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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN PATRICK FLYNN,

Defendant and Appellant.

A145160

(Solano County  
Super. Ct. No. FCR306559)

A defendant charged with two felony counts enters a guilty or no contest plea to one of them in exchange for the dismissal of the other. Later, the felony count to which the defendant pled is reduced to a misdemeanor under Penal Code section 1170.18,<sup>1</sup> part of The Safe Neighborhoods and Schools Act (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014) (“Proposition 47”). Are the People entitled to withdraw from the original plea agreement and reinstate the dismissed felony count?

This is a question that will be definitively answered by our Supreme Court, which recently granted review on the same issue in *Harris v. Superior Court* (2016) 242 Cal.App.4th 244 [195 Cal.Rptr.3d 3], review granted February 24, 2016, S231489. In the meantime, guided by our colleagues’ decision in *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646 (*T.W.*), we conclude the People remain bound by the original plea agreement, and reverse the judgment imposed on the reinstated felony count in this case. We reject appellant’s claim he is entitled to apply excess custody credits to the parole period, if any, under section 1170.18, subdivision (d).

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

## BACKGROUND

On March 18, 2014, appellant Shawn Patrick Flynn entered a Macy's department store, placed some shirts worth \$622.50 into a bag, and left the store. He returned a few hours later with a cohort, who helped him steal \$1,018 worth of merchandise.

On April 1, 2014, the Solano County District Attorney filed a complaint charging appellant with two counts of felony second degree commercial burglary. (§ 459.) On June 6, 2014, appellant pled guilty to Count 1 in exchange for the dismissal of Count 2 and an initial grant of felony probation for a three-year period. (§§ 459; 1203.1, subd. (a).) The plea agreement also allowed appellant's probation to be transferred to Sacramento County, where he resided, pursuant to section 1203.9. At the sentencing hearing held July 23, 2014, appellant was placed on felony probation for a three-year period with credit for one day in custody.

On November 4, 2014, the voters enacted Proposition 47, which "reclassified certain drug-and theft-related offenses that were felonies or 'wobblers' as misdemeanors, and provided a resentencing process for individuals who would have been entitled to lesser punishment if their offenses had been committed after its enactment." (*People v. Rouse* (2016) 245 Cal.App.4th 292, 294.) As relevant here, newly-enacted section 1170.18, subdivision (a), allows a "person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor . . . had this act been in effect at the time of the offense" to apply for resentencing as if the crime were a misdemeanor.

On January 30, 2015, the District Attorney filed a request to revoke appellant's probation, based on a new robbery conviction in Sacramento County Superior Court case No. 14F06400. On February 9, 2015, appellant filed a petition for resentencing under Proposition 47, asking the court to reduce his conviction for commercial burglary to a misdemeanor. The People opposed the petition, arguing it would deprive them of the benefit of the plea agreement.

The trial court granted appellant's Proposition 47 petition as to the Count 1 burglary to which he had pled and reduced that crime to a misdemeanor, but it allowed

the prosecution to withdraw from the plea agreement and reinstated the previously-dismissed Count 2. A preliminary hearing was held and appellant was held to answer on Count 1 as a misdemeanor and Count 2 as a felony. (See *Griffith v. Superior Court* (2011) 196 Cal.App.4th 943, 949–950 [recognizing rule that misdemeanor counts joined with felony counts in information must be supported by probable cause].)

On April 23, 2015, appellant and the District Attorney entered into a new negotiated plea agreement under which appellant pled guilty to the felony burglary charge in Count 2, stipulated the value of the property taken was more than \$950, and agreed to an eight-month prison sentence (one-third of the middle term) consecutive to the sentence he was serving on his robbery conviction in the Sacramento County case. As part of the plea agreement, appellant specifically reserved the right to challenge on appeal the reinstatement of the original charges. The court sentenced appellant to eight months in prison consecutive to the prison term he was already serving for the robbery in the Sacramento County case.

Appellant filed a timely notice of appeal and requested a certificate of probable cause seeking to challenge the reinstatement of the felony charge in Count 2. (§ 1237.5.) The trial court issued the certificate of probable cause.

## DISCUSSION

### A. *Proposition 47 and its Effect on the Negotiated Plea*

“Proposition 47, which is codified in section 1170.18, reduced the penalties for a number of offenses. Among those crimes are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5. Shoplifting is now a misdemeanor unless the prosecution proves the value of the items stolen exceeds \$950. [Citations.]” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879; see *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448–449 [recognizing Proposition 47’s applicability to second degree burglary conviction but concluding defendant did not carry burden of establishing the property stolen was worth less than \$950].) The property underlying the

commercial burglary charge in Count 1 of appellant's case was valued at \$622.50, bringing it within the ambit of Proposition 47.

Section 1170.18, subdivision (a), allows a petition for recall and resentencing to be filed by a person “ ‘currently serving a sentence’ ” for a qualifying felony conviction. A defendant who is on probation is “serving a sentence” for purposes of the statute. (*People v. Davis* (2016) 246 Cal.App.4th 127, 132.) “If the petitioner satisfies the criteria in subdivision (a), 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.” (§ 1170.18, subd. (b).) The People do not contend appellant posed an unreasonable risk of danger to public safety and the court, in granting the Proposition 47 petition, implicitly found he did not.

The petition for recall and resentencing may be filed for any qualifying conviction “*whether by trial or plea.*” (§ 1170.18, subd. (a), *Italics added.*) In *T.W.*, *supra*, 236 Cal.App.4th 646, Division One of this Court concluded this language plainly applied to a minor who had admitted a qualifying charge of receiving stolen property, even though a non-qualifying robbery count had been dismissed in accordance with a plea agreement. (*Id.*, at pp. 649, 651–653.) This result was consistent with both the plain language of the statute and the voters’ intent to “ ‘ “[s]top[] wasting prison space on petty crimes and focus[] law enforcement resources on violent and serious crime by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors.” ’ ” (*Id.* at p. 652, quoting Voter Information Guide, Gen Elec. (Nov. 4, 2014) argument in favor of Prop. 47, at p. 38.) Thus, it was error for the trial court to deny the defendant’s resentencing petition under Proposition 47 solely because the conviction had been obtained as part of a plea bargain. (*Id.* at p. 653.)

The trial court in *T.W.* was faced with an order denying a Proposition 47 petition, whereas the court in this case granted appellant’s petition but reinstated the felony count that had been dismissed as part of the original plea agreement. The People argue the trial court’s order reinstating the dismissed count was appropriate because otherwise, they

would be deprived of the benefit of the underlying plea agreement. We disagree. As noted in *T.W.*, *supra*, 236 Cal.App.4th at page 653, footnote 4, the application of Proposition 47’s resentencing provisions to an admission or conviction that had been the subject of a plea bargain was “consistent with the general rule announced by our Supreme Court in *Doe v. Harris* (2013) 57 Cal.4th 64 [(*Doe*): ‘[T]he general rule in California is that the plea agreement will be “ ‘deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . .’ ” [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.’ (*Id.* at p. 66 [.]”

In *Doe*, the Supreme Court answered a question posed by the Ninth Circuit Court of Appeals: “ ‘Under California law of contract interpretation as applicable to the interpretation of plea agreements, does the law in effect at the time of a plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?’ ” (*Doe*, *supra*, 57 Cal.4th at p. 66; see Cal. Rules of Court, rule 8.548 [allowing state Supreme Court to decide question of California law in response to a request by a court from another jurisdiction].) The defendant in *Doe* had pleaded guilty to a registerable sex offense as part of a plea bargain at a time when sex offender registration records were private. When the law subsequently changed to make those records subject to public disclosure, the defendant brought a federal lawsuit claiming his plea bargain contained an implied promise that the privacy protections in place at the time of his plea would remain in effect. (*Id.* at pp. 67–68.)

Responding to the Ninth Circuit’s query, our Supreme Court stated, “the rule in California is that a plea agreement’s reference to a statutory consequence attending a conviction, even when coupled with prosecutorial and judicial silence on the possibility the Legislature might amend the statute, does not give rise to an implied promise that the defendant, by pleading guilty or nolo contendere, will be unaffected by a change in the law.” (*Doe*, *supra*, 57 Cal.4th at p. 73.) However, “it is not impossible the parties to a particular plea bargain might affirmatively agree or implicitly understand the

consequences of a plea will remain fixed despite amendments to the relevant law. [Citations.] [¶] Whether such an understanding exists presents factual issues that generally require an analysis of the representations made and other circumstances specific to the individual case.” (*Id.* at p. 71.)

In this case, the parties did not explicitly agree the plea would be unaffected by future law, and none of the terms of the plea agreement support an implicit understanding to that effect. In ruling on appellant’s Proposition 47 petition, the trial court noted the purpose of the initial plea agreement had been to secure a felony conviction but the same could be said of any case in which the defendant entered a plea to a felony that subsequently became eligible for treatment under Proposition 47. The court also noted the felony conviction had been obtained so appellant’s probation could be transferred to Sacramento County for supervision under section 1203.9, but that provision appears on its face to allow the transfer of a misdemeanor probationer as well as a felony probationer. Appellant was placed on probation for three years, a term that was authorized for both felony and misdemeanor probation. (§§ 1203.1, subd. (a); 1203a.) Nothing in the terms of the plea agreement suggests the parties necessarily understood or agreed the crime would remain a felony despite future ameliorative changes in the law.

Absent any specific term in the plea agreement that would remove the case from the general rule set forth in *Doe*, we agree with the analysis in *T.W.* and conclude appellant was entitled to seek relief under Proposition 47 without triggering a reinstatement of dismissed charges under the plea agreement. The drafters of Proposition 47 obviously understood criminal convictions may result from a contested jury trial or from a negotiated plea, and they chose to make no distinction between the two for the purposes of eligibility for resentencing. Surely they were aware that convictions suffered by plea often involve negotiation, compromise, and the dismissal of other, more serious charges. Yet section 1170.18 as drafted does not provide any procedure for allowing the People to withdraw from a plea agreement or reinstate charges when a defendant is resentenced. To allow the People to reinstate charges as a remedy for a “breach of the bargain” under these circumstances would eviscerate section 1170.18, as the only

defendants who could take advantage of the statute would be those as to whom no other more serious charges had been filed or dismissed. The trial court's effort in this case to craft a remedy to address the People's grievance, while not unreasonable as a matter of equity, improperly alters the statutory scheme. It also runs afoul of section 1170.18, subdivision (e), which provides, "Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence."

*People v. Collins* (1978) 21 Cal.3d 208 (*Collins*), cited by the People, is not controlling. In *Collins*, a defendant charged with multiple felony counts pled guilty to a single count of nonforcible oral copulation under the then-effective version of section 288a in exchange for a dismissal of the remaining charges. (*Collins*, supra, 21 Cal.3d 208 at p. 211.) Prior to sentencing, the statute was repealed. (*Ibid.*) The Supreme Court held the defendant could not be sentenced on the repealed statute, but recognized that if the sole count of conviction were reversed outright, the prosecution would be deprived of the benefit of its plea bargain. (*Id.* at pp. 214–215.) The remedy, therefore, was to dismiss the count to which the defendant had pled but allow the reinstatement of the dismissed counts on remand, subject to the caveat that the defendant could not, upon the disposition of the charges, be given a greater sentence than he could have received under the plea bargain. (*Id.* pp. 216–217.)

Unlike the situation presented by *Collins*, a defendant who secures resentencing under Proposition 47 does not completely escape punishment. Moreover, *Collins* did not involve the interpretation of a broadly applicable statute expressly allowing a certain class of defendants to seek a reduction in punishment.

The People also rely on *In re Blessing* (1982) 129 Cal.App.3d 1026, in which the defendant entered into a plea bargain and later sought to reduce his agreed-upon sentence based on subsequent case law barring multiple firearm enhancements under the circumstances of his case. The Court of Appeal concluded it could not give effect to the enhancements, but instead of striking them outright and reducing the sentence by four years, it permitted the People to file a motion in the trial court to withdraw from the plea agreement. (*Id.* at pp. 1031–1032.) The change in law that affected the defendant's

sentence in *Blessing* was the result of an intervening court decision, and did not involve a determination of public policy by the electorate as did Proposition 47.

Other cases cited by the People similarly do not involve the effect of a subsequently enacted statute which ameliorated the punishment of certain offenders and explicitly extended that relief to defendants whose convictions followed a plea rather than a trial. (*People v. Enlow* (1998) 64 Cal.App.4th 850, 853 [declining to allow challenge to stipulated sentence without certificate of probable cause under § 1237.5; even if certificate was unnecessary, remedy would be withdrawal of plea, not reduction of sentence]; *In re Ricardo C.* (2013) 220 Cal.App.4th 688, 691–694, 699 [juvenile court could not impose less restrictive placement than that agreed to by People as part of negotiated disposition; court was required to set aside the plea and reinstate the allegations of the petition]; *In re Travis J.* (2013) 222 Cal.App.4th 187, 192–193 [noting that if commitment to the Division of Juvenile Facilities was invalid because juvenile court did not consider less restrictive alternatives, remedy would be to set aside the negotiated disposition requiring that penalty and reinstate the charges].) These authorities do not support the People’s argument they are entitled to withdraw from the plea agreement and reinstate the original charges.

#### B. *Credits Against Parole Period*

A defendant who is resentenced to a misdemeanor under section 1170.18, subdivision (a), “shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. Such person is subject to Section 3000.08 parole supervision by the Department of Corrections and Rehabilitation and the jurisdiction of the court in the county in which the parolee is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody.” (§ 1170.18, subd. (d).) Appellant argues the trial court should apply any excess custody credits to reduce this period of parole, consistent with *In re Sosa* (1980) 102 Cal.App.3d 1002, 1005–1006 [interpreting § 2900.5 to require excess custody credits to be applied to the parole period

of a defendant sentenced under the determinate sentencing law]. This claim was recently rejected in *People v. Morales* (June 16, 2016, S228030) \_\_\_\_ Cal.4th \_\_\_\_ [2016 WL 3346571], in which our Supreme Court held that excess custody credits could not be used to reduce the Proposition 47 parole period.

#### DISPOSITION

The judgment is reversed and the case is remanded. On remand, the trial court is directed to set aside appellant's April 23, 2015, negotiated plea to felony second degree commercial burglary under Count 2, and to reinstate appellant's conviction of second degree commercial burglary under Count 1, which has been reduced to a misdemeanor under the provisions of Proposition 47. The eight-month prison sentence is vacated. The court shall conduct further sentencing proceedings on the misdemeanor count.

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NEEDHAM, J.

We concur.

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SIMONS, ACTING P.J.

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BRUINIERS, J.

(A145160)