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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.

LARRY CASSITY,

Defendant and Appellant.

E063976

(Super.Ct.No. FSB09120)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Larry Cassity, in pro. per., and Leslie A. Rose, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Larry Cassity appeals from an order denying his petition to reduce his felony conviction to a misdemeanor, pursuant to Penal Code section 1170.18.¹ We affirm the order.

PROCEDURAL BACKGROUND

In 1995, defendant was charged by amended information with second degree robbery. (§ 211, count 1.) The information also alleged that defendant had two prior strike convictions (§§ 1170.12, subs. (a)-(d), 667, subs. (b)-(i)) and one prior serious felony (§ 667, subd. (a)(1)). On May 7, 1996, a jury found defendant guilty of count 1. In a bifurcated hearing, a trial court found true the strike priors and prior serious felony conviction allegation. The court sentenced defendant to a total term of 30 years in state prison.

In November 2014, California voters approved Proposition 47 (effective November 5, 2014). (§1170.18.) “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

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

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.)

Defendant filed a petition for recall of sentence pursuant to Proposition 47 in *propria persona*. At a hearing on May 8, 2015, the court determined that his conviction did not qualify for relief under Proposition 47 and denied the petition.

On July 7, 2015, defendant filed a notice of appeal.

DISCUSSION

Defendant appealed and, upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and one potential arguable issue: whether the court erred in denying defendant’s petition for resentencing under Proposition 47. Counsel has also requested this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, which he has done. Defendant alleges that he is currently serving a sentence for a second degree robbery of \$92, and that he would have been guilty of a petty theft of less than \$950 (§ 490.2) under Proposition 47, if it had been in effect at the time of his offense. We disagree.

Among the crimes reduced to misdemeanors by Proposition 47, rendering the person convicted of the crime eligible for resentencing, are: shoplifting where the property value does not exceed \$950 (§ 459.5); petty theft, defined as theft of property

where value of the money, labor, real or personal property taken does not exceed \$950 (§490.2); and receiving stolen property where the property value does not exceed \$950 (§ 496). (§ 1170.18, subd. (a).) Section 1170.18 does not list section 211, the offense at issue in the present appeal, as one of the code sections amended or added by Proposition 47. (*Ibid.*) In other words, Proposition 47 left the offense of second degree robbery unchanged, and that offense is a felony. (§ 211.) Thus, defendant is simply not statutorily eligible for relief under section 1170.18.

Defendant asserts that the trial court “developed a listing of . . . theft crimes that anyone who has been convicted of may file a petition to re-designate.” He argues that the court “left out” second degree robbery (§§ 211, 212.5, subd. (b)), even though it is a theft crime. He then claims that his current offense was for the theft of \$92, and, thus, his offense comes under section 490.2 (petty theft). However, robbery is not simply a theft crime. “Robbery is ‘the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.’ (§ 211.) It is the use of force or fear which distinguishes robbery from grand theft [or petty theft] from the person.” (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707.) Moreover, Proposition 47 lists a specific series of crimes that qualify for reduction to a misdemeanor, separated with the conjunction “or” and ending with the phrase “as those sections have been amended or added by this act.” (§ 1170.18, subd. (a).) Again, that list does not include section 211. “The legislative inclusion of the . . . crimes . . . necessarily excludes any other[s]” (*People v. Gray* (1979) 91 Cal.App.3d

545, 551.) Based on the statutory language, the court properly denied defendant's petition to reduce his robbery conviction to a misdemeanor.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.