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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.

JEROME PATRICK DAVIS,

Defendant and Appellant.

E064316

(Super.Ct.No. FVI1402917)

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.

Dawn S. Mortazavi, 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, Barry Carlton, and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

Defendant Jerome Patrick Davis appeals from an order denying his petition to have a felony conviction designated a misdemeanor under Proposition 47, the Safe Neighborhoods and Schools Act. (§ 1170.18.) The trial court denied defendant's petition on the ground defendant was ineligible for resentencing. We conclude defendant did not meet his burden of showing the value of the stolen property did not exceed \$950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880.) We therefore affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

In August 2014, defendant was charged with three felony counts of second degree commercial burglary (§ 459, counts 1, 3, and 4) and one count of receiving stolen property (§ 496, subd. (a), count 2.) It was also alleged defendant had suffered seven prior convictions and prison terms. (§ 667.5, subd. (b).)

On September 10, 2014, defendant pleaded guilty to an additional charge, count 5, receiving stolen property and admitted one prior prison term. Counts 1 through 4 were dismissed. The court sentenced defendant to the low term of one year four months, plus an additional one year.

According to the appellate record, in January 2015, defendant submitted a handwritten request regarding resentencing to the court. Defendant's request did not

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

include any information about the value of the stolen property in count 5.

On February 19, 2015, defendant filed a handwritten petition for writ of habeas corpus, again about resentencing, but not including any information about the value of the stolen property in count 5.

At a resentencing hearing on February 27, 2015, defense counsel orally represented to the court that the amount involved was \$1,225.65, an amount greater than \$950. The court ruled defendant was ineligible for resentencing.

At another resentencing hearing on August 14, 2015, defense counsel repeated the representation that the amount involved was more than \$1,200, based on the value of property found in defendant's car. The court again found defendant was ineligible for resentencing.

In an appellate motion to augment, defendant has attached a collation of police reports listing the value of the stolen property for counts 1, 3, and 4 as: count 1, \$703.98 taken from Target and Walmart on July 31, 2014; count 3, \$74.29, taken from Target on July 18, 2014; and count 4, \$284.37 taken from Target on June 28, 2014. There is no information in the appellate record about the value of the stolen property for count 5.

III

DISCUSSION

In November 2014, California voters enacted Proposition 47, which created a new resentencing provision: section 1170.18. Proposition 47 reduced the offense of receiving stolen property from a felony to a misdemeanor where the value of the property does not exceed \$950. (§ 496, subd. (a).) Such an offense is now a misdemeanor.

A defendant must establish eligibility by “stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed \$950. [Citations.] The defendant must attach information or evidence necessary to enable the court to determine eligibility.” (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137 [Fourth Dist., Div. Two], citing *People v. Sherow*, *supra*, 239 Cal.App.4th at p. 880.) The petitioner has the burden of establishing eligibility for resentencing “[b]ecause defendant is the petitioner seeking relief, and because Proposition 47 does not provide otherwise.” (*Perkins*, at p. 136, citing *Sherow*, at pp. 878-879; see *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450.)

As *Sherow* holds, the burden is on defendant to prove the stolen property does not exceed \$950. (*People v. Sherow*, *supra*, 239 Cal.App.4th at pp. 878-880; see *People v. Rivas-Colon*, *supra*, 241 Cal.App.4th at p. 449.) Defendant did not meet his burden of establishing in the trial court that the value of the stolen property for count 5 did not exceed \$950. The felony complaint did not allege the value of any of the stolen property. Defendant did not submit any information or evidence to the trial court, enabling the court to determine eligibility. Instead, at the time of each of the two resentencing hearings, defense counsel represented the value of the stolen property was more than \$1,200. In other words, insufficient evidence supported defendant’s petition for resentencing.

Because defendant failed to present the trial court with any evidence establishing that the stolen property did not exceed \$950, we affirm the trial court's ruling denying defendant's petition. (*People v. Rivas-Colon, supra*, 241 Cal.App.4th at pp. 449-450.) Defendant simply did not meet his burden of proof in the trial court. For that reason, we do not need to address the issue of ineffective assistance of counsel based on the defense counsel's statements that the value of the stolen property in count 5 was more than \$1,200. Defendant's remedy is to file a new petition for resentencing supported by evidence of the value of the stolen property in count 5.

In his reply brief, defendant argues the case should be remanded for resentencing because it would be a waste of time to compel him to file a new petition. Defendant argues that the police reports establish that the value of the stolen property for each of counts 1, 3, and 4 is less than \$950. However, the relevant count is count 5. We conclude the state of the record is inadequate. Defendant's two handwritten requests for resentencing did not include any information about the value of the stolen property in count 5. A fresh petition which complies with statutory requirements may afford defendant the relief he seeks.

IV

DISPOSITION

We affirm the order denying defendant's petition without prejudice to refiling his petition for resentencing.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.