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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.

DOUGLAS LEROY CUTLER, JR.,

Defendant and Appellant.

E063520

(Super.Ct.No. FVI023300)

OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam Ivy Morton, Judge. Affirmed.

James R. Bostwick, 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, Charles C. Ragland and Kristen Hernandez, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Douglas Leroy Cutler, Jr., appeals from an order denying his petition under Penal Code section 1170.18<sup>1</sup> to reclassify his felony conviction of receiving stolen property (§ 496d, subd. (a)) as a misdemeanor. Defendant contends his conviction qualified for relief under section 1170.18 and Proposition 47, and it violates equal protection principles to treat the receipt of a stolen vehicle worth \$950 or less differently from the receipt of other stolen property worth \$950 or less. We will affirm.

## FACTS AND PROCEDURAL BACKGROUND

Defendant borrowed a car, a 2000 Chevy Camaro, with the owner's consent to use it for a specific purpose, but he failed to return the car. In January 2006, he pled guilty to count 2, a felony charge of receiving stolen property, a motor vehicle. (Pen. Code, § 496d, subd. (a).) Additional charges of unlawfully driving or taking a motor vehicle (Veh. Code, § 10851) and receiving stolen property (Pen. Code, § 496, subd. (a)) were dismissed. The parties stipulated that “the police report[] contained in [the] court file” provided a factual basis for the plea. Defendant was placed on probation, but he violated the terms of his probation, and he was sentenced to one year four months in state prison.

On April 6, 2015, defendant filed a petition under section 1170.18 to have his felony conviction reclassified a misdemeanor. The trial court denied the petition on the ground that “PC 496d(a) does not qualify under Prop 47.”

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## 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 (f), provides: “A person who has completed his or her 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 file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.”

Section 1170.18, subdivisions (a) and (b), include the following offenses: “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 . . . .”

## **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.*)

## **Exclusion of Section 496d**

Defendant contends the trial court erred in denying his petition under Proposition 47 because section 1170.18 should be construed to apply to a felony conviction for violating section 496d where the value of the stolen motor vehicle was \$950 or less. Although a felony conviction under section 496d is not one of the theft-related offenses included in section 1170.18, subdivisions (a) and (b), section 1170.18 expressly applies to the offenses of vehicle theft (§ 490.2, subd. (a)) and receiving stolen property (§ 496, subd. (a)) when the value of the stolen property is \$950 or less. Defendant argues that all theft-related offenses should be treated as misdemeanors when the value of the property is \$950 or less.

However, the plain language of Proposition 47 does not include section 496d. ““When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.”” (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) Additionally, under the maxim *expressio unius est exclusio alterius*, when the Legislature

expressly includes certain criminal offenses in a statute, we infer a legislative intent was to exclude offenses that were not mentioned. (*People v. Sanchez* (1997) 52 Cal.App.4th 997, 1001.) Because section 1170.18, subdivisions (a) and (b), expressly includes certain theft-related offenses (§§ 459.5, 473, 476a, 490.2, 496, 666), we determine that the intent of the voters was to exclude other theft related offenses, such as section 496d, from reclassification and resentencing under Proposition 47. (See, e.g., *Sanchez*, at p. 1001.)

### **Equal Protection**

Defendant also contends that denying his petition for reclassifying a section 496d conviction of buying or receiving a stolen motor vehicle with a value of \$950 or less violates his constitutional right to equal protection. (U.S. Const., 14th Amend, § 1; Cal. Const., art. I, § 7.) He argues that a person convicted of receiving a stolen vehicle (§ 496d) with a value of \$950 or less is similarly situated with respect to persons convicted of stealing a vehicle of the same value (§ 490.2) and persons convicted of receiving other stolen property of the same value (§ 496).

Because “[a] defendant . . . ‘does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives,’” the rational basis test applies to an equal protection challenge involving “‘an alleged sentencing disparity.’” (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Our Supreme Court has also applied the rational basis test to an alleged statutory disparity: “Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, ‘equal protection of the law is denied only where there is no “rational relationship between the disparity of

treatment and some legitimate governmental purpose.” [Citation.]” (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*).

The *Johnson* court continued: ““This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in ““rational speculation”” as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review “whether or not” any such speculation has “a foundation in the record.”” [Citation.] To mount a successful rational basis challenge, a party must ““negative every conceivable basis”” that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its ““wisdom, fairness, or logic.”” [Citations.]” (*Johnson, supra*, 60 Cal.4th at p. 881.)

We may posit several reasons that could support treating the offense of receiving a stolen vehicle differently from theft offenses in general and from the offense of receiving other stolen property. For example, unlike other forms of stolen property, stolen vehicles are often dismantled and sold for parts in “chop shops,” which can raise their worth above retail value. (See *People v. Tatum* (1962) 209 Cal.App.2d 179, 184 [“the ‘fence’ is more dangerous and detrimental to society than is the thief”], abrogated by statute on another ground as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1162, 1165.) As another example, owners of vehicles are typically dependent on their vehicles for necessities, which is not so frequently the case with the theft of other forms of property.

“‘[W]hen conducting rational basis review, [the courts] must accept any gross generalizations and rough accommodations that the Legislature seems to have made.’ [Citation.] ‘A classification is not arbitrary or irrational simply because there is an “imperfect fit between means and ends” [citations], or ‘because it may be “to some extent both underinclusive and overinclusive” [citation].’ (*Johnson, supra*, 60 Cal.4th at p. 887.) Because we can discern plausible reasons for distinguishing between section 496d offenses on the one hand and section 490.2 and section 496 offenses on the other hand, defendant has failed to establish any violation of equal protection in failing to extend reclassification to section 496d, subdivision (a) offenses. We conclude the trial court properly denied defendant’s petition to reclassify his felony conviction.

DISPOSITION

The order appealed from is affirmed.

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McKINSTER  
J.

I concur:

RAMIREZ  
P. J.

MILLER, J., Concurring and Dissenting.

I agree with the majority opinion that Penal Code section 496d, receiving a stolen vehicle, was not intended to be included in Proposition 47, and the trial court properly denied defendant's petition to recall his sentence. I also concur with the majority opinion that it does not violate equal protection to punish the receipt of a stolen vehicle worth \$950 or less differently from the receipt of other stolen property worth \$950 or less.

I respectfully dissent to that part of the majority opinion, which addresses whether it violates equal protection to punish those who receive a stolen vehicle with a value of \$950 more severely than those who steal a vehicle worth less than \$950, who would only be guilty of a violation of Penal Code section 490.2, a misdemeanor. Defendant did not raise this equal protection argument on appeal. I would not address this argument, which was not raised on appeal.

MILLER

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J.