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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.

JASON HERBOLD,

Defendant and Appellant.

G051344

(Super. Ct. No.13WF2553)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Jonathan S. Fish, Judge. Reversed with directions.

Jared G. Coleman, 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, A. Natasha Cortina, Meagan Beale and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Jason Herbold pleaded guilty to three felonies, receiving stolen property (Pen. Code, § 496, subd. (a) [count 1; offense date August 20, 2013], all statutory references are to the Penal Code unless noted), second degree vehicle burglary (§§ 459, 460, subd. (b)) [count 2; offense date August 18, 2013], and vandalism (§ 594, subds. (a), (b)(1) [count 3; offense date August 18, 2013]). He contends the trial court erred when it denied his section 1170.18 petition to reduce his receiving stolen property conviction (count 1) to a misdemeanor, and we should remand for a determination whether “resentencing [Herbold] would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).) The Attorney General concedes a remand is appropriate, but the parties disagree about the scope of the remand. We agree the order must be reversed as explained below.

FACTS AND PROCEDURAL HISTORY

In August 2013, the Orange County District Attorney filed a complaint alleging Herbold committed the felonies noted above. The complaint also alleged Herbold previously had served two separate terms of incarceration as defined in section 667.5, subdivision (b).

In February 2014, Herbold waived his rights and pleaded guilty to the charged offenses, admitted the prior convictions, and admitted he violated a prior grant of probation. He acknowledged facing a maximum term of five years and eight months in prison. The court suspended imposition of sentence and placed Herbold on formal probation for three years on various terms and conditions. The court did not declare the receiving offense to be a misdemeanor. (See § 17, subd. (b)(3).) The court’s minutes reflect the court stayed (§ 654) sentence for the receiving conviction, as stipulated in Herbold’s guilty plea agreement.

In June 2014, the Orange County Probation Department filed a petition alleging Herbold violated probation by buying or receiving a stolen vehicle (§ 496d,

subd. (a)) and driving with a revoked or suspended license (Veh. Code, § 14601.1, subd. (a)) on June 13, 2014, failing to report to his probation officer on June 9, 2014, and failing to notify the probation officer he was moving to a new residence at least 72 hours in advance.

At a hearing on June 18, 2014, Herbold admitted violating probation. The court revoked and reinstated probation, and imposed a jail sentence of 180 days.

In September 2014, the probation officer filed a second petition alleging Herbold violated probation by failing to report to the probation officer within 72 hours of his release from custody, and failing to provide a residence address. The probation officer recommended the court revoke probation and impose sentence.

In November 2014, while the revocation petition was pending, Herbold filed a “Motion to Reduce Charges and Modify Probation” to have his current convictions (receiving stolen property, second degree vehicle burglary, and felony vandalism) reduced to misdemeanors. Herbold based his petition on the passage of Proposition 47 and *In re Estrada* (1965) 63 Cal.2d 740. (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 [Proposition 47, effective November 5, 2014, makes certain drug- and theft-related offenses misdemeanors unless the offenses were committed by certain ineligible defendants].) The district attorney filed a response in early December 2014 characterizing Herbold’s filing as a request for relief under section 1170.18, subdivision (a). The district attorney agreed Herbold was entitled to have his receiving stolen property conviction (§ 496) designated as a misdemeanor (§ 1170.18, subd. (f)), but opposed reducing the convictions for vehicle burglary and vandalism as “not subject to Proposition 47 relief.”

On December 29, 2014, Herbold filed a “Petition for Relief Under Proposition 47” citing sections 490.2 and 1170.18, subdivision (a). Herbold asserted his second degree vehicle burglary conviction should be “recast” as a misdemeanor because,

under Proposition 47, all thefts of property less than \$950 must be classified as misdemeanors.

At the December 30, 2014, hearing the court denied the “motion” stating “it relates to an auto burg” Herbold admitted violating probation, and the court revoked and reinstated probation and ordered Herbold to serve 196 days in jail with credit for time served. In January 2015, Herbold filed a notice of appeal from the order denying his “Prop 47 petition for resentencing pursuant to PC 1170.18.”

DISCUSSION

Herbold contends we must vacate his sentence for receiving stolen property (count 1) and remand for resentencing as a misdemeanor under section 1170.18. The Attorney General responds Herbold may be entitled to have the receiving conviction reduced to a misdemeanor, but cautions “the record is absolutely silent as to the value of the stolen property.” The Attorney General therefore suggest a limited remand to allow the trial court to resolve that factual issue, and whether “resentencing [Herbold] would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).) In his reply brief, Herbold agrees to a remand for a determination whether he poses a risk to public safety, but objects to a hearing addressing the value of the property because the prosecution failed to raise the issue of the stolen property’s value in the trial court, and therefore forfeited the issue on appeal. He also asserts determination whether the current offense qualified for relief is limited to the record of conviction and the record of conviction does not establish the value of the property.

Section 1170.18 provides in relevant part: “(a) 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 the act that added this section (“this act”) had this act 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 Section[] . . . 496, as [that] section[has] been amended or

added by this act. [¶] (b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . , unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

Receiving stolen property was punishable as either a felony or misdemeanor when Herbold committed his offense. The prosecution elected to charge Herbold with felony receiving stolen property.

After Herbold pleaded guilty, “[t]he electorate passed the Safe Neighborhoods and Schools Act (Proposition 47) in November 2014, reducing the punishment for various controlled substance offenses and some property-related offenses to misdemeanors.” (*People v. Acosta* (2015) 242 Cal.App.4th 521, 523 (*Acosta*).) “Section 1170.18 identifies two ways a defendant sentenced or placed on probation prior to Proposition 47’s effective date can have his or her sentence for an enumerated felony reduced to a misdemeanor. First, pursuant to section 1170.18, subdivision (a), the defendant may file a petition if she or he is currently serving a felony sentence for an enumerated offense. . . . Upon filing the petition, the trial court proceeds in compliance with section 1170.18, subdivision (b).” (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 310.) A defendant is eligible for resentencing if the value of the stolen property that was the basis of his conviction under section 496, subdivision (a), did not exceed \$950. (*People v. Perkins* (Jan. 25, 2016, E062878) ___ Cal.App.4th ___, ___ [2016 WL 297309]; *People v. Shabazz, supra*, at p. 308; see *People v. Sherow* (2015) 239 Cal.App.4th 875, 878-880 [petitioner must establish his or her eligibility for resentencing by demonstrating offense has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed \$950].)

The record reflects Herbold filed a motion to have all three offenses reduced to misdemeanors. The prosecutor opposed the motion to reduce the vehicle burglary and vandalism convictions to misdemeanors, but did not oppose Herbold's motion to reduce the section 496 offense, presumably because nothing in the record before us suggests the value of the property exceeded \$950. Accordingly, we conclude the prosecution forfeited any claim the value of the stolen property exceeded \$950. The parties agree the matter should be remanded to the trial court for a determination whether Herbold poses an unreasonable risk of danger to public safety. Herbold makes no claim on appeal the trial court erred in declining to reduce his vehicle burglary and vandalism convictions to misdemeanors. (See *Acosta, supra*, 242 Cal.App.4th at p. 524 [car burglary not reduced to a misdemeanor under the plain language of section 1170.18; no equal protection violation].)

DISPOSITION

The order is reversed and the matter is remanded to the trial court with directions to determine whether Herbold poses an unreasonable risk of danger to public safety.

ARONSON, ACTING P.J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.