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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.

MARK AARON VAUGHN,

Defendant and Appellant.

E063681

(Super.Ct.No. RIF129904)

O P I N I O N

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

Affirmed.

Eric S. Multhaupt, 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 Scott C. Taylor and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Mark Aaron Vaughn, 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 determining he was ineligible for resentencing. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND²

On April 19, 2006, the victim reported to officers that she saw defendant walking around her backyard. Defendant looked inside the victim's empty toy hauler. Defendant then opened the door to a second toy hauler, which contained a Sand Rail worth over \$40,000. Defendant cranked the trailer hitch and raised the vehicle to prepare it for transport. Defendant then lifted the cover off the victim's husband's \$90,000 Sand Rail which was parked inside the garage.

The victim called the police. Defendant ran from the garage and left in a stolen 2001 Chevrolet Silverado truck. Defendant later abandoned the vehicle when it became disabled due to a broken drive shaft and two flat tires. Defendant fled to Iowa from where he was extradited four years later.

On October 5, 2010, a jury convicted defendant of burglary (count 1, Pen. Code, § 459), driving a stolen vehicle, the 2001 Chevrolet Silverado (count 2, Veh. Code, § 10851, subd. (a)), and attempted vehicle theft, a 2006 Sand Rail, 2005 Universal trailer,

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

² Like the parties, we derive our recitation of the facts from the probation officer's report. Defendant filed an appeal from the original judgment in which we issued an opinion. (*People v. Vaughn* (Jan. 27, 2012, E052346) [nonpub. opn.].) However, the *trial* record from that case has been placed in off-site storage in Sacramento and was not included in the record in the instant case.

or 2000 Dune Sport toy hauler (count 4, Pen. Code, § 664; Veh. Code, § 10851, subd. (a)).³ The jury also found that a person other than an accomplice was present during the burglary so that the burglary was in the first degree (Pen. Code, § 460, subd. (a)) and constituted a violent felony under Penal Code section 667.5, subdivision (c)(21).

The court thereafter found true allegations defendant had suffered five prior prison terms. (§ 667.5, subd. (b).) The court sentenced defendant to an aggregate term of 10 years' incarceration.

On December 29, 2014, defendant filed a petition for resentencing requesting the court entertain any benefit which may inure to him from Proposition 47 based upon his conviction for burglary. The People responded that defendant was ineligible for resentencing because his convictions were not for qualified felonies. On April 3, 2015, the court denied defendant's petition, finding defendant's convictions were not for qualifying felonies.

II. DISCUSSION

Defendant contends his convictions for vehicle theft and attempted vehicle theft are qualifying felonies under Penal Code section 1170.18, such that the court erred in denying his petition. The People disagree.⁴ We hold that regardless of whether a

³ Presumably the court gave the jury a unanimity instruction or the prosecutor later elected to proceed on count 4 as to only one of the three items of property.

⁴ The People exposted then published cases for the proposition that defendants convicted under Vehicle Code section 10851 are ineligible for resentencing pursuant to Penal Code section 1170.18 because the offense is not specifically enumerated therein. We note the California Supreme Court granted review in those case and that issue is

[footnote continued on next page]

defendant convicted under Vehicle Code section 10851 may be eligible for resentencing under Penal Code section 1170.18, the defendant here failed to meet his burden of establishing that the property he was convicted of stealing and attempting to steal was not greater than \$950. Therefore, the court properly denied defendant's petition.

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.)

The petitioner bears the burden of proof to show eligibility for resentencing under section 1170.18. This includes, in cases of theft, that the value of the property stolen did not exceed \$950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [defendant failed his burden to establish eligibility for resentencing under § 1170.18 by failing to prove the

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currently being considered by that court. (See, e.g., *People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Garness* (2015) 241 Cal.App.4th 1370, review granted Jan. 27, 2016, S231031.)

value of the items he was convicted of taking did not exceed \$950]; accord, *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137.)

“If the decision of the trial court is correct on any theory of law applicable to the case, the appellate court will affirm the judgment” (*Estate of Kampen* (2011) 201 Cal.App.4th 971, 1000; accord, *Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1483; *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 944 [“[W]e look for any correct legal basis on which to sustain the judgment.”].)

Here, in the first instance, defendant did not even request resentencing on his theft-related offenses. Rather, defendant only requested possible resentencing on his burglary conviction. Second, assuming the court acted appropriately in addressing whether defendant was entitled to resentencing on *any* of the offenses for which he was convicted, defendant failed to make any attempt whatsoever to establish that the property he was convicted of stealing, or attempting to steal, was valued at \$950 or less. Thus, defendant’s failure to meet his burden of proof establishes a correct legal basis upon which to sustain the judgment.

Defendant notes that the victim of the offenses in counts 1 and 4 did not seek restitution because no items were actually stolen from her property. He infers therefrom that there was no evidence of any valuation of that property. That inference is incorrect considering the portions of the probation officer’s report, cited by defendant in his recitation of facts, indicating that two of the three items which were the subject of

defendant's attempted vehicle theft conviction were worth, respectively, \$40,000 and \$90,000. Thus, without actually deciding the issue of valuation, there is at least some indication in the record that the items defendant was convicted of attempting to steal in count 4 were worth well over \$950, which would obviously render him ineligible for resentencing pursuant to section 1170.18.

Defendant contends: "There is no record . . . or any documentation of any restitution claim by the owner of the Chevrolet Silverado. Perhaps that relates to the apparently poor condition of the truck . . . noting that the truck was found abandoned with a broken drive shaft 30 minutes after the attempted theft in Riverside." Defendant goes on to assert: "The record supports an inference that the 2001 Chevrolet Silverado vehicle was in fact a junker, as [defendant] abandoned it within 30 minutes of the theft because it had a broken drive shaft and was apparently not road-worthy." Defendant's contention is completely belied by the record.

In his report, the probation officer noted: "The defendant blatantly disregarded the safety of the community when he carelessly drove the vehicle and crashed it which resulted in possible high repair costs." Thus, to the extent the vehicle was a "junker," the rational inference of the record is that it became so due to defendant's manner in driving it.

Moreover, at the sentencing hearing, the prosecutor stated: "I do have proof of restitution, and I would request a court order in the amount of \$26,008.88 for Mr. Jay Wells" Mr. Wells was not the victim of the offenses in counts 1 and 4. Thus, the

rational inference is that Mr. Wells was the victim of count 2, the owner of the 2001 Chevrolet Silverado. The court put the issue of restitution over for another day. The record does not contain either the minute order or the reporter's transcript of the restitution hearing.

However, on June 27, 2014, defendant filed an ex parte motion to waive the "restitution fine" ordered in the amount of \$26,208.88. The court denied the motion noting: "The restitution imposed \$26_[,]208.88 is not a restitution fine. It is actual victim restitution." Thus, it appears the court actually did hold a restitution hearing in which it valued the vehicle defendant was convicted of stealing in count 2 at \$26,208.88. This, likewise, would make the vehicle worth well over \$950 and render defendant ineligible for resentencing. The court's denial of defendant's petition was legally correct.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.