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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LAUREN ANTHONY GRATIANO, Defendant and Appellant.	E066820 (Super.Ct.No. FVI1101688) OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Vander Feer, Judge. Affirmed.

John L. Staley, 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, Peter Quon, Jr., and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Lauren Anthony Gratiano pled guilty to one count of attempted unlawful driving or taking of a vehicle (Pen. Code, § 664; Veh. Code, § 10851, subd. (a)), pursuant to a plea agreement. Subsequently, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which among other things established a procedure for specified classes of offenders to have their felony convictions reduced to misdemeanors and be resentenced accordingly. (Pen. Code,[1] § 1170.18.) Defendant filed a petition for resentencing, pursuant to Penal Code section 1170.18. A trial court found her ineligible for relief and denied the petition. Defendant now appeals, arguing that the court erred in finding her ineligible. We affirm.

PROCEDURAL BACKGROUND

On July 25, 2011, defendant was charged by felony complaint with receiving stolen property. (Pen. Code, § 496d, subd. (a), count 1.) The complaint also alleged that she had served two prior prison terms. (Pen. Code, § 667.5, subd. (b).) On August 8, 2011, the complaint was amended by interlineation to add a charge of attempted unlawful taking or driving of a vehicle. (Pen. Code, § 664; Veh. Code, § 10851, subd. (a), count 2.) Defendant entered a plea agreement and pled guilty to count 2. In accordance with the agreement, the court sentenced her to one year in state prison and dismissed count 1 and the prison prior allegations.

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[1] All further statutory references will be to the Penal Code, unless otherwise noted.

On July 20, 2016, defendant filed a Proposition 47 petition for resentencing, alleging that she had completed her sentence and requesting to have her felony designated as a misdemeanor. (§ 1170.18.) On September 9, 2016, the court found that defendant's offense did not qualify for resentencing under Proposition 47 and denied the petition.

ANALYSIS

The Court Properly Denied Defendant's Petition

Defendant argues that the court erred in not designating her Vehicle Code section 10851[2] conviction a misdemeanor under Proposition 47. We disagree.

A. *Relevant Law*

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, section 1170.18. Section 1170.18 creates a process through which persons previously convicted of crimes as felonies, which would be misdemeanors

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[2] Vehicle Code section 10851, subdivision (a), provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished . . . ."

under the new definitions in Proposition 47, may petition for resentencing. (See *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108-1109.)

Specifically, section 1170.18, subdivision (f), provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

As relevant to the present case, Proposition 47 added section 490.2, which provides as follows: "(a) 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, . . ."

B. *Defendant Was Ineligible for Relief*

Penal Code section 1170.l8, subdivision (a), lists the offenses for which relief may be appropriate: "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." Penal Code section 1170.18 does not identify Vehicle Code section 10851 as one of the code sections amended or added by Proposition 47. (Pen. Code, § 1170.18, subd. (a).) To construe Proposition 47 to include the taking or driving of a vehicle under Vehicle Code section 10851 would violate the cardinal rule of statutory construction. " ' "When statutory

language is clear and unambiguous, there is no need for construction and courts should not indulge in it." [Citation.]' " (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) Furthermore, Proposition 47 left intact the language in Vehicle Code section 10851, subdivision (a), which makes a violation of that statute punishable as either a felony or a misdemeanor. Therefore, based on the statutory language alone, the court properly found defendant ineligible for relief under Proposition 47.

Defendant contends that her conviction for Vehicle Code section 10851 was eligible for reduction to a misdemeanor if it was based on theft, since Penal Code section 1170.18 explicitly applies to theft offenses through Penal Code section 490.2 when the value of the property taken is less than $950. That issue is presently before the California Supreme Court. (*People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Gomez* (2015) 243 Cal.App.4th 319, review granted May 25, 2016, S233849; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344, among others.)

The crux of defendant's argument is that Vehicle Code section 10851 was indirectly amended by virtue of Penal Code section 490.2's reference to section 487, and the circumstance that Vehicle Code section 10851 is a lesser included offense of Penal Code section 487, subdivision (d)(1). On its face, however, Penal Code section 490.2 does no more than amend the definition of grand theft, as articulated in Penal Code section 487 or any other provision of law, redefining a limited subset of offenses that would formerly have been grand theft to be petty theft. (Pen. Code, § 490.2.) Vehicle

Code section 10851 does not proscribe theft of either the grand or petty variety, but rather the taking or driving of a vehicle "with or without intent to steal." (Veh. Code, § 10851, subd. (a); see *People v. Garza* (2005) 35 Cal.4th 866, 876 [Veh. Code, § 10851, subd. (a), " 'proscribes a wide range of conduct,' " and may be violated " 'either 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).' "].) Thus, we conclude Penal Code section 490.2 does not apply to defendant's conviction offense.

C. *Defendant Has Not Shown an Equal Protection Violation*

Defendant claims that "[e]xcluding a conviction for unlawfully *driving* a vehicle from reduction to a misdemeanor" would violate the equal protection clause. (Italics added.) She specifically contends that "[i]t is irrational to grant misdemeanor treatment to *vehicle theft* under [Vehicle Code] section 10851, subdivision (a), and deny misdemeanor treatment to unlawfully *driving* a vehicle in violation of that statute." (Italics added.) Defendant's claim fails. Her argument assumes that Proposition 47 applies to unlawfully taking a vehicle under Vehicle Code section 10851, subdivision (a). However, Proposition 47 does not apply to Vehicle Code section 10851, subdivision (a). (See *ante*, § B.) Thus, defendant has not alleged or demonstrated that her conviction places her in a class of persons similarly situated to those who receive relief under Proposition 47. (See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [" 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the

state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' "].)

D. *Defendant Failed to Establish the Value of the Vehicle*

Assuming defendant's statutory interpretation of Proposition 47 is correct, she still failed to establish that she was eligible for relief. "[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878 (*Sherow*).) "The defendant must attach information or evidence necessary to enable the court to determine eligibility." (*People v. Perkins* (2016) 244 Cal.App.4th 129, 137 (*Perkins*).) To establish eligibility for resentencing under section 1170.18, defendant had the initial burden of showing that the value of the vehicle was less than $950. However, the record of conviction does not establish this fact, as defendant entered a guilty plea. Furthermore, she never stated in the petition that the vehicle was valued at less than $950, nor did she provide any supporting documentation. In other words, the petition provided no information whatsoever on the value of the vehicle to aid the trial court in determining whether she was eligible for resentencing. We conclude defendant did not meet her burden of providing evidence to establish she was eligible for resentencing on his convictions. (See *Perkins*, at p. 137.)

Defendant contends the court's ruling that a violation of Vehicle Code section 10851, subdivision (a), was not eligible for reduction to a misdemeanor as a matter of law made any issue of value moot at the Proposition 47 hearing; thus, the matter should be remanded to the trial court to give her the opportunity to present evidence regarding the

value of the vehicle. However, "the statute required defendant to include information supporting [her] petition with [her] *initial filing*." (*Perkins*, *supra*, 244 Cal.App.4th at p. 138, italics added.) Since she failed to provide any information that the value of the vehicle was less than $950, we cannot conclude the trial court erred in denying her petition. (See *Id*. at pp. 137-138.)

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

I concur:

RAMIREZ
P. J.

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MILLER, J.

I respectfully dissent to that part of the majority opinion finding that Proposition 47 does not apply to all convictions under Vehicle Code section 10851. Some convictions of Vehicle Code section 10851 constitute theft offenses. (*People v. Garza* (2005) 35 Cal.4th 866, 881; see *People v. Van Orden* (2017) 9 Cal.App.4th 1277, 1284-1295, review granted June 14, 2017, S241574.) Assuming that a defendant takes a vehicle with the intent to permanently deprive the owner of the vehicle and it is valued under $950, such violation would constitute a violation of Penal Code section 490.2, petty theft, which was added by Proposition 47. Under Proposition 47, defendant was entitled to prove she would have been guilty of a misdemeanor violation of Vehicle Code section 10851.

I concur in the result that defendant's petition to recall her sentence was properly denied by the trial court as defendant failed to meet her burden of establishing the vehicle she attempted to take was valued under $950, and that she intended to permanently deprive the owner of the vehicle.

MILLER

J.