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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.

RHEA CHRISTINE ABAS,

Defendant and Appellant.

E063746

(Super.Ct.No. FVA1301111)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. Affirmed.

Theresa Osterman Stevenson, 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 Eric A. Swenson, Lynne G. McGinnis, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

On September 24, 2013, defendant and appellant, Rhea Christine Abas, pled no contest to the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), and admitted one prison prior (Pen. Code, § 667.5, subd. (b)).<sup>1</sup> Defendant was sentenced to county prison for three years, plus a one-year enhancement for the prison prior.

Thereafter, the felony conviction that served as the basis for the prison prior was eligible to be reduced to a misdemeanor following the passage of Proposition 47, the Safe Neighborhoods and Schools Act. (§ 1170.18.) Defendant filed a petition for resentencing with the trial court, requesting that the trial court strike the one-year enhancement for the prison prior. The trial court denied defendant's petition. We affirm the trial court's ruling.

## I. PROCEDURAL BACKGROUND

On June 24, 2013, a felony complaint charged defendant with first degree residential burglary (Pen. Code, § 459, count 1), and with unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a), count 2). It was also alleged defendant had suffered two prison priors (Pen. Code, § 667.5, subd. (b)), a 2012 conviction for unauthorized possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and a 2011 conviction for forgery (Pen. Code, § 484f).

On September 24, 2013, pursuant to a plea agreement, defendant pled no contest to the count 2 charge of unlawful driving or taking of a vehicle (Veh. Code, § 10851,

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

subd. (a)), and admitted the prison prior for her 2012 conviction for the unauthorized possession of a controlled substance (Pen. Code, § 667.5, subd. (b); Health & Saf. Code, § 11377, subd. (a)). The parties stipulated that the police report and rap sheet contained a factual basis for the plea. According to the police report, the vehicle had a value of \$12,000. As part of the plea agreement, the trial court dismissed the count 1 charge of first degree residential burglary (Pen. Code, § 459), and struck the second prison prior for the 2011 forgery conviction (Pen. Code, § 484f). On that same day, the trial court sentenced defendant to a total of four years in county prison—three years on count 2 and a one-year enhancement for the prison prior. Defendant was awarded a total of 190 days of custody credits (95 actual days, plus 95 conduct days).

On January 20, 2015, while still serving her sentence, defendant petitioned the trial court to strike her one-year prior prison term enhancement in the current case<sup>2</sup> (Pen. Code, § 1170.18, subd. (a)). Defendant petitioned to have the prior prison term enhancement stricken because a conviction for violating Health and Safety Code section 11377 subdivision (a), the 2012 felony conviction that served as the basis for the enhancement, had been reduced to a misdemeanor following the passage of Proposition

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<sup>2</sup> Defendant stated in her petition that the People “appear to be in agreement that [she] is entitled to reclassification of [her 2012 conviction] to misdemeanor status pursuant to Penal Code Section 1170.18[, subdivisions] (f)-(n).” However, there is nothing in the record to confirm that defendant’s 2012 conviction for unauthorized possession of a controlled substance has been redesignated as a misdemeanor in the case in which it occurred (San Bernardino County Superior Court case No. FWV1200780).

47. (Pen. Code, § 1170.18, subds. (a), (b).) The trial court denied defendant’s petition. The trial court explained that Proposition 47 “was designed to say there are certain offenses that as a matter of public policy should now be treated as misdemeanors. And people currently serving a sentence for those specified offenses should get the benefit of that.” However, the trial court found that Proposition 47 did not apply to Penal Code section 667.5, subdivision (b), and it explained that “[t]he fact that the underlying [prison prior] offense has now been re-classified as a misdemeanor does not change the fact that the person, in fact, did serve a prior prison term. And does not change the public policy arguments behind [Penal Code section] 667.5[, subdivision] (b), that a person who did serve a prior prison term deserves an enhanced sentence for that effect, despite the fact that that underlying conviction has been reduced to a misdemeanor.”

## II. DISCUSSION

### A. *Standard of Review*

Whether a ballot initiative was intended to have retroactive application is a question of statutory interpretation, which is reviewed de novo. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 548.) In interpreting a voter initiative such as Proposition 47, “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. [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.]” (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *People v. Marks* (2015) 243 Cal.App.4th 331, 334.) This appeal also requires us to decide whether the principles of equal protection require striking defendant’s sentencing enhancement, a question we review de novo. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1338.)

#### B. *Overview of Proposition 47 and Section 1170.18*

On November 4, 2014, the voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a); *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) For qualified defendants, Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors, and added, among other statutory provisions, section 1170.18. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.)

Under Penal Code section 1170.18, subdivision (a), “[a] person currently serving a sentence for a conviction . . . 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 . . . .” (Pen. Code, § 1170.18, subd. (a); *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1329.) A person who satisfies the criteria in Penal Code section 1170.18 shall have his or her sentence recalled and be “resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public

safety.” (Pen. Code, § 1170.18, subd. (b).) Under Proposition 47, a conviction for violating Health and Safety Code section 11377 is now a misdemeanor. (Pen. Code, § 1170.18, subds. (a), (b).)

Under section 1170.18, subdivision (f): “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.” (§ 1170.18, subd. (f); *People v. Diaz, supra*, 238 Cal.App.4th at p. 1329.) “If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.” (§ 1170.18, subd. (g); *People v. Diaz, supra*, at p. 1329.)

Under section 1170.18, subdivision (k): “Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes . . . .” (§ 1170.18, subd. (k); *People v. Diaz, supra*, 238 Cal.App.4th at p. 1329.)

### *C. Proposition 47 Does Not Provide for Striking Sentence Enhancements Retroactively*

Defendant contends her sentence must be reduced by one year because the felony underlying the prior prison term enhancement, i.e., Health and Safety Code section

11377, was reduced to a misdemeanor by Proposition 47.<sup>3</sup> (Pen. Code, § 1170.18.) We reject her contention.

Statutes do not operate retroactively unless there is a clear indication of intent that they do so. (Pen. Code, § 3; Civ. Code, § 3; Code Civ. Proc., § 3; *People v. Brown* (2012) 54 Cal.4th 314, 319.) Intent with regard to prospective or retroactive application may be determined from either the language in the statute itself or, if the extrinsic sources are sufficiently clear, legislative history. (*People v. Brown, supra*, at pp. 319-320, citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.)

The plain language of section 1170.18 indicates it expressly applies only to *convictions* of offenses, not the imposition of *sentence enhancements*, and one court has held section 1170.18 does not apply retroactively. (§ 1170.18, subds. (a), (f); *Rivera, supra*, 233 Cal.App.4th at p. 1100.) As noted, the statute's remedial provisions apply only to cases where a person is currently serving a sentence for a conviction of a felony that is now a misdemeanor (§ 1170.18, subd. (a)), and where a person convicted of such a crime has already completed his or her sentence (§ 1170.18, subd. (f)). Neither provision provides for striking a sentence enhancement, particularly where the felony underlying the sentence enhancement was not reclassified to a misdemeanor until after defendant

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<sup>3</sup> The California Supreme Court is currently reviewing appellate decisions that concluded Proposition 47 does not apply retroactively to a sentence enhancement. (*People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.)

suffered the conviction to which the sentence enhancement applied. Moreover, the statute instructs: “Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act.”

(§ 1170.18, subd. (n).) The prison prior enhancement at issue here is part of such a judgment. Since section 1170.18 only applies prospectively to convictions and not to sentence enhancements, defendant is not entitled to a one-year reduction of her sentence.

Defendant relies on *People v. Park* (2013) 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 to support her assertion that her prison prior must be based on a felony conviction in order to be eligible as a sentence enhancement in the current case. In *Park*, the Supreme Court held that the defendant’s sentence could not be enhanced by a prior felony conviction that had been reduced to a misdemeanor, and later dismissed, after the defendant had completed the terms of probation, but before he committed the present crime. (*People v. Park, supra*, at pp. 787, 794-799, 802.) In *Flores*, the court held that it was error to enhance the defendant’s sentence based on a 1966 felony conviction for possession of marijuana, where the statute was amended in 1975 to make marijuana possession a misdemeanor rather than a felony. (*People v. Flores, supra*, at pp. 470, 474.)

Defendant’s reliance on *Park* and *Flores* is misplaced because the felony convictions that served as the basis for sentence enhancements in both cases were reduced to misdemeanors *before* the defendants committed, and were convicted of, the offenses that were the subject of their appeals. (*People v. Park, supra*, 56 Cal.4th at p.

787; *People v. Flores, supra*, 92 Cal.App.3d at pp. 464, 470.) Here, defendant’s 2012 conviction for unauthorized possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) was eligible to be redesignated as a misdemeanor *after* she committed and was sentenced for the current offense of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)). Thus, *Park* and *Flores* are inapplicable. Additionally, *Park* supports our conclusion, as the Supreme Court stated, that “[t]here is no dispute that . . . defendant would be subject to the [sentence] enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor.” (*People v. Park, supra*, at p. 802.)

Defendant also asserts the trial court erred in relying on *Rivera, supra*, 233 Cal.App.4th 1085 when it denied defendant’s petition, as *Rivera* only addressed whether section 1170.18, subdivision (k), “operated to change the well-established rules of appellate jurisdiction.” It is well established, that on appeal, “‘we review the ruling, not the court’s reasoning, and, if the ruling was correct on any ground, we affirm.’ [Citation.]” (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12.) Since we conclude that the trial court correctly denied defendant’s petition, we do not address whether it erroneously relied on *Rivera* in denying defendant’s petition.

#### D. *Equal Protection Does Not Require Retroactive Striking of Sentencing Enhancements*

Defendant next claims the failure to apply Proposition 47 to dismiss her prison prior enhancement would deny her equal protection under the Fourteenth Amendment, as

there is no rational basis to justify prospective, but not retroactive, application of sentence enhancements under Proposition 47. We reject defendant's claim.

It is well settled that the refusal to apply a statute retroactively does not violate equal protection. (*People v. Floyd* (2003) 31 Cal.4th 179, 188-189; *Baker v. Superior Court* (1984) 35 Cal.3d 663, 668; *People v. Aranda* (1965) 63 Cal.2d 518, 532; *People v. Rosalinda C.* (2014) 224 Cal.App.4th 1, 12.) Similarly, “[a] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.” [Citations.]” (*People v. Floyd, supra*, at p. 189.) The *Floyd* court explained that: “The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.” [Citations.] The voters have the same prerogative. [Citation.]” (*Id.* at p. 188.) And here, nothing in section 1170.18 indicates that the voters intended for it to apply retroactively to sentencing enhancements based on felonies that were made reducible to misdemeanors under the statute. Lastly, the *Floyd* court concluded that “[t]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.” [Citation.]” (*People v. Floyd, supra*, at p. 191.) Accordingly, the trial court's failure to strike defendant's prison prior enhancement does not constitute an equal protection violation.

III. DISPOSITION

The trial court's order is affirmed.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

SLOUGH  
J.