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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

DAVID CHARLES BURGESS,

Defendant and Respondent.

E063299

(Super.Ct.No. RIF1315119)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Reversed.

Michael A. Hestrin, District Attorney, and Natalie M. Lough, Deputy District Attorney, for Plaintiff and Appellant.

Steven L. Harmon, Public Defender, and Laura Arnold, Deputy Public Defender, for Defendant and Respondent.

INTRODUCTION

The People appeal from the trial court's order granting the petition of defendant David Charles Burgess for resentencing of his conviction of receiving stolen property. (Pen. Code,¹ § 496, subd. (a).) The People contend that defendant failed to meet his burden of establishing that the value of the property was less than \$950. We reverse.

FACTS AND PROCEDURAL BACKGROUND

On April 18, 2014, defendant pled guilty to receiving stolen property, a Bank of America Visa debit card (§ 496, subd. (a)) and admitted two prison priors (§ 667.5, subd. (b)). An additional charge of unlawfully possessing an access card with intent to commit fraud (§ 484e, subd. (d)) was dismissed, two additional prison priors were stricken, and defendant was sentenced to four years in county jail. Defendant admitted at the hearing that “on or about December 14th, 2013, . . . [he] willfully and unlawfully received property from Bank of America, a Visa debit card, which the property had been obtained by theft or fraud, and [he] did conceal it or with[o]ld it, and [he was] not entitled to do so, and [he] withheld it from the owner.”

On December 2, 2014, defendant filed a petition for resentencing under section 1170.18. His petition stated he believed the value of the property did not exceed \$950. Over the People's opposition on the grounds that the property was a “stolen debit card,” and its value exceeded \$950, the trial court granted the petition. To support their argument as to the value of the property, the People relied on the victim's statement to a

¹ All further statutory references are to the Penal Code unless otherwise indicated.

deputy that she had recently added herself to her husband's bank account, and she had been waiting for her debit card to arrive in the mail. Based on that statement, the People posited that "[a] joint bank account is used to pay bills and deposit checks for the purchase of daily expenses, which would be well over the amount of \$950."

DISCUSSION

Proposition 47 and Statutory Amendments

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, section 1170.18. Section 1170.18 creates a process through which persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. (See generally *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108-1109.) Specifically, section 1170.18, subdivision (a), provides: "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 [Proposition 47] . . . had [Proposition 47] 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 [Proposition 47]."

After the passage of Proposition 47, receiving stolen property is a misdemeanor if the value of the property does not exceed \$950, and the defendant does not have disqualifying prior convictions. (§ 496, subd. (a).)

Standard of Review

When interpreting a voter initiative, “we apply the same principles that govern statutory construction.” (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) We first look “to the language of the statute, giving the words their ordinary meaning.” (*Ibid.*) We construe the statutory language “in the context of the statute as a whole and the overall statutory scheme.” (*Ibid.*) If the language is ambiguous, we look to “other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.” (*Ibid.*)

Analysis

As noted *ante*, receiving stolen property under section 496, subdivision (a), is a misdemeanor for qualified defendants only if the value of the property does not exceed \$950. “[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing.” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878 (*Sherow*)). Here, defendant checked the box on his petition next to the statement that he believed the value of the property did not exceed \$950, and he argues that he thus made a *prima facie* showing of eligibility, after which the burden shifted to the People.

Defendant offered no evidence at the resentencing hearing.

We reject defendant’s contention that the mere use of a court-approved form, without supporting evidence, satisfied his burden of proof. Valuation of property for

purposes of resentencing is necessarily a fact-based determination. (See *Sherow, supra*, 239 Cal.App.4th at pp. 877-878.) We conclude defendant failed to meet his burden of establishing the value of the stolen debit card.

We next examine whether the trial court nonetheless properly ruled that the value of the stolen debit card was not over \$950. The court explained, “I don’t think the credit limit of a credit card is a persuasive reason to find it’s over \$950. If the defendant had tried to buy something over \$950, that would be easy to say he was not eligible in this case. He was just in possession of a credit card, and a defendant has no idea what the credit card limit is when they steal it. I’m sure they’re hoping for a good one, but he didn’t try to spend it.”

In *People v. Caridis* (1915) 29 Cal.App. 166, 167-168, the court held that the winning ticket in an illegal lottery, as a piece of paper, had slight intrinsic value to support a charge of petit larceny for its wrongful taking. Similarly, in *People v. Cuellar* (2008) 165 Cal.App.4th 833, at pages 838-839, the court held that a fictitious check “had slight intrinsic value by virtue of the paper it was printed on.” However, the issue before the court in those cases was not to assign a specific value to such property, but to establish whether the property had at least some intrinsic value so as to support a charge of larceny. (*People v. Caridis*, at p. 169; *People v. Cuellar*, at p. 839.) Thus, those cases are of limited value in making a determination of value as required for resentencing under section 1170.18.

The People and defendant propose alternative approaches to valuation of a stolen debit card.

The People contend that “the value of a stolen credit card should be calculated by the *intended loss and potential use* by the defendant, not the monetary value of the physical card or the amount charged by the defendant.” In so arguing, the People rely on federal appellate decisions interpreting federal sentencing guidelines under which a defendant can be sentenced to a longer term by using the credit card limit as the value of the “intended loss.” (See, e.g., *U.S. v. Sowels* (5th Cir. 1993) 998 F.2d 249, 251-252 [holding that the defendant could be sentenced to a longer term under sentencing guidelines by using the credit limit of stolen credit cards to determine the “intended loss”]; see also *U.S. v. Harris* (5th Cir. 2010) 597 F.3d 242, 256 [holding that the full credit limit of a card could be used to calculate intended loss when “a defendant recklessly jeopardizes the full credit limit of a card by transferring it to a third party whom he does not control”]; *U.S. v. Nosrati-Shamloo* (11th Cir. 2001) 255 F.3d 1290, 1292.) Those cases are inapposite; the federal sentencing guidelines at issue expressly permit consideration of the “intended loss that the defendant was attempting to inflict” when that amount can be determined. (See *U.S. v. Egemonye* (1st Cir. 1995) 62 F.3d 425, 428.) The People concede that a concept of “intended loss” has no counterpart in California law when measuring the value of stolen property for purposes of section 496, subdivision (a).

Defendant has proposed a third approach, which we believe is consistent with “California’s settled legal standard for determining the ‘value’ of stolen property.” That standard is “the fair market value of the property and not the value of the property to any particular individual.” (*People v. Lizarraga* (1954) 122 Cal.App.2d 436, 438, quoting

People v. Latham (1941) 43 Cal.App.2d 35, 39; see § 484, subd. (a) [“In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test . . .”].)

Defendant further notes that when there is no legal market for a stolen item, courts in other jurisdictions have looked to “the illegal market price” and other objective evidence in determining the value of a stolen item, including a credit or debit card and similar instruments. (See, e.g., *Miller v. People* (1977) 193 Colo. 415, 418 [“Evidence of the dollar amount which may be purchased using the credit card without card company approval provides an objective means of evaluating the illegitimate market value of credit cards.”]; *U.S. v. Tyers* (2d Cir. 1973) 487 F.2d 828, 831 [jury could properly consider street value of stolen blank money orders]; *U.S. v. Bullock* (5th Cir. 1971) 451 F.2d 884, 890 [trier of fact could consider the value of stolen money orders based on the value the defendants obtained through “legitimate channels, or at what they might bring on the thieves’ market”]; *Churder v. U.S.* (8th Cir. 1968) 387 F.2d 825, 833 [the measure of value of stolen money orders was “the amount the goods may bring to the thief”]; *State v. McCabe* (N.D. 1982) 315 N.W.2d 672, 676 [reasonable to believe that a stolen credit card “had a ‘street value’ or ‘thieves’ market’ value in excess of \$100].)

In our view, the market value approach is most consistent with existing California law. Because defendant failed to introduce any evidence on that issue, reversal is required.

DISPOSITION

The order appealed from is reversed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.