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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MICHAEL ALVAREZ, Defendant and Appellant.	H043234 (Santa Cruz County Super. Ct. Nos. F22948, F23933, F25120, F25028)

Defendant Anthony Michael Alvarez appealed from an order denying his request to strike a prior prison term enhancement imposed under Penal Code section 667.5, subdivision (b).[1] Defendant contended that the trial court was required to strike the enhancement, because the offense underlying the conviction had been redesignated a misdemeanor pursuant to section 1170.18[2] after the passage of Proposition 47. We affirmed the order. The California Supreme Court granted review, deferred briefing, and then transferred the case back to this court to vacate its decision and to reconsider the cause in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*). We vacate our original opinion and reverse the order.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] Our references to section 1170.18 are to the version which took effect in November 2014.

I. Background

A. Case No. F22948

In July 2012, the Santa Cruz County District Attorney's Office filed an information in case No. F22948, which charged defendant with: transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a) - count 1); possession of a controlled substance for sale (Health & Saf. Code, § 11378 - count 2); possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a) - count 3); possession of an injection device (Health & Saf. Code, § 11364.1, subd. (a) - count 4); and driving with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a) - count 5). The information also alleged that defendant had four prior prison term enhancements pursuant to section 667.5, subdivision (b). The prior prison term enhancements were based on defendant's violations of section 666 (petty theft with a prior conviction) in case No. F14501, section 496, subdivision (a) (receiving stolen property) in case No. F07802, Health and Safety Code section 11377, subdivision (a) in case No. F06149, and Vehicle Code section 10851, subdivision (a) in case No. F11440.

B. Case No. F23933

In February 2013, the Santa Cruz County District Attorney's Office filed an information in case No. F23933 which charged defendant with: possession of marijuana for sale (Health & Saf. Code, § 11359 - count 1); possession of hydrocodone (Health & Saf. Code, § 11350, subd. (a) - count 2); and possession of oxycodone (Health & Saf. Code, § 11350, subd. (a) - count 3). The information also alleged that defendant had four prior prison term enhancements (§ 667.5, subd. (b)) and an on-bail enhancement (§ 12022.1).

C. Plea and Sentencing in Case Nos. F22948 and F23933

In April 2013, defendant pleaded guilty to all counts and admitted all of the enhancement allegations in case Nos. F22948 and F23933. The pleas were entered pursuant to a negotiated agreement for both cases in which defendant would not be sentenced to more than three years and eight months and would have the possibility of probation.

On June 26, 2013, in case No. F22948, the trial court struck one of the prior prison term enhancements (Health & Saf. Code, § 11377, subd. (a)), imposed and suspended imposition of a six-year sentence, and placed defendant on probation for three years. In case No. F23933, the trial court suspended imposition of sentence and placed defendant on probation for three years.

Two days later, the trial court revoked defendant's probation in case Nos. F22948 and F23933.

D. Case No. F25028

On July 1, 2013, the Santa Cruz District Attorney's Office filed a criminal complaint in case No. F25028 and charged defendant with possession of cocaine and heroin (Health & Saf. Code, § 11350, subd. (a) - count 1) and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a) - count 2). The complaint also alleged that defendant had four prior prison term enhancements (§ 667.5, subd. (b)).

Two weeks later, defendant entered a plea of no contest to count 1 and admitted two prior prison term enhancements. The trial court dismissed count 2 and struck the other two prior prison term enhancements. On the same date, defendant also admitted violating the terms of probation in case Nos. F22948 and F23933.

E. Case No. F25120

On July 17, 2013, the Santa Cruz District Attorney's Office filed a criminal complaint in case No. F25120 and charged defendant with possession of a controlled substance in a jail facility (§ 4573.6). The complaint also alleged four prior prison term enhancements (§ 667.5).

A week later, defendant pleaded no contest to possession of a controlled substances in a jail facility (§ 4573.6) and admitted one prior prison term enhancement. The trial court struck the remaining prior prison term enhancements.

F. Sentencing

On August 23, 2013, the trial court imposed the previously suspended sentence of six years in case Nos. F22948 and F23933 and deemed case No. F22948 the principal case. The six-year sentence included: a two-year prison term on count 2 (the principal term) (possession of a controlled substance for sale - Health & Saf. Code, § 11378); a consecutive one-year prison term on count 1 (transportation of a controlled substance - Health & Saf. Code, § 11379, subd. (a)); a concurrent two-year prison term on count 3 (possession of a controlled substance - Health & Saf. Code, § 11350, subd. (a)); a concurrent 30-day jail term on count 4 (possession of an injection device - Health & Saf. Code, § 11364, subd. (a)); and a concurrent 30-day jail term on count 5 (driving with a suspended or revoked license - Veh. Code, § 14601.1, subd. (a)). The trial court also imposed a one-year term for each of the three prior prison term enhancements (§ 667.5, subd. (b)), which was based on defendant's prior violations of sections 496 and 666 and Vehicle Code section 10851, subdivision (a). In case No. F25028, the trial court sentenced defendant to eight months and imposed and stayed sentence on defendant's two prior prison term enhancements. In case No. F25120, the trial court sentenced defendant to two years in state prison. The trial court ordered that defendant's sentences

in case Nos. F25028 and F25120 run consecutive to the six-year sentence in case No. F22948 and ordered that defendant serve the sentences after completing his six-year sentence in case No. F22948.

In September 2013, the trial court sentenced defendant in case No. F23933 to eight months in state prison. Thus, defendant's total aggregate sentence was nine years and four months in case Nos. F22948, F23933, F25028, and F25120.

G. Redesignation of Felony Convictions

On September 29, 2015, the trial court redesignated defendant's felony section 666 (petty theft with a prior) conviction to a misdemeanor pursuant to section 1170.18, subdivision (f).

On November 20, 2015, defendant filed a petition for resentencing pursuant to section 1170.18. He argued that all of the violations of Health and Safety Code section 11350 should be reduced to misdemeanors. He also argued that the trial court was required to strike his prior prison term enhancement for violation of section 666 since the underlying felony was now a misdemeanor.

On January 5, 2016, the trial court resentenced defendant. In case No. F22948, the trial court reduced count 3 (possession of a controlled substance - Health & Saf. Code, § 11350) to a misdemeanor. The trial court denied defendant's request to strike his prior prison term enhancement (petty theft with a prior conviction - § 666). In case No. F23933, the trial court reduced counts 2 and 3 (possession of a controlled substance - Health & Saf. Code, § 11350) to misdemeanors. In case No. F25028, the trial court reduced count 1 (possession of a controlled substance - Health & Saf. Code, § 11350). In case No. F25120, the trial court found that the prior prison term enhancements were "double imposed" since they had been "[i]mposed in case No. F22948 as the lead case."

H. Appeal

Defendant filed an appeal in which he contended that the trial court erred by failing to strike the prior prison term enhancement in case No. F22948, because the underlying conviction was no longer a felony under Proposition 47. (*People v. Alvarez* (Sept. 22, 2017, H043234) [nonpub. opn.].) Since there was "neither an express retroactivity provision nor an expression of voter intent that the 'misdemeanor for all purposes' language in section 1170.18, subdivision (k) be applied retroactively," this court concluded that "the application of section 1170.18, subdivision (k) [was] prospective only" and affirmed the order. (*Id.* at pp. 8-9.)

II. Discussion

In November 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (the Act), which reclassified certain nonserious, nonviolent offenses from felonies to misdemeanors. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) Proposition 47 also enacted section 1170.18, which permits a defendant who is currently serving his or her sentence for a felony conviction, and who would have been guilty of a misdemeanor if the Act had been in effect at the time of the offense, to file an application to have the felony conviction resentenced as a misdemeanor. (§ 1170.18, subd. (a).) Section 1170.18 also provides that a felony conviction that is recalled and resentenced or designated as a misdemeanor "shall be considered a misdemeanor for all purposes . . . ." (§ 1170.18, subd. (k).)

In *Buycks*, *supra*, 5 Cal.5th 857, the California Supreme Court granted review in three cases involving issues related to Proposition 47's effect on felony-based enhancements in resentencing proceedings. Relevant to the present case is Valenzuela in which the defendant argued that Proposition 47 required the dismissal of a one-year enhancement for having served a prior prison term (§ 667.5, subd. (b)) when the felony

underlying the prior prison term enhancement was reduced to a misdemeanor under section 1170.18. (*Buycks*, at pp. 871, 874.) While Valenzuela's appeal involving her 2014 convictions was pending, voters passed Proposition 47. (*Buycks*, at p. 874.) The *Buycks* court concluded that "as to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, . . . Proposition 47 and the *Estrada*[[3]] rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under the measure." (*Buycks*, at p. 888.) However, the *Buycks* court also discussed another scenario in which a trial court must retroactively strike a prior prison term enhancement under the full resentencing rule. (*Buycks*, at pp. 893-895.) When resentencing a Proposition 47 eligible conviction, "the trial court must reevaluate the applicability of any enhancement within the same judgment *at that time*, so long as that enhancement was predicated on a felony conviction now reduced to a misdemeanor. Such an enhancement cannot be imposed because at that point the reduced conviction 'shall be considered as a misdemeanor for all purposes.' (§ 1170.18, subd. (k).) Under these limited circumstances, a defendant may also challenge any prison prior enhancement in that judgment if the underlying felony has been reduced to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment." (*Buycks*, at pp. 894-895.) In its disposition, the *Buycks* court stated: "Alternatively, because it appears that Valenzuela has a Proposition 47 eligible conviction . . . , if the resentencing court grants her petition to reduce that conviction to a misdemeanor, the court must resentence her anew in that case, and it will be required to reevaluate the applicability of the section 667.5 enhancement at that time." (*Buycks*, at p. 896.)

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[3] When a statute does not expressly prohibit retroactive application, "[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect when the prohibited act was committed, applies." (*In re Estrada* (1965) 63 Cal.2d 740, 744.)

Here, the trial court sentenced defendant in case No. F22948 on August 23, 2013. Defendant did not file an appeal from this judgment within 60 days and thus the judgment became final on October 22, 2014, which was before Proposition 47 became effective. (*People v. Valencia* (2017) 3 Cal.5th 347, 368; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) However, the trial court subsequently granted his petition to reduce his conviction for possession of a controlled substance in that case to a misdemeanor. Thus, when the trial court resentenced this Proposition 47 eligible conviction, it was also required to reevaluate the applicability of the prior prison term enhancement that had been reduced to a misdemeanor.

The Attorney General argues that defendant "was not resentenced on an 'eligible felony conviction,' as would have been needed to trigger renewed consideration of the prison prior enhancement's applicability." But the Attorney General overlooks his own brief in which he acknowledged that "the trial court redesignated all four of appellant's felony convictions for violation of Health and Safety Code section 11350, subdivision (a) to misdemeanors and resentenced appellant accordingly." (Fn. omitted.)

III. Disposition

The order is reversed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

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