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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.

MATTHEW BARTLETT,

Defendant and Appellant.

E064371

(Super.Ct.No. FVI021087)

OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam Ivy Morton, Judge. Affirmed.

Susan K. Shaler, 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, A. Natasha Cortina, Marvin E. Mizell and Meagan J. Beale, 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 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 March 17, 2005, prior to the passage of Proposition 47, defendant and appellant Matthew Paul Bartlett entered a guilty plea to a felony violation of Vehicle Code section 10851 and also admitted he had suffered a prior conviction of violating Vehicle Code section 10851 within the meaning of Penal Code section 666.5. 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 grounds that his conviction was not eligible for resentencing under Proposition 47.

Defendant now claims on appeal that the trial court erred by denying his Petition for the reasons that (1) Vehicle Code section 10851 was intended by the voters to be included in the felony offenses eligible to be reduced to misdemeanors; and (2) if this court finds Vehicle Code section 10851 was not affected by Proposition 47, the omission from Proposition 47 violated his equal protection rights under the state and federal Constitutions.

Review of the issue of whether a felony conviction under Vehicle Code section 10851 comes within the ambit of Proposition 47 is currently on review in the California Supreme Court in *People v. Page*, review granted January 27, 2016, S230793, and *People*

v. Solis, review granted June 8, 2016, S234150. We affirm the denial of the Petition as defendant failed to establish he was eligible for resentencing under Proposition 47.

FACTUAL AND PROCEDURAL HISTORY

On March 8, 2005, a felony complaint was filed against defendant in San Bernardino County case No. FVI021087, charging him in count 1 with “UNLAWFUL DRIVING OR TAKING OF A VEHICLE” in violation of Vehicle Code section 10851, subdivision (a). It was alleged that defendant did “unlawfully drive and take a certain vehicle, to wit, 1994 Honda . . . without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.” He was also charged in count 2 with receiving stolen property, the same vehicle, in violation of Penal Code section 496d, subdivision (a). It was further alleged that he had served three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). These offenses included prior violations of Vehicle Code section 10851 and Penal Code section 666.5.

On March 17, 2005, defendant entered into a written plea agreement. He agreed to plead guilty to a violation of Vehicle Code section 10851, which was described as “Driving Veh. w/o owner’s permission.” He also would admit to having suffered a prior conviction of Vehicle Code section 10851. The oral plea agreement is not included in the record. The minute order for March 17, 2015, stated the trial court accepted defendant’s plea of guilty to count 1 and that count 2 was dismissed pursuant to Penal Code section 1385. It also stated the three prior convictions were dismissed. Defendant was sentenced to four years in state prison pursuant to Penal Code section 666.5.

On July 8, 2015, defendant filed the Petition. It consisted of one page. The sole information with regard to his conviction provided to the trial court in the Petition was as follows: “Defendant in the above-entitled case requests that, pursuant to Penal Code § 1170.18, the following felony violation(s) VC10851 be designated as misdemeanor(s)” He stated he had completed his sentence. The People filed a response that Vehicle Code section 10851 was not affected by Proposition 47.

On August 21, 2015, the trial court denied the Petition finding only that Vehicle Code section 10851 was not covered by Proposition 47.

DISCUSSION

Defendant insists that even though Vehicle Code section 10851 is not listed in Penal Code section 1170.18, the voters intended to include it because it is a lesser included offense of grand theft automobile which is eligible for resentencing if the vehicle is less than \$950. Further, if this court finds that a violation of Vehicle Code section 10851 is not an eligible offense under Proposition 47, it violates equal protection.

A. ELIGIBILITY

Proposition 47 added Penal Code section 1170.18, and subdivision (a) 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.”

“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 [Penal Code] 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’ ([Pen. Code.,] § 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.’ ([Pen. Code.,] § 1170.18, subd. (g).)” (*People v. Diaz* (2015) 238

Cal.App.4th 1323, 1329.)

Section 490.2 was added to the Penal Code by Proposition 47. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Penal Code section 490.2 provides in pertinent part, “Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor.” Penal Code section 487, subdivision (a), provides that if the value of the money, labor, real or personal property taken exceeds \$950, the offense is a felony. Penal Code section 487, subdivision (d)(1), provides that

grand theft occurs if the property is an automobile. A violation of Penal Code section 487, subdivision (d)(1) can be reduced to a misdemeanor if the value of the vehicle is shown to be less than \$950.

Vehicle Code section 10851¹ can be violated by the taking of a vehicle with the intent to permanently deprive the owner of the vehicle. In *People v. Garza* (2005) 35 Cal.4th 866, the California Supreme Court “observed that [Vehicle Code] section 10851(a) ‘prescribes a wide range of conduct.’ [Citation.]” (*Id.* at p. 876.) In determining whether the defendant could be convicted of both a violation of Vehicle Code section 10851 and Penal Code section 496, receiving the same stolen vehicle, the court noted, “[T]he crucial issue usually will be whether the [Vehicle Code] section 10851[, subdivision](a) conviction is for a theft or a nontheft offense. If the conviction is for the taking of the vehicle, with the intent to permanently deprive the owner of possession, then it is a theft conviction that bars a conviction of the same person under [Penal Code] section 496[, subdivision] (a) for receiving the same vehicle as stolen property. Dual convictions are permissible, however, if the [Penal Code] section 10851[, subdivision] (a) conviction is for posttheft driving of the vehicle.” (*Garza*, at p.

¹ Vehicle Code section 10851 provides, “Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars (\$5,000), or by both the fine and imprisonment.”

881.) Assuming that a defendant takes a vehicle with the intent to permanently deprive the owner of possession and it is valued under \$950, such violation should constitute a violation of Penal Code section 490.2. The trial court here erred by finding that all violations of Vehicle Code section 10851 are not entitled to resentencing under Penal Code section 1170.18.

Nonetheless, defendant failed to meet his burden of establishing that his violation of Vehicle Code section 10851 constituted a theft offense. “[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing.” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878.) The *Sherow* court referred to background information prepared by “Judge J. Richard Couzens and Presiding Justice Tricia A. Bigelow” on Proposition 47, which provided, “The petitioner will have the initial burden of establishing eligibility for resentencing under [Penal Code] section 1170.18[subdivision](a): i.e., whether the petitioner is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. If the crime under consideration is a theft offense under [Penal Code] sections 459.5, 473, 476a, 490.2, or 496, the petitioner will have the additional burden of proving the value of the property did not exceed \$950.” (*Id.*, at p. 879.) The *Sherow* court concluded that the defendant’s petition was properly denied because it contained no facts or explanation how the value of the items taken were valued less than \$950. (*Id.* at p. 877.)

Here, defendant adduced absolutely no evidence that his violation of Vehicle Code section 10851 involved the intent to permanently deprive the owner of possession of the

1994 Honda or the value of the vehicle (in 2005 when he committed the crime). As discussed *ante*, this evidence was crucial to establishing that defendant was eligible for resentencing.

Further, the burden was not on the People to prove the value of the automobile; defendant carried the burden of alleging facts in the Petition that the value was less than \$950. As opposed to defendant's argument that he is entitled to remand to the trial court for an opportunity to litigate the issue of the value of the 1994 Honda, he failed to make a threshold showing that he qualified under Penal Code section 1170.18.

Finally, defendant makes no argument and provided nothing in the Petition regarding what affect his sentencing under Penal Code section 666.5 had on his eligibility for resentencing under Proposition 47. Penal Code section 666.5, subdivision (a) provides, "Every person who, having been previously convicted of a felony violation of Section 10851 of the Vehicle Code, or felony grand theft involving an automobile in violation of subdivision (d) of Section 487 or former subdivision (3) of Section 487, as that section read prior to being amended by Section 4 of Chapter 1125 of the Statutes of 1993, or felony grand theft involving a motor vehicle, as defined in Section 415 of the Vehicle Code, any trailer, as defined in Section 630 of the Vehicle Code, any special construction equipment, as defined in Section 565 of the Vehicle Code, or any vessel, as defined in Section 21 of the Harbors and Navigation Code in violation of former Section 487h, or a felony violation of Section 496d regardless of whether or not the person actually served a prior prison term for those offenses, is subsequently convicted of any of these offenses shall be punished by imprisonment pursuant to subdivision (h) of Section

1170 for two, three, or four years, or a fine of ten thousand dollars (\$10,000), or both the fine and the imprisonment.” Although Penal Code section 1170.18, subdivision (a) refers to Penal Code section 666, which involves a petty theft conviction with a prior qualifying conviction, it did not include Penal Code section 666.5. However, the trial court never considered the issue. Since the issue is not properly before this court, and we have concluded the Petition was inadequate, we will not address the issue on the merits.

B. EQUAL PROTECTION

Defendant argues that assuming the Proposition 47 voters intended to only reduce vehicle thefts under Penal Code section 487, subdivision (d)(1), while leaving Vehicle Code section 10851 violations as felonies, such discrimination is impermissible under the Equal Protection Clause of the United States Constitution and the California Constitution.

“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; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.)

We have concluded a person who is convicted pursuant to Vehicle Code section 10851 could be eligible for resentencing under Penal Code section 1170.18 under a properly filed petition. As such, we need not reach defendant’s equal protection claim.

DISPOSITION

The trial court’s order denying defendant’s Petition is affirmed. Nothing in this decision or in Penal Code section 1170.18 forecloses defendant’s ability to file a new petition alleging sufficient facts to support his claim that his conviction would have been a violation of Penal Code section 490.2 and addressing Penal Code section 666.5.

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MILLER
_____ J.

I concur in judgment only.

McKINSTER
_____ Acting P. J.

Slough, J., Dissenting.

I believe a defendant convicted of violating Vehicle Code section 10851, subdivision (a) (Section 10851) who establishes he was convicted of taking a vehicle valued at \$950 or less with the intent to permanently deprive the owner of possession is eligible for resentencing under Penal Code section 490.2, subdivision (a) (Section 490.2). I therefore agree with the conclusion of Justice Miller's lead opinion that the superior court erroneously concluded Section 10851 convictions are categorically ineligible. (Lead opn. *ante*, at pp. 6-7.)

I disagree, however, with how the lead opinion disposes of the case. The lead opinion affirms the superior court's erroneous order on the ground Bartlett's petition did not include evidence to show his offense was a *theft* offense or the value of the automobile he took did not exceed \$950. I believe it is a mistake to reflexively reject petitions as deficient. The superior court has discretion to allow a petitioner who has not provided enough information to amend the petition or submit additional evidence, to resolve a petition by looking to court records to determine eligibility, and to order a hearing. (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 108 [“[T]rial courts have substantial flexibility to devise practical procedures to implement Proposition 47, so long as those procedures are consistent with the proposition and any applicable statutory or constitutional requirements”].) Because the superior court ruled Bartlett's conviction was categorically ineligible, it had no reason to reach the issue of value.

In general, courts are required to be liberal in allowing amendments, permitting amendment whenever it is reasonably possible a party can cure a pleading insufficiency. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386 [failure to grant leave to amend complaint where there is a reasonable possibility the plaintiff can cure the defect “is an abuse of discretion”]; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028; see also 4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Pretrial Proceedings, § 242, p. 501; *People v. Duvall* (1995) 9 Cal.4th 464, 482 [habeas petitions].) I see no reason to employ a different standard in handling Proposition 47 petitions.

Here, Bartlett concedes in this court that the record does not establish whether he was eligible. However, if the trial court had reached the point of exercising its discretion, there was sufficient information in the record for it to conclude it was reasonably possible Bartlett could successfully amend his petition. Bartlett was convicted of either taking or driving a 1994 Honda in 2005. Accordingly, I would reverse the superior court’s order denying Bartlett’s petition and remand for further proceedings. On remand, I would allow the superior court to exercise its discretion whether determining eligibility requires augmentation of the factual record and, if so, whether to accomplish that end by ordering Bartlett to amend his petition or ordering the parties to supplement the record at an evidentiary hearing.

SLOUGH

J.