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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.

LAWRENCE BURDETTE GRAY,

Defendant and Appellant.

E062960

(Super.Ct.No. FVA1300357)

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.

Eric Cioffi, 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, A. Natasha Cortina and Meagan J. Beale, 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”; 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.

In 2013, prior to the passage of Proposition 47, in 2013, defendant and appellant Lawrence Burdette Gray pled guilty to unlawfully taking or driving a vehicle under Vehicle Code section 10851; admitted one prior strike conviction within the meaning of Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d); and admitted one prior conviction for which he served a term in prison within the meaning of Penal Code section 667.5, subdivision (b). On December 6, 2013, the trial court sentenced defendant to a total term of seven years. The court imposed a sentence of three years for unlawfully driving or taking a vehicle, doubled to six years due to a strike prior, plus one year for the prior prison conviction.

The prior prison conviction is central to this appeal. In 2012, defendant was convicted in Los Angeles County for felony possession of a controlled substance, in violation of Health and Safety Code section 11377, case No. LA068719; he served a term in prison for that case.

On December 2, 2014, defendant filed a petition for writ of habeas corpus, which was later deemed a petition for resentencing under Proposition 47. Defendant requested that his present conviction for taking or driving a vehicle be resentenced as a misdemeanor, and that the prior qualifying convictions also be designated as misdemeanors. On December 19, 2014, the trial court denied the petition because Proposition 47 does not apply to section 10851 of the Vehicle Code. The trial court held a mass hearing to dispose of several petitions at once. The court made no mention of or ruling on the request to recall and resentence on defendant's prior convictions. Defendant's prior convictions were all from Los Angeles; the San Bernardino court was not the proper venue for the redesignation of the prior convictions.

On February 19, 2015, defendant filed a notice of appeal. He is not challenging the order denying his petition to resentence his felony conviction for unlawfully taking or driving a vehicle. Instead, defendant stated: "I am seeking relief under Prop 47 1170.18(f), not to be resentenced on my current case, but rather to have any & all prior prison (felony) sentences reduced to misdemeanors as provided for & pursuant to P.C. 1170.18(f)"

Defendant asked the Los Angeles Superior Court (LASC) to reclassify the crime underlying his prior prison term conviction in case No. LA068719, for drug possession. The LASC granted defendant's application on May 12, 2015.¹ Defendant filed his appellant's opening brief six weeks later. Moreover on August 31, 2015, a month after filing his appellant's opening brief, defendant filed a petition for writ of habeas corpus (case No. E064330).² On September 3, 2015, we ordered the habeas petition be considered with the appeal for the sole purpose of determining whether an order to show cause should issue.

For the reasons set forth below, we affirm the trial court's order denying defendant's petition to recall his sentence.

DISCUSSION

Defendant, in his appeal and petition for writ of habeas corpus, contends that his sentence must be modified because the prior conviction on which the court imposed a sentence enhancement pursuant to Penal Code section 667.5 has been reduced to a misdemeanor, and therefore no longer supports imposition of the one-year enhancement. The People argue that the appeal is premature because the trial court did not rule on this particular issue. Defendant agrees that the issue was not decided by the trial court but requests us to address this issue because it is a pure question of law.

¹ Defendant requested that we take judicial notice of the minute orders of his felony conviction in case No. LA068719. On September 10, 2015, we granted defendant's request.

² We resolve the petition in case No. E064330 by separate order.

In the instant case, on December 19, 2014, when the trial court ruled on defendant's petition to resentence, the court did not address defendant's request to vacate the one-year enhancement for his prior prison conviction. The court read a roll call of the cases in which the petition had been granted; then a list of the cases in which the petition was denied because the conviction was not included under Proposition 47. Defendant's name was number 43 on the latter list. There was no discussion of his case individually.

Even if the court had addressed defendant's case individually, his prior prison term conviction *had not been designated as a misdemeanor at that time*. Defendant received the prior conviction in Los Angeles. Therefore, he had to file a petition with the LASC to designate his prior conviction as a misdemeanor. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1332-1333.) Defendant's application to reclassify his prior conviction at the LASC was heard and granted *after* the petition for resentencing was denied in San Bernardino. As provided above, the LASC designated defendant's prior felony conviction in case No. LA068719 as a misdemeanor on May 12, 2015. Therefore, defendant's prior prison conviction had not been designated a misdemeanor at the time the trial court in this case denied defendant's petition for resentencing; the court never addressed this issue below. Therefore, we agree with the People and hold that this issue is premature. Defendant can file a petition in the trial court to seek a ruling on the effect of the redesignation of his enhancement conviction on his sentence.

DISPOSITION

The trial court's order denying defendant's petition to recall his sentence is affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.