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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.

MARK MAGNAMPO,

Defendant and Appellant.

G051447

(Super. Ct. No. 13NF3209)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas A. Glazier, Judge. Affirmed.

Gerald J. Miller, 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, Eric A. Swenson and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

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In October 2013, defendant Mark Magnampo pleaded guilty to various crimes, including acquiring access card account information. (Pen. Code,<sup>1</sup> § 484e, subd. (d).) After the passage of Proposition 47, the “Safe Neighborhoods and Schools Act” that was approved by voters on November 4, 2014 (§ 1170.18), defendant petitioned to have that conviction reclassified from a felony to a misdemeanor. The court denied his petition. Defendant contends this was error. We disagree and affirm the order.

## I

### DISCUSSION

Proposition 47 created a new resentencing provision, section 1170.18, subdivision (a), which reduces penalties for certain nonserious, nonviolent crimes like petty theft and drug possession from wobblers or felonies to misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Section 1170.18, subdivisions (a) and (b) state the offenses for which resentencing is authorized. Individuals convicted of such crimes “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 [certain sections of the Health and Safety and Penal Codes], as those sections have been amended or added by this act.” (§ 1170.18, subd. (a).)

The crime of unlawfully acquiring or retaining access card account information under section 484e, subdivision (d), is not listed in section 1170.18. It is a so-called “wobbler” because it is punishable in the trial court’s discretion as a felony or a misdemeanor. (*People v. Molina* (2004) 120 Cal.App.4th 507, 517.) The fact it was not reclassified as a pure misdemeanor by Proposition 47, nor listed within the text of that law, suggests it was not intended to be included within the scope of the initiative. (See generally *People v. Gray* (1979) 91 Cal.App.3d 545, 551 [inclusion of some offenses in a criminal statute reflects intent to exclude those offenses not specifically enumerated].)

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<sup>1</sup> All further statutory references are to Penal Code unless otherwise stated.

Defendant nevertheless argues his section 484e, subdivision (d) conviction falls within section 490.2, a new statute added by Proposition 47. Section 490.2, subdivision (a) provides, “Notwithstanding [s]ection 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[.]” Section 484e, subdivision (d), in turn, states, “Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder’s or issuer’s consent, with the intent to use it fraudulently, *is guilty of grand theft.*” (Italics added.)

Citing the italicized words in section 484e, subdivision (d), defendant contends a violation of that statute is a theft crime under section 490.2. The question of whether section 490.2 encompasses violations of section 484e, subdivision (d) is pending in the California Supreme Court, which has granted review of all published cases. (See *People v. Thompson* (2015) 243 Cal.App.4th 413, review granted Mar. 9, 2016, S232212; *People v. King* (2015) 242 Cal.App.4th 1312, review granted Feb. 24, 2016, S231888; *People v. Romanowski* (2015) 242 Cal.App.4th 151, review granted Jan. 20, 2016, S231405; *People v. Cuen* (2015) 241 Cal.App.4th 1227, review granted Jan. 20, 2016, S231107; *People v. Grayson* (2015) 241 Cal.App.4th 454, review granted Jan. 20, 2016, S231757.) We need not decide the issue ourselves at this point because defendant failed to show his possession of access card account information was worth \$950 or less, which defendant himself acknowledges is a necessary requirement to resentencing.

A petitioner under section 1170.18 bears the burden of proving he or she is eligible for resentencing. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*)). That includes showing that the value of the access card account information did not exceed \$950. (*People v. Bush* (2016) 245 Cal.App.4th 992, 1007; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450 (*Rivas-Colon*); see Evid. Code, § 500 [“a party has

the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . that he is asserting”].)

In light of the above authorities, we reject defendant’s suggestion that the prosecution had the burden to show the information unlawfully acquired exceeded \$950. Defendant had the burden and failed to carry it. He neither alleged in his petition that the value of the information was under \$950, nor presented any evidence or argument to that effect at the hearing. The court therefore properly denied his resentencing petition.

Defendant maintains he “was actively prevented from introducing evidence of such value, as a result of the trial court’s threshold determination that section 484e was not subject to Proposition 47, which rendered the issue of valuation moot.” But the trial court did not “actively prevent[]” defendant from doing anything. The fact the court denied defendant’s petition without reaching the issue of whether the value of the access card account information exceeded \$950 did not preclude defendant from attaching some type of evidence. (See *People v. Perkins* (2016) 244 Cal.App.4th 132, 133 [defendant failed to carry burden to submit evidence of the value of the stolen property where his “petition . . . attached no evidence, included no declaration, and provided no record citations to support the factual assertion that the stolen property did not exceed \$950 in value”]; *Rivas-Colon, supra*, 241 Cal.App.4th at pp. 449-450 [trial court correctly denied resentencing petition where petition did not allege value of property was under \$950 and defendant presented no evidence or argument that “the value of the property he took from the store did not exceed \$950”].)

Defendant argues “an unlawfully obtained access card, like a forged check, has a defined ‘value,’ i.e., zero.” He relies on *People v. Cuellar* (2008) 165 Cal.App.4th 833, 838-839 and *United States Rubber Co. v. Union Bank & Trust Co.* (1961) 194 Cal.App.2d 703, 708-709. But the issue in those cases was not to assign a specific value to such property. In *Cuellar*, the court considered whether the forged check had at least some intrinsic value so as to support a charge of larceny of grand theft for taking property

“‘from the person of another,’” as opposed to grand theft of property exceeding the statutory maximum for petty theft. (*Cuellar*, at p. 836.) And in *United States Rubber Co.*, the court, relying on a statute since repealed (former Civ. Code, § 3104), addressed whether a cause of action for conversion could be maintained against a bank for having unwittingly negotiated a forged check. (*United States Rubber Co.*, at pp. 708-709.) Neither case involved the forgery statute nor the punishment for its violation and “cases are not authority for propositions not considered.” (*People v. Brown* (2012) 54 Cal.4th 314, 330.) By contrast, *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744-745 recently held, in part, “for purposes of resentencing under Proposition 47, the value of a forged check is the face value of the check. Under Proposition 47, the market value of any forged instrument listed in section 473, subdivision (b), may or may not correspond to the face value of the instrument, depending on the existence of a secondary market or other evidence of value. In the context of forgery, however, the word ‘value’ as used in section 473, subdivision (b), corresponds to the stated value or face value of the check.”

As a final matter, defendant questions the application of *Sherow* to this case. He asserts, “even assuming that the access card obtained by [him] had something more than a minimal, intrinsic value, it would be virtually impossible for a defendant charged with obtaining such a card to obtain information regarding the balances in the underlying bank accounts, or other information relevant to the issue of the card’s ‘value.’” To the extent defendant has conceded he cannot establish the value of the access card account information did not exceed \$950, he is not entitled to reduce his section 484e, subdivision (d) conviction to a misdemeanor. Defendant himself acknowledges he is entitled to resentencing only if “the value of the access card information taken does not exceed \$950.”

Nevertheless, we affirm the court’s order, but without prejudice so defendant may file a new petition if the Supreme Court determines Proposition 47

reclassified section 484e offenses as misdemeanors, or if defendant can show the access card account information he acquired or retained did not exceed a value of \$950.

II

DISPOSITION

The order is affirmed without prejudice.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.