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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.

PAUL EUGENE COUSIN,

Defendant and Appellant.

E064756

(Super.Ct.No. RIF1401312)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster (Retired judge of the Riverside Super Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Richard L. Fitzer, 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, Allison V. Hawley, and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Paul Eugene Cousin appeals an order denying his request to correct his sentence for a 2014 robbery conviction. After remand following appeal of his robbery conviction, the trial court struck one improper enhancement at the direction of this court. However, the trial court left in place another enhancement based on a 2000 drug possession conviction that had been reduced to a misdemeanor under Penal Code section 1170.18, subdivision (f) while the appeal of the robbery conviction was pending. The trial court denied Cousin's subsequent request to correct the sentence on the ground the robbery conviction was a felony at the time of sentencing. We conclude Penal Code section 1170.18, subdivision (k) reflects the voters' intent that, for the narrow class of defendants convicted before Proposition 47 passed but whose convictions were not subject to final judgment when their prior convictions were redesignated, their redesignated offenses not be used as the basis for sentencing enhancements.

We therefore reverse.

I

FACTUAL BACKGROUND

On March 28, 2000, Cousin was convicted of one felony count of drug possession (Health & Saf. Code, § 11350, subd. (a)) for which he served a term in state prison.

On April 24, 2014, a jury convicted Cousin of second degree robbery (§ 211)¹ for stealing \$20, apparently from an acquaintance on the street outside a motel.

¹ Unlabeled statutory citations refer to the Penal Code.

On June 6, 2014, the trial court imposed an aggregate sentence of nine years, which included a midterm sentence of three years for the robbery conviction and a one-year enhancement for the 2000 drug possession prior. On June 25, 2014, Cousin filed a notice of appeal with this court challenging his 2014 robbery conviction.²

While his appeal was pending, the California electorate passed The Safe Neighborhoods and Schools Act (Proposition 47), and Cousin sought to take advantage of its provisions. Among other things, Proposition 47 reclassified violations of Health and Safety Code section 11350, subdivision (a) as misdemeanors and created a process for offenders who had completed their sentences for such convictions to apply to have them redesignated. (Pen. Code, § 1170.18, subd. (f).) Proposition 47 also provides offenses, once redesignated, be treated as misdemeanors “for all purposes.” (Pen. Code, § 1170.18, subd. (k).)

On July 15, 2015, the trial court granted Cousin’s petition to redesignate his 2000 drug possession conviction as a misdemeanor. The trial court “deemed [the conviction] a misdemeanor pursuant to PC 1170.18” and “amend[ed] [it] to a violation of M11350(A) HS.”³

² We take judicial notice of certain court records related to Cousin’s appeal and motion to correct his sentence. (Evid. Code, § 452, subd. (d).)

³ We grant Cousin’s December 29, 2015 request for judicial notice of the trial court’s minute order granting his petition to redesignate his 2000 conviction. (Evid. Code, §§ 452, subd. (d); 453.) Cousin provided the court and the People with a copy of the minute order and the People did not object.

On June 9, 2015, a panel of this court issued an opinion affirming Cousin’s 2014 robbery conviction, but modifying his sentence by striking a different prison prior enhancement and ordering the trial court to issue an amended abstract of judgment. On August 25, 2015, after the Supreme Court denied review, this court issued its remittitur.

On September 1, 2015, the trial court held an ex parte hearing to review the remittitur. The trial court filed a new abstract of judgment reflecting the modified sentence.

On September 23, 2015, Cousin sent a letter to the trial court asking the court to correct his sentence. On October 1, 2015, the trial court denied Cousin’s request because, “[t]his case is closed . . . [and] [t]he fact that an offense is now a misdemeanor does not change the fact that it was a felony at time of sentencing.” Cousin appealed.

II

DISCUSSION

Cousin contends the trial court erred by denying his request to correct his sentence because his prior conviction had been redesignated a misdemeanor and did not qualify as a prison prior within the meaning of section 667.5, subdivision (b) (section 667.5(b)) for purposes of his request under section 1170.18, subdivision (k) (section 1170.18(k)). We agree.

We interpret voter initiatives like Proposition 47 de novo, applying the same principles that govern the construction of statutes passed by the Legislature. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136.) The basic purpose of statutory interpretation

is to determine the intent of the lawmakers so we may effectuate the purpose of the law. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) Because Proposition 47 “was enacted by the electorate, it is the voters’ intent that controls.” (*People v. Park* (2013) 56 Cal.4th 782, 796 (*Park*)). We look first to the text of the statute. When the text is clear and unambiguous, we apply it without recourse to interpretive aids. However, when the text bears more than one reasonable interpretation, we look to the purpose and goals of the statute, the problems it seeks to remedy, public policy, and legislative history or voter pamphlets, as well as the overall statutory scheme of which the statute is a part, any of which may aid us in choosing between rival interpretations. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008; *People v. Rizo* (2000) 22 Cal.4th 681, 685.) “If a penal statute is still reasonably susceptible to multiple constructions, then we ordinarily adopt the ‘ ‘construction which is more favorable to the offender.’ ’ ” (*People v. Rizo*, at pp. 685-686.)

A. Section 1170.18(k) Applies Prospectively to Enhancements

We begin with the question whether, setting aside the retroactivity issue, section 1170.18(k) entitles offenders to object to the imposition of one-year enhancements based on prior convictions the trial court has reduced to misdemeanors.

Imposing a one-year enhancement based on a prison prior requires proof defendant (1) was convicted of a felony, (2) was imprisoned as a result, (3) completed the term of imprisonment, and (4) did not remain free for five years of prison custody and committing a new offense that resulted in a felony conviction. (§ 667.5, subd. (b); *In re*

Preston (2009) 176 Cal.App.4th 1109, 1115.) By imposing a one-year enhancement based on Cousin’s 2000 drug possession conviction, the trial court determined Cousin had been convicted of a felony. Cousin’s request to correct his sentence asked the trial court to revisit that determination as of the time his prior conviction had become a misdemeanor.

Proposition 47 changed portions of the Health and Safety and Penal Codes to reduce certain drug possession and theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. The initiative also created a petitioning procedure designed to allow offenders who had previously been convicted of reclassified offenses to have their convictions reclassified and their sentences reduced. (Pen. Code, § 1170.18, subs. (a), (b), (f), & (g); *People v. Jones* (2016) 1 Cal.App.5th 221, 228 (*Jones*)). The plain language of the initiative therefore made those changes retroactive, that is it “allows offenders to seek redesignation of and resentencing on felony convictions” even if they “have become final.” (*Jones*, at p. 228.)

The plain language of Proposition 47 also explicitly anticipates redesignation of an offense as a misdemeanor will affect the collateral consequences of felony convictions. Among other things, suffering a felony conviction may result in the offender losing the right to vote (Elec. Code, § 2101), losing the right to own or possess a firearm (Pen. Code, § 29800, subd. (a)(1)), and, if the offender is convicted of a felony in the future, losing probation as a sentencing option (Pen. Code, § 1203, subd. (e)) and being exposed to

sentence enhancements (Pen. Code, § 667.5, subd. (b)). To ensure qualified offenders who have had prior convictions redesignated can gain relief from those collateral consequences, Penal Code section 1170.18, subdivision (k) directs “[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes.*” (Italics added.)

The “for all purposes” language is broad and there is nothing to suggest it encompasses other collateral consequences of a felony conviction, but excludes exposure to subsequent sentence enhancements. On the contrary, section 1170.18(k) by its terms applies to all such consequences except that redesignation “shall not permit that person to own, possess, or have in his or her custody or control any firearm.” The statement of such a “specific exception[] implies the exclusion of others.” (*Hisel v. County of Los Angeles* (1987) 193 Cal.App.3d 969, 974.) We therefore hold the plain language of 1170.18(k) shows the voters intended redesignated misdemeanor offenses should be treated like any other misdemeanor offense, except for firearm restrictions. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 746 (*Abdallah*) [“Once the trial court recalled Abdallah’s 2011 felony sentence and resentenced him to a misdemeanor, section 1170.18, subdivision (k), reclassified that conviction as a misdemeanor ‘for all purposes’”].) It follows that section 1170.18(k) requires courts to treat prior felony convictions redesignated under section 1170.18, subdivisions (b) or (g) as misdemeanors when determining whether the prior conviction supports imposing an enhancement under

section 667.5(b). (*Abdallah*, at p. 746 [holding trial court erred by imposing a one-year sentence enhancement because “Abdallah was not a person who had committed ‘an offense which result[ed] in a felony conviction’”].)

Our conclusion finds support in section 17, subdivision (b) (section 17(b)), which contains similar language directing a crime designated a misdemeanor “is a misdemeanor for all purposes.” Section 17(b) addresses when a crime which can be punished as a felony or a misdemeanor (a wobbler) must be treated as a misdemeanor. The statute directs an offense “is a misdemeanor for all purposes” when, among other circumstances, “the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.” (§ 17, subd. (b)(3).) The California Supreme Court has interpreted that language to mean once a court designates an offense as a misdemeanor, “the offense *thereafter* is deemed a ‘misdemeanor for all purposes,’ except when the Legislature [or electorate] has specifically directed otherwise.” (*Park*, *supra*, 56 Cal.4th at p. 795, italics added.) In *Park*, the trial court enhanced a sentence by five years because the offender had suffered a prior serious felony conviction. However, the court presiding over the prior case had reduced the prior offense to a misdemeanor under section 17(b) before defendant committed the second offense. (*Park*, at p. 787.) The Supreme Court held “when the court in the prior proceeding properly exercised its discretion by reducing the [felony] conviction to a misdemeanor, that offense no longer

qualified as a prior serious *felony* . . . and could not be used . . . to enhance defendant’s sentence.” (*Ibid.*)

We reach the same conclusion here. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6 [recognizing “the rule of statutory construction that identical language appearing in separate statutory provisions should receive the same interpretation when the statutes cover the same or analogous subject matter”].) Cousin successfully petitioned to have his 2000 drug possession felony conviction redesignated a misdemeanor. Once the trial court redesignated that conviction a misdemeanor, “section 1170.18, subdivision (k) reclassified that conviction as a misdemeanor ‘for all purposes.’” (*Abdallah, supra*, 246 Cal.App.4th at p. 746.) When Cousin requested to have his sentence corrected after his prior conviction had been redesignated a misdemeanor, he was not a person who had committed “an offense which result[ed] in a felony conviction.” (See *Park, supra*, 56 Cal.4th at p. 799; see also *Abdallah*, at p. 746.) At that point, his sentence was unauthorized.⁴ (See § 667.5, subd. (b).)

It does not matter that Cousin’s sentence was valid at the time the trial court imposed it. Once the trial court redesignated the prior conviction as a misdemeanor, it is

⁴ We cannot conclude the enhancement remains appropriate despite its redesignation as a misdemeanor on the ground enhancements are punishment for the fact an offender committed another offense after serving a prison term rather than for the underlying crime. The enhancement statute allows the enhancement *only if* the offender has a felony conviction *and* has served a term of imprisonment as a result. (§ 667.5, subd. (b); *In re Preston, supra*, 176 Cal.App.4th at p. 1115.) Cousin no longer has a prior felony conviction, and that alone renders the enhancement unauthorized.

deemed a misdemeanor for all purposes arising *thereafter*, and Cousin obtained redesignation of his prior conviction before asking the trial court to correct his sentence.

B. Section 1170.18(k) Applies to Non-Final Enhancements

We next ask whether Cousin’s request to correct his sentence seeks improper retroactive application of section 1170.18(k). The People contend we should reject Cousin’s appeal on the ground it does. We disagree because Cousin asks us to apply section 1170.18(k) to correct a sentence that was not yet subject to final judgment.

We have held elsewhere that Proposition 47 does not allow “the courts to strike prison prior enhancements imposed prior to Proposition 47 based on prior convictions redesignated as misdemeanors after judgment and sentence have become final.” (*Jones, supra*, 1 Cal.App.5th at p. 229.) Cousin does not ask us to depart from the holding in *Jones*. *Jones* holds section 1170.18(k) is not retroactive in the sense that it does not allow a successful petitioner to attack an enhancement if the judgment and enhanced sentence have become final. Cousin asks us to recognize only that section 1170.18(k) applies to allow striking an enhancement imposed in the narrow class of pending cases, where the sentence and judgment are *not* final when the court redesignated the prior conviction.

Under long-settled precedent, “where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.” (*In re Estrada* (1965) 63 Cal.2d 740, 748 (*Estrada*)). However, “[t]he key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of

conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.” (*Id.* at p. 744.) “A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari [with the United States Supreme Court] have expired.” (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.) This precedent requires us to recognize section 1170.18(k) allows successful Proposition 47 petitioners to attack enhancements that are not subject to final judgment.

Our Supreme Court adopted this rule based on legislative intent. “When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (*Estrada, supra*, 63 Cal.2d at p. 745.) The Supreme Court noted the Legislature could indicate a desire that a defendant be punished under the law in existence at the time the offense was committed by enacting a saving clause spelling out such an intent, but held “[i]f there is no saving clause [the defendant] can and should be punished under the new law.” (*Ibid.*)

The same principles guide our interpretation of the intent of the voters in passing ballot initiatives. (*Park, supra*, 56 Cal.4th at p. 796.) We therefore conclude the electorate, in passing Proposition 47, determined the penalties for drug possession crimes like Cousin’s were too severe and intended to reduce those penalties in every case to which the proposition constitutionally could apply. As we discussed in part II.A., *ante*, section 1170.18(k) shows the voters specifically anticipated redesignating a conviction as a misdemeanor would have collateral effects and directs that a redesignated offense “shall be considered a misdemeanor for *all* purposes.” (Italics added.) This language is broad and not limited by a saving clause that would indicate the voters intended offenders should continue being punished under the old law. The plain language of the statute therefore indicates the voters intended offenders should be able to avoid punishment for redesignated offenses imposed through section 667.5(b) enhancements, so long as they are not subject to final judgment. Consistent with this understanding, the statute specifies it does not apply to convictions or sentences that are subject to final judgment.

(§ 1170.18, subd. (n) [“Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act”].)

We therefore conclude offenders may challenge enhancements based on redesignated convictions so long as the enhanced sentence is not subject to a final judgment.

(§ 1170.18, subd. (k).)

Here, Cousin committed his offense and was convicted and sentenced months before the electorate passed Proposition 47. But his conviction and sentence were on

appeal to this court when the initiative passed on November 4, 2014 and were on a petition for review in the California Supreme Court when the trial court redesignated his prior conviction on July 15, 2015. Thus, Proposition 47 provided a means for Cousin to mitigate punishment, and Cousin successfully took advantage of that procedure *before judgment became final*. Cousin’s motion to correct his sentence therefore did not seek to apply Proposition 47 in a manner not approved by the voters.

At oral argument, the People argued the *Park* decision supports the contrary view based on dicta indicating a defendant whose prior felony sentence the court reduced to a misdemeanor under section 17(b) “would be subject to the . . . enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor.” (See *Park, supra*, 56 Cal.4th at p. 802.) The People contend this language shows Evans is not entitled to relief because he committed and was convicted of his 2015 offenses before the court redesignated his 2007 offense to a misdemeanor under Proposition 47. *Park* does not support that conclusion.

As we discussed above, the *Estrada* rule applies to section 1170.18(k) because Proposition 47 expresses the electorate’s determination that we have punished a class of offenders too harshly. That determination implies the benefits of Proposition 47 “should apply to every case to which it constitutionally could apply,” including to pending cases in which judgment is not yet final. (*Estrada, supra*, 63 Cal.2d at p. 745.)

Section 17(b) is different. As the *Park* court explained at length, section 17(b) recognizes incarceration in state prison may not be appropriate for some defendants—not

a class of offenders—who commit wobbler offenses. (*Park, supra*, 56 Cal.4th at p. 790.) To address this concern, the provision invests the trial court with the discretion to classify convictions for wobbler offenses as misdemeanors if doing so would be more likely to rehabilitate the particular offender. (*Ibid.*) Thus, section 17(b) is *not* a provision expressing the electorate or legislature’s determination “that its former penalty was too severe and that a lighter punishment is proper.” (*Estrada, supra*, 63 Cal.2d at p. 745.) Rather, section 17(b) intentionally and explicitly leaves that judgment up to the trial court. The *Estrada* rule therefore does not apply to section 17(b) and the Supreme Court’s discussion of that provision in *Park* could not implicate, much less answer, the question we face here.

The People’s argument is wrong for the additional reason that *Park* does not address retroactivity at all. As discussed in part II.A. above, *Park* involved the *prospective* consequence of the trial court’s decision to reduce the defendant’s wobbler offense to a misdemeanor. (*Park, supra*, 56 Cal.4th at p. 787 [“when the court in the *prior proceeding* properly exercised its discretion by reducing the [felony] conviction to a misdemeanor, that offense . . . could not be used [thereafter]. . . to enhance defendant’s sentence”].) We therefore conclude the People’s reliance on *Park* to avoid the application of the *Estrada* rule is doubly misguided. (See *People v. Jenkins* (2010) 50 Cal.4th 616, 684 [“ ‘The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning’ ”].)

C. *Timing of Request to Correct Sentence*

Finally, we ask whether the fact, noted by the trial court, that Cousin's case was "closed" when Cousin filed his request to correct the sentence was a basis for denying the request. We conclude it was not.

In general, "[t]here is no statutory authority for a trial court to entertain a postjudgment motion that is unrelated to any proceeding then pending before the court. . . . In most cases, after the judgment has become final, there is nothing pending to which a motion may attach." (*People v. Picklesimer* (2010) 48 Cal.4th 330, 337.) The Supreme Court recognized, however, that there are "exceptions to the rule precluding postjudgment motions." (*Ibid.*) Among the exceptions the Supreme Court recognized are motions seeking to correct unauthorized sentences, "which the trial court would have . . . jurisdiction to correct at any time." (*Id.* at p. 338; see also *People v. Fares* (1993) 16 Cal.App.4th 954, 958 ["There is no time limitation upon the right to make [a] motion to correct the sentence"]; *People v. Massengale* (1970) 10 Cal.App.3d 689, 693 ["When a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court"].)

People v. Reyes (1989) 212 Cal.App.3d 852, 855 is instructive on this point. In *Reyes*, the trial court entered an erroneous sentence on March 31, 1981, which the Court of Appeal affirmed on September 17, 1982 without noticing the error. Nearly four years later, the Department of Corrections notified the trial court that the sentence was

incorrect. (*Id.* at p. 856.) On March 25, 1988, nearly seven years after the sentence was imposed and over five years after the appellate court affirmed the sentence, the trial court determined it had erred in designating an indeterminate term as the principal term and a determinate term as a subordinate term. Correcting the sentence resulted in a longer term of imprisonment because the determinate term was not reduced to one-third of the midterm and it was required that the determinate term be served before the indeterminate term. (*Ibid.*) On appeal, the Second Appellate District “conclude[d] that it was permissible to make appellant’s sentence conform to the law’s demands.” (*Id.* at p. 858.) The same reasoning applies to this case.

Cousin’s sentence was unauthorized when the trial court entered it on September 1, 2015 and when Cousin sought to correct it two weeks later. “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) To qualify, the error in the sentence must be “ ‘clear and correctable’ independent of any factual issues presented by the record at sentencing.” (*Ibid.*) Such is the case here. As we discussed in part II.A., *ante*, once Cousin succeeded in having his 2000 drug possession prior conviction reduced to a misdemeanor, it no longer qualified as the basis for a prison prior enhancement under section 667.5(b) as a matter of law. There was, therefore, no circumstance in which the trial court could lawfully impose such an enhancement. Accordingly, we conclude Cousin’s sentence is unauthorized, strike the prison prior term based on his 2000

conviction, and subtract one year from his sentence. (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1165 [Court of Appeal “may correct an unauthorized sentence”].)

III

DISPOSITION

We reverse the order denying Cousin’s request to correct his sentence. Cousin’s sentence is modified to a total of seven years in prison. We direct the trial court to issue an amended abstract of judgment consistent with this opinion and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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SLOUGH
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.