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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.

SHAWN PATRICK GREENBLAT,

Defendant and Appellant.

E062874

(Super.Ct.No. FVI021372)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Sylvia W. Beckham, 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 Daniel Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Shawnpatrick Greenblat (defendant) appeals from an order denying his petition for resentencing pursuant to Penal Code section 1170.18.¹ He contends that there is no substantial evidence to support the trial court's finding that he does not qualify for resentencing to misdemeanor shoplifting in lieu of his original sentence for second degree commercial burglary. We will affirm the judgment.

HISTORY

Defendant was charged with second degree commercial burglary (§ 459; count 1), forgery with intent to pass a forged check as genuine (§ 470, subd. (d); count 2), and identity theft (§ 530.5, subd. (a); count 3). All three counts were alleged to have occurred on or about September 13, 2004. Count 1 alleged that defendant entered the commercial premises occupied by Money Mart with the intent to commit larceny “and any felony.”

The operative first amended complaint also alleged that defendant had two prior serious felony convictions within the meaning of section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i), and had served six prior prison terms within the meaning of section 667.5, subdivision (b).

On April 5, 2010, pursuant to a plea bargain, defendant pleaded no contest to counts 1 and 3, and count 2 was dismissed. The court struck one of the prior serious felony conviction allegations. It also struck one of the prior prison term allegations because the conviction occurred after the date of the offenses charged in the instant case. The court imposed an aggregate sentence of 12 years four months.

¹ All statutory citations refer to the Penal Code.

On November 4, 2014, the electorate passed Proposition 47, the Safe Neighborhoods and Schools Act. The act, which included section 1170.18, was effective on November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) On November 24, 2014, defendant filed a petition for resentencing pursuant to section 1170.18. At a hearing on December 5, 2014, at which defendant was not present but was represented by counsel, the court heard the matter “without case file.” The court found defendant not eligible for resentencing and denied the petition. Defendant filed a timely notice of appeal.

DISCUSSION

Section 1170.18 provides, in pertinent part:

“(a) 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.

“(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to 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, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

Among the crimes which may be reduced to misdemeanors are commercial burglaries where the defendant enters a store during business hours with the intent to steal. This offense is now defined as shoplifting as set forth in the newly enacted section 459.5. Shoplifting is a misdemeanor if the value of the items stolen is \$950 or less. (§ 459.5, subd. (a).) Defendant contends that he is eligible to have his felony sentence for second degree burglary recalled and to be resentenced for shoplifting.

Defendant initially contended that reversal is required because (1) the court decided the petition without examining the record and (2) there is no evidence in the record of his conviction that shows that he is not eligible. At oral argument, he conceded that case law now establishes that as the party seeking relief under section 1170.18, he bears the burden to demonstrate that his offense did constitute shoplifting. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880 (*Sherow*)). Defendant also conceded that neither his petition nor the record of his conviction contains a factual basis for determining whether the commercial burglary he committed includes the elements of shoplifting. He argued that we should either remand the matter for further proceedings to permit him to establish a factual basis or affirm the order denying the petition without prejudice, in order to permit him to file a new petition. The Attorney General, however, contends that defendant is not eligible for resentencing because the burglary was committed not for the purpose of stealing merchandise but for the purpose of passing a

forged check. She contends that this does not qualify as shoplifting. We address the Attorney General's contention first.

Section 459.5 provides, "Notwithstanding Section 459, 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." (§ 459.5, subd. (a).) Thus, the intent to commit larceny is an element of shoplifting. As the Attorney General points out, passing a forged check is not larceny. "Larceny requires the taking of another's property, with the intent to steal and carry it away. [Citation.] 'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.'" (*People v. Gomez* (2008) 43 Cal.4th 249, 254–255, fn. omitted.) "[L]arceny requires a 'trespassory taking,' which is a taking *without* the property owner's consent." (*People v. Williams* (2013) 57 Cal.4th 776, 788, italics added.) In *Williams*, the defendant used a credit card, which was encoded with a third party's credit card information, to purchase gift cards. (*Williams*, at p. 780.) In discussing the "'felonious taking'" requirement of robbery, the court found that the defendant did not commit larceny because his taking was consensual. (*Id.* at p. 788.) The court explained that the store, through its employees, consented to transferring title to the gift cards to the defendant. The defendant acquired ownership of the gift cards through his false representation, on which the store relied, that he was using valid payment cards to purchase the gift cards. Only after discovering the fraud did the

store seek to reclaim possession. “Because ‘felonious taking,’ as required in California’s robbery statute [citation], must be *without the consent* of the property owner, or ‘against his will’ [citation], and [the store] *consented* to the sale of the gift cards, defendant did not commit a *trespassory* (nonconsensual) taking, and hence did not commit robbery.” (*Id.* at p. 788.) For the same reason, the passing of a bad check does not constitute larceny. (*People v. Gonzalez* (Nov. 12, 2015, D067554) ___ Cal.App.4th ___ [2015 Cal.App. Lexis 1006, *4-*6].)

However, the record of defendant’s conviction does not establish that defendant entered a check cashing business to pass a forged check, as the Attorney General contends. The record of a conviction based on a guilty plea includes the charging instrument, the defendant’s guilty plea, and the preliminary hearing transcript if there is one.² (*People v. Reed* (1996) 13 Cal.4th 217, 223-229.) Here, defendant waived a preliminary hearing. Accordingly, the record of conviction consists solely of the first amended complaint, the change of plea form and the transcript of the change of plea hearing. (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1120-1123.) The parties specifically stipulated that the source of the factual basis for the plea is the first amended complaint. Count 1 of the first amended complaint does not allege that the commercial burglary victim, Money Mart, was a check cashing business. It also does not allege that

² In two other cases in which the court took guilty pleas in the same hearing as defendant’s plea, the court noted that the parties stipulated that the court could rely on the “complaint and/or police reports attached to and incorporated therein.” We presume that this stipulation makes the police report part of the record of conviction. There was no such stipulation in this case, however.

the objective of the burglary was to pass a forged check. The dismissed forgery count (count 2) describes the charged offense as including the intent to pass a forged check, but it does not refer to Money Mart as the locus or the victim of the crime. Count 3, identity theft, also does not contain any allegation that would establish that defendant intended to pass a forged check at Money Mart. Accordingly, the record does not contain any information which supports the contention that defendant's burglary does not qualify as shoplifting.

By the same token, however, the record of conviction also does not demonstrate that defendant entered Money Mart for the purpose of stealing merchandise as opposed to passing a forged check. Nor does it establish that any property defendant stole or intended to steal was valued at less than \$950 or that the store was "open during regular business hours" at the time the theft occurred. (§ 459.5, subd. (a).) Accordingly, the record of conviction neither supports nor refutes a factual basis for resentencing under section 1170.18.

Defendant also complains that the trial court denied his petition "without case file." He contends that we should reverse and remand the matter for a hearing with the court file present. He does not, however, assert that there is any document contained in the court file that would support his claim of eligibility, nor has he sought to augment the record on appeal to include any such document. It is the appellant's burden to "affirmatively demonstrate" reversible error. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Here, defendant has not done so.

At oral argument, both defendant and the Attorney General argued that it would be appropriate to remand the matter to allow defendant to present any available evidence that the crime did include the elements of shoplifting, or to affirm the judgment without prejudice to his bringing a new petition, if he can marshal relevant and reliable evidence to establish that the crime as committed included the elements of shoplifting. The latter is the approach taken in *Sherow, supra*, 239 Cal.App.4th 875. There, the court held that although the defendant’s petition did not contain any information that would support his eligibility for reduction of his offenses from second degree burglary to shoplifting, and the record of his conviction apparently did not contain any information concerning the value of the items he stole, a new petition “could certainly contain at least Sherow’s testimony about the nature of the items taken.” (*Id.* at p. 880.) The reference to Sherow’s testimony is ambiguous. Sherow was convicted in a jury trial.³ However, the court states that the trial record does not contain any evidence concerning the value of the items he stole. Consequently, it would appear that any “testimony” Sherow could provide in support of a new petition would be a declaration of facts not contained in the trial record.

³ The opinion does not explicitly state that Sherow was convicted following a trial. However, reference to the Court of Appeal’s opinion in the case in which it affirmed Sherow’s conviction establishes that there was a trial. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1302 [Sherow, Sr., convicted by jury and sentenced to 19 years four months in prison; Sherow, Jr. convicted by guilty plea and sentenced to six years four months in prison]; cf. *Sherow, supra*, 239 Cal.App.4th at p. 877 [Sherow sentenced to 19 years four months].)

People v. Bradford (2014) 227 Cal.App.4th 1322 (*Bradford*), on which *Sherow* relies, does not appear to support it, at least to the extent that *Sherow* appears to hold that the petitioner can supply information not contained in the record of conviction. *Bradford* involves a petition for resentencing under section 1170.126. Under that statute, an inmate may petition for resentencing as a second striker if the inmate's current sentence was not imposed for certain specified offenses. (§ 1170.126, subd. (e).) In *Bradford*, the court held that the inmate's eligibility must be established from the record of his conviction or convictions; section 1170.126 does not permit the taking of evidence outside that record. (*Bradford*, at pp. 1331, 1336-1339.) The court held that if the petition does not address an issue pertaining to eligibility "and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction (as here),^[4] the trial court should invite further briefing by the parties before finding the petitioner ineligible for resentencing." (*Bradford*, at p. 1341.) The court did not say that matters outside the record of conviction could be considered, however. Rather, the purpose of the briefing is to draw

⁴ The issue in *Bradford* was whether the fact that defendant had wire cutters in his possession when he committed a commercial burglary would support the trial court's conclusion that he was ineligible for resentencing based on a statutory exclusion that applies if "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (*Bradford, supra*, 227 Cal.App.4th at p. 1327, citing §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (e)(2)(C)(iii).) The defendant was not charged with possession or use of a deadly weapon at trial, and the appellate court held that based on the facts adjudicated at trial, the trial court could not properly find that the wire cutters were a deadly weapon for purposes of finding him ineligible for resentencing. (*Bradford*, at pp. 1341-1343.)

the court's attention to facts contained in the record which support or refute the inmate's eligibility for resentencing. (*Id.* at pp. 1340-1341.)

Because defendant failed to meet his burden of proof, the trial court properly denied his petition.

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.