Filed 6/24/19 P. v. Harmon CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ESTELLA HARMON, Defendant and Appellant.	D073975 (Super. Ct. No. SCN360700)

APPEAL from a judgment of the Superior Court of San Diego County, K. Michael Kirkman, Judge. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Estella Harmon[1] made two purchases at a store using another person's debit card and then went to a second store where she unsuccessfully attempted to make another purchase with the debit card. Harmon pleaded guilty to one charge of using personal identifying information of another for the purchases at the first store (Pen. Code,[2] § 530.5, subd. (a), count 1) and one charge of burglary for the attempted purchase at the second store (§ 459, count 4).

Harmon contends both of her convictions should be reclassified as misdemeanor shoplifting pursuant to Proposition 47 and section 459.5, subdivision (a). The People contend the appeal should be dismissed because the court denied Harmon's request for a certificate of probable cause. Absent dismissal, the People concede the burglary charge (count 4) should be reduced to misdemeanor shoplifting, but contend the trial court's order redesignating the burglary conviction as a misdemeanor while this appeal was pending must be vacated because the trial court did not have jurisdiction to enter the order. The People finally contend the conviction for using personal identifying information (count 1) should be affirmed because a violation of section 530.5 is a nontheft crime which is not eligible for resentencing under Proposition 47.

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1 Although defendant was charged in this matter under the name Mary Wilson, she signed and initialed her plea agreement with the names Estella Harmon and Mary Wilson. It was later determined her true name is Estella Harmon and she filed her notice of appeal using that name. We, therefore, refer to defendant by her true name.

2 Statutory references are to the Penal Code unless otherwise stated.

We deny the People's request to dismiss the appeal. A certificate of probable cause is not required under section 1237.5 since Harmon is not challenging the validity of the plea. We agree Harmon is eligible for relief under Proposition 47 for the burglary conviction, but the court's September 4, 2018 order entered while this appeal was pending is void. We, therefore, vacate the order and remand with directions for the trial court to enter a new order under section 1170.18 consistent with this opinion. We affirm the conviction for use of another's personal identifying information. Until the issue is resolved by the Supreme Court, we follow the analysis of our court in *People v. Sanders* (2018) 22 Cal.App.5th 397, 400, review granted July 25, 2018, S248775 (*Sanders*) holding a violation of section 530.5, subdivision (a) is not a theft offense eligible for reclassification under Proposition 47. In all other respects, we affirm the judgment.

BACKGROUND[3]

Harmon used a debit card she said she found to make two purchases at a discount store totaling just over $55. She then attempted to use the debit card at another store to purchase a $55 gift card. The last transaction was declined.

Harmon pleaded guilty to one charge of using personal identifying information of another related to the purchases at the discount store (§ 530.5, subd. (a), count 1) and one charge of burglary for the attempted purchase at the second store (§ 459, count 4). As the factual basis for the plea, Harmon admitted she "unlawfully used the personal identifying

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3 The facts of the offenses are undisputed and are taken from the probation officer's report and the factual basis for the plea.

information of another to purchase items [at] a store and entered a building with the intent to commit theft."

At the plea hearing, defense counsel requested reduction of the burglary charge to misdemeanor shoplifting because the amount involved was less than $950. The prosecutor objected saying he wanted a felony for both charges until the issue was resolved by the Supreme Court. Defense counsel commented the charge under section 530.5 for using personal identifying information of another would still be a felony. The court stated it would not make the decision at that time and advised Harmon to file a petition to recall the sentence under section 1170.18 when the Supreme Court issued a determinative decision.

The court granted Harmon formal probation for three years with a commitment of 180 days in jail. The court imposed mandatory fines and fees as well as victim restitution.

After Harmon's fourth probation violation, the court revoked and denied probation and imposed a total term of two years in county jail for count 1 with a concurrent term of two years for count 4. The court reimposed the restitution fines as well as fines and fees.

DISCUSSION

I

We decline the People's request to dismiss this appeal because the trial court denied the request for a certificate of probable cause following the guilty plea. " 'In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge

is made." [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.' " (*People v. French* (2008) 43 Cal.4th 36, 44.) In this case, Harmon does not challenge the validity of her plea or the factual basis for her plea. Rather, she challenges the classification of the crimes for purposes of sentencing. "[T]he certificate requirement does not apply when the defendant 'assert[s] only that errors occurred in the … adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed.' " (*Id.* at p. 45.)

II

In 2014, California voters passed Proposition 47, known as the Safe Neighborhoods and Schools Act, which reduced penalties for certain theft and drug offenses by amending existing statutes. (*People v. Gonzales* (2017) 2 Cal.5th 858, 863 (*Gonzales*).) Proposition 47 created a new misdemeanor offense of "shoplifting" as described in pertinent part in section 459.5: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($ 950)." (*Id.*, subd. (a).) Section 459.5 states shoplifting shall be punished as a misdemeanor, unless the defendant has a disqualifying prior conviction, and "[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (*Id.*, subd. (b).) A defendant is eligible under section 1170.18, subdivision (a) to petition the court

for recall of a sentence and for resentencing if he or she " 'would have been guilty of a misdemeanor under the act that added this section … had this act been in effect at the time of the offense ….' " (*Gonzales*, at p. 875.) The Supreme Court in *Gonzales* concluded the definition of shoplifting in section 459.5 applied to entry of a bank to cash a stolen check for an amount less than $950 because the electorate "intended that the shoplifting statute apply to an entry to commit a nonlarcenous theft." (*Gonzales*, at p. 862.)

Based upon *Gonzales*, the People concede, and we agree, Harmon's count 4 burglary conviction is eligible for resentencing under section 1170.18 because her entry of a commercial establishment during regular business hours with the intent to commit a theft of property worth $950 or less (i.e. attempting to use the debit card of another to purchase a gift card) could only be charged as shoplifting. (§ 459.5, subd. (a); *People v. Gonzales*, *supra*, 2 Cal.5th at pp. 862, 867–875.)

While this appeal was pending, the trial court granted Harmon's application to redesignate her burglary conviction as shoplifting on September 4, 2018.[4] However, the trial court lacked jurisdiction at the time to resentence defendant. (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 920.) Therefore, we vacate the September 4, 2018 order and remand the matter with directions to enter a new order granting the petition for count 4 (§ 459).

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4 The People's unopposed motion to augment the record on appeal, filed November 21, 2018, is granted.

III

Harmon contends the Supreme Court's analysis in *Gonzales* should also apply to reduce her conviction under count 1 for use of personal information of another (§ 530.5) to misdemeanor shoplifting.[5] We disagree.

Because the facts of the offense are not in dispute, we independently review the legal issue regarding whether Proposition 47 applies to section 530.5. (*Sanders, supra,* 22 Cal.App.5th at p. 404.)

The issue of whether a felony conviction under section 530.5, subdivision (a), may be reclassified as misdemeanor shoplifting under section 459.5 is pending before the Supreme Court in *People v. Jimenez* (2018) 22 Cal.App.5th 1282, review granted July 25, 2018, S249397. In that case, the Court of Appeal, Second Appellate District, Division Six, concluded a defendant's convictions under section 530.5 for use of stolen checks valued at less than $950 each constituted misdemeanor shoplifting as defined by section 459.5. (*Jimenez*, at p. 1285; see *People v. Brayton* (2018) 25 Cal.App.5th 734, review granted Oct. 10, 2018, S251122 [relief available under Prop. 47 for conviction under § 530.5, subd. (a) for use of a stolen driver's license to obtain store credit].)

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5 Section 530.5, subdivision (a) provides in pertinent part: "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense." A violation of section 530.5, subdivision (a) is a "wobbler" offense, chargeable as either a misdemeanor or felony and punishable accordingly. Harmon was charged and convicted of identity theft as a felony offense.

Our court reached a different conclusion in *Sanders*, *supra*, 22 Cal.App.5th 397. In that case, the defendant discovered a credit card on the ground and used the card to buy cigarettes and a beverage at a convenience store and to obtain cash at a restaurant. (*Id.* at p. 400.) The charges on the card totaled $174.61. (*Ibid.*) The defendant pleaded guilty to two counts of burglary (§ 459) and two counts of using the personal identifying information of another (§ 530.5, subd. (a)). After the defendant obtained relief under Proposition 47 for reclassification of the burglary charges to shoplifting, the defendant appealed the denial of the petition to reclassify the charges under section 530.5, subdivision (a). (*Sanders*, at p. 399.) We concluded offenses for violations of section 530.5, subdivision (a) are not eligible for reclassification under Proposition 47 because they are not theft offenses, even though they are often referred to as "identity theft." (*Sanders*, at p. 400.)

Theft is not an element of the offense described in section 530.5, subdivision (a). Instead, the "gravamen of the section 530.5, subdivision (a) offense is the *unlawful use* of a victim's identity." (*Sanders*, *supra*, 22 Cal.App.5th at p. 400, italics added.) The elements of a violation of section 530.5, subdivision (a) include "(1) that the person willfully obtain personal identifying information belonging to someone else; (2) that the person use that information for an unlawful purpose; and (3) that the person who uses the identifying information does so without the consent of the person whose personal identifying information is being used." (*Sanders*, at p. 405.)

In *Sanders*, we rejected the argument that use of a victim's card to obtain property from a merchant qualifies a violation of section 530.5 as a theft offense. Whereas the

merchant is the victim of a shoplifting theft under section 495.5, section 530.5 "seeks to protect the [cardholder] victim from the misuse of his or her identity." (*Sanders, supra,* 22 Cal.App.5th at p. 405.) Identity theft crimes " ' "were created because the harm suffered by identity theft victims went well beyond the actual property obtained through the misuse of the person's identity. Identity theft victims' lives are often severely disrupted. … [I]dentity theft in the electronic age is an essentially unique crime, not simply a form of grand theft." ' " (*Ibid.*, quoting *People v. Valenzuela* (2012) 205 Cal.App.4th 800, 808.) "The basic problem is [defendant's] acts of stealing from merchants do not amount to a theft from the cardholder. The cardholder [is] harmed by the unlawful use of her card and thefts from the merchants do not make the cardholder a victim of those thefts." (*Id.* at p. 403; see *People v. Truong* (2017) 10 Cal.App.5th 551, 561 ["Although commonly referred to as '[identity] theft' [citation], the Legislature did not categorize the crime as a theft offense."].) Accordingly, we concluded the crime of shoplifting as defined in section 459.5 does not encompass the offense of identity theft as defined by section 530.5, subdivision (a). (*Sanders*, at pp. 405–406.)[6]

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6 The Supreme Court in *Gonzales, supra,* 2 Cal.5th 858 rejected a hypothetical argument by the prosecution that the defendant would not be eligible for Proposition 47 relief for his felony burglary charge under an alternate theory that he also entered the bank with the intent to violate section 530.5, subdivision (a). The court commented in dicta that section 459, subdivision (b) would have precluded a burglary charge based on an entry with intent to commit "identity theft" because the conduct underlying such a charge, namely theft by cashing a stolen check, would have been the same as that involved in the charged shoplifting. (*Id.* at pp. 876–877.) The comment was not necessary to the court's ultimate holding and focused on theft from the merchant rather than harm to the individual account holder. The defendant in *Gonzales* was not charged

Our court similarly concluded convictions under section 530.5, subdivision (c)(1) and (2) for acquiring and retaining possession of personal identifying information with the intent to defraud are not theft offenses and are not eligible for reclassification under Proposition 47 as misdemeanor petty thefts under section 490.2. (*People v. Weir* (2019) 33 Cal.App.5th 868, 871, petn. for review pending, petn. filed Apr. 30, 2019, S255212.)

The Supreme Court has granted review of both *Sanders* and *Jimenez* and will ultimately resolve the split in authority. In the interim, we see no compelling reason to depart from our prior opinion in *Sanders*. (See *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1598 ["despite the inevitable differences among justices of appellate courts, stare decisis remains a vital principle. We hesitate to overrule a decision rendered by another panel of this court except for compelling reasons."].)

Accordingly, pending further guidance from our Supreme Court, we follow the reasoning of *Sanders.* Harmon was properly charged and pleaded guilty under section 530.5 to using the personal identifying information of another to make unauthorized purchases. The misdemeanor offense of shoplifting as defined by section 459.5 does not apply to this conviction.

DISPOSITION

The judgment is reversed as to count 4. The court's September 4, 2018 order is vacated as void and the matter is remanded with direction to enter a new order granting

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with a violation of section 530.5, subdivision (a) for the use of the account holder's personal identifying information. (*Gonzales*, at p. 862.)

Harmon's petition for reclassification only of count 4 from felony burglary to misdemeanor shoplifting. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

AARON, J.