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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.

GARY LEWIS RUBLE,

Defendant and Appellant.

E065459

(Super.Ct.No. FBA900453)

OPINION

APPEAL from the Superior Court of San Bernardino County. Dwight W. Moore, Judge. Affirmed.

Matthew Missakian, 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, Annie Featherman Fraser, and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

## I

### INTRODUCTION

Defendant Gary Lewis Ruble appeals from an order denying his petition for resentencing. (Pen. Code, § 1170.18, subd. (f).)<sup>1</sup>

The issue—whether a conviction for unlawful driving or taking of a vehicle under Vehicle Code section 10851, subdivision (a) (section 10851(a)), qualifies for resentencing under Proposition 47—is under review by the California Supreme Court. Even assuming that Proposition 47 does apply to section 10851(a) convictions arising from the theft of a vehicle worth no more than \$950, defendant did not meet his initial burden of establishing (1) that his section 10851(a) conviction was based on theft and not joyriding and (2) that the value of the vehicle was \$950 or less. For both reasons, we affirm the order denying defendant’s petition without prejudice to defendant filing another petition.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

In July 2009, defendant was charged with one felony count of unlawful driving or taking of a vehicle (§ 10851(a)) and multiple prior convictions (§ 667.5, subd. (b).) At the preliminary hearing, two deputy sheriffs testified that they had located a stolen red Volkswagen after it had been driven by defendant. The police report included the information that defendant was planning to resell the vehicle for \$500 or \$550.

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

On September 11, 2009, defendant pleaded guilty and the prior convictions were stricken. The court sentenced defendant to a prison term of 16 months.

On January 6, 2016, defendant filed a petition for resentencing to have his felony designated as a misdemeanor. The district attorney responded that section 10851(a) was not a qualifying felony. On January 21, 2016, the trial court denied defendant's petition.

### III

#### PROPOSITION 47 ELIGIBILITY

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 changed certain felony or wobbler drug-related offenses to misdemeanors unless the offenses were committed by ineligible defendants. (*Id.* at p. 1091; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47's addition of section 490.2 states that, "[n]otwithstanding 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." (§ 490.2, subd. (a).) Persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.)

Defendant argues that he is eligible for Proposition 47 resentencing if his section 10851(a) conviction was for the theft of a car worth \$950 or less. The question of whether a section 10851(a) conviction can qualify for relief under Proposition 47 is

pending before the California Supreme Court. (*People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, (S235041); *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted, June 8, 2016, S234150).)<sup>2</sup>

In *Solis*, like here, defendant argued that Proposition 47 applied to her felony conviction for taking or driving a vehicle under section 10851(a). The court disagreed and reasoned that section 490.2 neither redefines nor establishes a substantive theft offense. Rather, section 484, subdivision (a), defines theft as to steal or obtain property and a defendant must take the property with the specific intent permanently to deprive the owner of possession. Section 490.2 reclassifies theft as petty theft whenever the stolen property is worth \$950 or less. Accordingly, to convict a defendant of either grand theft or petty theft of an automobile, the People must prove the defendant intended permanently to deprive the owner of possession of his car. (*People v. Solis, supra*, 245 Cal.App.4th at pp. 1107-1108, rev. gr.)

On the other hand, a violation of section 10851 does not require this intent. For example, a person can violate section 10851(a) by driving or taking a vehicle, which are separate and distinct acts. (*People v. Solis, supra*, 245 Cal.App.4th at p. 1108, rev. gr.) A defendant can “take” a vehicle with the intent to deprive the owner of possession temporarily. Thus, while every car thief necessarily violates section 10851(a), a defendant who takes or drives a vehicle is not necessarily a car thief. (*Id.* at p. 1109, rev.

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<sup>2</sup> We shall continue to refer to these case under California Rules of Court, rule 8.1115(e), allowing citation “for potentially persuasive value” of published cases in which review has been granted.

gr.) Because driving or taking a vehicle with the intent to deprive the owner of temporary possession is not theft, defendants convicted of this offense are ineligible for resentencing under Proposition 47.

The *Solis* court also concluded that section 10851(a) violators convicted under a theft theory are ineligible for Proposition 47 resentencing. (*People v. Solis, supra*, 245 Cal.App.4th at p. 1109, rev. gr.) Specifically, the court observed that Proposition 47 amended section 666, subdivision (a), petty theft with a prior, specifying that eligible predicates include convictions for petty theft, grand theft, and auto theft under section 10851 of the Vehicle Code: “To interpret Proposition 47 as a symmetrical, coherent scheme, in which operative words are used consistently throughout, we must accord ‘petty theft’ and ‘grand theft’ the same meaning in both section eight (adding § 490.2) and section 10 (amending § 666).” (*Solis*, at p. 1110, rev. gr.)

Petty theft must mean the same thing in both provisions: “[i]f the initiative drafters considered ‘auto theft under Section 10851’ a species of petty theft—a term they defined in section eight (adding § 490.2)—there would have been no need to designate it as a separate predicate in section 10 (amending § 666).” (*People v. Solis, supra*, 245 Cal.App.4th at p. 1110, rev. gr.) Nevertheless, to interpret section 490.2 as including section 10851 “would render portions of the initiative surplusage,” contradicting the principle of statutory construction to avoid surplusage. (*Ibid.*; see *People v. Johnston, supra*, 247 Cal.App.4th at p. 258, rev. gr [holding that section 490.2 does not encompass convictions under section 10851(a)].) Here, for the same reasons articulated by the *Solis* and *Johnston* courts, we hold that section 10851(a) convictions are ineligible for

resentencing under Proposition 47.

#### IV

#### BURDEN OF PROOF

Assuming that a section 10851(a) conviction, based on the theft of a vehicle worth \$950 or less, is eligible for resentencing under Proposition 47, defendant failed to meet his initial burden to show that his conviction met the applicable criteria. A Proposition 47 petitioner must submit evidence of eligibility. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 137; *People v. Sherow, supra*, 239 Cal.App.4th at pp. 878-880.)

In *Perkins*, this court considered a defendant who filed a form request, seeking resentencing on a conviction for receiving stolen property: “Defendant’s petition stated the requirements for eligibility for resentencing on that conviction, but attached no evidence, included no declaration, and provided no record citations to support the factual assertion that the stolen property did not exceed \$950 in value.” (*People v. Perkins, supra*, 244 Cal.App.4th at p. 133.) The trial court denied the petition without holding a hearing about the value of the property. We affirmed, holding that a petitioner has the initial burden of establishing eligibility for resentencing and that “a successful petition” must show that the value of the property did not exceed \$950 and that defendant did not meet his burden to provide information about the value of the stolen property. (*Id.* at pp. 136-137; § 1170.18, subd. (b).)

Like the *Perkins* defendant, defendant has not submitted any information about the value of the stolen property. The police report notes that defendant may have planned to sell the stolen car for \$500 or \$550. Such information is not evidence of the actual value

of the car.

We reject defendant’s criticisms of San Bernardino County’s form petition.<sup>3</sup> Nothing in the form precluded defendant from submitting evidence or information to support his petition. Furthermore, as we stated in *Perkins*: “Nothing in our opinion should be read to disapprove the superior court’s stated procedure. We recognize Proposition 47 has imposed a substantial, if temporary, burden on the courts. Superior courts have inherent authority to adopt procedures needed to exercise jurisdiction as well as to manage and control their dockets. [Citations.] We hold only that the statute required defendant to include information supporting his petition with his initial filing. Since he did not do so, we cannot conclude the superior court erred in summarily denying his petition.” (*People v. Perkins, supra*, 244 Cal.App.4th at p. 138.)

V

DISPOSITION

We affirm the trial court’s order denying defendant’s petition for resentencing.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

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<sup>3</sup> SBSC Form #13-20067-360 Revised 12/11/14.

[*People v. Ruble*, E065459]

MILLER, J., Dissenting and Concurring.

I respectfully dissent to that part of the majority opinion finding that Proposition 47 does not apply to all convictions under Vehicle Code section 10851. Some convictions of Vehicle Code section 10851 constitute theft offenses. (*People v. Garza* (2005) 35 Cal.4th 866, 881.) Assuming that a defendant takes a vehicle with the intent to permanently deprive the owner of the vehicle and it is valued under \$950, such violation would constitute a violation of Penal Code section 490.2, petty theft, which was added by Proposition 47.

I concur in the result that defendant's petition to recall his sentence was properly denied by the trial court as defendant failed to meet his burden of establishing the vehicle he took was valued under \$950, and that he intended to permanently deprive the owner of the vehicle.