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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CRAIG WAYNE KIRKLAND,

Defendant and Appellant.

A145179, A145793

(Sonoma County  
Super. Ct. No. SCR655341)

**I.**

**INTRODUCTION**

These consolidated appeals raise two issues: (1) the denial of appellant Craig Wayne Kirkland’s petition to recall his sentence pursuant to Penal Code section 1170.18,<sup>1</sup> a provision of Proposition 47, to reduce his conviction for unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) from a felony to a misdemeanor, and; (2) the court’s termination of his probation and imposition of a two-year state prison sentence. We conclude that Proposition 47 does not apply to a conviction for unlawfully driving or taking a vehicle under Vehicle Code section 10851, and therefore, Kirkland was ineligible for resentencing. After suspending imposition of its sentence to allow Kirkland to participate in residential drug treatment, the court could properly impose a two-year sentence upon terminating his probation. The judgment is affirmed.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code unless otherwise stated.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

The Sonoma County District Attorney filed a complaint charging Kirkland with two counts: unlawfully driving and taking a vehicle in violation of Vehicle Code section 10851, subdivision (a) (count one), and unlawfully buying and receiving a stolen vehicle in violation of section 496d (count two). The complaint alleges that Kirkland took a 1993 Saturn SL with the intent to either permanently or temporarily deprive the owner of its possession. With regard to count two, the complaint alleges the 1993 Saturn had been “stolen” in a “manner constituting theft and extortion” and was found in possession of Kirkland and his codefendants from August 8 through September 2, 2014.

At the plea hearing, the prosecutor informed the court that count two was now a misdemeanor by operation of Proposition 47. The prosecutor stated the value of the 1993 Saturn was “approximately \$700.”

Kirkland pled no contest to a violation of Vehicle Code section 10851, subdivision (a), and the second count was dismissed. On his “Advisement of Rights, Waiver and Plea Form for Felonies,” the charge was listed as Vehicle Code section 10851, subdivision (a) and “auto theft.” The factual basis for the plea was derived from the police reports concerning the crime. The plea was conditioned on Kirkland receiving a stipulated term of custody at the low end of the sentencing range of 16 months, or probation if Kirkland was accepted into a residential treatment program for six months or more. The plea agreement specified that if Kirkland committed another crime pending sentence or violated any of the terms of release, the agreement was “canceled.”

At sentencing, Kirkland presented evidence of his acceptance into a residential treatment program. The court commented in response as follows: “[F]or the next 36 months, you’ll be on formal probation. Imposition of judgment is suspended.”

On March 27, 2015, the court accepted Kirkland’s guilty plea to two new charges: count one, identity theft in violation of section 530.5, subdivision (c)(1), and count two, false identification to a police officer in violation of section 148.9, subdivision (a). The court stated that Kirkland had been given the option of residential treatment and had

failed to take advantage of it. The court advised Kirkland of his rights. The court identified count one and asked Kirkland: “How do you plead to that count?” The record reflects: “There was a sotto voce discussion between [Kirkland] and counsel.” Kirkland then stated: “Yes.” The court set forth count two and asked Kirkland how he pleaded to that count, and he responded: “No contest.” The court found him guilty of both counts. Kirkland waived his right to a probation hearing and the court found him in violation of probation.

The court held a sentencing hearing on April 30, 2015. Respondent argued that Kirkland had failed to avail himself of treatment and committed additional crimes so the court should impose a prison term. Kirkland admitted that he “blew it” and failed to show up for treatment, but he requested a further opportunity to seek treatment. The court denied probation and sentenced him to six months county jail on the charges of identity theft and false identification. On the earlier charge of taking or driving a vehicle, the court imposed a two-year state prison term.

Kirkland filed a *propria persona* petition for resentencing under Proposition 47. On July 5, 2015, the court held a hearing and found Proposition 47 did not apply to Vehicle Code section 10851.

**III.**  
**DISCUSSION**

**A. *Proposition 47 Does Not Apply to Vehicle Code Section 10851***

Kirkland argues the trial court acted illegally in rejecting his petition to reduce his conviction to a misdemeanor pursuant to Proposition 47.<sup>2</sup> He further argues that denying relief to a person convicted of auto theft under Vehicle Code section 10851 while granting relief to similarly situated individuals convicted of auto theft under section 487 violates his equal protection rights.

The interpretation of a statute is subject to de novo review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) “ ‘In interpreting a voter initiative like [Proposition 47], [the courts] apply the same principles that govern statutory construction.’ . . .” (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136, quoting *People v. Rizo* (2000) 22 Cal.4th 681, 685.)

In November 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (the Act), which reduced certain drug- and theft-related offenses to misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089, 1091 (*Rivera*)). “These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*Id.* at p. 1091.)

Proposition 47 created a new resentencing scheme for persons serving felony sentences for offenses which were made misdemeanors by the Act. (§ 1170.18, subd. (a).) A person currently serving a sentence for a felony conviction may petition for

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<sup>2</sup> At oral argument Kirkland’s counsel argued for the first time that the trial court acted illegally in accepting the plea as a felony to Vehicle Code section 10851. Proposition 47 was passed on November 4, 2014 and became effective the following day on November 5, 2014. (Cal. Const., art. II, § 10, subd. (a).) Kirkland’s plea hearing was held on November 13, 2014. At the hearing, the prosecutor informed the court that count two, buying and receiving a stolen vehicle pursuant to section 496d, was now a misdemeanor by operation of Proposition 47. Neither the prosecution nor defense counsel mentioned the application of Proposition 47 to count one. Even if defense counsel should have raised this issue, as discussed here, the court properly accepted the plea as a felony.

recall of that sentence if the person would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense. A person may petition for resentencing in accordance with section 490.2, among other sections. (*Rivera, supra*, 233 Cal.App.4th at p. 1092.)

Proposition 47 added section 490.2, which provides as follows: “Notwithstanding [Penal Code] 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 . . . .” (§ 490.2, subd. (a).) Section 490.2 is explicitly listed in section 1170.18 as one of “those sections [that] have been amended or added” by Proposition 47. (§ 1170.18, subd. (a).) Section 1170.18 does not specifically include Vehicle Code section 10851 as one of the code sections amended or added by Proposition 47. (§ 1170.18.)

There is no consensus among the Courts of Appeal about whether a conviction for theft under Vehicle Code section 10851 is eligible for resentencing under sections 490.2 and 1170.18, and the issue is currently on review before our Supreme Court.<sup>3</sup>

We hold that Proposition 47 does not apply to Vehicle Code section 10851. Section 1170.18 does not identify Vehicle Code section 10851 as one of the code sections amended by Proposition 47. (§ 1170.18.) Section 1170.18 provides a defendant can petition for resentencing under Proposition 47 if he would have been guilty of a

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<sup>3</sup> The Supreme Court has granted review of several cases raising this issue. In *People v. Page*, the Fourth District Court of Appeal held a defendant convicted under Vehicle Code section 10851 was not eligible for relief under section 1170.18. (*People v. Page*, review granted Jan. 27, 2016, S230793, 2016 Cal. LEXIS 784 (*Page*).) The Third District followed the reasoning of *Page* in *People v. Haywood*, review granted March 9, 2016, S232250, 2016 Cal. LEXIS 1329.) Similarly, the Second District held that Proposition 47 does not apply to Vehicle Code section 10851. (*People v. Solis*, review granted June 8, 2016, S234150, 2016 Cal. LEXIS 3761.)

The Sixth District disagreed with *Page* in *People v. Ortiz*, review granted March 16, 2016, S232344, 2016 Cal. LEXIS 1821, and *People v. Lopez* (Jan. 25, 2016, H042129, 2016 Cal.App. Unpub. LEXIS 527 [remanding to allow appellant to demonstrate value of vehicle].)

misdemeanor if Proposition 47 had been in effect at the time of the crime. Vehicle Code section 10851 is punishable as either a felony or a misdemeanor and that was not altered by Proposition 47. (Veh. Code, § 10851, subd. (a).)

Kirkland argues that the purpose of Proposition 47 was to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft.” (Prop. 47, Sec. 3, subds. (1), (3).) Kirkland contends that Vehicle Code section 10851 is a provision of law defining a theft offense. He cites to section 666, subdivision (a), which describes a violation of Vehicle Code section 10851 as “auto theft.”

Our analysis does not compel this result. Section 1170.18, subdivision (a) includes section 490.2, and states that a defendant may petition for a recall of sentence “in accordance with” section 490.2. Section 490.2 provides that “obtaining any property by theft” shall be considered petty theft where the property’s value does not exceed \$950. (§ 490.2, subd. (a).) Section 490.2 does not reference Vehicle Code section 10851, as it does section 487 (the grand theft statute), nor does the text of Vehicle Code section 10851 purport to define the taking of a vehicle as grand theft within the language of section 490.2. We find this omission significant because, unlike statutes that simply prohibit theft, Vehicle Code section 10851 is not a theft statute. It prohibits both theft and non-theft conduct: the taking or driving of a vehicle “with or without the intent to steal.” (Veh. Code, § 10851, subd. (a); *People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) Vehicle Code section 10851 may be violated by “ ‘taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).’ [Citations.]” (*Garza*, at p. 876.) If a defendant takes or drives a vehicle with the intent to deprive the owner of possession *temporarily*, he has not committed theft (See *id.* at p. 871; *People v. Barrick* (1982) 33 Cal.3d 115, 135 (*Barrick*), overruled on other grounds in *People v. Collins* (1986) 42 Cal.3d 378.) If, however, a defendant takes or drives a vehicle with the intent to deprive the owner of possession *permanently*, he has committed a theft offense. (*Garza*, at pp. 879, 881.)

Thus, section 490.2 cannot apply to all violations of Vehicle Code section 10851. As the more specific statute, Vehicle Code section 10851 prevails over section 490.2. (See *People v. Ahmed* (2011) 53 Cal.4th 156, 163.)

Kirkland next argues that any ambiguity in the statute must be read in favor of its application to him. Section 1170.18 expressly includes certain theft offenses (§§ 459.5, 473, 476a, 490.2, 496, & 666), but does not include Vehicle Code section 10851. There is nothing ambiguous about the offenses that are included or about excluding Vehicle Code section 10851 from the list. “The expression of some things in a statute necessarily means the exclusion of other things not expressed. [Citation.]” (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) Where the Legislature expressly includes certain criminal offenses in a statute, the legislative intent was to exclude offenses that were not mentioned. (*People v. Sanchez* (1997) 52 Cal.App.4th 997, 1001-1002.)

Similarly, contrary to Kirkland’s contention, the rule of lenity does not apply here. “ ‘The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.’ [Citation.]” (*People v. Avery* (2002) 27 Cal.4th 49, 58.) “Thus, although true ambiguities are resolved in a defendant’s favor, an appellate court should not strain to interpret a penal statute in defendant’s favor if it can fairly discern a contrary legislative intent.” (*Ibid.*) We find no ambiguity in section 1170.18 with regard to the theft offenses that are eligible for reclassification and resentencing; therefore, the rule of lenity does not apply.

Kirkland’s final argument is that equal protection principles require that a conviction for vehicle theft under Vehicle Code section 10851 be treated the same as a conviction for grand theft under section 487, subdivision (d). Vehicle Code section 10851 is a lesser included offense of section 487, subdivision (d)(1), grand theft auto. (*Barrick, supra*, 33 Cal.3d at p. 128.)

Our Supreme Court has held that “neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection

principles. . . .” (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838 (*Wilkinson*), citing *United States v. Batchelder* (1979) 442 U.S. 114, 124–125.) A defendant “ ‘does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.’ [Citation.]” (*Wilkinson*, at p. 838.)

The fact that the prosecution elects to prosecute the accused for a more serious penalty is not a denial of equal protection. (*People v. Romo* (1975) 14 Cal.3d 189, 197 (*Romo*)). A “car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile (§§ 487, subd. 3, . . . 489) when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code.” (*Romo*, at p. 197.) Similarly, it does not violate equal protection for Proposition 47 to provide for a reduced sentence for a subset of grand theft cases under section 487 but not include those convicted of unlawfully driving or taking vehicle under Vehicle Code section 10851. Absent a showing that a particular defendant “ ‘has been singled out deliberately for prosecution on the basis of some invidious criterion,’ . . . the defendant cannot make out an equal protection violation. [Citation.]” (*Wilkinson, supra*, 33 Cal.4th at p. 839.) Kirkland has failed to make the necessary showing.<sup>4</sup>

**B. *Kirkland’s Two-Year Sentence Was Lawful After His Probation Was Revoked***

Kirkland argues that after he committed new offenses in violation of his probation, the court improperly considered these new convictions in sentencing him. Kirkland also argues the court should not have considered his two additional crimes because his pleas to identity theft and false identification to a police officer were invalid. He contends that at the time of the second plea hearing, the court did not obtain an express waiver of rights, and it failed to secure an unequivocal plea of guilty or no contest to the first count.

“Upon any revocation and termination of probation the court may, *if the sentence has been suspended, pronounce judgment for any time within the longest period for*

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<sup>4</sup> We do not address the sufficiency of the evidence demonstrating the value of the stolen Saturn or which party bears the burden of proof on the issue because we conclude Kirkland’s offense is not eligible for resentencing under Proposition 47.

*which the person might have been sentenced.* However, if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that the judgment shall be in full force and effect.” (§ 1203.2, subd. (c), italics added.) At the time of sentencing, when the trial court grants probation, it may either suspend imposition of the sentence or actually impose sentence and suspend its execution. If it imposes sentence and suspends *execution*, then the court lacks the power to reduce or increase the sentence when it revokes probation. (*People v. Howard* (1997) 16 Cal.4th 1081, 1084 (*Howard*); Cal. Rules of Court, rule 4.435(b)(1).) However, if “the court has suspended *imposition* of sentence and later revokes the defendant’s probation, then the court has undisputed authority to choose from all the initially available sentencing options. (§ 1203.2, subd. (c).)” (*Howard*, at p. 1084, italics added.) “When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation. [Citations.]” (*Id.* at p. 1087.)

Here the court placed Kirkland on 36 months formal probation with the requirement that he participate in a residential drug treatment program. The court then suspended imposition of the sentence. Kirkland failed to participate in a residential treatment program as a required condition of his probation and committed two new crimes. Under these circumstances, when the court revoked Kirkland’s probation, it could choose to sentence him based on all available options. (*Howard, supra*, 16 Cal.4th at p. 1084.)

Kirkland next argues that when his probation was revoked, the court could only sentence him to the 16-month term specified in the plea agreement. However, that term was agreed to as an alternative to a grant of probation. Moreover, it was understood that if Kirkland violated his probation and committed another crime during the period of probation, the court would no longer be limited by the terms of the original plea agreement. In this regard, the written plea agreement expressly provided: “I understand that if pending sentencing I commit another crime, violate any condition of a Supervised O.R. release, or willfully fail to appear for my sentencing hearing, this agreement will be



do you plead to that count?” The hearing transcript states: “There was a sotto voce discussion between [Kirkland] and counsel.” Kirkland then stated: “Yes.” The court then set forth count two and asked Kirkland how he pleaded to that count and he responded: “No contest.” Kirkland never suggested that he was not, in fact, pleading to both counts and he expressly acknowledged he understood his rights.

“When a criminal defendant enters a guilty plea, the trial court is required to ensure that the plea is knowing and voluntary. [Citation.]” (*People v. Cross* (2015) 61 Cal.4th 164, 170.) The court must inform the defendant of three constitutional rights: (1) the privilege against compulsory self-incrimination; (2) the right to trial by jury; and (3) the right to confront one’s accusers. The court must obtain a waiver of each of these rights. (*Ibid.*)

Kirkland argues on appeal that the court failed to obtain an express waiver or advise him of the consequences of his plea, but this is not supported by the reporter’s transcript. The court expressly advised Kirkland of each of his rights and he stated, on the record, that he understood them. Therefore, we conclude Kirkland’s pleas were knowingly and voluntarily entered. The court could properly consider them in revoking Kirkland’s probation. Further, contrary to Kirkland’s contention, the two new crimes were not the “sole basis” for revoking probation as Kirkland had failed to participate in residential treatment as required by the plea agreement.

#### **IV.**

#### **DISPOSITION**

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.

A145179 & A145793, *People v. Kirkland*