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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.

RICHARD RAINES,

Defendant and Appellant.

E064448

(Super.Ct.No. RIF133614)

OPINION

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

Affirmed in part; reversed in part with directions.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Allison V. Hawley, and Samantha L. Begovich, Deputy Attorneys General, for Plaintiff and Respondent.

On May 30, 2008, defendant and appellant Richard Raines pled guilty to six counts of second degree burglary. (Pen. Code, § 459.)<sup>1</sup> He also admitted a strike conviction and six prior prison term enhancements. Raines was sentenced to state prison for 15 years 4 months.

After passage of Proposition 47, Raines filed a petition to be resentenced claiming that each conviction would now be considered misdemeanor shoplifting pursuant to section 459, as the value of the items taken was below \$950. Plaintiff and respondent, the People, filed an opposition to the petition averring “each PC 459 2nd of Home Depot [was] under \$950, but common scheme/plan-in aggregate [is] not eligible,” and requested a hearing for an “aggregate motion.”

On September 11, 2015, the trial court denied Raines’s petition after finding that the crimes were committed within a two-week period, using the same “M.O.,” stealing essentially the same items, but different brands. Raines argues, and the People agree, by way of footnote, that it was error to aggregate the value in order to deny the petition. We agree.

As to count 6, Raines argues the burden is on the People to demonstrate the value of property taken. We disagree.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

## I

### FACTS AND PROCEDURAL BACKGROUND

On April 19, 2007, the People filed an information accusing Raines of six counts of second degree burglary. (§ 459.) On May 30, 2008, he pled guilty to all six counts, admitted all sentencing enhancements, and requested immediate sentencing.

On January 28, 2015, Raines filed a petition for resentencing, which the People opposed. At the September 11, 2015 hearing on the petition, the People asked that the police report be filed under seal, which it was, and the report served as the document which established the value of the property on each count. The value for each count was itemized by counsel for defendant as follows: Count 1, \$629; count 2, \$499; count 3, \$729; count 4, “which I am submitting on, is \$1,258”;<sup>2</sup> count 5, \$469.94; and “[c]ount 6 is not mentioned anywhere in the report, nor is the incident explained.”

After argument, the trial court ruled that Raines’s conduct of going to the same exact store within a short period of time to steal essentially the same items, demonstrated an intent to commit grand theft, and ruled that he was not eligible for relief.

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<sup>2</sup> Since Raines conceded and the evidence demonstrated the value of the property as to count 4 was in excess of \$950, count 4 is not at issue on appeal.

## II

### DISCUSSION

#### A. Statutory Background

On November 4, 2014, the California voters enacted “The Safe Neighborhoods and Schools Act” (Proposition 47), which became effective the next day. (Cal. Const., art. II, § 10, subd. (a).) Proposition 47 reduced various drug possession and theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

Before Proposition 47, second degree burglary was a wobbler offense, punishable as a felony or a misdemeanor. (§§ 459-461.) Proposition 47 added section 459.5, which states in relevant part: “*Notwithstanding Section 459*, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a), italics added.) Proposition 47 makes this new offense of *shoplifting* a misdemeanor, provided the defendant does not have a prior conviction for a strike offense listed in section 667, subdivision (e)(2)(C)(iv), or a sex offense requiring registration pursuant to section 290, subdivision (c). (§ 459.5, subd. (a).)

Proposition 47 also added a new sentencing provision to the Penal Code. (*People v. Rivera, supra*, 233 Cal.App.4th at p. 1092.) Section 1170.18, subdivision (a), provides a defendant serving a sentence for a felony conviction may petition for resentencing if he “would have been guilty of a misdemeanor under [Proposition 47] . . . had [it] been in effect at the time of the offense.” Under section 1170.18, subdivision (b), “[t]he trial court must then determine if the petitioner is eligible for resentencing; if so, the trial court *must* recall and resentence the petitioner, unless it determines that doing so ‘would pose an unreasonable risk of danger to public safety.’ ”<sup>3</sup> (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 924, italics added.)

*B. The Trial Court Erred in Aggregating the Counts to Find Appellant Ineligible*

Raines argues the evidence submitted during the hearing demonstrated four of the counts (1, 2, 3, 5) were eligible for Proposition 47 relief, as the value of the property stolen in each of those individual counts did not exceed \$950. He further argues the trial court erred when it aggregated the individual counts to find he was ineligible. The

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<sup>3</sup> Section 1170.18, subdivision (c), defines “unreasonable risk of danger to public safety” to mean “an unreasonable risk that the petitioner will commit a new violent felony” under section 667, subdivision (e)(2)(C)(iv), i.e., a super-strike offense, such as murder, rape, or child molestation. (*People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1309.)

People, by way of footnote 4, concedes aggregation is a disapproved theory upon which to reject an application for resentencing.

We hold that when a petitioner seeks resentencing on multiple convictions of section 459, the court must consider the value of the property involved in each conviction separately, and cannot simply review the underlying facts of each offense and aggregate the value of the property from each count to deny the petition. This holding is consistent with the holding in *People v. Hoffman, supra*, 241 Cal.App.4th 1304, where the Court of Appeal, Second District, reversed the denial of the defendant's resentencing petition because the trial court had aggregated the amounts of the forged checks from separate forgery convictions. (*Id.* at pp. 1308-1310.) The trial court had concluded the defendant fell "outside the spirit of the law" because the "aggregate amount" of the forged checks exceeded \$950. (*Id.* at p. 1308.) The court stated: "The trial court may not refuse to reduce a defendant's sentence based on the court's notion of the statute's 'spirit.' The 'criteria' for resentencing are explicitly stated in section 1170.18, subdivision (a), and . . . [i]f the criteria are met, and the resentencing does not pose an unreasonable risk of a new super-strike offense, the 'felony sentence shall be recalled and the petitioner resentenced to a misdemeanor.'" (*Id.* at p. 1131.) Similarly, in this case, the trial court errs when it reviews the circumstances of the individually charged crimes to determine the date of the crimes, the similarity of the items taken, and the modus operandi is consistent with *grand theft* rather than *petty theft*, and as such denies the petition.

The drafters of Proposition 47 knew how to indicate when aggregation was allowed. Section 476a (delivering a check with insufficient funds) states that ‘if the *total amount* of all checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering [with insufficient funds] does not exceed nine hundred fifty dollars (\$950), the offense is punishable only by imprisonment in the county jail.’ (§ 476a, subd. (b), italics added.) Section 459.5 does not contain this “total amount” language. Instead, the misdemeanor characterization for shoplifting depends on the “value of the property that is taken.” (§ 459.5, subd. (a).) Accordingly, we reverse the trial court’s order denying Raines’s petition as to counts 1, 2, 3, and 5.

*C. Appellant Failed to Carry His Burden as to Count 6*

As stated above, during the hearing on the petition, the prosecutor filed the police report with the court under seal. Raines argued that the report supplied sufficient evidence to demonstrate the value of the property in counts 1, 2, 3, and 5 rendering him eligible for resentencing on those counts. However, there was no evidence submitted, in the police report or otherwise, related to count 6. As such, the trial court did not err when finding count 6 ineligible for resentencing.

“[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.) Raines had the burden of showing that count 6 qualified as shoplifting pursuant to the

newly enacted section 459.5. He did not. Therefore, the trial court correctly denied the petition on that count.

It is settled by statute that “[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500.) Proposition 47 itself is silent as to the burden of proof, so Evidence Code section 500 controls. As a result, a petitioner for resentencing under Proposition 47 must establish his or her eligibility for resentencing. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136.) Raines was required to establish that the charge was a qualifying charge, and that the value of the items stolen did not exceed \$950. Raines did not present any evidence to meet his burden as to value on count 6. The trial court did not err in denying the petition as to that count.

### **III**

#### **DISPOSITION**

The trial court’s order denying the resentencing petition is reversed as to counts 1, 2, 3, and 5, as there is no dispute that these second degree burglary convictions each involved less than \$950. We direct the trial court to grant the petition as to those counts on remand, unless it finds that resentencing him would “pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).)

We affirm the trial court order as to count 6. However, nothing in this decision or in section 1170.18 forecloses Raines's ability to file a new petition that supplies evidence of his eligibility on that count.

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SLOUGH  
J.

We concur:

HOLLENHORST  
Acting P. J.

MILLER  
J.