[, subdivision (a): i.e., whether the petitioner is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. If the crime under consideration is a theft offense under [Penal Code] sections 459.5, 473, 476a, 490.2 or 496, the petitioner will have the burden of proving the value of the property did not exceed \$950.”” (*Sherow*, at p. 879.) The *Sherow* court concluded that the defendant’s petition was properly denied because it contained no facts or explanation how the value of the items taken were less than \$950. (*Id.* at p. 877; see also *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 6-7 [found a defendant was not entitled to development of facts or hearing if the trial court determined he was ineligible on the face of a Penal Code section 1170.126 petition for resentencing].)

Similarly here, defendant made no attempt in the Petition to allege that the value of the 1992 Honda Accord was less than \$950. Since he did not allege any facts that the car was less than \$950, he did not allege facts making him eligible under Penal Code section 1170.18. Hence, defendant failed to make a threshold showing that he qualified under Penal Code section 1170.18. Further, defendant carried the burden of alleging facts in the Petition that the value was less than \$950.

B. REQUEST FOR JUDICIAL NOTICE

On February 18, 2016, defendant filed a request for judicial notice. The People filed an opposition to the request for judicial notice. We reserved ruling on the request for judicial notice, for consideration with defendant's appeal.

On appeal, defendant has asked us to take judicial notice of a San Bernardino Police Department investigative report of the theft of the 1992 Honda under Evidence Code section 452, subdivision (c); and of the Kelley Blue Book under Evidence Code section 452, subdivision (h). The investigate report indicated that the officer's valuation of the 1992 Acord ranged from \$301 to \$4000. The Kelley Blue Book valued the vehicle at \$502 in "fair condition."

In the opposition, the People contend that under Evidence Code section 452, subdivision (c), "only allows for judicial notice of official acts. The evidentiary assertions in a police report are not acts, much less official ones. Were things otherwise, the contents of police reports could simply be judicially noticed in criminal trials, which would dispense with the need for witnesses, and, for that matter, with the need for juries to make factual determinations." We agree with the People's analysis.

Moreover, the People opposed defendant's request for judicial notice of the printout of the valuation from The Kelley Blue Book website under Evidence Code section 452, subdivision (h). The People aptly stated that defendant failed to explain "how the Kelley Blue Book site is a 'source of reasonably indisputable accuracy,'" and "not reasonably subject to dispute." Again, we agree with the People. Although defendant argues that courts have taken judicial notice that the "Kelley Blue Book is a 'report of a regularly organized stock or commodity market published in a . . . periodical of general circulation or in an official publication or trade journal'"—the "courts" that defendant cites to are two unreported trial court opinions from New York. These cases are neither binding nor relevant to this case.

Notwithstanding, even if we were to take judicial notice of the items in question, it would be improper for us, in essence, to hold an evidentiary hearing to determine the value of the 1992 Honda Accord on this appeal. As stated above, it was defendant's burden to establish eligibility for relief in the lower court, not in this court. (*People v. Sherow, supra*, 239 Cal.App.4th at pp. 878-880; see also *People v. Awad* (2015) 238 Cal.App.4th 215, 221-222.)

### C. CONCLUSION

Based on the foregoing, defendant was not entitled to resentencing under Penal Code section 1170.18 because he did not meet his burden of showing his offense constituted a petty theft pursuant to Penal Code section 490.2.

**DISPOSITION**

The trial court's order denying defendant's petition to recall his sentence is affirmed without prejudice. Moreover, defendant's request for judicial notice is denied.

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MILLER  
J.

We concur:

HOLLENHORST  
Acting P. J.

SLOUGH  
J.