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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. PAUL RUSSELL LUPIEN, Defendant and Appellant.	G051852 (Super. Ct. No. 02NF1132) O P I N I O N

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

John L. Staley, 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, Scott C. Taylor and Daniel Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Paul Russell Lupien contends the trial court erred in denying his petition to reduce his felony convictions to misdemeanors pursuant to Proposition 47. Because appellant's convictions stemmed from his attempt to pass a forged check that was made out for over $950 we affirm the court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, appellant pleaded guilty to felony charges of second degree commercial burglary, forgery and check fraud. (Pen. Code, §§ 459/460, subd. (b), 470, subd. (d) & 475, subd. (c).)[1] The plea was based on appellant's admission he entered a credit union with the intent to commit theft and fraudulently attempted to pass a forged check. The trial court sentenced him to 16 months in prison consecutive to his sentence in an unrelated case.

After Proposition 47 was passed in 2014, appellant petitioned the trial court to reduce all three of his felony convictions to misdemeanors. The prosecution opposed the petition on the basis that "we have a forged check in the amount of $1,700." Appellant did not dispute the amount but maintained he was eligible for Proposition 47 relief because "he did not actually cash and receive money from the check." The trial court denied his petition.

DISCUSSION

Arguing the face value of the check he attempted to pass is irrelevant for purposes of Proposition 47, appellant contends the court erred in denying his petition. We disagree.

"'Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that

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1 All further statutory references are to the Penal Code.

can be punished as either felonies or misdemeanors).' [Citation.]" (*People v. Morales* (June 16, 2016, S228030) __ Cal.4th __, __ [2016 WL 3346571].)

"Proposition 47 also added section 1170.18, concerning persons currently serving a sentence for a conviction of a crime that the proposition reduced to a misdemeanor. It permits such a person to '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' specified sections that 'have been amended or added by this act.' (§ 1170.18, subd. (a).)" (*People v. Morales, supra,* __ Cal.4th at p. __.)

As relevant to appellant's case, Proposition 47 amended Penal Code sections pertaining to the crimes of forgery and check fraud. (§§ 473, 476a.) In addition, Proposition 47 created the new crime of shoplifting. (§ 459.5.) Under certain circumstances, those crimes are now punishable as misdemeanors. So if the conduct underlying appellant's convictions qualifies for misdemeanor treatment under these provisions, he would be eligible for resentencing under Proposition 47.

The subject provisions – sections 473, 476a and 459.5 – have one thing in common; they all reference the monetary figure of $950. To constitute misdemeanor forgery, the value of the forged instrument cannot exceed that amount (§ 473, subd. (b)); to constitute misdemeanor check fraud, the amount of the check cannot exceed that amount (§ 476a, subd. (b)); and to constitute misdemeanor shoplifting, the value of the property that is intended to be taken cannot exceed that amount (§ 459.5, subd. (a)). This monetary limitation is a problem for appellant because the check he tried to pass was made out for $1,700.

Relying on *People v. Cuellar* (2008) 165 Cal.App.4th 833, appellant argues the face value of the check is irrelevant for valuation purposes because there is no evidence he received any proceeds from trying to cash the check. But *Cuellar* was decided before the passage of Proposition 47. The question presented in that case was whether a "'bogus check'" the defendant took back from a department store clerk had any

value so as to support his conviction for grand theft from a person. (*Id*. at p. 836.) The court ruled the check did have some slight value based on the paper it was printed on, but that "a forged check does not have a value equal to the amount for which it is written. [Citation.] The check's value is 'a nullity'; it is merely 'an order to pay [citation] and is of no value unless accepted.' [Citation.]" (*Id*. at p. 838.)

That may be true for the crime of grand theft from a person, which requires an actual taking of the subject property. (See § 487, subd. (c).) However, unlike that offense, the crimes of forgery, check fraud and shoplifting are not dependent on the defendant actually acquiring the fruit of his unlawful exploits. Forgery occurs whenever a person with fraudulent intent "passes or attempts" to pass a false financial instrument. (§ 470, subd. (d).) Check fraud turns on possession "with the intent to utter or pass" a completed check for the purpose of defrauding any person. (475, subd. (c).) And shoplifting is based on entering a commercial establishment with the intent to commit larceny. (§ 459.5, subd. (a).) Since these crimes are grounded in the defendant's *intent* to obtain money or property by wrongful means, it matters not that appellant failed to obtain any proceeds from the forged check he tried to pass. What does matter is that he clearly *intended* to fraudulently obtain cash proceeds in the amount of $1,700 from the check. Because that amount exceeds $950, appellant is not eligible for resentencing under Proposition 47.[2]

We hasten to add that if we adopted appellant's position to ignore the amount written on a forged check in cases where the check was not actually accepted, we would undermine the voters' intent to draw a distinction between felony and misdemeanor conduct for the crimes involved here. Indeed, as respondent points out, appellant's position would require misdemeanor treatment in all such cases because

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[2] In *People v. Franco* (2016) 245 Cal.App.4th 679, the court reached a similar conclusion in a case involving a forged check in the amount of $1,500. However, that case is of no precedential value because the Supreme Court granted the defendant's petition for review. (See *People v. Franco*, rev. granted June 15, 2016, S233973.)

valuation would turn not on the stated value of the check, but on the value of the paper on which the check was written, which would always be less than $950. To avoid this unintended consequence, and to ensure the defendant's punishment is commensurate with his culpability, the amount written on the subject check should always be considered in cases involving forgery, check fraud and burglary. (See generally *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 ["In the case of a voters' initiative statute, . . . we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."].)

DISPOSITION

The trial court's order denying appellant's Proposition 47 petition is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.