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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.

HARYER ALAN DOMINGUEZ
MADRID,

Defendant and Appellant.

G050789

(Super. Ct. No. 14WF1211)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed in part, reversed in part and remanded for resentencing.

Stephanie M. Adraktas, 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, Meagan J. Beale and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant stands convicted of two felonies, second degree burglary and second degree robbery. Relying on Proposition 47, which was passed while this appeal was pending, appellant contends he is entitled to have his burglary conviction reduced to misdemeanor shoplifting. That may be the case, but contrary to appellant's claim, he is not entitled to that relief *in this court*. Rather, he must seek it in the trial court, as contemplated by the terms of Proposition 47. Therefore, we affirm his convictions. However, due to undisputed sentencing error, we reverse appellant's sentence and remand the matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2014, appellant entered a store in Huntington Beach and put three pairs of jeans in his backpack. He then tried to leave the store without paying for the jeans. When a security guard contacted him near the exit, a violent confrontation ensued, and the guard backed down. Appellant ran away, but the police apprehended him a short time later.

Following a jury trial, appellant was convicted of burglary and robbery, both in the second degree. (Pen. Code, §§ 459, 460, subd. (b), 461, subd. (b), 211, 212.5, subd. (c), 213, subd. (a)(2).)¹ At sentencing, the trial court ordered appellant to serve three years' probation on the robbery count and stayed sentencing on the burglary count pursuant to section 654. The court also imposed various fines and penalties. A timely notice of appeal was filed on September 29, 2014.

DISCUSSION

On November 4, 2014, the voters passed Proposition 47, and it became effective the following day. (*People v. Awad* (2015) 238 Cal.App.4th 215, 219.) In light

¹ All further statutory references are to the Penal Code.

of this development, appellant requests that we reduce his burglary conviction to a misdemeanor. However, as we now explain, we are not the proper tribunal to entertain this request. Rather, it must be directed to the trial court in the first instance.

As recently explained in *People v. Sherow* (2015) 239 Cal.App.4th 875, “Proposition 47, which is codified in section 1170.18, reduced the penalties for a number of offenses. Among those crimes reduced are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5. Shoplifting is now a misdemeanor unless the prosecution proves the value of the items stolen exceeds \$950. [Citations.]” (*Id.* at p. 879.)

Thus, appellant may be entitled to have his conviction for second degree burglary reduced to misdemeanor shoplifting. However, there are specific rules in place for doing so. Proposition 47 created a statutory “process through which persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. [Citation.] Specifically, section 1170.18, subdivision (a), provides: ‘A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] . . . had [Proposition 47] been in effect at the time of the offense may 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” the newly enacted sections, including section 459.5. (*People v. Marks* (2015) 243 Cal.App.4th 331, 334, italics added.)

In addition, section 1170.18, subdivision (f), provides, “A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had

[Proposition 47] 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.” (Italics added.)

These provisions make clear requests for Proposition 47 relief should be addressed to the trial court in the first instance, not the Court of Appeal. In fact, several cases have expressly so held. (See, e.g., *People v. Diaz* (2015) 238 Cal.App.4th 1323; *People v. Shabazz* (2015) 237 Cal.App.4th 303; *People v. Noyan* (2014) 232 Cal.App.4th 657.) While defendants are generally entitled to obtain a sentence reduction in the appellate court when the penalty for their crime has been decreased during the pendency of their appeal (*In re Estrada* (1965) 63 Cal.2d 740), that rule does not apply in Proposition 47 cases because its provisions contemplate a thorough review of the defendant’s criminal record, which is best carried out by the trial court. (*People v. Diaz, supra*, 238 Cal.App.4th at pp. 1335-1336; *People v. Shabazz, supra*, 237 Cal.App.4th at pp. 311-314.)

Appellant acknowledges this. However, he contends his situation is special somehow because, in sentencing him on the burglary count, the trial court stayed his sentence pursuant to section 654. Appellant argues that because his sentence was stayed he cannot serve or complete it, and thus he can never obtain Proposition 47 relief in the trial court. (See § 1170.18, subd. (a) [allowing a person who is “currently serving” his sentence to petition for relief in the trial court] & subd. (f) [allowing a person who has “completed” his sentence to apply for relief in the trial court].) Therefore, we should take it upon ourselves to reduce his burglary conviction to a misdemeanor in compliance with its terms.

Appellant’s argument is unconvincing. It makes little sense that a person who is either serving or has completed a given sentence can obtain relief under Proposition 47, but a person like appellant, who received a stay of sentence under section

654, cannot. Proposition 47 was designed to save money and resources by allowing low-level offenders to obtain sentencing relief, while ensuring serious and violent offenders remain imprisoned. (*People v. Diaz, supra*, 238 Cal.App.4th at p. 1328; Argument in Favor of Proposition 47, Official Ballot Statements, p. 38.) Because crimes which result in stayed sentences are generally less deserving of punishment than crimes that do not, it would defeat the purpose of Proposition 47 to preclude relief for them. We conclude appellant is not barred from obtaining Proposition 47 relief simply because the trial court stayed his burglary sentence pursuant to section 654. (Cf. *People v. Shabazz, supra*, 237 Cal.App.4th at pp. 310-313 [defendants who are given probation in lieu of a prison term are entitled to seek Proposition 47 relief in the trial court].) That being the case, there is no reason for us to disturb appellant's underlying convictions.

Nevertheless, it is clear the trial court incorrectly implemented section 654 in this case. No one questions section 654 – which prohibits multiple punishment for acts comprising an indivisible course of conduct – applies in this case. (*People v. Le* (2006) 136 Cal.App.4th 925, 931-932 [a defendant who harbors the single intent to steal cannot not be punished for both burglary and robbery].) However, when the trial court finds section 654 applicable to a particular count, it is required to impose sentence on that count and then stay execution of that sentence. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592; *People v. Alford* (2010) 180 Cal.App.4th 1463.) Here, however, the trial court simply stayed the burglary count without imposing any sentence whatsoever, which was error. (*People v. Duff* (2010) 50 Cal.4th 787, 795-796; *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.) It is also undisputed the trial court erred by failing to take account of appellant's excess custody credits in calculating his eligible sentencing fines. (§ 2900.5, subd. (a); *People v. Robinson* (2012) 209 Cal.App.4th 401, 406-407; *People v. McGarry* (2002) 96 Cal.App.4th 644.) Therefore, appellant's sentence cannot stand, and he must be resentenced.

DISPOSITION

Appellant's sentence is reversed and the matter is remanded for resentencing consistent with the views expressed herein. On remand, the court may also entertain appellant's request for relief under Proposition 47. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.