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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOHN GABRIELSON, Defendant and Appellant.	A143772 (Lake County Super. Ct. No. CR932764)

Appellant John Gabrielson pleaded no contest to one count of auto theft and to two sentence enhancements under Penal Code section 667.5, subdivision (b).[1] The sentence enhancements were based on his having served prior prison terms for drug offenses that were felonies at the time of the sentencing. After the passage of Proposition 47 (The Safe Neighborhoods and Schools Act), Gabrielson petitioned to have the drug offenses reduced to misdemeanors and, on that basis, to reduce his sentence by having the sentence enhancements removed. The trial court agreed to reduce the two drug offenses to misdemeanors, but it declined to remove the enhancements. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2013, Gabrielson entered a plea of no contest to one felony count of auto theft (Veh. Code, § 10851, subd. (a)). He also pleaded no contest to having served two prior prison terms for prior felony drug convictions (Health & Saf. Code, §§ 11377,

[1] All subsequent references are to the Penal Code unless otherwise specified.

subd. (a), 11350, subd. (a)). The plea to the prior prison terms meant that Gabrielson qualified for sentence enhancements under section 667.5, subdivision (b), which requires the trial court to impose a one-year enhancement for each qualifying prior prison term. The court sentenced Gabrielson to five years in prison: three years for the auto-theft conviction and two years for the enhancements (one year for each prison prior).

Proposition 47 was passed by voters on November 4, 2014, and it is codified in section 1170.18. The section reclassifies a series of non-violent felonies as misdemeanors. (§ 1170.18, subds. (f)-(h).) The drug offenses underlying Gabrielson's sentence enhancements, Health and Safety Code sections 11377, subdivision (a), and 11350, subdivision (a), are among those that have been reclassified.

A month after Proposition 47 went into effect, and about a year and a half after his plea, Gabrielson filed a petition for resentencing under section 1170.18. At the hearing, the court reduced the drug offenses underlying Gabrielson's sentence enhancements to misdemeanors, but it declined to strike the enhancements.

II.

DISCUSSION

Gabrielson's chief contention is that once the offenses giving rise to his two prior prison terms were reduced to misdemeanors under section 1170.18, they could no longer support the prior-prison-term sentence enhancements under section 667.5, subdivision (b). We reject this argument.[2]

Section 667.5, subdivision (b), provides that where a current offense is any felony for which a prison sentence is imposed, "the court shall impose a one-year term for each prior separate prison term . . . imposed . . . for any felony." Imposition of a prior-prison-

[2] After briefing in this case became final, the California Supreme Court granted review to decide whether sentence enhancements under section 667.5, subdivision (b), should be removed when the offenses giving rise to the prison terms upon which they are based are reduced to misdemeanors under Proposition 47. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.) Respondent has diligently informed the court of relevant new authority since this case became fully briefed.

term enhancement under the statute "requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) Gabrielson does not dispute that three elements under the statute are still met. He contends, however, that the first element no longer applies, because his felony drug convictions were reduced to misdemeanors.

Section 1170.18, subdivisions (a) and (b) provide that a person serving a sentence for a felony conviction who would have been guilty of a misdemeanor under Proposition 47 may petition for a recall of sentence and request resentencing, and that the trial court shall grant the petition if certain conditions have been met. Subdivisions (f) and (g) provide a similar procedure for a person who has *completed* a sentence for a felony conviction to file an application to have the felony designated as a misdemeanor. Any felony conviction that is reduced to a misdemeanor under these provisions "shall be considered a misdemeanor for all purposes." (§ 1170.18, subd. (k).) But these procedures do not provide for "either the recall and resentencing or the redesignation, dismissal, or striking of sentence enhancements." (*People v. Jones* (July 7, 2016, E063745) __ Cal.App.4th __.)

In arguing that the court should have stricken his enhancements, Gabrielson relies on *People v. Park* (2013) 56 Cal.4th 782 (*Park*), but this reliance is misplaced. After the defendant in *Park* successfully completed the terms of his probation for a "wobbler" offense that was charged as a felony, the trial court reduced the offense to a misdemeanor under section 17, subdivision (b)(3). (*Park*, at p. 787.) The following year, defendant was charged with a separate crime, and the prosecution also alleged a five-year serious-felony sentence enhancement under section 667, subdivision (a), based on the felony conviction that had been reduced to a misdemeanor. (*Park*, at pp. 787-788.) After a jury convicted defendant, the trial court imposed the sentence enhancement based on defendant's having previously been convicted of a serious felony. (*Id.* at p. 788.) The

Supreme Court reversed the enhancement, noting that when the felony was reduced to a misdemeanor, it became a "misdemeanor for all purposes" under section 17, subdivision (b), and thus could not be the basis for an enhancement in a subsequent criminal proceeding. (*Park*, at pp. 795, 798.) But the court noted that there was "no dispute that . . . defendant would be subject to the section 667(a) enhancement *had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor*." (*Id.* at p. 802, italics added.) This passage describes precisely the situation here: Gabrielson was convicted of the present crime and subject to the sentence enhancements *before* the crimes upon which they were based were reduced to misdemeanors. Under *Park*, Gabrielson remains subject to the sentence enhancements under section 667.5, subdivision (b). (See also *People v. Abdallah* (2016) 246 Cal.App.4th 736, 747-748 [Proposition 47 precludes court from using prior felony for sentence enhancement under § 667, subd. (b), where defendant is sentenced *after* prior conviction is reduced to misdemeanor, following *Park*]; but see *People v. Acosta* (2016) 247 Cal.App.4th 1072, 1078 [Proposition 47 has no effect on prior-prison-term enhancement because statute "does not alter the historical fact of [a] prison term service"].)

Because we follow the reasoning of the Supreme Court's decision in *Park*, we also reject Gabrielson's argument that the trial court's ruling goes against the purpose of Proposition 47 "to ensure that prison spending is focused on violent and serious offenses, [and] to maximize alternatives for nonserious, nonviolent crime." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2 p. 70.) "The voters enacted Proposition 47 after *Park*, and we presume they were aware of the Supreme Court's interpretation of the California Constitution in *Park*." (*People v. Abdallah*, *supra*, 246 Cal.App.4th at p. 747; see also *People v. Acosta*, *supra*, 247 Cal.App.4th at p. 1078 [striking enhancement under § 667.5, subd. (b), "would be a windfall beyond the imagination of the drafters of Proposition 47"].) We have been provided with no evidence or arguments that would justify our conclusion that the voters' intent was otherwise.

III.

DISPOSITION

The order denying Gabrielson's request to strike his two sentence enhancements under section 667.5, subdivision (b), is affirmed.

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Humes, P.J.

We concur:

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Margulies, J.

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Dondero, J.