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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY FERNANDEZ,

Defendant and Appellant.

B266087

(Los Angeles County
Super. Ct. No. VA138442)

APPEAL from an order of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

In a felony complaint filed on March 2, 2015, Anthony Fernandez was charged with receiving a stolen vehicle on February 26, 2015, in violation of Penal Code section 496d, subdivision (a).¹ On March 20, 2015, he pled no contest, admitted a prior strike conviction, and was sentenced to 32 months in state prison. On May 20, 2015, he filed a petition for resentencing pursuant to section 1170.18, previously added by Proposition 47 in November 2014. The trial court denied the petition on the ground that section 496d, subdivision (a) was not subject to Proposition 47. Appellant timely appealed the court's order.

As enacted by Proposition 47, section 1170.18 provides in relevant part: "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 under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).)

We question whether appellant can take advantage of the petition procedure in section 1170.18, given he committed his offense *after* Proposition 47 went into effect. Section 1170.18 contemplates a procedure for defendants to seek relief if they are serving a felony sentence but "who would have been guilty of a misdemeanor under the act . . . *had this act been in effect at the time of the offense.*" (§ 1170.18, subd. (a), italics added.) This

¹ Penal Code section 496d, subdivision (a) states in relevant part: "Every person who buys or receives any motor vehicle, as defined in Section 415 of the Vehicle Code, . . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any motor vehicle . . . from the owner, knowing the property to be stolen or obtained, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years or a fine of not more than ten thousand dollars (\$10,000), or both, or by imprisonment in a county jail not to exceed one year or a fine of not more than one thousand dollars (\$1,000), or both." Undesignated statutory citations are to the Penal Code.

language suggests those defendants committing offenses after Proposition 47 went into effect must seek relief by other means, such as by timely challenging the felony complaint or information. But the parties have not briefed the issue, so we leave it for another day. Even if appellant’s petition were proper, we hold section 496d, subdivision (a) was not affected by Proposition 47. (See *People v. Nichols* (2016) 244 Cal.App.4th 681 (*Nichols*).)²

Proposition 47 did not amend section 496d, and it is not listed in section 1170.18. Thus, the voters must have intended to exclude section 496d from reclassification and resentencing under Proposition 47. (*Nichols, supra*, 244 Cal.App.4th at p. 688.) Nor was section 496d affected by the amendment of section 496, receiving or concealing stolen *property*, because section 496d prohibits the distinct act of receiving a stolen *vehicle*. Any other interpretation would render section 496d superfluous. And section 496d was not affected by the enactment of section 490.2, subdivision (a), which provides:

“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” Section 496d, subdivision (a) does not define a theft offense, so it does not fall within section 490.2. Indeed, the voters’ decision to list section 496 alongside section 490.2 in section 1170.18 indicates they did not consider receiving stolen property as a form of theft.

DISPOSITION

The court’s order is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

² This issue is currently pending before our Supreme Court. (*People v. Peacock* (2015) 242 Cal.App.4th 708, rev. granted Feb. 17, 2016, S230948.)