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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.

DAMIEN JAMES MELTON,

Defendant and Appellant.

E063368

(Super.Ct.No. BAF1300141)

O P I N I O N

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

Affirmed.

Robert E. Boyce, 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, and Barry Carlton, Seth Friedman, and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Damien James Melton, filed a petition for resentencing pursuant to Penal Code section 1170.18,¹ which the court denied. On appeal, defendant contends the court erred in denying his petition. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant admitted that on or about January 12, 2013, he unlawfully entered a locked motor vehicle with the intent to commit theft. On March 4, 2013, the People charged defendant with vehicle burglary (count 1; § 459) and alleged that defendant had suffered eight prior prison terms (§ 667.5, subd. (b)) and one prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

On March 22, 2013, pursuant to a plea agreement, defendant pled guilty to the count 1 offense and admitted having suffered three prior prison terms and one prior strike conviction. Pursuant to the plea agreement, the court sentenced defendant to an aggregate term of imprisonment of seven years. The court struck the remaining allegations.

On January 8, 2015, defendant filed a petition for resentencing pursuant to section 1170.18. On February 18, 2015, the People filed a response in which they contended defendant was not eligible for resentencing under section 1170.18 because vehicle burglary was not a statutorily qualifying offense. On March 17, 2015, the court denied defendant's petition, noting that vehicle burglary was not a qualifying offense for resentencing pursuant to section 1170.18.

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

II. DISCUSSION

Defendant contends the court erred in denying his petition for resentencing because section 1170.18 should be broadly construed to include all theft-related offenses and that any other interpretation violates constitutional principles of due process and equal protection. We disagree.

On November 4, 2014, voters enacted Proposition 47, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) “Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47.” (*Id.* at p. 1092.)

Here, defendant pled guilty to vehicle burglary under section 459. Vehicle burglary is not an offense listed as rendering a defendant eligible for resentencing pursuant to section 1170.18. Thus, defendant is simply not statutorily eligible for resentencing pursuant to section 1170.18. (*People v. Page* (2015) 241 Cal.App.4th 714, 718 [Fourth Dist., Div. Two]; *People v. Garness* (2015) 241 Cal.App.4th 1370, 1373-1374 [Fourth Dist., Div. Two].)

Nevertheless, defendant contends it was the electorate's intent in enacting Proposition 47 to permit resentencing in all cases, whether specified or not, in which a defendant has been convicted of a theft offense in which the property is valued at less than or equal to \$950 and the defendant has no other disqualifying prior conviction.

“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.’ [Citation.]” (*People v. Briceno* (2004) 34 Cal.4th 451, 459; accord, *People v. Park* (2013) 56 Cal.4th 782, 796.)

“In construing this, or any, statute, our office is simply to ascertain and declare what the statute contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does. We may not rewrite the statute to conform to an assumed intention that does not appear in its language.” (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 253.) “Where there is no ambiguity in the statutory text, ““then the [enacting body] is presumed to have meant what it said, and the plain

meaning of the language governs.” [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 55.)

Here, there is no ambiguity in the text of the statute. There is simply no provision in section 1170.18 for resentencing a defendant convicted of burglary. The drafters of Proposition 47 clearly knew how to compose language to include crimes committed under section 459, including vehicle burglary, if it so desired. (*People v. Albillar, supra*, 51 Cal.4th at p. 56.) The fact that an offense committed under section 459 is not listed as eligible for resentencing indicates the drafters intended to exclude it from such eligibility. Indeed, “[t]he legislative inclusion of [specific] crimes as exceptions necessarily excludes any other exceptions [citation].” (*People v. Gray* (1979) 91 Cal.App.3d 545, 551.) “[I]f Proposition 47 were intended to apply not only to reduce the punishment for certain specified offenses, but also any similar offenses, or offenses that *could* have been, but were not, charged as one of the specified offenses, we would expect some indication of that intent in the statutory language. We find nothing of the sort. It is simply not our role to interpose additional changes to the Penal Code beyond those expressed in the plain language of the additions or amendments resulting from the adoption of Proposition 47.” (*People v. Garness, supra*, 241 Cal.App.4th at p. 1375; accord, *People v. Page, supra*, 241 Cal.App.4th at p. 720.)

Here, section 1170.18 expressly limits, by explicit enumeration of the particular statutes, those offenses which render defendants eligible for resentencing. The absence of section 459 reveals an intent to render defendants convicted of burglary ineligible for

such resentencing. Therefore, the court correctly determined defendant was ineligible for resentencing because he was convicted of an offense not enumerated as making him statutorily eligible for resentencing.

Moreover, defendant was not convicted of a theft offense. He was convicted of vehicle burglary, i.e., breaking and entering into a vehicle with the intent to commit a theft. Nothing in this record establishes defendant actually stole any items. (*People v. Ceja* (2010) 49 Cal.4th 1, 9, fn. 9 [“Burglary does not require a theft.”].)

“An essential element of burglary of an automobile set forth in . . . section 459 is that the vehicle must be locked.’ [Citations.]” (*People v. Woods* (1980) 112 Cal.App.3d 226, 230.) In defining vehicle burglary, it was “the legislative objective to make it more serious to break into the interior sections of locked cars than merely stealing from them. [Citations.]’ [Citation.]” (*People v. Henry* (2009) 172 Cal.App.4th 530, 535.) Thus, because defendant was not convicted of a theft offense, but of the more serious offense of *burglary*, any interpretation of the statute to broadly include all *theft* offenses would not avail him.

Furthermore, even were we to strain interpretation of defendant’s conviction for burglary to amount to a theft offense, defendant has failed to prove his “theft” of items, or any damage to the car caused by the burglary, did not exceed \$950. “The burden of proof lies with defendant to show the facts demonstrating his eligibility for relief, including that the value of the stolen vehicle did not exceed \$950. [Citation.] Defendant did not attempt to meet that burden in his petition, providing no information at all regarding his

eligibility for resentencing in his petition.” (*People v. Page, supra*, 241 Cal.App.4th at p. 719, fn. 2.) “[I]t is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts, upon which his or her eligibility is based.” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [Fourth Dist., Div. Two] [defendant failed his burden to establish eligibility for resentencing under § 1170.18 by failing to prove the value of the items he was convicted of taking did not exceed \$950].)

Due process is not offended by requiring the petitioning defendant to bear the burden of establishing eligibility for resentencing because defendant has already been proven guilty of the offenses for which he was convicted. It is defendant who is seeking remediation of his sentence, not the People seeking to enhance it. (*People v. Sherow, supra*, 239 Cal.App.4th at p. 880.) Thus, because defendant has failed to meet his burden of establishing that the value of any “theft” he committed was less than \$950, defendant would be ineligible for resentencing even under his broadened interpretation of section 1170.18.

Finally, defendant’s contention that any interpretation rendering him ineligible for resentencing violates constitutional principles of equal protection fails because he has not demonstrated he is similarly situated to those defendants who are statutorily eligible for resentencing. Defendant notes that the People could charge and convict a hypothetical defendant for petty theft under section 490.2 for the theft of an entire vehicle, so long as that vehicle was not worth more than \$950. Such a defendant would be statutorily eligible for resentencing under section 1170.18. Thus, defendant contends it violates

equal protection to permit eligibility for resentencing for a defendant who has stolen an entire car while denying him such eligibility for “merely” breaking and entering the same car.

“[N]either the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles. [Citation.]” (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) “Applying rational basis scrutiny, the California Supreme Court has held that ‘neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles.’ [Citation.]” (*People v. Page, supra*, 241 Cal.App.4th at p. 719 [applying rational basis standard to claim of equal protection violation where the defendant was convicted of an offense not enumerated within § 1170.18].)

“Indeed, “[i]t is axiomatic the Legislature may criminalize the same conduct in different ways,” thereby giving the prosecutor ‘discretion to proceed under either of two statutes that proscribe the same conduct, but which prescribe different penalties.’ [Citation.]” (*People v. Garness, supra*, 241 Cal.App.4th at p. 1374.) “Absent a showing that a particular defendant “‘has been singled out deliberately for prosecution on the basis of some invidious criterion,’ . . . the defendant cannot make out an equal protection violation.’ [Citation.]” (*People v. Page, supra*, 241 Cal.App.4th at p. 720.)

Defendant has failed to demonstrate he has been singled out deliberately for prosecution based on some invidious criterion. Thus, defendant's claim of a violation of his equal protection rights fails. The court properly denied defendant's petition for resentencing.

III. DISPOSITION

The judgment is affirmed.

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KING
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.