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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.

GRACEE LYLLIAN CRISWELLCARR,

Defendant and Appellant.

E063995

(Super.Ct.No. BAF10000227)

OPINION

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

Affirmed.

Marcia R. Clark, 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, Arlene A. Sevidal and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gracee Lyllian Criswellcarr appeals from an order denying her petition to reduce her conviction for felony receipt of stolen property (Pen. Code, § 496, subd. (a))¹ to a misdemeanor pursuant to Proposition 47. On appeal, she argues that the trial court erred in denying her petition because the prosecution failed to establish the value of the property exceeded the statutory maximum of \$950 and that the error constituted a denial of her due process rights. For the reasons explained below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In March 2010, defendant received stolen jewelry knowing the property had been obtained by theft.

On April 14, 2010, a three-count felony complaint was filed charging defendant with receipt of stolen property, to wit, jewelry (§ 496, subd. (a); count 1); possession of a controlled substance, to wit, methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 2); and residential burglary (§ 459; count 3).

On June 2, 2010, pursuant to a plea agreement, defendant pled guilty to counts 1 and 2. In exchange, the remaining count was dismissed and defendant was placed on formal probation for a period of three years on various terms and conditions.

¹ All future statutory references are to the Penal Code unless otherwise stated.

On January 19, 2012, the trial court revoked defendant's probation and vacated the previously imposed sentence. The court thereafter sentenced defendant to one year four months (eight months on each count), with nine months to be served in county jail and seven months on mandatory supervision, to be served consecutive to defendant's sentence in another case.

On May 30, 2013, a bench warrant was issued for defendant's arrest for her failure to comply with mandatory supervision. Defendant's mandatory supervision was revoked, and defendant was eventually sentenced on both counts.

On November 4, 2014, voters enacted Proposition 47, entitled "the Safe Neighborhoods and Schools Act" (hereafter the Act). It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) As of its effective date, the Act classifies as misdemeanors certain drug- and theft-related offenses that previously were felonies or "wobblers," unless they were committed by certain ineligible defendants. (§ 1170.18, subd. (a).)

On February 24, 2015, defendant filed a petition for resentencing and reduction of her offenses to misdemeanors pursuant to Proposition 47. The People filed a response, noting defendant was entitled to resentencing on count 2 for possession of methamphetamine, but indicated defendant was not eligible for resentencing on count 1 for receiving stolen property because the loss exceeded \$950. The People specifically noted, "Ct. 1 is not entitled. Jewelry worth over \$10,000. Ct. 2 defendant is entitled."

On July 10, 2015, following a hearing, the trial court considered and denied defendant's petition on count 1, finding defendant did not qualify for relief as to her conviction for receiving stolen property because the amount of loss exceeded \$950. Defendant filed a timely notice of appeal from that order on July 13, 2015.

II

DISCUSSION

Defendant urges us to reverse the order denying her petition for resentencing, arguing that the trial court erred in finding her ineligible for resentencing under Proposition 47. Specifically, defendant argues: (1) there was no admissible evidence the value of the stolen property, to wit, jewelry, exceeded the statutory maximum of \$950; (2) the fact that the offense was charged as a felony does not establish the value of the loss was greater than \$950; (3) the record of conviction does not establish the value of the loss exceeded \$950 and therefore the trial court erred in determining the value by looking beyond the record of conviction; (4) the trial court's finding violated her due process rights; and (5) the People failed to meet their burden of establishing the value of the stolen property exceeded \$950. Because defendant failed to meet her initial burden of proving her eligibility for resentencing under Proposition 47, we reject defendant's contentions.

A. *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, 685-686.) We first look

“ ‘to the language of the statute, giving the words their ordinary meaning.’ ” (*Id.* at p. 685.) 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 the “ ‘voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ ” (*Ibid.*) In other words, “ ‘our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.’ ” (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) Our review is de novo. (*California Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 248, fn. 11.)

B. *The Act and Section 1170.18 Generally*

As previously noted, on November 4, 2014, the voters approved the Act, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) The Act 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. (*People v. Rivera, supra*, at p. 1091; *People v. Contreras* (2015) 237 Cal.App.4th 868, 889-890.) 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.)

Under section 1170.18, subdivision (a), and section 490.2, receiving stolen property (§ 496, subd. (a)) is an offense that qualifies for resentencing if the value of the property is less than \$950. Section 1170.18, subdivision (b), provides in part: “Upon

receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a).”

C. *Burden of Proof*

In *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*), the court observed that “Proposition 47 does not explicitly allocate a burden of proof.” (*Id.* at p. 878.) The court stated that “applying established principles of statutory construction we believe a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing” (*ibid.*) and therefore must “show the property loss . . . did not exceed \$950 and thus fell within the new statutory definition of shoplifting.” (*Id.* at p. 877.) The court noted the well-settled principle that “ “[a] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting” ’ ” (*id.* at p. 879) and explained, “ “[t]he petitioner will have the initial burden of establishing eligibility for resentencing under section 1170.18[, subdivision] (a): *i.e.*, whether the petitioner is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime as committed. If the crime under consideration is a theft offense under sections 459.5, . . . or 496, the petitioner will have the additional burden of proving the value of the property did not exceed \$950.’ ” (*Sherow, supra*, at p. 879, quoting Couzens & Bigelow, Proposition 47: “The Safe Neighborhoods and Schools Act” (Feb. 2015) <<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>> [as of Aug. 11, 2015] p. 40.) The court further noted, “It is a rational allocation of burdens if the petitioner in

such cases bears the burden of showing that he or she is eligible for resentencing of what was an otherwise valid sentence.” (*Sherow*, at p. 878; accord, *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449 (*Rivas-Colon*)). We believe the court in *Sherow* reached the correct result on the issue, and we adopt the analysis and conclusion of that court.

In *Sherow*, the court explained that it was entirely appropriate, fair, and reasonable to allocate the initial burden of proof to the petitioner to establish the facts upon which eligibility is based because the defendant knows what items he or she possessed. In the instant case, defendant knows what items she possessed. Thus, “[a] proper petition could certainly contain at least [defendant’s] testimony about the nature of the items taken. If he [or she] made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination. [Citation.]” (*Sherow, supra*, 239 Cal.App.4th at p. 880.)

In *Rivas-Colon, supra*, 241 Cal.App.4th 444, citing *Sherow, supra*, 239 Cal.App.4th 875, the court rejected the defendant’s argument that the prosecution had the burden of establishing the value of the property was more than \$950. (*Rivas-Colon*, at p. 449.) The defendant in *Rivas-Colon* had stipulated to a factual basis for the plea contained in the police report, which listed the value of the property he removed from a store as \$1,437.74. (*Id.* at p. 447.) The appellate court explained that the defendant had not provided any evidence or argument demonstrating that he was eligible for

resentencing and therefore the trial court properly denied his resentencing petition. (*Id.* at pp. 447-448.)

Here, defendant's petition gave the trial court no information on the value of the property. She has thus failed to show her eligibility for resentencing. (*Sherow, supra*, 239 Cal.App.4th at p. 878-880; *Rivas-Colon, supra*, 241 Cal.App.4th at pp. 449-450; § 1170.18, subd. (b) ["the court shall determine whether the petitioner satisfies the criteria in subdivision (a)"] & subd. (g) [court must designate the offense as a misdemeanor "[i]f the application satisfies the criteria"].) As such, the court properly denied defendant's resentencing petition.

In her reply brief, defendant urges this court not to follow *Sherow*, arguing that it was wrongly decided. Specifically, she asserts *Sherow* conflicts with existing case law that the prosecution must bear the burden of proof the value of the property exceeded \$950, pointing out the prosecution has easy access to court records and hearing transcripts. We agree with the reasoning in both *Sherow* and *Rivas-Colon*. These courts' analyses are consistent with the well-established rule set forth in Evidence Code section 500, which reads: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (See also *People v. Barasa* (2002) 103 Cal.App.4th 287, 295-296 [under Evidence Code section 500, defendant has the burden of proving that his drug possession or transportation was for personal use and that he was therefore eligible for sentence reduction under Proposition 36]; *People v. Atwood* (2003) 110

Cal.App.4th 805, 812 [under Evidence Code section 500, “[t]he burdens of producing evidence and of persuasion flow from a party’s status as a claimant seeking relief”].) Defendant is the party who petitioned for relief, and therefore she had the initial burden of demonstrating eligibility under section 1170.18, subdivision (a).

Defendant’s due process argument also has been soundly rejected in *Sherow*, *supra*, 239 Cal.App.4th 875. The *Sherow* court explained that due process is relevant to the initial prosecution for an offense, not resentencing under Proposition 47.

Resentencing concerns people who have already been proven guilty of their offense beyond a reasonable doubt. (*Sherow, supra*, at p. 880.) In any event, defendant had an opportunity to present briefing to the trial court on the issue of value. Her Proposition 47 petition could have contained facts, evidence, and arguments regarding the value of the property, but the petition was devoid of any such facts, evidence, or arguments. (See *Sherow, supra*, at p. 880 [a “proper petition could certainly contain at least” the petitioner’s testimony about the stolen item].) Because defendant had an opportunity to be heard on the issue of value, her due process argument fails.

D. *Pleading and Proof Requirement*

Additionally, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Descamps v. United States* (2013) 570 U.S. ___, 133 S.Ct. 2276 (*Descamps*), defendant contends in her reply brief that she must be resentenced under section 1170.18 because judicial factfinding of elements that were never pled or proven is prohibited and it was never pled or proven the value of the stolen property was greater than \$950. Defendant

posits that following the passage of Proposition 47, “the new norm” for a violation of section 496d is a misdemeanor sentence, which “represents the maximum sentence that can be imposed on such a defendant without findings of fact that were never made or admitted during the trial proceedings”

Initially, we note defendant waived her pleading and proof argument for failing to raise it in her opening brief. As under federal law, California permits application of the waiver doctrine where (1) a criminal defendant raises an issue for the first time in a reply appellate brief (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441; *People v. Harris* (1985) 165 Cal.App.3d 1246, 1256-1257, criticized on another ground in *Whitman v. Superior Court (People)* (1991) 54 Cal.3d 1063, 1078) and (2) where a point is not properly raised in the defendant’s opening brief. (*People v. Adams, supra*, 216 Cal.App.3d at p. 1441; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282; *People v. Johnson* (1961) 191 Cal.App.2d 694, 703.) In any event, we reject defendant’s claim on the merits.

In *Apprendi*, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.)

In *Descamps*, our Supreme Court considered whether *Apprendi* applied to sentencing enhancements under the Armed Career Criminal Act (ACCA) (18 U.S.C., § 924(e)). (*Descamps, supra*, 570 U.S. __ [133 S.Ct. 2276].) The defendant in *Descamps* faced a minimum sentence of 15 years, because he had a prior conviction for burglary in California. However, the California burglary statute was broader than the definition of burglary set forth under the ACCA, which requires an additional element that the defendant had “unlawful or unprivileged entry.” (*Taylor v. United States* (1990) 495 U.S. 575, 599.) In order to determine whether the additional element of an unlawful or unprivileged entry was satisfied, the district court looked to the facts set forth in the transcript of his plea colloquy. Finding the element satisfied based on the prosecutor’s statements, the court increased the defendant’s sentence. (*Descamps, supra*, 570 U.S. at p. __ [133 S.Ct. at p. 2282].)

The United States Supreme Court held that the district court’s factfinding violated the Sixth Amendment under *Apprendi*. The court asserted that factfinding by a sentencing court would “raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction.” (*Descamps, supra*, 570 U.S. at p. __ [133 S.Ct. at p. 2288]; see *People v. Wilson* (2013) 219 Cal.App.4th 500, 515 (*Wilson*).) *Descamps* has thus been interpreted as calling into question the scope of the prior conviction exception, stated in *Apprendi*. (*Wilson*, at pp. 515-516.)

But, while *Descamps* may affect sentence enhancing provisions, it does not affect an ameliorative provision such as section 1170.18, which only decreases a defendant’s

sentence and reduces an offense from a felony to a misdemeanor. (See, i.e., *People v. Manning* (2014) 226 Cal.App.4th 1133, 1141, fn. 3; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304-1305 (*Kaulick*.) *Apprendi*, and by extension, *Descamps*, are not applicable in the context of a petition for resentencing under section 1170.18. Section 1170.18 is similar to section 1170.126, and appellate courts, including this one, have held that there is no pleading and proof requirement with respect to factors relied on by a trial court when determining eligibility for resentencing. (See *Kaulick, supra*, 215 Cal.App.4th 1279; *People v. Blakely* (2014) 225 Cal.App.4th 1042 (*Blakely*); *People v. Chubbuck* (2014) 231 Cal.App.4th 737; *People v. Brimmer* (2014) 230 Cal.App.4th 782.)

In *Kaulick*, our colleagues at the Second Appellate District concluded that a trial court's finding that an inmate would pose an unreasonable risk of dangerousness if resentenced need not be established by proof beyond a reasonable doubt to a jury. (*Kaulick, supra*, 215 Cal.App.4th at p. 1303.)

Kaulick relied on *Dillon v. United States* (2010) 560 U.S. 817 (*Dillon*). In *Dillon*, the court considered whether a two-step sentence modification procedure implicated the Sixth Amendment. (*Id.* at pp. 826-829.) If eligible for a sentence modification, a reduction in the defendant's sentence could be ordered. (*Id.* at pp. 826-827.) *Dillon* concluded that "a defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening laws." (*Kaulick, supra*, 215 Cal.App.4th at p. 1304.)

Kaulick found *Dillon*'s rationale to be equally applicable to section 1170.126, since "[t]he retrospective part of the [Three Strikes Reform] Act [pursuant to section 1170.126] is not constitutionally required, but an act of lenity on the part of the electorate." (*Ibid.*) The resentencing scheme is not plenary, instead it provides for a proceeding where the original indeterminate life term can be modified downward.

Defendant argues that a reliance on *Dillon* is misplaced, because the resentencing scheme "create[s a] new statutory presumption[] favoring, respectively, a second-strike sentence and a one-year misdemeanor maximum," meaning that the court must impose the second-strike sentence or a one-year misdemeanor sentence unless a defendant is found ineligible to be resentenced, or if the court finds that the defendant would pose an unreasonable risk of danger to public safety. We disagree with defendant's interpretation of sections 1170.126 and 1170.18, and do not believe they create a statutory presumption in favor of resentencing.

And, although *Kaulick* dealt with a trial court's factual findings with respect to its determination of a defendant's current dangerousness, its rationale is equally applicable to a trial court's initial determination of eligibility. Other appellate courts have concluded that *Apprendi* is not applicable to a trial court's eligibility determination. (*People v. Manning, supra*, 226 Cal.App.4th at p. 1141, fn. 3.) Although recent appellate opinions have questioned to what extent, following *Descamps*, the record of a prior conviction may be considered to determine whether that conviction constituted a strike (*People v. Marin* (2015) 240 Cal.App.4th 1344, 1348-1349, 1351-1364; *People v. Saez*

(2015) 237 Cal.App.4th 1177, 1199-1208; *Wilson, supra*, 219 Cal.App.4th at pp. 513-516), those cases do not address the eligibility issue under either sections 1170.126 or 1170.18. (See *Blakely, supra*, 225 Cal.App.4th at p. 1062.)

As we explained above, *Apprendi*, and by extension, *Descamps*, are inapplicable in the context of a petition for resentencing. A determination that a prior conviction qualifies as a strike increases punishment. However, a determination that a petitioner is eligible for resentencing does not.

In sum, nothing in the record before us indicates that the value of the stolen jewelry was worth \$950 or less. “Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the [defendant’s] burden to affirmatively demonstrate error.” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) “The very settled rule of appellate review is a trial court’s order/judgment is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record.” (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.)

Here, defendant’s entire argument is premised on the assumption that the jewelry involved in her offense was valued at \$950 or less. Nothing in the record, however, shows that the jewelry was worth \$950 or less. Defendant therefore has not affirmatively demonstrated error, and we must affirm.

III

DISPOSITION

The order denying defendant's petition for resentencing on her receiving stolen property conviction (§ 496, subd. (a)) is affirmed.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

McKINSTER

J.