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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.

DUSTIN JAMES MARTIN,

Defendant and Respondent.

E064345

(Super.Ct.No. INF1400835)

OPINION

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

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

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from the granting of a petition for resentencing under Proposition 47, The Safe Neighborhoods and Schools Act (Prop. 47). They argue

defendant and respondent Dustin James Martin failed to meet his burden of proving eligibility for resentencing and contend he was not, in fact, eligible because he would have been guilty of a felony rather than a misdemeanor even after passage of Proposition 47. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 21, 2014, defendant pled guilty to one count of second degree burglary (Pen. Code, § 459)¹ and two counts of forgery (§§ 470, subd. (a), 475, subd. (a)). In trial court briefs, defendant admitted the police report said he stole his mother's checkbook and used it to cash checks to himself at a bank. The trial court found a factual basis for the plea and sentenced defendant to one year in custody, followed by one year of supervised release.

On January 30, 2015, defendant filed his petition for resentencing on all counts to which he pled guilty (second degree burglary and both forgery counts) under Proposition 47. (§ 1170.18, subd. (a).) The People filed a response indicating they were opposed to resentencing on the burglary count. The response contained handwritten interlineation reading: "Count 1—section 459 second—defendant enter [a bank] (not a commercial establishment) with the intent to commit ID theft." The trial court set a hearing on the petition. The minute order states: "Issue is the amount of loss and intent at bank."

¹ Unless otherwise specified, all statutory references are to the Penal Code.

The People then filed a brief opposing the resentencing petition. They argued defendant's felony burglary conviction under section 459 could not be reduced to a misdemeanor shoplifting conviction under section 459.5 because the shoplifting statute only applies to theft from a "commercial establishment," which does not include a bank.

At the hearing on defendant's resentencing petition, the People obtained permission to file, under seal, the police report on which the charges against defendant were based.² The trial court then asked the prosecutor: "Then you're not contending, though, that anything is over \$950 . . . ? Your contention is strictly that a bank is not a commercial establishment?" The prosecutor responded, "Yes," and clarified that this was her office's position on the burglary count. She then indicated she had no opposition to resentencing on the forgery counts under sections 470 and 475. The trial court found that a bank qualified as a commercial establishment and granted the petition, thereby converting the felony conviction for burglary under section 459 into a misdemeanor conviction for shoplifting under section 459.5, imposing a 364-day concurrent sentence on each count with credit for time served, and releasing defendant from mandatory supervision.

² In this court, the People moved to augment the record with this same police report. We granted the motion and ordered the police report made part of the record under seal.

ANALYSIS

Proposition 47 added section 1170.18 to the Penal Code. Subdivision (a) reads: “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 Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.” In this case, the People argue both that defendant failed to meet his evidentiary burden of proving that he “would have been guilty of a misdemeanor under [this act] had this act been in effect at the time of the offense” (§ 1170.18, subd. (a)), and that he could not, in fact, make this showing as a matter of law given the facts underlying the burglary conviction. We reject each of these contentions in turn.

1. The petition did not fail for lack of evidentiary support

Subject to the more nuanced discussion of the extent of this burden that appears *post*, we agree with the People (and have recently held) that defendant bore the burden of proving his eligibility for resentencing. “Because defendant is the petitioner seeking relief, and because Proposition 47 does not provide otherwise, ‘a petitioner for resentencing under Proposition 47 must establish his or her eligibility

for such resentencing.’ ” (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136 (*Perkins*), quoting *People v. Sherow* (2015) 239 Cal.App.4th 875, 878-879 (*Sherow*)). The People assert that, “Without providing sufficient evidence to establish the factual basis of his section 459 conviction, respondent failed to meet his burden and his petition should have been summarily denied.” Defendant responds that the People waived this issue by failing to object to the extent to which he met his burden in the trial court. We agree that the People’s position fails, but for slightly different reasons than the one defendant asserts.

The issue is not so much one of waiver, since the People opposed resentencing on the burglary count and therefore argued to some extent that defendant failed to meet his burden of proving entitlement to resentencing. The problem for the People is that they themselves supplied precisely the evidence they say was lacking by filing the police report at the hearing on the resentencing petition. In fact, the People’s motion to augment refers to the police report as an exhibit at the hearing and states: “The trial court considered this document in determining the underlying facts of [defendant’s] crimes.” Moreover, the People rely almost exclusively on the police report as their source of background information about the crime.

If we reversed on the ground that defendant failed to meet his burden of producing evidence, we would remand the matter without prejudice to defendant’s ability to file a new resentencing petition supported by evidence. (*Perkins, supra*,

244 Cal.App.4th at p. 140; see *Sherow, supra*, 239 Cal.App.4th at p. 881 [order denying resentencing petition affirmed without prejudice to submission of new petition].) “ ‘ ‘The law neither does nor requires idle acts.’ (Civ. Code, § 3532.)’ ” (*People v. Espana* (2006) 137 Cal.App.4th 549, 553.) We will therefore not reverse on the ground that defendant failed to meet his burden of proof only to remand so the trial court can consider the document it already had before it at the hearing that has already occurred on defendant’s request for resentencing.

2. *The People’s argument that defendant was guilty of a felony even after passage of Proposition 47 because he intended to commit a felony when he entered the bank is both forfeited and unavailing*

The People argue the trial court erroneously granted defendant’s petition for resentencing because, even after passage of Proposition 47, he remained guilty of second degree burglary (§ 459), a felony, rather than shoplifting (§ 459.5), which is now a misdemeanor. Defendant counters that his act of presenting a forged check totaling less than \$950 constitutes misdemeanor shoplifting (§ 459.5) rather than felony burglary (§ 459) under Proposition 47. He also contends the People forfeited the contention they make on appeal. We agree with defendant on both points.

3. *The People forfeited their argument that defendant committed burglary rather than shoplifting*

“It is settled that points not raised in the trial court will not be considered on appeal. [Citations.] This rule precludes a party from asserting on appeal claims to

relief not asserted in the trial court.” (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422.)

On appeal, the People reason as follows: When defendant entered the bank, he intended to cash a forged check, which means he intended to commit identity theft within the meaning of section 530.55. Identity theft is a felony. Proposition 47’s creation of the shoplifting statute (§ 495.5) did not alter the traditional definition of second degree burglary, which “requires an entry into a specified structure with the intent to commit theft or any felony.” (See, e.g., *People v. Tafoya* (2007) 42 Cal.4th 147, 170.) Since defendant intended to commit the felony of identity theft when he entered the bank, he committed second degree burglary, which is also a felony. Defendant was therefore ineligible for resentencing. (§ 1170.18, subd. (a) [resentencing available to defendants “who would have been guilty of a misdemeanor under [Proposition 47] had this act been in effect at the time of the offense”].)

In the trial court, the People presented no part of this argument. Although their initial response to defendant’s resentencing petition made oblique reference to his intention when he entered the bank, the brief the People filed in opposition to the petition argued only that defendant could not be guilty of shoplifting because section 459.5 only applies to “commercial establishment[s]” (§ 459.5, subd. (a)), and a bank is not a “commercial establishment.” More to the point, when the trial court asked the attorney who represented the People at the resentencing hearing if

her “contention [wa]s strictly that a bank [wa]s not a commercial establishment,” counsel answered, “Yes.”

The People did not present to the trial court the argument they advance on appeal. The argument on appeal is therefore forfeited.

4. *The People’s contention that defendant committed burglary rather than shoplifting fails on the merits*

For the reasons given *ante*, we need not consider the People’s contention that defendant was ineligible for sentencing because the crime he committed was felony burglary (§ 459) rather than misdemeanor shoplifting (§ 459.5). Even were we to do so, the argument fails for two reasons.

First, the record does not support the People’s claim. Without evidence that defendant did, in fact, enter the bank with the intent to commit a felony, there is nothing on which to base the conclusion that defendant committed burglary. Yet the only evidence the People cite in support of their conclusions about defendant’s intent is a series of pages from a police report about the passing of the forged checks. The police report recounts details about the crimes to which defendant pled guilty, but it neither says nor purports to say anything about what defendant’s intention was when he entered the bank.

Second, and more important, we reject the People’s essential premise, which is that a defendant seeking resentencing bears the burden of disproving that he or she committed any felony, charged or uncharged, that might arguably be supported

by the undisputed facts of the case. Section 1170.18, subdivisions (a) and (b), focus entirely upon resentencing for existing but reclassified convictions; they say nothing about charges that could have but were not brought, and we fail to see how a defendant moving for resentencing, who bears the burden of proof as discussed *ante*, could anticipate every felony the People might try to argue could apply to the facts of the case. Because of his guilty plea, defendant has a conviction under section 459, which is a conviction that is eligible for Proposition 47 resentencing. Nothing in section 1170.18 requires the trial court to inquire into whether the conduct to which defendant admitted when he pled guilty could support a conviction for any felony, whether alleged in the complaint or not.

We are aware that courts have reached different conclusions regarding whether the act of forging a check in a bank can ever constitute shoplifting within the meaning of section 459.5. (Cf., e.g., *People v. Triplett* (2016) 244 Cal.App.4th 824, review granted April 27, 2016, S233172 [cashing a forged check can be shoplifting], with *People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171 [cashing a check in a bank cannot be shoplifting].) To the best of our knowledge, each of these cases is under review by the California Supreme Court, which has not issued an opinion on the issue. Given the People's forfeiture of the contention they make on appeal and the inadequate record regarding defendant's intent when he entered the bank, we decline to undertake this task in this particular case.

DISPOSITION

We affirm the order granting defendant's petition for resentencing of his conviction for burglary.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

SLOUGH
J.