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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.

RUBEN A. ORELLANA,

Defendant and Appellant.

G051012

(Super. Ct. No. 14WF2525)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Lewis A. Wenzell, 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, Arlene A. Sevidal, Collette Cavalier and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant’s sentence was enhanced one year based on the fact he had previously served a prison term for a felony offense. (Pen. Code, § 667.5, subd. (b)).<sup>1</sup> Because that offense is now subject to reclassification as a misdemeanor under Proposition 47, appellant argues his sentence should be vacated and the matter should be remanded for resentencing. We disagree. Appellant may be entitled to relief under Proposition 47, but that is an issue that should be addressed to the trial court in the first instance, not on appeal. Accordingly, we affirm the judgment in all respects.

#### PROCEDURAL BACKGROUND

On November 12, 2014 – a week after Proposition 47 became effective – a jury convicted appellant of first degree burglary.<sup>2</sup> The next day, the trial court found true an allegation appellant had been convicted of a prior felony offense, i.e., second degree burglary, for which he served a prison term. (§ 667.5, subd. (b)). Appellant requested immediate sentencing. The trial court sentenced him to the midterm of two years on the burglary count, plus one year for the prison prior. This appeal followed.

#### DISCUSSION

Appellant contends his one-year enhancement under section 667.5, subdivision (b) should be vacated because it is based on the commission of a felony offense that is subject to reclassification as a misdemeanor under Proposition 47. That may be correct. However, contrary to appellant’s belief, we are in no position to make that determination on appeal. Rather, he must petition the trial court for the relief he is seeking.

“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.

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

<sup>2</sup> The underlying facts of the burglary are not germane to this appeal.

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.]” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.)

Thus, appellant may be entitled to have his prior 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 that 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 (*Diaz*); *People v. Shabazz* (2015) 237 Cal.App.4th 303; *People v. Noyan* (2014) 232 Cal.App.4th 657.) *Diaz* is particularly on point to the present situation. Like appellant here, the defendant in that case bypassed the trial court and asked the appellate court to reduce his prior felony

conviction to a misdemeanor so as to prevent it from being used to enhance his sentence under section 667.5, subdivision (b). (*Diaz, supra*, 238 Cal.App.4th at pp. 1330-1331.) However, given the plain language and intent of Proposition 47, *Diaz* determined the defendant's claim was premature, and his sole remedy was to seek relief in the trial court. (*Id.* at pp. 1331-1337.)

We find *Diaz* well reasoned and persuasive, and although the Attorney General cited it in her brief, appellant makes no attempt to distinguish it. Instead, he simply contends we should reverse his sentence on the ground his prior conviction is based on a felony that is amenable to reduction as a misdemeanor under Proposition 47. However, just because appellant's prior felony conviction is theoretically amenable to reduction does not mean he is entitled to have his sentence reversed. There are other considerations, such as the factual circumstances surrounding the prior conviction and appellant's criminal history, that must be considered before it can be determined whether appellant is actually suitable for Proposition 47 relief. (See *Diaz, supra*, 238 Cal.App.4th at pp. 1332-1333.) And the fact is, the trial court is in a much better position than we are to make that determination, which is why Proposition 47 "contemplates filing in superior court." (*Id.* at p. 1329.) It would therefore be premature to reverse appellant's sentence at this point.

It is also too early for us to determine what effect a reduction of appellant's prior felony to a misdemeanor would have on his sentence. The parties disagree about whether such a reduction would preclude application of the one-year enhancement under section 667.5, subdivision (b). But until such a reduction occurs – and there is no guarantee it will – the issue is not ripe for adjudication. Therefore, we will refrain from passing on that issue at this time.

We will also leave for the trial court's consideration whether it would be appropriate to entertain a request to dismiss appellant's prior prison term in the interests of justice pursuant to section 1385. Although appellant did not make such a request at his

sentencing hearing, the trial court is free to take up that issue should appellant decide to seek Proposition 47 relief there. But as things currently stand, there is no basis for disturbing appellant's sentence.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.