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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.

JIMMY RAY HERNANDEZ,

Defendant and Appellant.

E064315

(Super.Ct.No. FSB1303494)

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.

Arielle Bases, 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, Andrew Mestman and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

On November 4, 2014, the voters approved Proposition 47, The Safe Neighborhoods and Schools Act (Proposition 47). Proposition 47 reduced certain nonserious, nonviolent felonies to misdemeanors. Proposition 47 allows a person convicted of a felony prior to its passage, who would have been guilty of a misdemeanor under Proposition 47, to petition the court to reduce his or her felony to a misdemeanor and be resentenced.

On December 10, 2013, prior to the passage of Proposition 47, defendant and appellant Jimmy Ray Hernandez entered a guilty plea to a felony violation of receiving stolen property, specifically a motor vehicle, within the meaning of Penal Code section 496d, subdivision (a).¹ Defendant filed a petition to recall his sentence (Petition) stating that his felony conviction should be reduced to a misdemeanor. The trial court denied the petition on the ground that defendant's conviction was not eligible for resentencing under Proposition 47.

Defendant now claims on appeal that the trial court erred by finding that a violation of section 496d does not qualify for resentencing under Proposition 47 because (1) Proposition 47 redefines all theft-related offenses with the value of the property under \$950 as misdemeanors; and (2) if this court finds section 496d was not affected by Proposition 47, the omission from Proposition 47 violated his equal protection rights because those convicted of receiving stolen property with a value less than \$950 under section 496, subdivision (a), are only guilty of a misdemeanor.

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

A conviction for receiving a stolen motor vehicle in violation of section 496d is not an eligible offense under Proposition 47. Moreover, it does not offend principles of equal protection to treat a defendant who receives a stolen vehicle, whether or not it is valued less than \$950, differently than a person who receives stolen property of other kinds. We affirm the denial of the Petition.

FACTUAL AND PROCEDURAL HISTORY

On August 15, 2013, a felony complaint was filed against defendant in San Bernardino County case No. FSB1303494, charging him in count 1 with receiving stolen property, a motor vehicle, within the meaning of section 496d, subdivision (a). Specifically, he was charged with unlawfully buying or receiving a 1994 Honda Civic.

On December 10, 2013, defendant signed a plea agreement agreeing to enter a guilty plea to a violation of section 496d, subdivision (a), receiving stolen property, a vehicle. The trial court accepted the plea. The parties entered into a stipulation that if the trial court were to review the police report, it would provide a factual basis for the entry of the plea. The police report has not been made part of the record on appeal. Defendant was sentenced to three years felony probation and was to serve the first 240 days in county jail.

On January 2, 2014, the San Bernardino County Probation Department filed a restitution memorandum with the trial court. In that memorandum, the victim attested that on the morning of August 11, 2013, he went to where he had parked his 1994 Honda Civic and it was gone. There was shattered glass in its place. He received notice that his car was recovered and he could retrieve it from a towing yard. The victim submitted his

expenses, which included the towing charge, the amount to fix the broken window, and to replace other items taken off of the vehicle. It totaled \$849.37. The trial court ordered defendant to make restitution to the victim in the amount of \$849.37. On June 11, 2014, defendant violated his probation and was sentenced to two years in this case, to run concurrent to case No. FSB1402674.

On July 15, 2015, defendant filed his Petition. It consisted of one page. The sole information on his conviction that was provided to the trial court in the Petition was as follows: “Defendant in the above-entitled case requests that, pursuant to Penal Code section 1170.18, the following felony violation(s) PC496d be designated as misdemeanor(s).” He stated that he had completed his sentence. There was no written response made by the People.

On July 31, 2015, the trial court heard the petition. At the hearing, the trial court stated, “Number 10 Jimmy Hernandez. The charge is PC 496(d), receiving stolen property, a stolen vehicle. It is this Court’s view that that charge makes the defendant statutorily ineligible regardless of the value of the vehicle involved. And so that is the basis for the Court’s determination that the defendant is statutorily ineligible.” Defense counsel objected and stated, “The petition was filed by another attorney in the office because restitution was set at 849.37 as fair market value of the vehicle in question, a 1994 Honda Civic, actually is over \$950, between 1242 and 1989. I believe the petition was filed because of the restitution amount.”

DISCUSSION

Defendant contends the trial court erred in denying his petition because the voters intended to include section 496d under Proposition 47. Defendant also contends that if this court concludes section 496d was not intended to be included in Proposition 47, his equal protection rights have been violated.²

A. PROPOSITION 47

“The voters approved Proposition 47 at the November 4, 2014, general election, and it became effective the next day.” (*People v. Diaz*. (2015) 238 Cal.App.4th 1323, 1328.) “[P]roposition 47 ‘was intended to reduce penalties ‘for certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors.’”” (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652.)

Subdivision (a) of Penal Code section 1170.18, provides in pertinent part, “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act 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 in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Sections 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.”

² These issues are currently under review in the California Supreme Court in *People v. Romanowski* (2015) 242 Cal.App.4th 151, review granted January 20, 2016, S231405 and *People v. Garness* (2015), review granted January 27, 2016, S231031.

“The procedure for a person who has completed the sentence for a crime reduced by Proposition 47 likewise contemplates filing in the superior court. 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 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.*’ (Italics added.) No hearing on the application is required ‘[u]nless requested by the applicant’ (§ 1170.18, subd. (h)), and ‘[i]f 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*, 238 Cal.App.4th at p. 1329.)

Proposition 47 amended section 496, buying or receiving stolen property, to provide that if the defendant receives “any property” that is \$950 or less, the offense shall be a misdemeanor except for some ineligible individuals. (§ 496, subd. (a).) The previous version of section 496 gave the prosecution discretion to charge the offense as a misdemeanor if the value of the property did not exceed \$950 and the district attorney or grand jury determined that so charging would be in the interests of justice. (Former § 496 [eff. Oct. 1, 2011-Nov. 4, 2014].) Accordingly, Proposition 47 converted the offense of receiving stolen property in section 496 from a wobbler to a misdemeanor.

Proposition 47 did not amend section 496d, the section under which defendant was convicted. Section 496d provides “Every person who buys or receives any motor vehicle

. . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing” shall be convicted of either a misdemeanor or felony.

B. ELIGIBILITY

As stated, section 496d is not listed in Proposition 47. In order to be eligible for resentencing, defendant had the burden of showing that he “would have been guilty of a misdemeanor” if Proposition 47 had been in effect at the time of his offense. (See *People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880 [defendant has the burden of establishing his or her eligibility for resentencing under Proposition 47].) “When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative’s language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters’ intent and understanding of a ballot measure.” (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

Defendant stated in his petition only that he had been convicted of “PC 496d(a).” The trial court determined that defendant was not eligible for resentencing. The trial court did not err because section 496d is not included in section 1170.18. Moreover, there is no indication that the drafters of Proposition 47 intended to include section 496d.

Construing the plain language of section 1170.18 to include section 496d would be inconsistent with our Supreme Court’s determination that we may not “add to the statute or rewrite it to conform to some assumed intent not apparent from that language.”

(People v. Superior Court (Pearson), supra, 48 Cal.4th at p. 571.)

Defendant’s reliance on the changes made by Proposition 47 to the crimes of grand theft and petty theft do not support that the drafters of Proposition 47 intended to include section 496d. Section 490.2, which was added by Proposition 47, provides a definition of petty theft that affects the definition of grand theft in section 487 and other provisions. Section 490.2 begins with the phrase: “Notwithstanding Section 487 or any other provision of law defining grand theft” (§ 490.2) Similarly, section 459.5, which was also added by Proposition 47, and which provides a definition of shoplifting that affects the definition of burglary in section 459, begins with the phrase: “Notwithstanding Section 459. . . .” (§ 459.5.) The drafters of Proposition 47 knew how to indicate when they intended to affect the punishment for an offense the proposition was not directly amending. This “notwithstanding” language is conspicuously absent from section 496, subdivision (a). Because that provision contains no reference to section 496d, we must assume the drafters intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies. The trial court did not err by concluding defendant was ineligible for resentencing based on his conviction of section 496d.

Defendant further contends that it would be absurd for a defendant who is convicted of receiving stolen property valued at less than \$950, in violation of section 496, to be eligible for a reduction to a misdemeanor when essentially the same offense of receiving a stolen vehicle worth less than \$950 is not eligible for reduction. However, as stated, before Proposition 47's passage, section 496 provided that a prosecutor had the discretion to charge a defendant who had received stolen property as a misdemeanor if the property stolen was valued less than \$950. (Former § 496 [effective Oct. 1, 2011-Nov. 4, 2014].) The only change to section 496 relevant here is that now a defendant must be charged with a misdemeanor if the value of the property is under \$950. Section 496d has remained the same since October 1, 2011. (Stats. 2011, c. 15 (A.B. 109), § 374.) Proposition 47 did not alter the prosecution's discretion to charge receiving a stolen vehicle under the more general statute (§ 496) or the more specific statute (§ 496d). Section 1170.18 applies only to those people who "would have" been guilty of a misdemeanor prior to the passage of Proposition 47. Here, the prosecution would likely have charged defendant with the same felony violation of section 496d because exactly the same sentencing considerations applied to defendant's offense before and after Proposition 47.

C. EQUAL PROTECTION

Defendant contends if his conviction of a felony for receiving a stolen vehicle valued at less than \$950³ does not qualify under Proposition 47, his equal protection rights were violated because he is similarly situated to a person who is convicted of receiving other stolen property under section 496, which is now a misdemeanor. Specifically, he argues that the state cannot provide a justification for the disparity between these two similarly situated groups, as there is no legitimate state interest or rational basis for treating these two groups differently.

“The United States and California Constitutions entitle all persons to equal protection of the laws. [Citations.] This guarantee means “that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances.” [Citation.] A litigant challenging a statute on equal protection grounds bears the threshold burden of showing “that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.” [Citation.] Even if the challenger can show that the classification differently affects similarly situated groups, “[i]n ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest,” the classification is upheld unless it bears no rational relationship to a legitimate state purpose.” (*People v. Singh* (2011) 198 Cal.App.4th 364, 369.)

³ We will assume for sake of this argument that defendant met his burden of establishing that the Honda Civic was valued at less than \$950.

“In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200, overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871.)

The analysis here is subject to the rational relationship test. (See *People v. Noyan* (2014) 232 Cal.App.4th 657, 667-668 [applying the rational basis test in assessing section 1170, subdivision (h), the Realignment Legislation].)

Defendant cannot show he is similarly situated to a person who steals property other than a motor vehicle. An owner of a vehicle relies on his or her vehicle for transportation to work, doctor’s appointments, and numerous other necessities of life. Moreover, even if a vehicle that is stolen is only valued at less than \$950, the replacement cost can be much more.

There is a rational basis for alleged disparity between a conviction under section 496d for buying or receiving a motor vehicle with a value of \$950 or less, which is not eligible for reclassification and resentencing under section 1170.18; and the eligible conviction under section 496 for receiving other stolen property. In order to address the uniqueness of receiving stolen vehicles, the Legislature enacted section 496d. The bill’s author proposed that section 496d be added “to the Penal Code to encompass only motor

vehicles related to the receiving of stolen property.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390 (1997–1998 Reg. Sess.) as amended June 23, 1998.) Section 496d was described as ““provid[ing] additional tools to law enforcement for utilization in combating vehicle theft and prosecuting vehicle thieves. Incarcerating vehicle thieves provides safer streets and saves Californians millions of dollars. These proposals target persons involved in the business of vehicle theft and would identify persons having prior felony convictions for the receiving of stolen vehicles for enhanced sentences.”” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998.)

Those punished under section 496d are not situated similarly to those punished under section 496. Moreover, the drafters of Proposition 47 could legitimately determine that those who engage in vehicle theft should be punished more severely than those engaged in theft of other property. Section 496d addresses the unique problems involving vehicle theft. There are legitimate and plausible reasons for treating vehicle crimes different from other types of property crime.⁴

⁴ We express no opinion as to whether a defendant convicted of violating section 496d could show his equal protection rights have been violated based on the fact that the same person who *steals* a vehicle valued at less than \$950 would only be subject to a misdemeanor conviction as it was not raised by defendant either in the trial court or on appeal.

Based on the foregoing, defendant has failed to show that the exclusion of section 496d from Proposition 47 violated his equal protection rights.⁵

DISPOSITION

The trial court's order denying defendant's petition to recall his sentence is affirmed.

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MILLER
J.

I concur:

McKINSTER
Acting P. J.

⁵ Defendant also contended in his opening brief that remand for an evidentiary hearing on the value of the stolen motor vehicle involved in his section 496d conviction is required. However, we have concluded that defendant's section 496d conviction is not eligible for reclassification and resentencing under section 1170.18 in this case even if the actual value of the stolen motor vehicle was \$950 or less.

Slough, J., Concurring.

I agree with the majority that convictions for receiving stolen motor vehicles under Penal Code section 496d (Section 496d) are not eligible for resentencing under Penal Code section 1170.18 (Section 1170.18). (Maj. opn. *ante*, at p. 5-6.) I write separately because I reach that conclusion by a different route.

The majority decides Section 496d convictions do not qualify for resentencing based on the fact that “[S]ection 496d is not listed in Proposition 47.” (Maj. opn. *ante*, at p. 7.) The majority writes the superior court did not err in determining Hernandez was not eligible for resentencing “because section 496d is not included in section 1170.18” and “[c]onstruing the plain language of section 1170.18 to include section 496d would be inconsistent with our Supreme Court’s determination that we may not ‘add to the statute or rewrite it to conform to some assumed intent not apparent from that language.’” (*Id.* at p. 7-8 [quoting *People v. Superior Court (Pearson)*, *supra*, 48 Cal.4th at p. 571].)

I disagree with the majority’s rationale because there is no list of eligible offenses that qualify for resentencing in Section 1170.18 or anywhere else in Proposition 47. Section 1170.18 contains a list of the sections Proposition 47 added or amended that change the penalties for substantive theft-related and drug possession crimes. Numerous statutory sections that set out substantive offenses that are eligible for resentencing do not appear in that list, including Penal Code sections 487 (grand theft), 459 (burglary), 476 (forgery and counterfeiting), and 504 (embezzlement). Thus, the exclusion of Section

496d from the list of new and amended punishment provisions that appear in section 1170.18 says nothing about whether 496d is an eligible offense.

To decide whether an offense is eligible, the courts must look to the statutory provisions setting out substantive offenses. Doing so leads me to arrive at the same conclusion as the majority. Receiving stolen motor vehicle convictions do not qualify for resentencing because Proposition 47 did not amend Section 496d, under which violations of the statute remain wobblers. Proposition 47 *did* amend the provision criminalizing receipt of stolen property generally (Pen. Code, § 496, subd. (a)) to make low-value violations misdemeanors. That fact does not alter the analysis, however, because a specific provision takes precedence over a conflicting general provision. (*Warne v. Harkness* (1963) 60 Cal.2d 579, 588.) Section 496d is more specific in that it applies to receipt of stolen motor vehicles whereas section 496 applies to any stolen property.

I therefore conclude receipt of stolen motor vehicle remains a wobbler, and an offender previously convicted of felony receipt of a stolen motor vehicle does not qualify for resentencing because he would not have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense.

SLOUGH

J.