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

THE PEOPLE,

Plaintiff and Respondent,

v.

GAVIN MCVEY QUTOB,

Defendant and Appellant.

H043197

(Santa Clara County

Super. Ct. No. F1244497)

Defendant Gavin McVey Qutob appeals from the denial of his petition to have a felony conviction designated as a misdemeanor under Proposition 47. (Pen. Code, § 1170.18, subd. (f).)<sup>1</sup> In 2012, Qutob entered a Walmart and used discarded receipts to obtain a fraudulent refund for \$26.39 in cash. He pleaded no contest to second degree burglary. (§ 459.) He petitioned to designate the offense as a misdemeanor in 2015. The trial court denied his petition on the ground that the offense did not constitute shoplifting under section 459.5.

The parties agree that the conduct underlying the offense constituted theft by false pretenses. In *People v. Garrett* (2016) 248 Cal.App.4th 82, review granted August 24, 2016, S236012 (*Garrett*), we held that the term “larceny” as used in section 459.5 encompasses theft by false pretenses, making such offenses eligible for resentencing

<sup>1</sup> Subsequent undesignated statutory references are to the Penal Code.

under Proposition 47.<sup>2</sup> Accordingly, we will reverse the order denying the petition and remand for further proceedings.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

On September 30, 2012, Qutob entered a Walmart in Gilroy and used discarded receipts he had found in a parking lot to return three items of merchandise for fraudulent refunds.<sup>3</sup> He obtained \$26.39 in cash. The prosecution charged Qutob with second degree burglary. (§§ 459, 460, subd. (b).) He pleaded no contest to the count as charged. In accord with a negotiated plea agreement, the trial court denied probation and imposed a term of sixteen months in county jail. The court ordered that the balance of the term would be suspended after six months, whereupon Qutob would be released on mandatory supervision.

In October 2015, Qutob petitioned to have his conviction designated as a misdemeanor under Proposition 47. (§ 1170.18, subd. (f).) The prosecution opposed the petition on the ground that the offense did not constitute shoplifting. The trial court agreed with the prosecution and denied the petition. The court found Qutob ineligible for resentencing on the ground that the term “larceny” as used in section 459.5 requires a trespassory taking of property. The court found that no such taking had occurred because the merchant had willingly given Qutob possession of the property, whereas a trespassory taking must be nonconsensual.

### **II. DISCUSSION**

Qutob contends the trial court erred because the conduct underlying his offense constituted shoplifting under section 459.5. The Attorney General adopts the position taken by the trial court—that the conduct did not involve a trespassory taking and hence

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<sup>2</sup> The Supreme Court granted review and deferred further action pending a disposition in *People v. Gonzales* (2015), formerly at 242 Cal.App.4th 35, review granted February 17, 2016, S231171.

<sup>3</sup> The facts are taken from the parties’ pleadings in the trial court proceedings.

did not constitute larceny under section 459.5. However, both parties agree that the conduct underlying the offense constituted theft by false pretenses. We conclude that larceny under section 459.5 includes theft by false pretenses, making Qutob eligible for resentencing.

*A. Legal Principles*

In November 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (Act), reducing certain drug- and theft-related offenses to misdemeanors. Among other things, the Act added section 459.5, making the offense of “shoplifting” a misdemeanor: “Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary.” (§ 459.5, subd. (a).) Section 459.5 mandates that shoplifting shall be punished as a misdemeanor except for persons having certain prior convictions not at issue here. Subdivision (b) of section 459.5 further provides: “Any act of shoplifting as defined in subdivision (a) *shall be charged as shoplifting*. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.” (§ 459.5, subd. (b), italics added.)

Proposition 47 also created a new resentencing scheme for persons serving felony sentences for specified offenses made misdemeanors by the Act. (§ 1170.18, subds. (a) & (f).) Under subdivision (f), “[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 this act had this act 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. (§ 1170.18, subd. (f).) (Italics added.)

B. *Qutob is Eligible for Resentencing Under Section 459.5*

The parties do not dispute that Qutob entered a commercial establishment during regular business hours, nor that he took property valued at less than \$950. The sole dispute over his eligibility concerns whether he entered the establishment with the intent to commit larceny.

In *Garrett, supra*, 248 Cal.App.4th 82, review granted, we considered the application of Proposition 47 to a commercial burglary offense involving theft by false pretenses. Garrett and his compatriot entered a convenience store and attempted to use a stolen credit card to buy gift cards worth \$50. The trial court denied Garrett’s petition for resentencing on the ground that he entered the store with the intent to commit identity theft and not larceny. We concluded Garrett had entered the store with the intent to commit theft by false pretenses. We also observed that the term “larceny” in section 459.5 includes theft offenses because section 490a requires the term “larceny” to be construed as identical to the term “theft.” (*Id.* at pp. 88-89.) Furthermore, because section 484 defines theft to include taking property “by any false or fraudulent representation or pretense”—i.e., theft by false pretenses—we held that section 459.5 encompasses the fraudulent use of a credit card. (*Id.* at pp. 89-90.)

The parties here agree that Qutob’s conduct—the fraudulent use of discarded receipts to obtain a refund—also constitutes theft by false pretenses. Accordingly, we conclude under *Garrett* that section 459.5 encompasses Qutob’s offense.

The Attorney General further argues that if Qutob is eligible for resentencing, the prosecution would be entitled to withdraw from the underlying plea agreement. We recently rejected this argument in *People v. Dunn* (2016) 248 Cal.App.4th 518, review granted, September 14, 2016, S236282.<sup>4</sup> “We hold that a defendant whose conviction is

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<sup>4</sup> The Supreme Court granted review and deferred further action pending a disposition in *Harris v. Superior Court*, formerly at 242 Cal.App.4th 244, review granted February 24, 2016, S231489.

based upon a negotiated plea who is otherwise eligible for resentencing under Proposition 47 may not be denied relief on the ground that reclassification of his or her conviction to a misdemeanor would reduce the bargained-for punishment of the plea.” (*Id.* at p. 522.) Although *Dunn* concerned a petition for resentencing under subdivision (a) of section 1170.18, subdivision (f) contains the same operative language allowing for a petition with respect a conviction obtained “by trial *or plea . . . .*” (§ 1170.18, subd. (f).) (Italics added.) Accordingly, we conclude Qutob is eligible for resentencing notwithstanding the plea agreement, and nothing in Proposition 47 entitles the prosecution to withdraw from that agreement.

For the reasons above, we will reverse the trial court’s order denying Qutob’s petition to have his conviction designated as a misdemeanor.

### **III. DISPOSITION**

The trial court’s order of December 7, 2015, denying Qutob’s petition under Proposition 47, is reversed, and the matter is remanded for further proceedings consistent with this opinion.

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WALSH, J.\*

WE CONCUR:

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RUSHING, P.J.

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GROVER, J.

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\*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.