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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.

DARIUS ANTHONY MARTIN,

Defendant and Appellant.

E064641

(Super.Ct.No. PEF003133)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan,  
Judge. Reversed and remanded with directions.

Paul Stubb Jr., 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, Senior Assistant Attorney General, and A.  
Natasha Cortina, Meagan J. Beale, and Annie Featherman Fraser, Deputy  
Attorneys General, for Plaintiff and Respondent.

Darius Anthony Martin (defendant) filed a petition for resentencing pursuant to Proposition 47. The People conceded that he was entitled to resentencing. Nevertheless, the trial court denied the petition. In light of the People's concession, we will reverse.

## I

### PROCEDURAL BACKGROUND

In 2000, after a jury trial, defendant was convicted on a total of 26 felony counts, as follows:

1. Three counts of robbery (Pen. Code, § 211);
  2. Sixteen counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b));
  3. Two counts of assault with a deadly weapon on a peace officer (Pen. Code, § 245, subd. (c));
  4. Two counts of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1));
  5. One count of unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a));
  6. One count of recklessly evading a peace officer (Veh. Code, § 2800.2);
- and
7. One count of receiving stolen property (Pen. Code, § 496).

He was sentenced to a total of 35 years 4 months in prison. The sentence for receiving stolen property was stayed pursuant to Penal Code section 654.

On November 5, 2014, Proposition 47 went into effect. (See *People v. Esparza* (2015) 242 Cal.App.4th 726, 735.)

In December 2014, defendant, in propria persona, filed a petition for resentencing pursuant to Proposition 47. In the petition, he checked the box for, “Defendant believes the value of the check or property does not exceed \$950.”

The People filed a response conceding that “[d]efendant . . . *is entitled* to resentencing.” (Emphasis in original.) They added, “People waive presence and agree court may resentence.” Nevertheless, in May 2015, the trial court summarily denied the petition.

On September 22, 2015, without a hearing, the trial court ordered:

“On the Court’s own motion:

“The Court has determined that no notice was given as to the Court[’]s ruling until 09/03/15.

“Therefore; Notice of Appeal time begins as of 09/13/15.”

On October 13, 2015, defendant filed a notice of appeal.

## II

### THE TIMELINESS OF THE APPEAL

We perceived a preliminary issue regarding the timeliness of the appeal. At our request, the parties have filed supplemental briefs addressing this issue.

Defendant filed his notice of appeal more than 60 days after the entry of the order denying his petition. On September 22, 2015, however, the trial court determined that he had not been given notice of the order until September 3, 2015, and therefore his time to appeal was tolled.

In a criminal appeal, “a notice of appeal . . . must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.” (Cal. Rules of Court, rule 8.308(a).) Moreover, subject to one exception not applicable here, “no court may extend the time to file a notice of appeal.” (*Ibid.*)

Although the rule speaks in terms of the “making” of the order, rather than “notice” of the order, we are required to give it a liberal construction. (Cal. Rules of Court, rule 1.5(a).) In *People v. Griggs* (1967) 67 Cal.2d 314, the Supreme Court gave just such a liberal construction to the predecessor of the current rule.

In *Griggs*, after the defendant was convicted, sentenced, and imprisoned, he filed a motion in propria persona to set aside the judgment. (*People v. Griggs, supra*, 67 Cal.2d at pp. 315-317.) On August 12, 1966, the trial court denied the motion. It mailed notice to the defendant, which arrived at the prison on August 17, 1966. On August 24, 1966, the defendant filed a petition for writ of *coram nobis* in the court of appeal. On September 27, 1966, he filed a notice of appeal. (*Id.* at p. 316.) At that time, a criminal appeal had to be filed within 10 days after the making of the challenged order. (*Ibid.*, citing Cal. Rules of Court, former rule 31(a).)

The Supreme Court held that the *coram nobis* petition could be deemed to be a notice of appeal. (*People v. Griggs, supra*, 67 Cal.2d at pp. 317-318.) It then further held that this “notice of appeal” was timely, even though it was filed 12 days after the order appealed from: “[T]he period for filing a notice of appeal does not begin to run against a prisoner, whose only contact with the courts is through the mail, until the prisoner receives the order from which he seeks to appeal. In this case the superior court denied petitioner’s motion on August 12, but the superior court’s order did not arrive at Soledad until August 17. Petitioner’s ‘notice of appeal’ was received by the Court of Appeal no later than August 25, or well within the 10 days allowed by rule . . . .” (*Id.* at p. 318.)

Here, defendant was in *propria persona*, so his only contact with the courts was through the mail. Hence, his time to file a notice of appeal did not begin to run until he received notice of the order appealed from. According to the trial court, the notice was not even given until September 3, 2015. Indeed, the People concede that “[n]otice of the order was not sent to appellant until September 3, 2015.” Defendant filed his notice of appeal less than 60 days thereafter.<sup>1</sup> We therefore conclude that the appeal is timely.

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<sup>1</sup> It is not clear why the trial court found that notice was given on *September 3*, yet ruled that the time to appeal started on *September 13*. One of these may be a typographical error. Alternatively, it may have been allowing 10 days for the notice to reach defendant at the prison. The notice of appeal was timely based on either date.

We commend the People for forthrightly citing *Griggs* and for graciously conceding that the appeal is timely.

### III

#### THE VALUE OF THE PROPERTY WAS ADEQUATELY ESTABLISHED

In general, as relevant here, Proposition 47 reduced specified theft-related offenses — provided they involve property worth \$950 or less — from felonies (or wobblers) to misdemeanors. (Couzens & Bigelow, Proposition 47: “The Safe Neighborhoods and Schools Act” (May 2016 rev. ed.) pp. 24-28.<sup>2</sup>)

The specified offenses include receiving stolen property in violation of Penal Code section 496, subdivision (a). Thus, Penal Code section 496, subdivision (a) now provides: “[I]f the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor . . . .”

Proposition 47 also allowed persons previously convicted of one of the specified offenses as a felony to petition to reduce the conviction to a misdemeanor. Specifically, it enacted Penal Code section 1170.18, which, as relevant here, provides:

“(a) A person currently serving a sentence for a conviction . . . 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

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<sup>2</sup> Available at <<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>>, as of October 27, 2016.

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.

“(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to 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, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

A defendant is not eligible for resentencing under Proposition 47 if he or she has a disqualifying prior conviction. The disqualifying prior convictions are those listed in Penal Code section 667, subdivision (e)(2)(C)(iv) — nicknamed “super-strikes” — as well as those requiring sex offender registration under Penal Code section 290. (E.g., Pen. Code, § 496, subd. (a).) Here, the People do not claim that defendant has any disqualifying prior conviction.

The People's *only* argument for affirmance is that defendant failed to show that the value of the property was \$950 or less. It has been held that a petitioner seeking relief under Proposition 47 has the burden to show that he or she is eligible for resentencing, including, when applicable, that the value of the property involved was \$950 or less. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880.)

Here, however, the People conceded that defendant was eligible for resentencing. Moreover, they conceded that the trial court could resentence defendant, and they waived their right to be present when it did so. "Because the prosecutor affirmatively agreed the value of the [property involved] was less than \$950, thus reflecting there was no issue as to value in the trial court, we will find the value element has been satisfied. [Citation.]" (*People v. Mutter* (2016) 1 Cal.App.5th 429, 436.)

The People do not contend that resentencing defendant would pose an unreasonable risk of danger to public safety. In any event, they forfeited any such contention by conceding below that defendant was entitled to be resentenced.

Accordingly, we will reverse and remand with directions to resentence defendant.

IV

DISPOSITION

The order denying defendant's petition is reversed. On remand, the trial court shall resentence defendant.

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RAMIREZ

P. J.

I concur:

HOLLENHORST

J.

[*People v. Martin*, E064641]

MILLER, J., Dissenting

I respectfully dissent to that part of the majority opinion reversing the trial court's summary denial of defendant's petition to recall his sentence (Petition). Specifically, I reject the finding that the People's form response stating defendant was entitled to resentencing and waiving their appearance at any hearing, provided the "value element" required to show defendant qualified for resentencing under Proposition 47.

Defendant had to make an initial prima facie evidentiary showing that his felony conviction of receiving stolen property (Pen. Code, § 496) constituted a misdemeanor because the value of the property was less than \$950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878 ["It is a rational allocation of burdens if the petitioner in such cases bears the burden of showing that he or she is eligible for resentencing of what was an otherwise valid sentence"]; see also *People v. Bush* (2016) 245 Cal.App.4th 992, 1007-1008.) Defendant only stated in the Petition he believed the value of the property received was less than \$950. He provided no evidence, by either a declaration or documents, establishing the true value of the property. Even though the People conceded in the form response defendant was entitled to be resentenced, and waived their presence at any hearing, this did not provide evidence that was necessary for the trial court to grant relief. The People did not appear in court and attest on the record that based on their knowledge of defendant's conviction, the value did not exceed \$950. The

value of the property was never established. There were no facts supporting the Petition and the People's concession in a form response did not provide this evidence.

I would affirm the judgment without prejudice to defendant filing a new petition providing the necessary evidence through a declaration or other documentary evidence showing the value of the property he received was less than \$950.

MILLER

J.