Filed 12/21/16 P. v. Dixon CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PARIS DIXON, III, Defendant and Appellant.	B268722 (Los Angeles County Super. Ct. No. BA409103) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:*

It is ordered that the opinion filed herein on December 14, 2016, be modified as follows:

At page 1, the one-sentence paragraph starting with "Ann Krausz," delete "Ann Krausz" and add "John L. Staley" to replace the deletion.

There is no change in the judgment.

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*EPSTEIN, P. J. MANELLA, J. WILLHITE, J.

Filed 12/14/16 P. v. Dixon CA2/4 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PARIS DIXON, III, Defendant and Appellant.	B268722 (Los Angeles County Super. Ct. No. BA409103)

APPEAL from an order of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed.

Ann Krausz, under appointment of 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 Margaret E.

Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

This appeal raises an issue this court recently addressed and which is currently under review by the California Supreme Court: whether a prior felony conviction, reduced to a misdemeanor under Penal Code section 1170.18[1] after a defendant has begun serving his sentence, can support an enhancement under section 667.5, subdivision (b). In *People v. Hoang*, review granted October 12, 2016, S236454, we held that such a prior conviction can support the enhancement.[2] As the Supreme Court has not

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

Section 1170.18 was added to the Penal Code by Proposition 47, the Safe Neighborhoods and Schools Act. (See Prop. 47, approved Nov. 4, 2014, eff. Nov. 5, 2014.)

[2] The lead case on this issue is *People v. Valenzuela*, review granted March 30, 2016, S232900. The order granting review was addressed to the following issue: "Is defendant eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had reclassified the underlying felony as a misdemeanor under the provisions of Proposition 47?" (Cal. Supreme Ct. News Release (Apr. 1,

yet decided the issue and appellant's arguments do not persuade us otherwise, we affirm our prior ruling and apply it to this case. Accordingly, we conclude the trial court did not err in denying appellant's application for resentencing pursuant to section 1170.18, which sought to strike four one-year enhancements pursuant to section 667.5 on the basis that the underlying felony convictions had been reduced to misdemeanors.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[3]

On March 17, 2013, appellant Paris Dixon, III assaulted and threatened his girlfriend. On June 19, 2013, appellant pled guilty to one count of making criminal threats (§ 422, subd. (a)), and admitted one prior "strike" under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and four prior felony convictions for which he had served

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2016) Summary of Cases Accepted and Related Actions During Week of March 28, 2016.) The court has granted review on this and related issues in numerous other cases. (E.g., *People v. King*, review granted June 8, 2016, S234196, *People v. Cisneros*, review granted June 8, 2016, S234078, *People v. Williams*, review granted May 11, 2016, S233539, *People v. Ruff*, review granted May 11, 2016, S233201, *People v. Carrea*, review granted April 27, 2016, S233011.)

[3] We grant respondent's request to take judicial notice of the court's opinion in defendant's direct appeal from the judgment of conviction. (*People v. Dixon* (Jan. 29, 2014, B250016) [nonpub. opn.].)

prison terms. Pursuant to a plea agreement, the trial court sentenced appellant to a three-year upper term for making criminal threats, doubled that term pursuant to the Three Strikes law, and added four one-year enhancements for the prior prison terms pursuant to section 667.5, subdivision (b). (See *People v. Dixon*, *supra*, at pp. 2-3.)

In appellant's direct appeal, we independently reviewed the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We affirmed his conviction and sentence in an unpublished opinion. (See *People v. Dixon*, *supra*, at p. 4.)

On December 24, 2014, appellant, representing himself, filed a motion for modification of sentence pursuant to section 1170, subdivision (d), to reduce each prior felony conviction to a misdemeanor under Proposition 47. On January 20, 2015, the trial court denied the motion. Subsequently, the court granted appellant's separate petitions to reduce each of his four prison priors to a misdemeanor pursuant to section 1170.18.

On June 5, 2015, appellant's retained counsel filed an application for resentencing pursuant to section 1170.18, seeking to strike the four section 667.5 enhancements on the ground that the underlying prison priors had become misdemeanors. The trial court denied the application. This appeal followed.[4]

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[4] This court granted appellant's application for relief from default, and permitted the late filing of his notice of appeal.

DISCUSSION

Because a prior prison term enhancement can be imposed only for a felony (see § 667.5, subd. (b)) and the underlying prior convictions are now misdemeanors, appellant contends the trial court erred in denying his application to strike the four section 667.5 enhancements pursuant to section 1170.18. As explained below, we disagree.[5]

As we have previously stated, while Proposition 47 created a procedure -- set forth in section 1170.18 -- for offenders to obtain reclassification and resentencing on convictions on a retroactive basis, it does not provide a similar procedure to strike or dismiss sentence enhancements retroactively. Additionally, while a re-designated misdemeanor is a "misdemeanor for all purposes" (§ 1170.18, subd. (k)), because Proposition 47 does not otherwise address the retroactive application of that subsection, we conclude that the misdemeanor treatment occurs prospectively, not retroactively. (See *People v. Brown* (2012) 54 Cal.4th 314, 324 [""a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective""]; see also § 3 ["No part of it [Penal Code] is retroactive, unless expressly so declared."].)

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[5] Respondent contends the appeal should be dismissed, as the trial court lacked jurisdiction under section 1170.18 to grant the relief requested. Because dismissal requires us to interpret section 1170.18 on the issue raised in the appeal, we decline to do so.

Finally, section 1170.18 makes no reference to section 667.5, subdivision (b), and thus it cannot be interpreted to affect enhancements under that statute. The qualifying criterion for an enhancement under section 667.5, subdivision (b) is having served a prior prison term for a felony conviction. That criterion is not changed by a later reduction of the felony to a misdemeanor, as the purpose of the section 667.5, subdivision (b) enhancement is to punish individuals for recidivism. (See *People v. Gokey* (1998) 62 Cal.App.4th 932, 936 ["Sentence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction."].)

Appellant further contends that the failure to strike the one-year sentence enhancement for the prison priors which were re-designated misdemeanors violates his right to equal protection under the federal and state constitutions. He argues there is no rational distinction between individuals who commit the same crimes but are sentenced before or after the enactment of Proposition 47. We reject this claim because no "equal protection violation aris[es] from the timing of the effective date of a statute lessening the punishment for a particular offense." (*People v. Floyd* (2003) 31 Cal.4th 179, 188 [rejecting equal protection claim with respect to Proposition 36].) "'The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as

written.'" (*Ibid*., quoting *In re Kapperman* (1974) 11 Cal.3d 542, 546.) "The voters have the same prerogative." (*People v. Floyd*, *supra*, at p. 188 .) As the Supreme Court has explained, "'the ability to elect to be sentenced under a law enacted after the date of the commission of a crime is not a constitutional right but a benefit conferred solely by statute. It is not unconstitutional for the legislature to confer such benefit only prospectively . . . . '" (*Id*. at pp. 189-190, quoting *People v. Grant* (Ill. 1978) 377 N.E.2d 4, 9.) Accordingly, the failure to strike the prison prior enhancements does not constitute an equal protection violation.

DISPOSITION

The order is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.