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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KERRY SHANE ABELA, Defendant and Appellant.	H045723 (Santa Cruz County Super. Ct. No. F22003)

Kerry Shane Abela appeals the denial of his petition to reduce his felony conviction of second degree burglary of a vehicle to a misdemeanor and to resentence him pursuant to Proposition 47. (Pen. Code, §§ 459, 1170.18, subd. (f).)[1] We conclude that burglary of a vehicle is not an offense that has been reclassified as a misdemeanor by Proposition 47 and affirm.

I. STATEMENT OF THE FACTS AND CASE

This court affirmed the judgment of the trial court in Abela's first appeal of this case, *People v. Abela* (Oct. 19, 2016, H042550 [nonpub. opn.] (*Abela*)). The facts and procedure related to his convictions are summarized in *Abela* as follows: "On July 2, 2011, the Santa Cruz Police Department received a report of a residential burglary. When the police arrived to investigate, the victim told them he had found his stolen property—an electric guitar and two microphones—at a local music store. An employee

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

at the store told police he bought the items from a man with a paper copy of a driver's license in the name of 'Robin Abela.'

"Also on July 2, 2011, another victim told police two speakers had been stolen from his van. The victim found the speakers at the same music store where the guitar and microphones were found. The music store employee showed the victim video footage from a surveillance camera next door. The victim recognized a man known as 'Karey' or 'Carey' who had been causing problems and stealing items at the victim's apartment complex. The music store employee later identified Abela in a photographic lineup.

"Abela subsequently stated he had received the stolen property from someone named 'Stanley,' but he denied committing either of the burglaries." (*Abela, supra*, H042550 [nonpub. opn.] at p. 2.)

"The information charged Abela with three counts: Count One—Residential burglary ([Penal Code] § 459); Count Two—Burglary of a vehicle (§ 459); and Count Three— Receiving stolen property (§ 496, subd. (a)). As to Count One, the information alleged Abela had suffered two prior serious felony convictions: Resisting arrest in 2005 (§ 148.10), and assault with a deadly weapon in 1994 (§ 245). As to all three counts, the information also alleged the two prior convictions constituted strike priors. (§ 667, subds. (b)-(i).) The information further alleged Abela had served six prior prison terms. (§ 667.5, subd. (b).)

"In June 2013, Abela pleaded guilty to Count Three, and he pleaded no contest under *Alford*[2] to Counts One and Two. Abela admitted he had previously been convicted of a strike and a serious felony for assault with a deadly weapon in 1994. The parties stipulated to dismissal of the remaining strike allegation—the conviction for resisting arrest in 2005—because it did not constitute a strike. Abela also admitted three of the

[2] *North Carolina v. Alford* (1970) 400 U.S. 25.

prior prison term allegations. The remaining prior prison term allegations were stricken." (*Abela*, *supra*, H042550 [nonpub. opn.] at pp. 2-3.)

"The court imposed a total term of 17 years 4 months, composed of eight years for Count One (the midterm of four years, doubled by the strike), 16 months for Count Two (one-third the midterm of two years, doubled by the strike), five years for the prior serious felony, and three years for the prior prison terms, all consecutive. The court also reduced the conviction on Count Three to a misdemeanor and imposed a term of 30 days in county jail." (*Abela, supra,* H042550 [nonpub. opn.] at p. 4.)

On February 9, 2018, Abela filed a petition for reduction of his conviction to a misdemeanor and resentencing pursuant to section 1170.18. The district attorney filed an objection to the petition on the ground that Proposition 47 does not apply to second degree burglary of a vehicle (§ 459). On March 26, 2018, the trial court summarily denied the petition.

Abela filed a notice of appeal and requested a certificate of probable cause on April 6, 2018.

II. DISCUSSION

Proposition 47, the Safe Neighborhoods and Schools Act of 2014, reduced certain felonies to misdemeanors, including, theft, by adding section 490.2, which states in pertinent part: "Notwithstanding Section 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, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." (§ 490.2, subd. (a).)

Interpretations of Proposition 47 are subject to de novo review. (*People v. Bush* (2016) 245 Cal.App.4th 992, 1003.) The statute's plain meaning controls our interpretation, unless the words are ambiguous and permit more than one reasonable interpretation. (*Ibid.*)

Abela was convicted of burglary, consisting of entry into a locked vehicle with the intent to steal property or commit any felony. (§ 459.) The statutory language in Proposition 47 does not include burglary. Neither section 490.2 nor section 1170.8 refers specifically to vehicle burglary as an offense eligible for resentencing. Proposition 47 did not affect section 459, "nor did it explicitly reduce all prior felony second degree burglary offenses to misdemeanor second degree burglary offenses." (*People v. Chen* (2016) 245 Cal.App.4th 322, 326.)

Abela acknowledges that burglary is not specifically referenced in Proposition 47. However, he argues that the crime of burglary of a vehicle is analogous to vehicle theft, which is eligible for resentencing if the defendant can establish that the vehicle was worth less than $950. (*People v. Page* (2017) 3 Cal.5th 1175 (*Page*).) In *Page*, the Supreme Court held that convictions for vehicle theft under Vehicle Code section 10851 "are not categorically ineligible for resentencing" under section 1170.18. (*Id.* at p. 1189.) Accordingly, "obtaining an automobile worth $ 950 or less by theft constitutes petty theft under section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged." (*Id.* at p. 1187.)

Abela notes that the Supreme Court in *Page* interpreted Proposition 47 "broadly" and "liberally" to effectuate the intent of the voters. (*Page*, *supra*, 3 Cal.5th 1175 at p. 1187.) He asserts that a such a broad interpretation has been used in recent cases such as *People v. Romanowski* (2017) 2 Cal.5th 903, 910, wherein the court held that theft of access card information was a crime that came within the petty theft statute in section 490.2, and *People v. Gonzales* (2017) 2 Cal.5th 858, wherein the court held that cashing stolen checks came within the shoplifting statute in section 459.5. Abela argues

that we too should interpret Proposition 47 broadly to include burglary of a vehicle as an offense that is eligible for resentencing under Proposition 47.

While we agree that Proposition 47 should be interpreted broadly, such interpretation does not necessitate a conclusion that burglary of a vehicle is tantamount to petty theft. Indeed, the theory that burglary of a vehicle falls within section 490.2 was rejected in *People v. Acosta* (2015) 242 Cal.App.4th 521. In *Acosta*, the defendant sought to reduce his felony conviction of attempted second degree car burglary to a misdemeanor. The court held that car burglary, which is a crime of *entering*, and petty theft, which is a crime of *taking* are not analogous. The court concluded, "Because nothing in the language of Proposition 47 suggests it applies to [defendant]'s crime, there is no merit to his argument that reclassifying his offense as a misdemeanor is required in order to comply with the express intent of liberal construction of Proposition 47." (*Id.* at p. 526.)

We agree with the court in *Acosta* that burglary of a vehicle does not come within the meaning of petty theft under section 490.2, and therefore, it is not an offense that is eligible for reduction to a misdemeanor and resentencing pursuant to section 1170.18.

III. DISPOSITION

The order is affirmed.

Greenwood, P.J.

WE CONCUR:

Grover, J.

Danner, J.

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Grover, J., Concurring

The offense defined by the burglary statute is fundamentally based on unlawful entry, not theft. (Pen. Code, § 459; *People* v. *Acosta* (2015) 242 Cal.App.4th 521, 526.) That remains true even when the objective of the entry is to commit theft, as is commonly the case. I therefore agree that Proposition 47 did not make vehicle burglary a misdemeanor, since a person convicted of burglary has not been convicted of "obtaining any property by theft where the value ... does not exceed nine hundred fifty dollars." (Pen. Code, § 490.2.)

People v. *Page* (2017) 3 Cal.5th 1175 (*Page*) does not dictate a different result. There the Supreme Court determined that a conviction under Vehicle Code section 10851 for the unauthorized taking or driving of a vehicle is covered by Proposition 47 when the basis for the conviction is *taking* the vehicle. A person convicted of violating the statute in that way has in effect been convicted of vehicle theft. *(Page*, *supra*, at p. 1184.) In reaching that conclusion, the court relied on *People* v. *Garza* (2005) 35 Cal.4th 866, 871, which held that a person convicted of taking a vehicle under Vehicle Code section 10851 cannot also be convicted of receiving stolen property because one cannot both steal and receive the same property. *(Page*, *supra*, at p. 1183.) In contrast, one can properly be convicted of both burglary and receiving property from the same burglary. *(People* v. *Allen* (1999) 21 Cal.4th 846, 866, quoting *People* v. *Carr* (1998) 66 Cal.App.4th 109, 113 ["A defendant who is convicted of burglary is not convicted of stealing any property at all. [The] prohibition on dual conviction is thus inapplicable. We therefore hold that a defendant may lawfully be convicted of burglary and of receiving property that he

stole during the burglary.”) The conclusion that burglary is not a theft offense is therefore consistent with the reasoning in *Page.*

I also observe that Proposition 47 expressly identified one type of burglary for misdemeanor treatment: entering a commercial establishment during business hours with intent to steal property valued at not more than $950. (See Pen. Code, § 459.5, defining shoplifting.) Had Penal Code section 490.2 been intended to extend to burglaries generally, there would have been no need to create the shoplifting offense in Penal Code section 459.5.

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GROVER, J.