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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN CERVANTES,

Defendant and Appellant.

G050529

(Super. Ct. No. 13NF3440)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg and Gregg L. Prickett, Judges. Affirmed.

Valarie Mark Kalb, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel, Alana Cohen Butler and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Steven Cervantes challenges Judge Steven D. Bromberg's denial of his motion to suppress evidence (Pen. Code, § 1538.5; all further statutory references are to the Penal Code) on the grounds that he was illegally detained, and the illegal detention vitiated his consent to the ensuing search of his personal property. We disagree and conclude the motion to suppress was properly denied.

Cervantes also claims the passage of Proposition 47 converted two of his felony convictions in this case to misdemeanors. We conclude his remedy is to file in the trial court, either a petition for recall and resentencing (§ 1170.18, subd. (a)), or an application to designate his felony convictions to be misdemeanors (§ 1170.18, subd. (f)). Therefore, we affirm the judgment.

GUILTY PLEA AND SENTENCING

Cervantes pleaded guilty to possession of counterfeiting equipment (§ 480, subd. (a); count 1), possession of fictitious instruments (§ 476; count 2), acquisition of access card information (§ 484e, subd. (d); count 3), and possession of drug paraphernalia (§ 11364.1, subd. (a); counts 4, 5), with various sentencing enhancements. Judge Gregg L. Prickett sentenced him to two years in jail and a year on mandatory supervision. (§ 1170, subd. (h)(5).)

MOTION TO SUPPRESS HEARING AND RULING

Arresting Officer Testimony

Buena Park Police Officer Diana Kotani testified that around noon on October 1, 2013, she went to the Roadway Inn motel to conduct a routine "business check." As she drove into the motel parking lot, Kotani saw Cervantes and Mark Botich walking toward the motel. Botich was carrying two new motorcycle tires, but neither Botich nor Cervantes had a motorcycle. Kotani made eye contact with the men, which prompted them to change course and head toward a nearby trash can. Botich put the tires in a shopping cart next to the trash can, and then both men headed back toward the motel.

Kotani parked her police cruiser, got out of her car, and said, "Let me talk to you guys. What's going on with the tires?" Cervantes stopped and disclaimed ownership of the tires. Botich kept walking. Kotani said, "Come back. Let me talk to you." Botich then stopped and asked "why [Kotani] was giving [them] a hard time, were they being detained?" Kotani replied she needed to identify them and find out where they were staying.

Kotani asked Cervantes for his name and identification. Cervantes told Kotani his name and handed her his driver's license. He also volunteered his room number at the motel, and he said he was staying with his girlfriend, Ms. Chacon. Cervantes invited Kotani to go to the motel room and talk to Chacon to verify the information he had provided.

While Cervantes and Botich stood and waited, Kotani checked Cervantes's identification over her portable radio. Kotani did not draw a weapon, make accusations, or issues directions. She did, however, request an assistance officer be dispatched to her location, primarily because she was a lone female officer with two males, but also because Botich was uncooperative and "quite obvious[ly] he didn't want to have contact with [her]."

Within minutes, two more police officers arrived in separate patrol cars. Neither activated their overhead lights or sirens, and neither drew a weapon or issued any orders.

When asked if either Cervantes or Botich had been handcuffed, Kotani testified, "I might have handcuffed [Botich] because of his demeanor at the time. He was not really cooperating, and he became a safety issue for myself."

Kotani also said Cervantes had not been handcuffed and he was "extremely cooperative." When asked about what she did with Cervantes's driver's license, Kotani testified, "I might have just handed it back to him or placed it on the police car. I didn't have it with me."

As the backup officers stood with Cervantes and Botich, Kotani went into the motel lobby to confirm Cervantes's residency. Neither Cervantes nor Chacon were registered guests of the room number given by Cervantes.

Kotani walked to the room and knocked on the door. Chacon opened the door. Chacon told Kotani she was Cervantes's girlfriend, she was on probation, and she was subject to search and seizure terms. However, she pointed to some of the items in the room and said they belonged to Cervantes.

Kotani did not go in the motel room at that time. Instead, she walked back to the parking lot and "requested that [Cervantes] be taken or escorted over to the room" in an effort to identify his property.

At the motel room, Cervantes identified his property, and Kotani asked him for permission to search it. Cervantes told Kotani she could search and that "there was nothing illegal in [his] property." However, Kotani found tools commonly used to perpetrate identity fraud, paint used to make counterfeit bills, and syringes consistent with heroin use.

Kotani arrested and handcuffed Cervantes. Cervantes then asked if he could give Chacon his money and Kotani said he could, if Kotani looked at it first. Upon inspection, Kotani determined Cervantes had tried to give Chacon eight counterfeit \$100 bills.

Counsel Arguments and Trial Court Ruling

The prosecutor argued the entire encounter was consensual, and Cervantes voluntarily consented to the search of his possessions. Defense counsel asserted the consensual encounter had become a detention either when Kotani took Cervantes's driver's license, or when the two backup police officers arrived and Cervantes waited while Kotani went to the motel lobby. Defense counsel argued Cervantes was certainly not "free to leave at that point."

Judge Bromberg observed, “I’m not hearing an argument about once they got to the motel room. That’s not an issue. The issue is was this a detention.” Cervantes had been “incredibly cooperative. . . . he cooperated with them all the way down the line.” “But it was that cooperation that led him – led the officer to the motel room and everything else that happened after that.”

Judge Bromberg explained, “Who knew those cards were going to fall where they were, that the girlfriend was on search and seizure, and now he gives consent. He cooperated all the way down the line. Now he’s being punished for that. But that happens more often than we see.”

Judge Bromberg found, “So based on that, it will be – it was not a detention. I don’t believe it was a detention. And I have considered both of your cases before we even walked in here. The court is familiar with the litany of cases in this area.” Ultimately, Judge Bromberg denied the motion to suppress.

DISCUSSION

1. Motion to Suppress

A. General Principles and Standards of Review

The prosecution has the burden of proving the consent exception to the warrant requirement. (*People v. Ibarra* (1980) 114 Cal.App.3d 60, 64.) Valid consent has two components. First, in order to be valid, the consent must not be the result of unlawful police activity like an illegal detention, entry or arrest. (*Florida v. Royer* (1983) 460 U.S. 491, 497 (*Royer*); *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 791.) Courts speak of consent given as the result of unlawful police activity as being involuntary. (*People v. James* (1977) 19 Cal.3d 99, 100 (*James*); *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 251; *People v. Bailey* (1985) 176 Cal.App.3d 402, 405.) In this sense, trial court determinations regarding voluntariness involve conclusions of law that we review using our independent judgment. (*People v. Loewen* (1983) 35 Cal.3d 117, 123; *People v. Leyba* (1981) 29 Cal.3d 591, 597.)

Second, the consent must be free and voluntary, not a mere submission to a claim of lawful authority or the result of coercion of duress. (*Royer, supra*, 460 U.S. at p. 497; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227; *James, supra*, 19 Cal.3d at p. 106.) In this sense, “The voluntariness of the consent is in every case ‘a question of fact to be determined in the light of all the circumstances.’ [Citations.]” (*James*, at p. 106; *Schneckloth, supra*, at p. 227.) Trial court determinations of voluntariness in this sense are given great deference, and are rarely reversed. (See, e.g., *People v. Ratliff* (1986) 41 Cal.3d 675, 686.)

“Our role in reviewing the resolution of this issue is limited. The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, ‘The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court’s findings—whether express or implied—must be upheld if supported by substantial evidence.’ [Citations.]” (*James, supra*, 19 Cal.3d at p. 107.)

B. Detention

A detention (aka seizure) arises when the officer by means of physical force or show of authority restrains an individual’s liberty. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 789 (*Wilson*)). “[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” (*Florida v. Bostick* (1991) 501 U.S. 429, 439 (*Bostick*)). “Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer’s display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer’s request might be compelled.” (*In re Manuel G.* (1997) 16 Cal.4th 805, 821 (*Manuel G.*)).

“The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.” (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.)

In this case, Kotani saw Cervantes and Botich in a public parking lot, in the middle of the day. She was alone. She did not activate her car lights or siren. When she parked she did not impede their path of travel. She did not display her weapon or issue any orders. She merely said, “Let me talk to you guys. What’s going on with the tires?”

Cervantes stopped and voluntarily responded to Kotani. He willingly told her his name and volunteered his driver’s license. He also volunteered his motel room number, said he was staying with Chacon, and invited Kotani to go to their motel room. Then he waited while she checked his identification over her radio and requested backup.

Considering all of these circumstances, including the setting in which the encounter occurred, and exercising our independent judgment as we must, we agree with Judge Bromberg—Cervantes was not detained. The encounter was consensual.

Cervantes points to six circumstances which he claims “demonstrate unequivocally” that he was detained. We will address each in turn.

First, citing *Wilson, supra*, 34 Cal.3d at p. 791, fn 11, Cervantes argues Kotani’s initial statements to Cervantes and Botich were sufficiently accusatory to put them “on notice that she suspected they were engaged in a crime.” Not so. In this case Kotani, unlike the narcotics officer in *Wilson*, made no direct accusations. A reasonable person upon hearing Kotani’s initial statements, “might well have thought that the officer was simply pursuing routine, general investigatory activities” (*Wilson*, at p. 790), and felt “free to decline the officers’ requests or otherwise terminate the encounter.” (*Bostick, supra*, 501 U.S. at p. 439.)

Second, Cervantes contends there is no evidence Kotani ever returned his driver's license to him after she ran the records check. He observes, "she testified she 'might have' left it on the roof of her police car while she completed her investigation and search." He then concludes: "no reasonable person in [his] shoes would have felt free to leave the scene or otherwise terminate the encounter. [He] was compelled either to leave without his identification, or to remain."

The record is not as clear on this point as Cervantes suggests. When asked what happened to Cervantes's driver's license, Kotani testified, "I might have just handed it back to him or placed it on the police car. I didn't have it with me." So it appears Kotani was just unsure what happened to his driver's license. Besides, the police may ask for and obtain identification, without necessarily turning a consensual encounter into a detention. (*Bostick, supra*, 501 U.S. at p. 435; *Royer, supra*, 460 U.S. at p. 501.)

Third, Cervantes argues, "Kotani's tone of voice and actions toward Botich would have conveyed to a reasonable person in [Cervantes's] shoes that he was not free to leave" He notes Kotani ordered Botich to "'come back'" when he tried to walk away and "'might have'" handcuffed him. Plus, he points out that, "[w]hen Botich asked why [Kotani] was 'giving him a hard time' and 'were they being detained,' rather than denying she was detaining both [Cervantes] and Botich, . . . Kotani said she needed to investigate the situation."

But Cervantes and Botich were not in the same position. Botich was the one who put the tires in the shopping cart, not Cervantes. Botich was uncooperative and walked away, while Cervantes was cooperative and did not. Botich might have been handcuffed, Cervantes was not. Thus, a reasonable person in Cervantes's position would have recognized the differences in the way Kotani treated the two men, and likely would have concluded Cervantes was free to leave, even if Botich was not. Anyway, even "[t]he arrest of one person does not mean that everyone around him has been seized by police." (*United States v. Drayton* (2002) 536 U.S. 194, 206 (*Drayton*).)

Fourth, citing *United States v. Mendenhall* (1983) 446 U.S. 544, 554 (*Mendenhall*) and *Manuel G., supra*, 16 Cal.4th at p. 821, Cervantes asserts: “The presence in the motel parking lot of not one but *three* officers in three police cars—two of whom were then assigned specifically to guard appellant and Botich while . . . Kotani completed her investigation—was a coercive display of authority that, combined with the other circumstances here, would cause any reasonable person to believe that his liberty to terminate the encounter with police had been restrained.”

The presence of several officers is a relevant, but not decisive circumstance, bearing on whether a detention occurred. Yet again the test is whether, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” (*Mendenhall, supra*, 446 U.S. at p. 554.) “This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.]” (*Manuel G., supra*, 16 Cal.4th at p. 821.)

Applying this test, and again looking at all the circumstances, including the number of officers present, our conclusion Cervantes was not detained remains. The arrival of two additional officers did not change the circumstances in any material way. To the contrary, these officers, like Kotani, did not activate their overhead lights or sirens, nor did they draw their weapons or issue any orders. In fact, there is no evidence either officer said or did anything to Cervantes or Botich. The only evidence other than the fact of their arrival, was that they stood by while Kotani went to the motel office.

Fifth, Cervantes maintains, even if no detention occurred up to that point, it surely did when Kotani requested Cervantes be ““taken or escorted”” to the motel room. But again the record is not that clear. Kotani testified, “We wanted to verify that, in fact, [the property] belonged to him, so then we requested that he be taken or escorted over to the room.” But there is no evidence any officer actually took or escorted Cervantes to the motel room. In any event, a person may voluntarily accompany an officer without being detained. (*Mendenhall, supra*, 446 U.S. at p. 556.)

Sixth, Cervantes points out Kotani never told him he was free to leave. Then, citing *Royer, supra*, 460 U.S. at pp. 501-502, he declares: “When combined with the other circumstances here—the accusation of criminal activity, the record check of appellant’s driver’s license without evidence of its return, the express detention of Botich, the presence of multiple officers, and the police escort of appellant to the motel room—this factor leads inescapably to the conclusion that appellant was detained within the meaning of the Fourth Amendment.” Again we disagree.

The Supreme Court has made clear: “While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.’ [Citation.] Nor do this Court’s decisions suggest that even though there are no *per se* rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate.” (*Drayton, supra*, 536 U.S. at pp. 206-207.) Instead, the totality of the circumstances controls, “without giving extra weight to the absence of this type of warning.” (*Id.* at p. 207.) The same is equally true in the detention context.

Finally, we reject Cervantes’s penultimate contention, “*Royer* is controlling here.” The facts of *Royer* are distinguishable from the case at bar. *Royer* was observed at Miami International Airport by two plain-clothes narcotics detectives. They “believed that *Royer*’s appearance, mannerisms, luggage, and actions fit the so-called ‘drug courier profile.’” (*Royer, supra*, 460 U.S. at p. 493.) “*Royer*, apparently unaware of the attention he had attracted, purchased a one-way ticket to New York City and checked his two suitcases, placing on each suitcase an identification tag bearing the name ‘Holt’ and the destination, ‘LaGuardia.’” (*Ibid.*) “As *Royer* made his way to the concourse which led to the airline boarding area, the two detectives approached him, identified themselves as policemen . . . , and asked if *Royer* had a ‘moment’ to speak with them; *Royer* said ‘Yes.’” (*Id.* at pp. 493-494.) “Upon request, but without oral consent, *Royer* produced for the detectives his airline ticket and his driver’s license.” (*Id.* at p. 494.)

The airline ticket, like the baggage identification tags, bore the name “Holt,” while the driver’s license carried Royer’s correct name. (*Royer, supra*, 460 U.S. at p. 494.) “When the detectives asked about the discrepancy . . . Royer became noticeably more nervous during this conversation, whereupon the detectives informed Royer that they were in fact narcotics investigators and that they had reason to suspect him of transporting narcotics.” (*Ibid.*)

“The detectives did not return his airline ticket and identification but asked Royer to accompany them to a room, approximately 40 feet away, adjacent to the concourse. Royer said nothing in response but went with the officers as he had been asked to do.” (*Royer, supra*, 460 U.S. at p. 494.) Without Royer’s consent, one of the detectives retrieved the Holt luggage from the airline and brought it to the room. (*Ibid.*)

“Royer was asked if he would consent to a search of the suitcases. Without orally responding to this request, Royer produced a key and unlocked one of the suitcases, which the detective then opened without seeking further assent from Royer.” (*Royer, supra*, 460 U.S. at p. 494.) Drugs were found in that suitcase. “When asked if he objected to the detective opening the second suitcase, Royer said ‘[no], go ahead[.]’” (*Id.* at pp. 494-495.) The second suitcase was pried open and more drugs were found. Royer was then arrested. Approximately fifteen minutes had elapsed. (*Id.* at p. 495.)

The plurality rejected the claim Royer’s consent to search occurred during a consensual encounter, stating: “Asking for and examining Royer’s ticket and his driver’s license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver’s license and without indicating in any way that he was free to depart, Royer was effectively seized for purposes of the Fourth Amendment. These circumstances surely amount to a show of official authority such that ‘a reasonable person would have believed he was not free to leave.’” (*Royer, supra*, 460 U.S. at pp. 501-502.)

Cervantes argues: “This case is on all fours with *Royer*. As in *Royer*, . . . Kotani asked for and examined [Cervantes]’s driver’s license, informed [Cervantes] he was suspected of stealing motorcycle tires, and requested that [Cervantes] be ‘escorted’ to his motel room while never informing him he was free to leave. Not only that, she expressly detained Botich in [Cervantes]’s presence, did not deny that [Cervantes] also was being detained, and summoned additional officers to the scene. These circumstances ‘surely amount to a show of official authority such that’ no reasonable person in [Cervantes]’s shoes would have felt free to leave.”

We are not persuaded. Here, as in *Royer*, the fact Kotani asked for and examined Cervantes’s driver’s license is “no doubt permissible.” (*Royer, supra*, 460 U.S. at p. 501; see *Bostick, supra*, 501 U.S. at p. 435.) Plus, as we have explained, the record here, unlike in *Royer*, does not conclusively establish what Kotani did with the license. Similarly, in this case there is no evidence Kotani ever informed Cervantes “he was suspected of stealing motorcycle tires,” whereas in *Royer*, the detectives told Royer they had reason to suspect he was transporting narcotics.

Furthermore, as discussed, while there may be evidence Kotani requested that Cervantes be “escorted” to his motel room, there is no evidence that actually occurred. Likewise, there is no evidence Kotani “expressly detained Botich,” or “did not deny” Cervantes was also being detained. In any event, the fact that Botich may have been detained is not dispositive. Nor do all of these facts, together with the fact that Kotani never informed Cervantes he was free to leave, mean Cervantes was detained.

C. Voluntariness and Reasonable Suspicion

Having rejected Cervantes’s contention that he was detained, we summarily reject his related claims that the supposed detention was unlawful and thus vitiated his consent to the ensuing search. In short, Cervantes voluntarily consented to the search. As well, we need not address the Attorney General’s assertion, raised for the first time on appeal, that Kotani had reasonable suspicion to detain him.

2. Proposition 47

Proposition 47 amended various provisions of the Penal and Health and Safety Codes to reduce specified drug and theft offenses to misdemeanors unless the crime is committed by an ineligible defendant. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.)¹ Cervantes claims the ameliorative benefits of Proposition 47 apply to his felony convictions for possession of a fictitious instrument (count 2) and possession of access card information (count 3). We do not agree.

The problem is section 3 states “no part of [the Penal Code] is retroactive, unless expressly so declared.” Cervantes pled guilty, received his negotiated sentence, and filed a notice of appeal about three months before Proposition 47 passed. Nevertheless, to counter the statutory preference for prospective only application, Cervantes cites the equal protection principles set forth in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

In *Estrada*, the California Supreme Court held, “A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.” (*Estrada, supra*, 63 Cal.2d at p. 745.) 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.” Under the *Estrada* rule, a legislative amendment that lessens criminal punishment is presumed to apply to all cases not yet final. (*Id.* at pp. 742, 745, 748.) That is, unless the Legislature specifically states otherwise by including a “saving clause” providing for prospective application. (*Ibid.*)

¹ “Proposition 47 (1) added Chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377. [Citation.]” (*People v. Lynall, supra*, 233 Cal.App.4th at p. 1108.)

The Attorney General argues section 1170.18 acts as the functional equivalent of a saving clause, relying primarily on *People v. Yearwood* (2013) 213 Cal.App.4th 161 (*Yearwood*).² *Yearwood* addressed the retroactivity of Proposition 36, which amended the “Three Strikes” law so that an indeterminate life sentence may only be imposed when the offender’s third strike is a serious and/or violent felony or there are other disqualifying factors. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c); see *Teal v. Superior Court* (2014) 60 Cal.4th 595, 596.) *Yearwood* held section 1170.126 acted as a saving clause that took Proposition 36 out of the *Estrada* rule.

We also find instructive two published cases addressing the retroactivity of Proposition 47, *People v. Noyan* (2014) 232 Cal.App.4th 657 (*Noyan*) and *People v. Shabazz* (2015) 237 Cal.App.4th 303 (*Shabazz*). The defendant in *Noyan* pled guilty to violations of Health and Safety Code section 11350 (possession of a controlled substance) and other crimes. On petition for rehearing, the defendant argued the appellate court should reduce his convictions from felonies to misdemeanors pursuant to Proposition 47’s amendment to Health and Safety Code section 11350, subdivision (a).

The *Noyan* court stated defendants like *Noyan*, i.e., those with pending appeals from convictions and sentences entered before passage of Proposition 47, must pursue a reduction of a felony conviction to a misdemeanor according to the statutory remedy of petitioning for recall of sentence in the trial court once his judgment is final pursuant to section 1170.18. (*Noyan, supra*, 232 Cal.App.4th at p. 672.)

² As the parties note, the issue of whether the Reform Act applies retroactively to those convicted before passage of the Reform Act, but whose convictions are not yet final, is currently pending before the California Supreme Court. (*People v. Lewis* (2013) 216 Cal.App.4th 468, review granted Aug. 14, 2013, S211494 [Proposition 36 requires automatic resentencing of people with judgments that are not yet final]; *People v. Conley* (2013) 215 Cal.App.4th 1482, review granted Aug. 14, 2013, S211275 [Proposition 36 does not require automatic resentencing of people with judgments that are not yet final]; *People v. Lester* (2013) 220 Cal.App.4th 291, review granted Jan. 15, 2014, S214648 [Proposition 36 does not apply retroactively].) In the meantime, *Yearwood* is good law.

Noyan cited *Yearwood*, *supra*, 213 Cal.App.4th at pages 170, 177, but did not mention or discuss the Supreme Court’s *Estrada* rule. The *Noyan* court simply directed the defendant to file a petition in superior court pursuant to section 1170.18.

In *Shabazz*, the defendant pled no contest to methamphetamine possession (Health & Saf. Code, § 11377, subd. (a)) and receiving stolen property (§ 496, subd. (a)). He was sentenced to two years in jail, received credit for 272 days of presentence custody, and completed his sentence on September 24. (*Shabazz*, *supra*, 237 Cal.App.4th 303.) The voters approved Proposition 47 after *Shabazz* pled no contest and the court imposed sentence, but while his appeal was pending. (*Ibid.*)

The *Shabazz* court framed the retroactivity question as one of voter intent. (*Shabazz*, *supra*, 237 Cal.App.4th at p. 312.) “[T]he issue is whether the electorate intended the amendatory provisions of Proposition 47—reducing defendant’s crimes from felonies to misdemeanors—to be automatically applied on appeal.” (*Ibid.*) Given the lack of an express saving clause, the court observed section 1170.18, subdivision (f) “expressly, specifically and clearly address the application of the reduced punishment provisions” to defendants with pending appeals. (*Id.* at p. 313.)

Further, “The plain meaning of the language in section 1170.18 is this—the voters never intended that Proposition 47 would automatically apply to allow us to reduce defendant’s two felonies to misdemeanors. Rather, the voters set forth specific procedures for securing the lesser punishment to eligible persons such as defendant.” (*Shabazz*, *supra*, 237 Cal.App.4th at p. 313.) There are two ways a defendant “sentenced or placed on probation prior to Proposition 47’s effective date” can have his sentence for an enumerated felony reduced to a misdemeanor. (*Ibid.*) “First, pursuant to section 1170.18, subdivision (a), the defendant may file a *petition* [in the sentencing court] if she or he is currently serving a felony sentence for an enumerated offense.” (*Id.* at p. 310; § 1170.18, subd. (a).) “Upon filing the petition, the trial court proceeds in compliance with section 1170.18, subdivision (b).” (*Shabazz*, at p. 310, fn. omitted.)

On the other hand, if a defendant “has completed his or her sentence for a conviction, . . . of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an *application* before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” (§ 1170.18, subd. (f), italics added.) “Section 1170.18, subdivisions (f) through (g) specify the defendant must file an application and describes a procedure for the trial court to rule upon it.” (*Shabazz, supra*, 237 Cal.App.4th at p. 310, italics added.) Thus, as the *Shabazz* court observed, “the voters intended there be specified retroactive application of the mitigating sentencing provisions of Proposition 47 for an accused sentenced prior to its effective date.” (*Id.* at pp. 309-310.)

We agree with *Noyan* and *Shabazz*, although we acknowledge the California Supreme Court granted review in *People v. DeHoyos* (2015) 238 Cal.App.4th 363, September 30, 2015, S228230, (Proposition 47 applies prospectively). (See also *People v. Lopez* (2015) 238 Cal.App.4th 177, 182-183, Oct. 14, 2015, S228372 [prospective application of Proposition 47].) In our view, Cervantes’s remedy is to file a petition or an application in the superior court, depending upon whether he is currently serving, or has completed, the three-year sentence imposed pursuant to his plea. If qualified, Cervantes will receive the ameliorative effect of Proposition 47 “unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b); see also § 1170.18, subd. (c), and *People v. Lynall, supra*, 233 Cal.App.4th at p. 1109 [as used in section 1170.18, unreasonable risk of danger to public safety means an unreasonable risk that the petitioner will commit a new violent felony].)

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.