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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN JOSEPH SHORES,

Defendant and Appellant.

H042163

(Santa Clara County

Super. Ct. Nos. F1243059,

F1347723)

**I. INTRODUCTION**

This appeal arises from two cases that were resolved in January 2014 in one negotiated disposition. In case No. F1243059, defendant Steven Joseph Shores pleaded no contest to felony possession of a controlled substance (former Health & Saf. Code, § 11377, subd. (a)), misdemeanor resisting a police officer (Pen. Code, § 148, subd. (a)(1)),<sup>1</sup> and misdemeanor destroying or concealing evidence (§ 135) and admitted that he had one prior conviction that qualified as a strike, in exchange for a sentence of 32 months in the state prison. In case No. F1347723, defendant pleaded no contest to possession for sale of a controlled substance (Health & Saf. Code, § 11378) and admitted that he had one prior conviction that qualified as a strike. The total state prison term was four years.

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<sup>1</sup> All statutory references hereafter are to the Penal Code unless otherwise indicated.

In December 2014 defendant filed a petition to recall his sentence in case No. F1243059 under section 1170.18, which was enacted by Proposition 47, the Safe Neighborhoods and Schools Act. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) The trial court, which was not the original sentencing judge, granted the petition and, as indicated in the amended minute order for the February 24, 2015 hearing on the petition, calculated that the total term for both cases after resentencing was four years. The court denied defendant's subsequent request to return the case to the original sentencing judge.

On appeal, defendant contends that he was entitled to resentencing by the original sentencing judge pursuant to section 1170.18, subdivision (*l*), which states: "If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application." For reasons that we will explain, we determine that the record shows that defendant waived any right to be resentenced by the original sentencing judge, and therefore we will affirm the judgment.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

In June 2012, in case No. F1243059, defendant was charged by complaint with felony possession of a controlled substance (former Health & Saf. Code, § 11377, subd. (a); count 1), misdemeanor resisting a police officer (§ 148, subd. (a)(1); count 2), and misdemeanor destroying or concealing evidence (§ 135; count 3.) The complaint also alleged that defendant had one prior conviction that qualified as a strike within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12).

In August 2013, in case No. F1347723, defendant was charged by complaint with one felony, possession for sale of a controlled substance (Health & Saf. Code, § 11378; count 1) and one infraction, possession of marijuana of 28.5 grams or less (Health & Saf. Code, § 11357, subd (b); count 2.) The complaint also alleged that defendant had one prior conviction that qualified as a strike within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12).

In January 2014 defendant entered into a negotiated disposition of both cases. In case No. F1243059, defendant pleaded no contest to all three counts and admitted that he had one prior conviction that qualified as a strike, in exchange for a sentence of 32 months in the state prison. In case No. F1347723, defendant pleaded no contest to count 1, possession of methamphetamine for sale, and admitted that he had one prior conviction that qualified as a strike, in exchange for a consecutive sentence of 16 months and dismissal of count 2.

A combined sentencing hearing was held in April 2014 before the Honorable Edward Lee. In case No. F1243059, Judge Lee imposed a sentence of 32 months (doubled low term) on count 1 and concurrent 30-day county jail sentences on count 2 and count 3. In case No. F1347723, Judge Lee imposed a consecutive 16 month sentence (one-third the middle term, doubled) and dismissed count 2. The total term imposed was four years.

In December 2014 defendant filed a petition in propria persona to recall his sentence in case No. F1243059 under section 1170.18. The trial court issued an order on January 21, 2015, appointing the public defender to represent defendant and directing the district attorney to file a response to the petition. The district attorney filed a response to the petition stating that defendant was eligible for resentencing and there was no objection.

The hearing on defendant's petition to recall the sentence in case No. F1243059 was held on February 24, 2015, before the Honorable Linda R. Clark, who was not the original sentencing judge. Defendant made no objection to Judge Clark hearing his petition.

In case No. 1243059 Judge Clark granted the petition, recalled the sentence of 32 months on count 1, and resentenced defendant under section 11377, subdivision (a) as amended by Proposition 47 to serve one year in county jail, concurrent to the sentence imposed in case No. F1347723. Based on defendant's presentence custody credits,

Judge Clark deemed the sentence in case No. F1243059 to be fully served. In case No. F1347723, Judge Clark stated that the sentence (16 months in the state prison) remained the same and directed the clerk to prepare an amended abstract of judgment that reflected a recalculation of custody credits.

The trial court later entered a corrected minute order for the February 24, 2015 hearing in case No. F1347723. The corrected minute order, dated March 2, 2015, includes the following notation: “Court states that due to re-sentencing in defendant’s other case F1243059, count 1 in this case becomes the principal term—[middle term of] 4 years (2 years doubled by [§] 667(b)-(i)/1170.12).” Defendant then requested a hearing on the ground that the trial court had changed the term of imprisonment in the March 2, 2015 corrected minute order.

The hearing requested by defendant with respect to the March 2, 2015 corrected minute order in case No. F1347723 was held before Judge Clark on March 23, 2015. Defense counsel asked the trial court to impose the mitigated term, doubled, of 32 months on count 1 in case No. F1347723. Judge Clark denied defendant’s request, explaining that the court upon resentencing in case No. F1243059 intended to make the sentence imposed in case No. F1347723 on count 1 (§ 11378) the principal term and “to impose the four years that had originally been imposed. It simply wouldn’t be divided into thirds because there’s nothing to run it consecutive to.”

Defense counsel responded that “[i]t’s the defense position since the original term, even if it was still four years, it was a mitigated term. And by the court imposing the [middle] term, it would have in effect increased the sentence. And if the original sentencing judge believed it was a mitigated case, then it should remain a mitigated case.” Defense counsel also made the following request: “[I]f the court is considering keeping the sentence as is with the four years, I would request the court consider sending us back to Judge Lee to see if it would have made a difference to him had one of these cases or counts been a misdemeanor.”

Judge Clark declined to return the case to Judge Lee, stating: “I can’t do that. Judge Lee is not one of the judges who is available for doing Proposition 47 cases. Our [presiding justice] has determined that judges who are no longer on the criminal assignment in the Hall of Justice are unavailable for purposes of Proposition 47. That’s why they are all staying here.”

After hearing further argument that included defense counsel’s acknowledgment that defendant had been given an additional 323 days of custody credit in case No. F1347723 because the sentence on count 1 was no longer consecutive, Judge Clark issued the court’s ruling, as follows: “Counsel, I’m not going to recall the sentence at this time. It does appear to me to be an appropriate sentence. By virtue of the additional credits, the defendant ends up serving less time than he would have originally and, in fact, it looks like he should be fairly close to getting out, if he hasn’t already, in this case. ¶ I will deny the request to recall the sentence for those reasons only.”

Defendant filed a notice of appeal that included a “notice of appeal addendum” that stated the appeal was from the “order of March 2, 2015 and March 23, 2015 granting his petition for resentencing pursuant to [] section 1170.18 in [case] No. F1243059 in that the court also resentenced defendant in [case] No. F1347723 to the midterm as opposed to the mitigated term, even though the original sentence imposed the mitigated term.”

### **III. DISCUSSION**

On appeal, defendant does not challenge the terms of his sentence in case No. F1243059 or case No. F1347723. Instead, defendant contends that he had a statutory right under section 1170.18 to have his petition for resentencing heard before Judge Lee, the original sentencing judge, because Judge Lee was not unavailable within the meaning of the statute. Defendant requests that the matter be remanded for resentencing.

The People respond that section 1170.18 only requires a petition for resentencing to be filed in the county that entered the judgment of conviction. Alternatively, the People assert that defendant expressly waived any right to have his petition heard by the

original sentencing judge in the consent form that he signed to authorize the public defender to represent him on his petition for resentencing.

We will begin our analysis of the parties' contentions with an overview of Proposition 47.

**A. Legal Background: Proposition 47**

On November 4, 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (the Act). (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) Proposition 47 reclassified certain drug and theft related offenses as misdemeanors instead of felonies or alternative felony misdemeanors. (§ 1170.18, subd. (a); *People v. Shabazz* (2015) 237 Cal.App.4th 303, 308.)

The statutes amended by Proposition 47 include Health and Safety Code section 11377, subdivision (a), the former version of which provided the basis for defendant's felony conviction in case No. F1243059. Prior to Proposition 47, possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a) was a wobbler. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) As a result of Proposition 47, Health and Safety Code section 11377, subdivision (a) now provides that possession of specified controlled substances is punishable as a misdemeanor unless the defendant has certain disqualifying prior convictions.

Proposition 47 also enacted a new statutory provision, section 1170.18, which sets forth the procedures for defendants seeking to have a felony conviction resentenced as a misdemeanor. Relevant here, a defendant "currently serving a sentence" for a felony conviction, who would have been guilty of a misdemeanor under the Act if the Act had been in effect at the time of the offense, may petition for a recall of his or her sentence and request resentencing in accordance with the amended statute that reclassified the defendant's offense as a misdemeanor. (§ 1170.18, subd. (a).) If the petitioner meets the requisite statutory criteria, "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.” (*Id.*, subd. (b); see *id.*, subd. (c).)

Regarding the sentencing judge, section 1170.18, subdivision (*l*) states: “If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.” As we will further discuss, we need not determine whether Judge Lee, the original sentencing judge in this case, was unavailable within the meaning of section 1170.18, subdivision (*l*) since we find the issue of waiver to be dispositive.

### **B. Waiver**

The People argue that defendant waived any right to have his petition to recall the sentence under section 1170.18 heard by Judge Lee, the original sentencing judge. Having reviewed the record on appeal, we agree for reasons that we will discuss.

The record shows that in January 2015, prior to the February 2015 hearing on the petition, defendant executed a consent to representation by the public defender with respect to his request for resentencing under Proposition 47 and section 1170.18. Among other things, the consent form states: “I give my attorney the right to waive my right to be resentenced in front of the original sentencing judge and accept post-release supervision conditions. I request that the Court proceed with my resentencing in my absence.” We will determine whether defendant’s waiver was sufficient to waive any right to have a petition to recall the sentence under section 1170.18 heard by the original sentencing judge under the rules governing waiver in criminal cases.

“ ‘ “[W]aiver is the ‘intentional relinquishment or abandonment of a known right.’ [Citations.]” [Citation.]’ [Citation.]” (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) “Ordinarily, criminal defendants may waive rights that exist for their own benefit. ‘Permitting waiver . . . is consistent with the solicitude shown by modern jurisprudence to the defendant’s prerogative to waive the most crucial of rights.’ [Citation.] ‘An accused may waive any rights in which the public does not have an interest and if waiver of the

right is not against public policy.’ [Citation.]” (*Ibid.*; *People v. Farnam* (2002) 28 Cal.4th 107, 146 [same].)

Waiver has been applied in the sentencing context. “[W]henver a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge. Because of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant’s decision to enter a guilty plea. [Citations.]” (*People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757 (*Arbuckle*)). However, any right to a particular sentencing judge pursuant to the decision in *Arbuckle* may be waived by the defendant. (See, e.g., *People v. Serrato* (1988) 201 Cal.App.3d 761, 765 [“when faced with a different sentencing judge, a defendant must object at that time or waive his *Arbuckle* rights”]; but see *People v. Horn* (1989) 213 Cal.App.3d 701, 709 [*Arbuckle* waiver requires affirmative statement or conduct by the defendant].)

Also instructive on the issue of waiver are cases involving a petition for resentencing under Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12 and added section 1170.126. (See *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 (*Yearwood*)). Proposition 36 “created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)” (*Yearwood, supra*, at p. 168.)

As enacted, Proposition 36 includes a provision regarding the sentencing judge (§ 1170.126, subdivision (j)) that is nearly identical to Proposition 47’s sentencing judge provision (§ 1170.18, subdivision (l)). Section 1170.126, subdivision (j) states: “If the

court that originally sentenced the defendant is not available to resentence the defendant, the presiding judge shall designate another judge to rule on the defendant's petition.”

In *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279 (*Kaulick*), the court construed section 1170.126, subdivision (j) as follows: “It is therefore clear that the initial sentencing judge shall rule on the prisoner's petition. However, as with other rights, a defendant may waive the right for the petition to be considered by a particular judge. ‘A valid waiver of any right, however, presupposes an actual and demonstrable knowledge of the right being waived so that the waiver is deemed knowing and intelligent. Courts should not find a waiver by mere silence or acquiescence even when the defendant is represented by counsel. [Citation.]’ [Citation.]” (*Kaulick, supra*, at p. 1301, fn. omitted.)

The reasoning in *Kaulick* was recently applied in the Proposition 47 context in *People v. Adelman* (2016) 2 Cal.App.5th 1188 (*Adelman*) (pet. for review filed Oct. 5, 2016 (S237602)). In *Adelman*, the defendant was originally sentenced in San Diego County Superior Court. (*Id.* at p. 1191.) Because the defendant, who was on probation, had changed his residence to Riverside County, the San Diego County Superior Court granted the defendant's motion for jurisdictional transfer of his probation case to Riverside County Superior Court. (*Id.* at p. 1192.) The defendant subsequently filed a petition to redesignate his felony conviction as a misdemeanor under section 1170.18, subdivision (a) in Riverside County Superior Court. (*Ibid.*) After the petition was granted by the Riverside trial court, the district attorney appealed on the ground that the petition must be decided by the San Diego trial court that originally sentenced the defendant. (*Ibid.*)

The *Adelman* court determined that “ ‘as with other rights, a defendant may waive the right for the petition to be considered by a particular judge.’ ([*Kaulick, supra*,] 215 Cal.App.4th [at p.] 1301.) Applying the reasoning of *Kaulick* means a defendant seeking Proposition 47 relief may waive his [or her] right to be sentenced by a particular

judge in a particular county, something [the defendant] has done in this instance by filing his petition in Riverside Superior Court.” (*Adelmann, supra*, 2 Cal.App.5th at p. 1194.)

Here, the trial court’s January 21, 2015 order in response to defendant’s petition for resentencing shows that it was apparent at the outset that Judge Lee, the original sentencing judge, would not be assigned to rule on defendant’s petition for resentencing. Judge Clark issued the January 21, 2015 order, which appointed the public defender to represent defendant and directed the district attorney to file a response to the petition. The order also included a February 24, 2015 hearing date on the petition in Department 31, which was Judge Clark’s department.

A few days after Judge Clark issued the January 21, 2015 order, defendant executed a consent form for representation by the public defender with respect to resentencing under Proposition 47 and section 1170.18. The consent form, dated January 30, 2015, includes the following terms: “I give my attorney the right to waive my right to be resentenced in front of the original sentencing judge and accept post-release supervision conditions. I request that the Court proceed with my resentencing in my absence.”

There is no indication in the record on appeal that defendant’s public defender objected to Judge Clark being assigned to rule on defendant’s petition for resentencing at any time. Significantly, when the hearing on defendant’s petition was held on February 24, 2015, before Judge Clark, defendant was not present and defense counsel made no objection to Judge Clark. Based on the available record, we therefore find that defendant waived any right to have his petition to recall the sentence heard by Judge Lee, the original sentencing judge. (See *Adelmann, supra*, 2 Cal.App.5th at p. 1194.)

Defendant contends that his waiver was rendered invalid due to a change in circumstances. According to defendant, “[b]ased on the assumption that Judge Clark was presiding over a straightforward resentencing in case [No.] F1243059, there was no reason for defense counsel not to waive resentencing by the original sentencing judge.”

According to defendant, Judge Clark's decision to impose a new sentence in case No. F1347723 after the hearing on his petition for resentencing (as set forth in the amended minute order for the February 24, 2015 hearing) "was a change in circumstances that rendered the waiver invalid."

We are not convinced by defendant's contention that his waiver is invalid. He does not provide any authority for the proposition that a waiver of any right to have a petition for resentencing heard by the original sentencing judge is invalid where a different judge does not rule as the defendant has assumed the original sentencing judge would rule on a petition for resentencing. Moreover, the decisions on which defendant relies are distinguishable and do not support his contention. The California Supreme Court ruled in *In re Crumpton* (1973) 9 Cal.3d 463 that habeas corpus relief is available to a defendant whose conviction was based on a guilty plea where there is no material dispute as to the facts relating to the conviction and the statute under which the defendant was convicted did not prohibit his or her conduct. (*Id.* at pp. 467-468.)

The other decisions on which defendant relies address jury trial waivers and likewise do not stand for the proposition that a waiver may be rendered invalid due to an unexpected trial court ruling. (See *People v. Hopkins* (1974) 39 Cal.App.3d 107, 117 [defendant did not waive a jury trial on amended charges where amendment made after his waiver]; *People v. Luick* (1972) 24 Cal.App.3d 555, 559 ["where allegations of priors are added *after* a jury waiver, defendant must, personally and expressly, waive jury trial on the issue thus presented"]; *People v. Ray* (1965) 238 Cal.App.2d 734, 735 ["no indication that defendant personally or by his counsel waived his right to trial by jury on the two prior convictions"]; *People v. Walker* (1959) 170 Cal.App.2d 159, 162 [jury trial waiver did not apply to charge added to amended information].)

For these reasons, we conclude that defendant waived any right to have his petition for resentencing heard by the original sentencing judge pursuant to section 1170.18, subdivision (l), and therefore we will affirm the judgment.

#### **IV. DISPOSITION**

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.