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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON DIETMAR SCHATTSCHNEIDER,

Defendant and Appellant.

F070791

(Super. Ct. No. BF152430A)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Michael B. Lewis, Judge.

Timothy E. Warriner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Gomes, J. and Poochigian, J.

On March 14, 2014, defendant Aaron Dietmar Schattschneider was convicted of second degree burglary (Pen. Code, § 460, subd. (b))¹ and was sentenced to four years in prison. On December 4, 2014, he filed a resentencing petition pursuant to Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18). On December 19, 2014, the trial court denied the petition for resentencing.

On appeal, defendant contends the trial court failed to conduct an adequate hearing and make factual findings regarding whether the value of the property he took exceeded \$950. The People concede that the case must be remanded for a proper hearing that includes consideration of whether defendant’s prior conviction disqualified him from resentencing. We reverse and remand.

DISCUSSION

I. Background

Proposition 47 was enacted on November 4, 2014, and went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*Id.* at p. 1091.) Proposition 47 added the misdemeanors of shoplifting, the taking of property worth no more than \$950 from a commercial establishment (§ 459.5),² and petty theft, the obtaining of property by theft where the

¹ All statutory references are to the Penal Code unless otherwise noted.

² Section 459.5, added by Proposition 47, provides: “(a) 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). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense

value of the money, labor, real or personal property taken does not exceed \$950 (§ 490.2, subd. (a)).³

“Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).)” (*People v. Rivera, supra*, 233 Cal.App.4th at p. 1092.) As noted, however, not everyone who petitions is eligible for resentencing. A petitioner whose offense has not been reclassified as a misdemeanor by Proposition 47 does not satisfy the criteria in section 1170.18 and is thus not eligible for resentencing. And a petitioner who satisfies the criteria in section 1170.18 is nevertheless ineligible for resentencing if (1) “the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety”⁴ (§ 1170.18, subd. (b)), or (2) the petitioner has a prior conviction for a “super strike” offense (see § 667,

requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170. [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”

³ Section 490.2, subdivision (a), added by Proposition 47, provides: “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, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.”

⁴ “Subdivision (c) of section 1170.18 defines the term ‘unreasonable risk of danger to public safety,’ and subdivision (b) of the statute lists factors the court must consider in determining ‘whether a new sentence would result in an unreasonable risk of danger to public safety.’ (§ 1170.18, subds. (b), (c).)” (*People v. Rivera, supra*, 233 Cal.App.4th at p. 1092.)

subd. (e)(2)(C)(iv)) or an offense requiring mandatory sex offender registration pursuant to section 290, subdivision (c) (§ 1170.18, subd. (i)).

In this case, defendant's petition stated he was convicted of a felony under section 460, subdivision (b) on March 14, 2014, the felony had since been reclassified as a misdemeanor, and he was still serving his four-year term in prison. No other facts were included in the petition.

At the resentencing hearing on December 19, 2014, two issues were cited as reasons defendant was not eligible for resentencing—whether defendant's offense had been reclassified as a misdemeanor by Proposition 47 and whether he had a prior conviction for a super strike. The following occurred:

“[PROSECUTOR]: ... [¶] This one Mr. Briley notes that defendant does not qualify.⁵ It was a vehicular burglary; it would be outside of Prop[osition] 47.

“THE COURT: [Defense counsel], any comments?

“[DEFENSE COUNSEL]: I would argue even if it is involving a vehicle, the items allegedly taken the amount being under [\$]950 is within the spirit of Prop[osition] 47 could be a petty theft as opposed to a shoplift which normally we would be asking for in a burglary situation.

“THE COURT: All right. At this point I'll deny the petition as [section] 460[, subdivision](b) [second degree burglary] in this case, based on the People's representation, is not within the meaning of [section] 459[.5, subdivision](a) [shoplifting] or the [section] 490.2 [petty theft] allegations as they are amended in the new statute.

“[PROSECUTOR]: And, your Honor, just to make the record clear, defendant also has [a section] 191.5 [vehicular manslaughter while intoxicated] conviction, which, I believe, would be a super strike, excludes him regardless of the factual underlying basis.

“THE COURT: Thank you.”

The clerk's transcript memorialized this hearing as follows:

⁵ The record does not explain the identity of Mr. Briley.

“The People state that defendant does not qualify as he has a superstrike.

“The Court makes the following findings and/or orders:

“Petition for resentencing (PC 1170.18) is denied.

Reason: Defendant has a superstrike.” (Unnecessary capitalization omitted.)

II. Analysis

In this case, defendant’s petition provided almost no information regarding his eligibility for resentencing. Furthermore, the only facts in the appellate record concerning defendant’s second degree burglary (§ 460, subd. (b)) conviction are the prosecution’s representation that it was a vehicular burglary, and defense counsel’s response that the crime could have been a petty theft even if a vehicle was involved. The trial court made no factual findings on the record, and stated it was denying the petition based on the prosecutor’s representation that defendant’s conviction was for vehicle burglary.

We agree with the parties that the matter should be remanded for the trial court to make factual findings regarding defendant’s eligibility. The court never mentioned what evidence, if any, it was considering. Our record does not establish even the nature of defendant’s conviction for second degree burglary or the value of the property he took. Thus, we have nothing to review regarding his eligibility for resentencing under Proposition 47.

We reverse the order denying the petition for resentencing, and remand to the trial court for further proceedings on the petition. On remand, defendant bears the initial burden to establish his eligibility for resentencing under Proposition 47. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*)). Resentencing on second degree burglary is not automatic. Defendant must show he “would have been guilty of a misdemeanor ... had [Proposition 47] been in effect at the time of the offense.” (§ 1170.18, subd. (a).) Depending on the circumstances surrounding the offense,

defendant may or may not be eligible for relief. If he can prove he committed an offense that is now classified as a misdemeanor, such as shoplifting (§ 459.5) or petty theft (§ 460.5, subd. (a)), he may be eligible for resentencing. Defendant should include with his petition evidence proving his eligibility. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137.) The petition “could certainly contain at least [defendant’s] testimony about the nature of the items taken” (*Sherow, supra*, at p. 880) and “should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief” (*People v. Perkins, supra*, at p. 140). If defendant makes “the initial showing[,] the court can take such action as appropriate to grant the petition or permit further factual determination.” (*Sherow, supra*, at p. 880.) Further factual determinations might include whether defendant was previously convicted of a super strike and whether a new sentence would result in an unreasonable risk of danger to public safety.

DISPOSITION

The order denying defendant’s petition for resentencing is reversed. The matter is remanded to the trial court for further proceedings on the petition.