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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.

ROBERT WAYNE PULS,

Defendant and Appellant.

E064118

(Super.Ct.Nos. FVI021475 &
FVI901984)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Miriam Ivy Morton, Judge. Affirmed.

Jennifer Peabody, 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 Allison V. Hawley and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, Robert Wayne Puls, appeals from an order in case No. FVI021475, denying his Proposition 47 petition to redesignate his 2005 felony conviction for unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)) to misdemeanor petty theft (Pen. Code, §§ 490.2, 1170.18, subds. (f), (g)).¹ The People opposed the petition, and the trial court denied it on the ground that a conviction for violating Vehicle Code section 10851 is ineligible to be reduced to a misdemeanor under Proposition 47. We affirm.

Defendant did not offer any evidence with his petition or at the hearing on the petition that the value of the vehicle—a 1999 Ford F-150 truck—did not exceed \$950 at the time he unlawfully drove it in 2005, nor did defendant offer any evidence that he intended to permanently deprive the owner of the vehicle, and that his conviction was therefore theft-based. On appeal, defendant claims that any conviction for violating Vehicle Code section 10851—even if it is not based on the theft of the vehicle—must be reduced to misdemeanor petty theft under Penal Code section 490.2 if the value of the vehicle did not exceed \$950. Defendant further claims he did not have the burden of proving that the value of the vehicle did not exceed \$950 because nothing in the record of his 2005 conviction showed that the value of the vehicle exceeded \$950. As we explain, a conviction for violating Vehicle Code section 10851 is ineligible to be reduced to a

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

misdemeanor under Proposition 47, regardless of whether defendant can show the conviction was theft-based and that the value of the vehicle did not exceed \$950.

Defendant also appeals from an order in case No. FVI901984, denying his petition to redesignate a 2009 commercial burglary conviction (§ 459) to an unspecified misdemeanor. The appeals were assigned the same case number, E064118. In his opening brief on appeal, defendant does not challenge the order denying his petition in case No. FVI901984. We observe that the 2009 commercial burglary conviction was ineligible to be reduced to misdemeanor shoplifting, as a matter of law, because it involved a vacant house, not a commercial establishment. (§ 459.5.) Thus, without further discussion, we also affirm the order denying that petition.

II. BACKGROUND

On May 12, 2005, the People filed a felony complaint in case No. FVI021475, charging defendant with the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a), count 1), and grand theft of the same vehicle (Pen. Code, § 487, subd. (d)(1), count 2). The crimes allegedly occurred on or about April 9, 2005, and the vehicle in question was a white 1999 Ford F-150 truck. Additionally, the complaint alleged defendant had three prison priors (Pen. Code, § 667.5, subd. (b)) and two prior convictions for violating Vehicle Code section 10851, subdivision (a) (Pen. Code, § 666.5).

On August 1, 2005, before the preliminary hearing in case No. FVI021475, defendant entered into a plea agreement: he pled guilty to the Vehicle Code section

10851 charge in count 1, admitted one of the Penal Code section 666.5 allegations and the grand theft charge, and the prison prior allegations were dismissed. Pursuant to the plea agreement, defendant was sentenced to three years in prison on his 2005 Vehicle Code section 10851 conviction, an enhanced term based on his admission of having one of the Penal Code section 666.5 conviction allegations.²

On September 10, 2009, the People filed a felony complaint in case No. FVI901984, charging defendant with one count of second degree burglary (§ 459) based on his entry into “a vacant residence with the intent to commit larceny and any felony.” It was further alleged that defendant had seven prison priors (§ 667.5, subd. (b)), including a prison prior based on a June 23, 2008, conviction in case No. FVI801098 for vehicular manslaughter while intoxicated. (§ 191.5, subd. (b).)

On October 28, 2009, defendant entered into a plea agreement in case No. FVI901984: he pled guilty to the second degree burglary charge (§ 459) and admitted a prison prior based on his 2008 conviction for vehicular manslaughter while intoxicated (§ 191.5, subd. (b)). Defendant agreed that the “police reports” contained a factual basis

² Pursuant to the same plea agreement, defendant pled guilty in case No. FVI021680 to possessing a dangerous weapon, namely, metal knuckles (§ 12020), and was sentenced to 16 months in prison, concurrent to the three-year term imposed on the Vehicle Code section 10851 conviction in case No. FVI021475. Additional charges and allegations in case No. FVI021680, and in other cases, were dismissed. In entering his guilty pleas in case Nos. FVI021680 and FVI021475, defendant stipulated that the police reports in the court files established a factual basis for his pleas, provided the reports did not become “part of the face of the record.” The record on appeal does not include any police reports.

for his plea,³ and he was sentenced to three years in prison: two years for the 2009 burglary conviction plus one year for the prison prior based on the 2008 vehicular manslaughter conviction.

On April 21, 2015, defendant filed a petition in case No. FVI021475, seeking to redesignate his 2005 Vehicle Code section 10851 felony conviction as an unspecified misdemeanor. (Pen. Code, § 1170.18, subs. (f), (g).) The petition did not allege that the conviction was theft-based—that is, based on his unlawful taking as opposed to his unlawful driving of the vehicle—nor did the petition allege the value of the vehicle. The People filed a response opposing the petition, stating defendant was “not entitled to the relief requested” because Vehicle Code section 10851 “is not affected by Prop. 47.”

On April 15, 2015, defendant filed a petition in case No. FVI901984 to redesignate his 2009 burglary conviction (§ 459) as a misdemeanor. The People filed a response opposing this petition, stating that defendant was not entitled to the relief requested because the “PC 459 is of a vacant house.” The court set simultaneous hearings on both petitions. At a June 26, 2015, hearing, the court did not receive any evidence or argument, and denied each petition on the ground “[n]either [conviction] qualifies under Prop 47.”⁴

³ As noted in footnote 2, *ante*, the record on appeal contains no police reports.

⁴ On October 21, 2015, while this appeal was pending, defendant filed a second petition to reduce his 2005 Vehicle Code section 10851 conviction to a misdemeanor. On November 2, 2015, the court denied the petition, and on November 13, 2015, defendant filed a notice of appeal from that order. Because the order denying defendant’s April 21, 2015, petition was on appeal when defendant filed the second petition, the court

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III. DISCUSSION

A. *Proposition 47; Relevant Provisions*

On November 4, 2014, California voters approved Proposition 47 (the Act), and it 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.)

As pertinent, Proposition 47 added sections 490.2, and 1170.18 to the Penal Code. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Under section 1170.18, subdivision (f), a person who has completed his or her sentence for a felony conviction that would have been a misdemeanor under the Act, had the Act been in effect at the time the felony was committed, may petition the trial court that entered the judgment of conviction to redesignate the conviction as a misdemeanor.⁵ If the petition satisfies the

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did not have jurisdiction to rule on the second petition. (See *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 929-930 [court lacks jurisdiction to recall defendant’s sentence and resentence defendant pursuant to Pen. Code, § 1170.18 while the defendant’s conviction is on appeal].)

⁵ Section 1170.18, subdivision (f), states: “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 this act had this act 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.”

criteria of section 1170.18, subdivision (f), the court “shall” designate the felony offense as a misdemeanor. (§ 1170.18, subd. (g).) Newly-enacted section 490.2 provides as follows: “(a) Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor”

B. A Vehicle Code Section 10851 Conviction Is Ineligible to be Reduced to Misdemeanor Petty Theft Under Section 490.2, as a Matter of Law

The California Supreme Court is currently reviewing whether a felony conviction for violating Vehicle Code section 10851, subdivision (a), may be reduced to misdemeanor petty theft (Pen. Code, §§ 490.2, 1170.18), or whether the defendant may be resentenced as if convicted of misdemeanor petty theft.⁶ More recently, in *People v. Solis* (2016) 245 Cal.App.4th 1099, petition for review pending, petition filed April 27, 2016, S234150, and *People v. Johnston* (2016) 247 Cal.App.4th 252, the courts held that a felony conviction for violating Vehicle Code section 10851, subdivision (a) does not come within the ambit of Penal Code section 1170.18 and is ineligible for misdemeanor resentencing or misdemeanor redesignation under Proposition 47, regardless of the facts of the crime or the value of the vehicle involved. The *Johnston* decision is not yet final

⁶ *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793, *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250, and *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344.

in the Third District, and Supreme Court review may yet be granted in *Solis* and *Johnston*. Until the California Supreme Court rules on the question, we will adhere to the view that no felony conviction for violating Vehicle Code section 10851 can be reduced to misdemeanor petty theft or qualify for resentencing as misdemeanor petty theft under Penal Code section 1170.18.

As a matter of statutory interpretation, all Vehicle Code section 10851 convictions, including theft-based convictions or violations committed with the intent to permanently deprive the owner of possession of a vehicle, are ineligible for reduction in accordance with section 8 of Proposition 47. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 8, p. 72 [adding Pen. Code, § 490.2]

<http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf> [as of June 7, 2016].)

Penal Code section 1170.18 does not include Vehicle Code section 10851 as one of the enumerated offenses eligible for resentencing. Penal Code section 490.2, added by Proposition 47, also does not mention that Vehicle Code section 10851 is eligible to the limited extent a Vehicle Code section 10851 offense might qualify as a petty theft under Penal Code section 490.2. Furthermore, Vehicle Code section 10851 is not strictly a theft statute. It applies not only to thefts but also to nontheft offenses, such as driving someone's car without consent and without intent to permanently deprive the owner of the car.

In construing the intent of the electorate in passing Proposition 47, we must look to the language of Proposition 47 as a whole. (*Pineda v. Williams-Sonoma Stores, Inc.*

(2011) 51 Cal.4th 524, 529-530.) When the Legislature—or here, the voters—“intend[] for a statute to prevail over all contrary law, it typically signals this intent by using phrases like ‘notwithstanding any other law’ or ‘notwithstanding other provisions of law.’ [Citations.]” (*In re Greg F.* (2012) 55 Cal.4th 393, 406-407.) Here, the electorate included such “notwithstanding” language in regard to Penal Code section 487 and statutes defining grand theft, but not in regard to Vehicle Code section 10851. This omission suggests the electorate did not intend Penal Code section 490.2 to apply to Vehicle Code section 10851.

In addition, applying the legal maxim that “‘a general provision is controlled by one that is special’” (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577), Vehicle Code section 10851 should be construed as not falling within the purview of the more general petty theft statute, Penal Code section 490.2. “‘A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.’” (*San Francisco Taxpayers Assn. v. Board of Supervisors, supra*, at p. 577.) Therefore, to the extent Vehicle Code section 10851 may be violated in a way that brings it within Penal Code sections 484 and 490.2, we conclude the specific rule of Vehicle Code section 10851 is an exception to the general rule announced in Section 490.2, subdivision (a). (See *Bradwell v. Superior Court* (2007) 156 Cal.App.4th 265, 272 [“Although welfare fraud is like other fraudulent theft in terms of conduct, it differs in terms of context,” in part

because of the ““unique statutory scheme”” that blends noncriminal and criminal resolutions].)

Furthermore, the inclusion of “auto theft under Section 10851 of the Vehicle Code[]” alongside “grand theft” and “petty theft” in Penal Code section 666 is therefore a significant indication that the voters did not consider Vehicle Code section 10851 a variety of petty theft. If the initiative drafters considered “auto theft under Vehicle Code section 10851” a species of petty theft—a term they defined in section 8 (adding Pen. Code, § 490.2)—there would have been no need to designate it as a separate predicate in section 10 (amending Pen. Code, § 666). (See *Bradwell v. Superior Court*, *supra*, 156 Cal.App.4th at p. 272 [statute’s inclusion of both “[g]rand theft of any type” and “[f]elony welfare fraud” indicates welfare fraud is not a form of grand theft].)

Felony prosecutions under Vehicle Code section 10851 serve important public safety and deterrence functions that differ from those served by prosecutions for theft. It is thus reasonable for the Legislature to afford prosecutors the discretion to prosecute joyriders as felons rather than misdemeanants. Although Proposition 47 amended other statutes to change specific offenses from wobblers to misdemeanors, a Vehicle Code section 10851 offense remains a wobbler, punishable either as a felony or misdemeanor. (Veh. Code, § 10851, subd. (a); see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974, fn. 4 [listing Veh. Code, § 10851, subd. (a) as a statute that provides for “alternative felony or misdemeanor punishment”].)

Penal Code section 1170.18 provides a mechanism for a person “who would have been guilty of a misdemeanor,” if Proposition 47 had been in effect at the time of the offense, to petition for resentencing in accordance with certain enumerated sections that were amended or added by Proposition 47, and if the person has completed his or her sentence to petition to have his or her felony conviction redesignated as a misdemeanor. (Pen. Code, § 1170.18, subds. (a), (f).) Because Vehicle Code section 10851 remains a wobbler, it cannot be said that defendant would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of his offense. Proposition 47 left intact the language in Vehicle Code section 10851, subdivision (a), which makes a violation of that statute punishable as either a felony or a misdemeanor. Proposition 47 therefore does not apply to a Vehicle Code section 10851 conviction, because a defendant convicted of section 10851 would not necessarily have been guilty of a misdemeanor if Proposition 47 had been in effect at the time of the offense. Although reasonable minds can differ on the issue of whether a Vehicle Code section 10851 conviction is eligible for resentencing/reclassification under Proposition 47, compelling reasons support the conclusion that a Vehicle Code section 10851 conviction is ineligible under Proposition 47 as a matter of law.

C. Equal Protection

For the first time on appeal, defendant claims that, assuming the Proposition 47 voters intended to only reduce vehicle thefts under Penal Code section 487, subdivision (d)(1), to misdemeanors through Penal Code section 490.2, while leaving Vehicle Code

section 10851 violations as felonies, such discrimination is impermissible under the equal protection clauses of the state and federal Constitutions. Applying rational basis scrutiny, the California Supreme Court has held that “neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles.” (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Similarly, it has long been the case that “a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code.” (*People v. Romo* (1975) 14 Cal.3d 189, 197.) The same reasoning applies to Proposition 47’s provision for resentencing/reclassification of a limited subset of those previously convicted of grand theft (those who stole an automobile or other personal property valued at \$950 or less), but not for those convicted of unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. Absent a showing that a particular defendant “has been singled out deliberately for prosecution on the basis of some invidious criterion,’ . . . the defendant cannot make out an equal protection violation.” (*People v. Wilkinson, supra*, at p. 839.) Defendant here has made no such showing.⁷

⁷ Because defendant’s Vehicle Code section 10851 conviction is ineligible, as a matter of law, to be reduced to misdemeanor petty theft under Penal Code section 490.2, it is unnecessary to address the People’s claim that defendant is ineligible for Proposition 47 relief because he had a disqualifying prior conviction, namely, his 2008 conviction for vehicular manslaughter while intoxicated. (Pen. Code, § 191.5, subd. (b).)

IV. DISPOSITION

The orders denying defendant's Proposition 47 petitions in case Nos. FVI021475 and FVI901984 are affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.