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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.

ANTHONY JAMES DEMBROWSKI,

Defendant and Appellant.

E064127

(Super.Ct.No. RIF1104337)

OPINION

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

Reversed with directions.

Anthony James Dembrowski, in pro. per., and Leslie A. Rose, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Butler, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

In the summer of 2011, defendant and appellant, Anthony James Dembrowski, was caught on surveillance video stealing medical textbooks from various Barnes & Noble locations in Riverside County, and the police found 18 stolen medical textbooks in his car. The People charged Dembrowski with six counts of second degree burglary (Pen. Code, § 459, counts 1-6)¹ and one count of receiving stolen property (§ 496, subd. (a), count 7).

Pursuant to an August 2011 plea agreement, Dembrowski pled guilty to five of the second degree burglary counts and to the receiving stolen property count, and was sentenced to five years in prison. In November 2014, California voters passed Proposition 47, which, among other things, reduced certain second degree burglaries to misdemeanors by defining them as “shoplifting,” that is, “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a).)

Dembrowski promptly petitioned for resentencing on his second degree burglary convictions. He asserted that none of the five individual counts of burglary involved textbooks in an amount greater than \$950.² The trial court denied the petition. It found

¹ Unlabeled statutory references are to the Penal Code.

² Proposition 47 also converted receiving stolen property under section 496, subdivision (a), into a misdemeanor where the value of the property was less than \$950.

[footnote continued on next page]

Dembrowski's burglaries, while "petty" when viewed separately, were part of a larger book-theft scheme. Based on its finding that Dembrowski's crimes were "not simple shoplifts," the court concluded he did not "meet the intent" of Proposition 47 and was therefore ineligible for resentencing.

On appeal, Dembrowski argues, and the People agree, that the trial court erred when it aggregated his burglary convictions to conclude he was ineligible for resentencing. The disagreement on appeal is over what should happen on remand. Dembrowski argues we should reverse and direct the trial court to grant his resentencing petition as to his five burglary convictions. The People argue they should be able to withdraw from the plea agreement and amend their complaint in light of the change in the law created by Proposition 47.

We agree with the parties the trial court was not allowed to aggregate the amounts at issue in the burglary convictions. We conclude Dembrowski is eligible for resentencing on his five burglary convictions because each conviction involved textbooks less than \$950 in value and thus would have been a misdemeanor had Proposition 47 been in effect when Dembrowski committed the crimes in 2011. Following our recent holdings in *People v. Gonzalez* (2016) 244 Cal.App.4th 1058 (*Gonzalez*) and *People v.*

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Dembrowski did not seek resentencing on his receiving stolen property conviction, presumably because the value of the 18 textbooks found in his car exceeded \$950.

Brown (2016) 244 Cal.App.4th 1170 (*Brown*), we further conclude the People are not entitled to withdraw from the plea agreement and amend their complaint. Accordingly, we reverse the trial court's order denying Dembrowski's petition with directions to resentence his convictions from felony second degree burglaries under section 459 to misdemeanor shopliftings under section 459.5, subdivision (a).

I

FACTS AND PROCEDURAL BACKGROUND

A. *The Plea Agreement*

On August 9, 2011, the People filed a felony complaint charging Dembrowski with six counts of second degree burglary of Barnes & Noble bookstores and one count of receiving stolen property. On August 18, 2011, Dembrowski pled guilty to all counts except one count of second degree burglary (count 5), and agreed to be sentenced to five years in prison. In exchange, the People dismissed count 5, which the prosecutor described as "out of our jurisdiction," as it allegedly occurred at a Barnes & Noble in San Bernardino County.

The People's sentencing memorandum, filed the same day as the plea agreement, claimed Dembrowski and a codefendant stole medical books from Barnes & Noble bookstores throughout California as part of a retail theft organization. Based on Dembrowski's alleged admissions to a Barnes & Noble employee, the People estimated

Dembrowski was responsible for the theft of over \$1.3 million in medical books from 2005 to August 2011.

At the hearing on the plea agreement on August 18, 2011, the trial court accepted Dembrowski's plea and sentenced him to five years in prison.³ The maximum sentence for the admitted charges was 7 years 4 months.

B. *The Resentencing Petition*

On March 17, 2015, Dembrowski petitioned to be resentenced on his five second degree burglaries under Proposition 47.⁴ The People opposed the petition on the ground that the combined total of the medical books Dembrowski stole was over \$950 and therefore reducing the felonies to misdemeanors would frustrate the purpose of Proposition 47. Dembrowski responded that none of the individual burglary convictions

³ The sentence comprises three years on count 1 plus two years total for counts 2, 3, and 4. Dembrowski was also sentenced to concurrent two-year sentences on counts 6 and 7. Dembrowski appealed this sentence, but later abandoned the appeal. (Case No. E054586.)

⁴ Section 1170.18, subdivision (a), provides for resentencing where the defendant is currently serving a sentence on his or her conviction. Section 1170.18, subdivision (f), provides for a reduction of conviction if the defendant has already completed his or her sentence. Dembrowski filed a form entitled "Petition for Resentencing—Application for Reduction to Misdemeanor" and checked the box indicating he had already completed his sentence on the felony convictions. However, in his briefing supporting the petition and on appeal, Dembrowski states he is currently serving a sentence on his convictions and seeks resentencing under section 1170.18, subdivision (a), and the People do not contend otherwise. We therefore consider the petition as one for resentencing under section 1170.18, subdivision (a), not as a petition for reduction of conviction under section 1170.18, subdivision (f).

involved an amount greater than \$950. Relying on statements in the People’s sentencing memorandum and the incident reports for the burglaries, Dembrowski presented the following values for each conviction: count 1—\$44.95 (one book); count 2— \$134.85 (three books); count 4—\$175.80 (four books); and count 6—\$151.85 (three books). The incident reports did not contain an estimated amount for count 3; however, in their sentencing memorandum, the People claimed count 3 was based on Dembrowski’s theft of “several” books and valued each book at approximately \$50. Using the People’s valuation, in order for count 3 to reach \$950, Dembrowski would have had to have stolen 19 books during that burglary.

At a July 31, 2015 hearing, the court denied Dembrowski’s petition. The court concluded he was ineligible for resentencing “based on the intent of the statute.” The court stated that while it “agree[d] with the defense that each individual [conviction] listed . . . is under \$950,” Dembrowski’s conduct was “not petty in any sense. He is a professional book thief, and he does it over and over again.” Dembrowski timely appealed.

II

DISCUSSION

A. *Statutory Background*

On November 4, 2014, the California voters enacted “The Safe Neighborhoods and Schools Act” (Proposition 47 or the Act), which became effective the next day. (Cal.

Const., art. II, § 10, subd. (a).) Proposition 47 reduced various drug possession and theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 (*Rivera*).)

Before Proposition 47, second degree burglary was a wobbler offense, punishable as a felony or a misdemeanor. (§§ 459-461.) Proposition 47 added section 459.5, which states in relevant part: “*Notwithstanding Section 459*, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a), italics added.) Proposition 47 makes this new offense of “shoplifting” a misdemeanor, provided the defendant does not have a prior conviction for a strike offense listed in section 667, subdivision (e)(2)(C)(iv), or a sex offense requiring registration pursuant to section 290, subdivision (c). (*Ibid.*)

Proposition 47 also added a new sentencing provision to the Penal Code. (*Rivera, supra*, 233 Cal.App.4th at p. 1092.) Section 1170.18, subdivision (a) provides that a defendant serving a sentence for a felony conviction may petition for resentencing if he “would have been guilty of a misdemeanor under [Proposition 47] . . . had [it] been in effect at the time of the offense.” Under section 1170.18, subdivision (b), “[t]he trial court must then determine if the petitioner is eligible for resentencing; if so, the trial court

must recall and resentence the petitioner, unless it determines that doing so ‘would pose an unreasonable risk of danger to public safety.’ ”⁵ (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 924, italics added.)

B. *Dembrowski Is Eligible for Resentencing Under Proposition 47*

Dembrowski argues, and the People concede, that his five second degree burglary convictions qualify for resentencing as violations of the new shoplifting offense. The People agree with Dembrowski that a court cannot aggregate separate convictions to surpass the \$950 threshold distinguishing between misdemeanor shoplifting and felony commercial burglary. They concede that “the value of the property taken in each individual incident was below \$950” and that “the only way to find [Dembrowski] ineligible for Proposition 47 resentencing was to aggregate the loss from all counts (and additional uncharged conduct).”

We agree with the parties. The drafters of Proposition 47 knew how to indicate when aggregation was allowed. Section 476a (delivering a check with insufficient funds) states that “if the *total amount* of all checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering [with insufficient funds] does not

⁵ Section 1170.18, subdivision (c), defines “unreasonable risk of danger to public safety” to mean “an unreasonable risk that the petitioner will commit a new violent felony” under section 667, subdivision (e)(2)(C)(iv), i.e., a super-strike offense, such as murder, rape, or child molestation. (*People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1309.)

exceed nine hundred fifty dollars (\$950), the offense is punishable only by imprisonment in the county jail.” (§ 476a, subd. (b), italics added.) Section 459.5 does not contain this “total amount” language. Instead, the misdemeanor characterization for shoplifting depends on “the value of the property that is taken.” (§ 459.5, subd. (a).) We therefore conclude section 495.5 does not allow for aggregation or use of the “total amount” taken over a course of conduct.

Our holding is consistent with the holding in *People v. Hoffman* (2015) 241 Cal.App.4th 1304, where the Second District Court of Appeal reversed the denial of the defendant’s resentencing petition because the trial court had aggregated the amounts of the forged checks from separate forgery convictions. (*Id.* at pp. 1308-1310.) The trial court had concluded the defendant fell “outside the spirit of the law” because the “aggregate amount” of the forged checks exceeded \$950. (*Id.* at p. 1308.) The Second District held Proposition 47 did not allow aggregation of the amounts at issue in separate forgery convictions because “[t]he misdemeanor/felony characterization for forgery depends on ‘the value of the check’ or other instrument” not the “total amount” of the instruments. (*Id.* at p. 1310.) The court stated: “The trial court may not refuse to reduce a defendant’s sentence based on the court’s notion of the statute’s ‘spirit.’ The ‘criteria’ for resentencing are explicitly stated in section 1170.18, subdivision (a), and ‘unreasonable risk’ is defined in subdivision (c). If the criteria are met, and the resentencing does not pose an unreasonable risk of a new super-strike offense, the ‘felony

sentence shall be recalled and the petitioner resentenced to a misdemeanor.’ ” (*Id.* at p. 1311.)

We understand the trial court’s concern over the gravity of Dembrowski’s uncharged conduct. The People’s sentencing memorandum claims Dembrowski had admitted to a Barnes & Noble employee that he “would go to 3-4 store locations 4-5 times a week, removing sensor tags and concealing medical books in backpacks . . . [and] admitted to stealing in excess of 27,000 medical books.” At the hearing on his plea, Dembrowski answered “Yes, ma’am” when the court asked him: “Is it true, sir, that you went into about a billion Barnes and Nobles, lots of them all over the place, and you would go in and you had the intent to steal medical books, and then you would steal the medical books and then sell them and get a kickback for the sales?” However, section 1170.18’s criteria for resentencing does not include consideration of a defendant’s uncharged conduct. At the hearing on the petition, the trial court stated that each of Dembrowski’s felonies involved amounts less than \$950. Section 1170.18 plainly and unambiguously makes a defendant eligible for resentencing on a felony conviction for which the defendant is currently serving a sentence and which would have been “a misdemeanor” under the Act had the crime been committed after the Act went into effect. (§ 1170.18, subd. (a).) As conceded by the People, and based on the trial court’s finding that the burglaries involved amounts less than \$950, Dembrowski met this requirement.

The only persons categorically ineligible for resentencing under the Act are those the court determines pose “an unreasonable risk of danger to public safety” (§ 1170.18, subd. (b)), and “those with prior convictions for an enumerated handful of serious [or violent] crimes [listed in section 667, subdivision (e)(2)(C)(iv)], such as murder, rape, or child molestation.” (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652; § 1170.18, subd. (i).) Dembrowski had no such disqualifying prior convictions, and the court did not find he posed “an unreasonable risk of danger to public safety” if resentenced under the Act. (§ 1170.18, subds. (b), (i).) Thus, the fact Dembrowski may have engaged in more insidious criminal conduct than was charged in the five counts of burglary to which he pled guilty does not render him ineligible for resentencing. “[T]he electorate weighed the costs and benefits of the measure and the resulting Act is unambiguous. In construing a measure, we may not undertake to rewrite its unambiguous language.” (*Hoffman, supra*, 241 Cal.App.4th at p. 1311.)

C. *The People Are Not Entitled to Withdraw from the Plea Agreement*

The People argue that because “the trial court erred when it aggregated [Dembrowski’s] convictions to find him ineligible for Proposition 47 resentencing, . . . the case should be remanded” and they should be “permitted an opportunity to withdraw from the plea agreement.” The People assert that a plea agreement is a contract between the defendant and the prosecutor that binds both parties to its terms, and they argue that

reducing Dembrowski’s felonies to misdemeanors would deprive them of the benefit of their bargain.

In the recent cases of *Gonzalez* and *Brown*, the People made, and we rejected, the same argument. (*Gonzalez, supra*, 244 Cal.App.4th at pp. 1068-1073); *Brown, supra*, 244 Cal.App.4th at pp. 1178-1183.) “[T]he general rule in California is that a plea agreement is ‘ “deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.” ’ ’ ” (*Doe v. Harris* (2013) 57 Cal.4th 64, 73.) Thus, “[i]t follows, also as a general rule, that requiring the parties’ compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law.” (*Id.* at pp. 73-74; *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888-889, fn. 10 [requiring the parties’ compliance with changes in the law made retroactive to them does not violate the terms of their plea agreement].)

Proposition 47 made resentencing available retroactively for certain theft- and drug-related felonies, including second degree burglary under section 459, if the charge and conviction would have been a misdemeanor under Proposition 47’s amendments to

the Penal Code. (§§ 459.5, subd. (a), 1170.18.) Section 1170.18 explicitly states that it applies to specified felony convictions, whether obtained “by trial or plea.” (§ 1170.18, subd. (a).) Dembrowski, who is currently serving a sentence on an eligible felony conviction obtained by plea agreement, is eligible to be resentenced on the conviction pursuant to section 1170.18. (*T.W. v. Superior Court, supra*, 236 Cal.App.4th at p. 652.)

Furthermore, nothing in the parties’ plea agreement provided or implied Dembrowski’s felony convictions for second degree burglary would be unaffected by subsequent changes in the law. (See *Doe v. Harris, supra*, 57 Cal.4th at pp. 71, 73-74 [parties to a plea agreement may expressly or impliedly agree the plea agreement will be unaffected by subsequent changes in the law]; *People v. Smith* (2014) 227 Cal.App.4th 717, 728-730 [same]; cf. *People v. Arata* (2007) 151 Cal.App.4th 778, 787-788 [because it found the plea agreement contained an implied promise that the defendant’s lewd act conviction would be expunged following his completion of probation, the court refused to apply a subsequent change in the Penal Code disallowing expungement upon completion of probation to the plea agreement].)

We are not persuaded by the People’s argument that *People v. Collins* (1978) 21 Cal.3d 208 (*Collins*) requires a different result. In *Collins*, the defendant pled guilty to a single count of oral copulation, under former section 288a, in exchange for the dismissal of 14 other felony charges and several enhancement allegations, including an allegation that the copulation was forcible. (*Collins, supra*, at p. 211.) After the plea but before

sentencing, the Legislature repealed former section 288a and replaced it with a new section 288a, which made the defendant's act of oral copulation no longer a crime. (*Collins*, at pp. 211-213.) Despite this statutory change, the trial court sentenced the defendant to one to 15 years in prison on the conviction. (*Id.* at p. 212.)

The Supreme Court reversed the judgment of conviction on the ground the defendant's conduct was no longer a crime at the time of sentencing. (*Collins*, *supra*, 21 Cal.3d at p. 213.) It concluded the "proper remedy" was to reverse the judgment with directions to dismiss the oral copulation charge but allow the People to refile the dismissed charges. (*Id.* at p. 214.) The People had been "deprived of the benefit" of their plea bargain because the repeal of former section 288a allowed the defendant to gain "total relief from his vulnerability to sentence." (*Collins*, at p. 215.) The court explained that "[w]hether the defendant formally seeks to withdraw his guilty plea or not is immaterial; it is his escape from vulnerability to sentence that fundamentally alters the character of the bargain." (*Ibid.*) The repeal "destroyed a fundamental assumption underlying the plea bargain—that [the] defendant would be vulnerable to a term of imprisonment." (*Ibid.*)

The circumstances of this case are very different from those in *Collins*. Unlike the defendant in *Collins*, who was rendered invulnerable to any sentence on his agreed-upon conviction by the legislative repeal of former section 288a, Proposition 47 did not decriminalize Dembrowski's conduct nor did it render him invulnerable to *any* sentence.

On the contrary, Dembrowski's convictions will remain in place, even after his petition is granted on remand. He merely took advantage of a process enacted by the voters through Proposition 47 allowing him to reduce his convictions to misdemeanors because the convictions are now for shoplifting amounts under \$950 in violation of section 459.5, as opposed to second degree burglaries in violation of section 459.

As we explained in *Gonzalez*, interpreting the holding of *Collins* broadly, as the People would have us do, to allow the parties to withdraw from a plea agreement when legislation affects the punishment in a way that can be said to deprive a party of the "benefit of the bargain" creates a conflict with the Supreme Court's decision in *Doe v. Harris*: "In [*Doe v.*] *Harris*, the Supreme Court held a plea agreement is 'deemed to incorporate and contemplate . . . the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.' [Citation.] It follows that when legislation or an initiative changes the punishment called for by a plea agreement, the agreement is altered but remains binding on both parties. As a result, the People are *not* entitled to withdraw from the plea agreement. If *Collins* held otherwise, [*Doe v.*] *Harris* overruled it. [Citation.] However, we understand the cases to be harmonious and hold that [*Doe v.*] *Harris* governs this case." (*Gonzalez, supra*, 244 Cal.App.4th at p. 1073.)

The People assert their investigation of Dembrowski revealed he "was responsible for an additional 10 burglaries, with losses totaling \$2,774.51." They argue that, had they

known the minimizing effect Proposition 47 would have on Dembrowski's felony convictions, they "likely would have proceeded on the additional charges," but cannot now because the statute of limitations has expired. Whether or not this is the case, the fact remains nothing in the parties' plea agreement provided or implied the agreement would be unaffected by subsequent changes in the law. The long-standing principle that a court has no authority to modify a plea agreement absent the consent of both parties (*People v. Segura* (2008) 44 Cal.4th 921, 931) is inapplicable when a change in the law, like Proposition 47, retroactively modifies the consequences of the parties' agreement, including the agreed-upon convictions, " "for the public good and in pursuance of public policy." ' ' (*Doe v. Harris, supra*, 57 Cal.4th at p. 66.)

Therefore, on remand, the People may not withdraw from the plea bargain and amend their complaint against Dembrowski.

D. *The Parole Issue Is Not Ripe*

Proposition 47 provides that when a defendant's petition for resentencing under section 1170.18, subdivision (b), is granted, the defendant is "subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole." (§ 1170.18, subd. (d).)

Dembrowski urges us to direct the trial court not to impose a parole term, or in the alternative, direct the trial court to apply his excess custody credits to reduce his parole

term, if imposed. We decline to address this issue because we agree with the People that it is not yet ripe for review.

To be ripe, an issue must present a “real and substantial controversy” capable of “specific relief through a decree of a conclusive character.” (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171.) Courts should abstain from deciding issues until they are ripe and from issuing advisory opinions upon a hypothetical state of facts. (*Ibid.*)

Here, the issue before us is a hypothetical one, because the trial court denied the petition and therefore has not yet had the opportunity to decide whether to impose, or release Dembrowski from parole. Because both options are within the trial court’s discretion upon granting the petition, Dembrowski’s argument will only become ripe if the trial court imposes parole. Put differently, Dembrowski asks this court to order that he not be placed on parole in the first instance, rather than review the trial court’s ruling on whether or not to impose parole. That is not our role. (See, e.g. *People v. Contreras* (2015) 237 Cal.App.4th 868, 891-892.)

III

DISPOSITION

The trial court’s order denying the resentencing petition is reversed. Because there is no dispute Dembrowski’s second degree burglary convictions each involved less than \$950, we direct the trial court to grant the petition on remand, unless it finds that

resentencing him would “pose an unreasonable risk of danger to public safety.”

(§ 1170.18, subd. (b).) On remand, the People may not withdraw from the plea bargain and may not amend their complaint.

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SLOUGH
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.