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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.

OMAR CASILLAS,

Defendant and Appellant.

E063565

(Super.Ct.No. SICRF0538306)

OPINION

APPEAL from the Superior Court of Inyo County. Brian J. Lamb, Judge.

Affirmed without prejudice.

Richard Schwartzberg, 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, Lynne G. McGinnis and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Omar Casillas appeals from the denial of a petition for resentencing under Proposition 47, The Safe Neighborhoods and Schools Act (Proposition 47). Finding no error, we affirm. Our affirmance, however, is without prejudice to defendant's ability to file a new petition with evidentiary support for the facts he must prove to be entitled to relief under Proposition 47.

#### FACTUAL AND PROCEDURAL BACKGROUND

In 2005, defendant pled guilty to receiving stolen property (Pen. Code<sup>1</sup>, § 496, subd. (a)) and obtained dismissal of two other counts alleging he took a vehicle without the owner's permission (Veh. Code, § 10851, subd. (a)) and drove on a suspended driver's license (Veh. Code, § 14601.1, subd. (a)). Defendant agreed that the police and probation officer's reports would form the factual basis for the plea. Those reports indicate defendant was found driving a box truck that was owned by U-Haul of Arizona and it had been taken without the owner's permission. The trial court imposed the lower term of 16 months in state prison.

In December 2014, petitioner, while representing himself, filed a petition for resentencing under Proposition 47. He used a form petition to which he attached no evidence regarding, among other things, the value of the U-Haul truck. (§ 496, subd. (a) [receiving stolen property is ordinarily a misdemeanor if value of stolen goods is less than \$950].) The trial court appointed counsel to represent defendant on the resentencing petition and asked the People to opine about his entitlement to relief. The People

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<sup>1</sup> Unless otherwise specified, all statutory references are to the Penal Code.

responded that the transcript from the preliminary hearing did not establish a value of the truck, but that it likely exceeded \$950, which would render defendant ineligible for resentencing.

The trial court denied defendant's petition for resentencing. It indicated defendant bore the burden of establishing the value of the U-Haul truck but failed to carry that burden and was therefore not entitled to relief. In the course of making this ruling, the trial court expressed a view that defendant would unlikely be able to show that the value of the U-Haul was less than \$950 because the vehicle was less than one year old at the time of the incident, and because U-Haul had reported no damage after reclaiming the truck.

### ANALYSIS

Defendant argues the trial court erred by relying on police reports regarding the value of the vehicle even though the reports are not part of the record of conviction, by concluding that the U-Haul truck was worth more than \$950 based on nothing but speculation and conjecture, and by imposing on him the burden of proving the value of the U-Haul. The People argue defendant bore but failed to meet the burden of proving the U-Haul's value, such that the trial court properly denied his petition for resentencing. Because we agree with the People, we affirm the trial court's order without needing to reach the merits of defendant's first two contentions.

Proposition 47 added section 1170.18 to the Penal Code. Subdivision (a) of that statute reads: "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.”

To determine whether defendant “would have been guilty of a misdemeanor under [this act] had this act been in effect at the time of the offense” (§ 1170.18, subd. (a)), we look to the terms of the statute under which defendant was convicted. Subdivision (a) of section 496 indicates that the crime that subdivision describes is ordinarily a “ ‘wobbler,’ ” or one that is, “in the discretion of the court, punishable as either a felony or a misdemeanor.” (*People v. Park* (2013) 56 Cal.4th 782, 789.) The statute then continues: “However, if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no[ne of certain specified] prior convictions.” (§ 496, subd. (a).) Therefore, the only way defendant’s act of receiving the stolen U-Haul truck would have constituted a misdemeanor if it had been prosecuted after the passage of Proposition 47 is if the value of the truck was \$950 or less. (See *People v. Perkins* (2016) 244 Cal.App.4th 129, 136 (*Perkins*) [Fourth Dist., Div. Two]; *People v. Sherow* (2015) 239 Cal.App.4th 875, 878-880 (*Sherow*).

In this case, defendant concedes the record of conviction was silent as to the value of the stolen U-Haul truck. He argues the trial court cannot place on him the burden of proving the value of the stolen property he received, but we have already concluded otherwise. In *Perkins*, we held that, “Because defendant is the petitioner seeking relief, and because Proposition 47 does not provide otherwise, ‘a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing.’ ” (*Perkins, supra*, 244 Cal.App.4th at p. 136, quoting *Sherow, supra*, 239 Cal.App.4th at p. 878.) Like the petition defendant filed here, the resentencing petition at issue in *Perkins* “provided no information whatsoever on the nature and value of the stolen property” on which a conviction under section 496, subdivision (a), was based. (*Perkins*, at p. 137.) We therefore reach the same conclusion we drew in *Perkins* and hold the trial court did not err in denying defendant’s petition for resentencing on a conviction under section 496, subdivision (a), because defendant failed to prove that the value of the stolen goods he received was \$950 or less.

Because we resolve this appeal on the basis of defendant’s failure to meet his burden, we need not reach his contentions about the extent to which the trial court may have relied on improper evidence or improperly engaged in speculation. Even had the trial court done either of these things, its actions would not change the fact that defendant’s petition for resentencing failed for lack of evidentiary support.

The reply brief asks us to allow defendant to file a new, properly supported petition for resentencing if we affirm the trial court’s order. We see no reason not to

grant this request, as we did in *Perkins* and as the court did in *Sherow*. (*Perkins, supra*, 244 Cal.App.4th at p. 140; see also *Sherow, supra*, 239 Cal.App.4th at p. 881 [order denying resentencing petition affirmed without prejudice to submission of new petition].) As we noted in *Perkins*, rules about who bore the burden of proof were “unsettled” when defendant filed his petition. (*Perkins*, at p. 140.) “In any new petition, defendant should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief.” (*Ibid.*, fn. omitted.)

#### DISPOSITION

We affirm the order denying defendant’s petition for resentencing of his conviction for receipt of stolen property without prejudice to consideration of a subsequent petition that supplies evidence of his eligibility.

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CODRINGTON  
J.

We concur:

MILLER  
Acting P. J.

SLOUGH  
J.