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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

RODOLFO GARCIA,

Defendant and Respondent.

E064336

(Super.Ct.No. RIF134578)

OPINION

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

Affirmed.

Michael A. Hestrin, District Attorney, and Emily R. Hanks, Deputy District Attorney, for Plaintiff and Appellant.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from the trial court's order granting defendant Rodolfo Garcia's petition to reduce his felony second degree burglary conviction (Pen. Code,¹ § 459) to a misdemeanor under the Safe Neighborhoods and Schools Act (Proposition 47). (§ 1170.18.)

On appeal, the People argue: (1) defendant failed to meet his burden to prove eligibility for the redesignation of the offense to a misdemeanor under Proposition 47; (2) defendant was not eligible to petition for redesignation of the offense to a misdemeanor under Proposition 47 because he remained guilty of second degree burglary even after the passage of Proposition 47; (3) defendant's conduct of entering a bank with the intent to commit felony identity theft does not meet the statutory definition of misdemeanor "shoplifting" under section 459.5, a crime added by Proposition 47; and (4) defendant did not enter a "commercial establishment" within the meaning of section 459.5. We affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND²

On May 31, 2006, defendant entered a Bank of America branch in Moreno Valley and attempted to cash a check in the amount of \$100 from the account of Harold Deaton. While attempting to cash the check, a red flag came up in the Bank of America computer system indicating defendant had already cashed checks from the same account at several

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

² The factual background is taken from the police report.

Bank of America branches on that same day. Additional checks from Deaton's account were also cashed by a man named Rafael Arroyo. The checks contained a forged victim's signature of "Harold M. Deaton."

Defendant was an acquaintance of Deaton's son and had been at their home previously. However, Deaton had not written any checks to defendant or Arroyo, and neither defendant nor Arroyo had permission to cash the checks. The total amount of stolen and forged checks written from Deaton's account was \$1,650.

On January 24, 2008, defendant pleaded guilty to second degree burglary (§ 459), forgery (§ 470, subd. (a)), and receiving stolen property (§ 496, subd. (a)). In return, defendant was sentenced to a total term of two years in state prison, to run concurrent to another sentence he was already serving.

On November 4, 2014, voters enacted Proposition 47. It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) As of its effective date, Proposition 47 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).)

Proposition 47 also included a provision that allows certain offenders to seek resentencing. Defendants who are serving a sentence for a felony that would have been a misdemeanor had Proposition 47 been in effect at the time of the offense may file a petition for recall of sentence. (§ 1170.18.)

On December 31, 2014, defendant, through counsel, filed a petition to reduce all three of his offenses to misdemeanors under section 1170.18. The People conceded defendant was entitled to relief on his forgery and receiving stolen property offenses, but opposed redesignation of the second degree burglary offense. The People argued defendant was ineligible for redesignation on the burglary offense because second degree burglary is not shoplifting under section 459.5, a bank is not a “commercial establishment” within the meaning of section 459.5, and defendant entered the bank with the intent to commit identity theft.

Following a hearing on defendant’s petition on July 31, 2015, the trial court granted defendant’s petition as to all three counts. At that time, the court also granted the People’s request to file the police report of the incident as an exhibit considered by the court in determining defendant’s eligibility under Proposition 47.

Neither in their opposition to the petition nor at the hearing did the People raise the adequacy of defendant’s petition.

On August 26, 2015, the People filed a timely notice of appeal.

II

DISCUSSION

The issues presented in this case are virtually identical to and governed by our recent decision in *People v. Abarca* (Aug. 12, 2016, E063687) ___ Cal.App.5th ___ [2016 Cal.App. Lexis 675] (*Abarca*).

A. *Petitioner's Burden*

For the first time on appeal, the People challenge the sufficiency of defendant's petition to establish a prima facie case for relief. The opposition filed by the People never challenged the sufficiency of defendant's petition to establish eligibility. It only contested whether a bank was a "commercial establishment" and whether passing a forged check constituted "shoplifting" within the meaning of section 459.5. Neither did the People at the time of the hearing on the petition challenge the petition's adequacy. Factually, everyone was on the same page and agreed that defendant entered a Bank of America branch and passed a stolen and forged check for \$100.

The issue is forfeited. (*Abarca, supra*, ___ Cal.App.5th ___ [2016 Cal.App. Lexis 675 at p. *7].)

B. *Commercial Establishment*

The People contend that defendant is not entitled to resentencing because a bank is not a commercial establishment. That term is not defined in the Penal Code, and the People urge us to adopt a commonsense meaning, which would be its plain, ordinary

meaning. The People contend that the voters intended to limit shoplifting to theft crimes of establishments which have goods on display.

In *Abarca, supra*, ___ Cal.App.5th ___ [2016 Cal.App. Lexis 675 at pp. *9-*11], we rejected the same argument, noting that the term “commerce” is normally defined as the exchange of goods *and services*, and the term “establishment” is defined as a place of business. A bank, therefore, is a financial services business. We follow our precedent in *Abarca*, and again reject the argument. (*Ibid.*)

C. *Identity Theft*

The People contend that defendant was not eligible for resentencing because he entered the bank with the intent to commit felony identity theft (§ 530.5), an offense not subject to Proposition 47.

The complaint charged that on May 31, 2006, defendant committed three crimes: count 1 charged burglary (§ 459); count 2 charged forgery of a \$100 check (§ 470, subd. (a)); and count 3 charged receiving stolen property (§ 496, subd. (a)). All three crimes are interrelated in that defendant entered the bank intending to cash a stolen and forged check made out for \$100. The complaint did not charge identity theft. Defendant entered a plea to all three counts. Identity theft simply was not placed in issue at the time of the plea.

In *Abarca, supra*, ___ Cal.App.5th ___ [2016 Cal.App. Lexis 675 at pp. *12-*15], we relied on the convicted offenses, not offenses that could have been filed but were not, such as identity theft. We noted that Proposition 47 provided a petitioning procedure by

which an offender could seek resentencing on felony *convictions* that qualified under Proposition 47. Defendant here was not convicted of identity theft. We will not look behind defendant’s actual convictions to find an uncharged crime that would make him ineligible. (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1427-1428; *People v. Maestas* (2006) 143 Cal.App.4th 247.)

For the reasons stated in *Abarca, supra*, ___ Cal.App.5th ___ [2016 Cal.App. Lexis 675], we reject the People’s contention that defendant is ineligible for resentencing.

III

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.