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SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

APR 21 2016

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

RUBEN PHILIP FRANCO,

Defendant and Appellant.

S _____

Frank A. McGuire Clerk

Deputy

B260447

(Los Angeles County
Superior Court
No. VA125859)

FROM THE JUDGMENT OF THE SUPERIOR COURT, COUNTY OF LOS
ANGELES, THE HONORABLE ROGER ITO, JUDGE

PETITION FOR REVIEW

ALLISON H. TING, SB 164933
Law Office of Allison H. Ting
1158 26th Street, # 609
Santa Monica, CA 90403

Tel. & Fax: (310) 826-4592
ting164933@gmail.com
Attorney for Appellant/Petitioner

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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S. _____

B260447

(Los Angeles County
Superior Court
No. VA125859)

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellant, RUBEN PHILIP FRANCO, petitions this Court for review following the decision of the Court of Appeal, Second Appellate District, Division Seven, on **March 14, 2016**. (Cal. Rules of Court, rule 8.500.) Appellant did not file a petition for rehearing.

A copy of the opinion of the Court of Appeal is attached as Exhibit "A."

STATEMENT OF THE CASE

Pursuant to a negotiated plea bargain, appellant was placed on three years' formal probation, with execution of a four-year prison sentence suspended, for forgery (§ 475, subd. (a)), and receiving stolen property (§ 496, subd. (a)), with one prior prison term (§ 667.5, subd. (b)). (1CT 28, 35-38, 48-49, 51, 63; 1RT 2-10.) On November 19, 2014, the trial court found that appellant had violated probation, and imposed the previously suspended four-year sentence. (1CT 61-62; 1SRT 306-307.) Appellant then made an oral petition for re-classification of his offenses to misdemeanors, pursuant to Proposition 47 (Pen. Code, § 1170.126); and, after a hearing, the trial court denied the motion. (1CT 61-62; 1SRT 301-302.) Appellant filed an appeal, and the Court of Appeal affirmed the judgment. (Exh. A.) Appellant now seeks review of the trial court's order denying his Proposition 47 petition.

STATEMENT OF FACTS

The parties stipulated to a factual basis for the plea. (1RT 5-6.) On July 17, 2012, Jeni Muniz went into a Rite Aid in Whittier, and left her purse in the car, thinking she had locked the car, when, in fact, she might not have clicked the remote control. (1CT 20.) When she returned to the car, she found her purse was missing, along with a checkbook. (1CT 21.) None of the checks were signed,

and she had not given anyone permission to sign a check on her behalf. (1CT 22, 39.)

On July 21, 2012, police conducted a parole search and found appellant had check in his wallet, made out for \$1,500, with the payee left blank. (1CT 5-6, 10, 39.) The check was dated July 17, 2012, and bore a signature in the name of Jeni Muniz. (1CT 7, 39.)

Appellant told the officer that his employer owed him \$200 for a cleaning job and had given him the \$1,500 check, stating it was a bad check, but if appellant could cash it, he could keep the money. (1CT 11, 15, 17-19, 39.)

ISSUE PRESENTED FOR REVIEW

After Proposition 47, forgery under Penal Code section 475 is a misdemeanor if the instrument's "value" is under \$950; does "value" mean actual value, i.e, negotiated or intrinsic value?

NECESSITY FOR REVIEW

Review is necessary to settle an important question of law and to promote uniformity of decision. (Rule 8.500(b)(1).) Resolution of the question presented will implicate appellant's federal constitutional rights, under the due process clause of the Fourteenth Amendment. The arbitrary deprivation of a purely state law right may violate the Due Process Clause of the Fourteenth Amendment. (See, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343,

346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [arbitrary deprivation of liberty under state law implicates federal due process]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [state trial court's misapplication of its capital sentencing statute implicates the liberty interest protected by the Fourteenth Amendment]; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673 [sentencing court's failure to comply with state statute requiring a finding that habitual offender status is "just and proper" violated due process].)

This case raises significant issues of law within the meaning of California Rules of Court, rule 8.500(b)(1) and thus review is necessary. Because these important issues of law have not been resolved in this state, review should be granted.

ARGUMENT

A FORGED CHECK, MADE OUT FOR A MILLION DOLLARS, BUT NOT PRESENTED, NEGOTIATED, OR EXCHANGED, DOES NOT HAVE AN ACTUAL VALUE OF A MILLION DOLLARS; INFLECTING A FELONY, RATHER THAN MISDEMEANOR PUNISHMENT ON THE BASIS OF THE CHECK'S "STATED" VALUE IS ABSURD AND UNJUST; THE SAME RESULT OBTAINS IF THE STATED VALUE IS \$1,500; ONLY AN ACTUAL VALUE OVER \$950 SATISFIES THE FELONY PUNISHMENT PROVISION OF PENAL CODE SECTION 475, SUBDIVISION (a); APPELLANT MUST RE RE-SENTENCED TO A MISDEMEANOR COUNTY JAIL TERM FOR FORGERY

A. Standard of Review

Reviewing courts "independently construe statutory law, as its interpretation is a question of law on which [the appellate court is] not bound by the trial court's analysis. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal. 3d 692, 699.)

B. Relevant Facts and Procedural History

Appellant stole a checkbook and wrote the amount \$1,500 on one of the checks. (1CT 5-6, 10, 20-22, 39.) He signed the check in the name of the account-holder, and dated it with a current date, but left the payee portion blank. (1CT 5-7, 10, 39.) He did not negotiate the check, but kept it in his wallet. (1CT 5-6, 10, 39.)

Appellant pled guilty to, inter alia, one count of possession or receipt of a forged item with intent to defraud. (Pen. Code, § 475, subd. (a).) Section 475, subdivision (a) provides:

(a) Every person who possesses or receives, with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items, or completed items contained in subdivision (d) of Section 470 with intent to defraud, knowing the same to be forged, altered, or counterfeit, is guilty of forgery.

Appellant's subsequent motion to reduce the forgery from a felony to a misdemeanor pursuant to Proposition 47 (Pen. Code § 1170.126) was denied. (1CT 61-62; 1SRT 301-302.) Appellant is serving a felony term of four years in county jail. (1CT 61-62; 1SRT 307.)

The Court of Appeal affirmed the trial court's denial of Proposition 47 relief. (Exh. A.) This petition seeks review of the Court of Appeal's opinion that Proposition 47's reference to \$950 value as the cutoff between misdemeanor and felony treatment of the forgery statute requires examination of the forged instrument's actual negotiated value or its intrinsic value, rather than its face value.

C. The "Absurd Consequences" Rule of Statutory Interpretation Evaluates Statutes on Fairness and Justice Grounds; It Thus Requires that the "Value" of a Forged Instrument Be Determined By Reference to Its Actual, Intrinsic, or Negotiated Value, but Not Its Potentially Absurd Face Value

Proposition 47 lessened the punishment for crimes such as forgery of a check with a value of less than \$950, by making such crimes misdemeanors unless the defendant had a disqualifying prior conviction. (§ 473, subd. (b).) Appellant wrote "\$1,500" on a stolen

and forged check, but merely placed it in his pocket, never attempting to negotiate it for that value.

The Court of Appeal held the word "value" in section 473, subdivision (b), must be interpreted as "stated value" or "face value" rather than "actual value," intrinsic value, or negotiated value, in order to avoid "absurd consequences." (Exh. A, p. 5.) For this proposition, the court cited *Flannery v. Prentice* (2001) 26 Cal.4th 572, 578.)

In *Flannery*, this Court interpreted Government Code section 12965, which provides, in pertinent part, that a trial court, "in its discretion, may award to the prevailing party reasonable attorney's fees and costs" The question was whether the word "party" was limited to a litigant, or whether the definition could be expanded to mean the attorney for the party, i.e., whether the fees and costs could be awarded directly to counsel. The *Flannery* court pointed out that awarding fees/costs to a pro bono litigant who had not spent any money on legal fees, and not to the attorney who had incurred costs and earned fees, would result in "unjust enrichment" and would be unfair. (*Flannery v. Prentice, supra*, 26 Cal.4th at pp. 585-586.)

Thus, *Flannery* equated absurd results with unfair results; and that was the right thing to do. Applying the *Flannery* court's

reasoning to the instant case would require finding that using "stated value" of a check is unfair and absurd.

Because appellant merely wrote some numbers on a check, but never cashed the check or otherwise exchanged the check with a third party, the check should be deemed worth no more than the paper on which it was printed, as in *People v. Cuellar* (2008) 165 Cal.App.4th 833, 835. To hold otherwise is unfair and absurd.

The arbitrary deprivation of a purely state law right may violate the Due Process Clause of the Fourteenth Amendment. (See, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [arbitrary deprivation of liberty under state law implicates federal due process]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [state trial court's misapplication of its capital sentencing statute implicates the liberty interest protected by the Fourteenth Amendment]; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673 [sentencing court's failure to comply with state statute requiring a finding that habitual offender status is "just and proper" violated due process].)

If a defendant writes "\$1,000,000" on a check and signs the account-holders name, but never presents it for cashing, or for any exchange of value, it is not fair to say he possesses a forged check with a value of a million dollars. *That* would be absurd.

Likewise, it is not fair to hold that appellant, by writing an amount greater than \$950 on an uncashed check, and leaving it in his pocket, committed a felony rather than a misdemeanor. This Court should grant review, and say so.

CONCLUSION

For any or all of the foregoing reasons, this petition for review should be granted.

Dated: **April 18, 2016**

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Allison H. Ting". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

ALLISON H. TING
Attorney for Appellant
RUBEN PHILIP FRANCO

WORD-COUNT CERTIFICATE

I, Allison H. Ting, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is **less than 8,400 words**, excluding the tables, this certificate, and any attachment permitted under rule 8.504(d), specifically, the word count is: **1,662** words. This document was prepared with Word, and this is the word count generated by the program for this document. I certify that the foregoing is true and correct.

Executed at Los Angeles, California, on **April 18, 2016**.

Allison H. Ting

Attorney for Appellant

EXHIBIT A

Filed 3/14/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN PHILLIP FRANCO,

Defendant and Appellant.

B260447

(Los Angeles County
Super. Ct. No. VA125859)

COURT OF APPEAL – SECOND DIST.

FILED

Mar 14, 2016

JOSEPH A. LANE, Clerk

James Renteria Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed and remanded with instructions.

Allison H. Ting, 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, Senior Assistant Attorney General, Mary Sanchez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Ruben Franco appeals the denial of his oral petition for resentencing on his convictions for forgery and receiving stolen property. We affirm the judgment but remand for correction of the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 17, 2012, Franco was charged with forgery (Pen. Code,¹ § 475, subd. (a)) and receiving stolen property (§ 496, subd. (a)). It was alleged that he had served five prior prison terms within the meaning of section 667.5, subdivision (b). Franco pleaded guilty to the charged offenses and admitted the five prior prison terms. The court struck four of the five prior prison term allegations, suspended the execution of a four-year felony state prison sentence, and placed Franco on three years' formal probation.

On August 11, 2014, Franco failed to appear for a probation violation hearing. The trial court revoked his probation and issued a bench warrant. On November 4, 2014, Franco was taken into custody.

On November 19, 2014, the trial court found that Franco had violated his probation and imposed the previously suspended four-year sentence. Franco made an oral petition for resentencing that the court denied. Franco appeals.

DISCUSSION

I. Proposition 47 Resentencing Petition

“On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*)). “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. 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.)

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

Proposition 47 amended the law regarding forgery to provide, in relevant part, that “any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950), shall be punishable by imprisonment in a county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.” (§ 473, subd. (b).)

Section 496, subdivision (a), regarding receiving stolen property, was also amended by Proposition 47. It now provides, “Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.” (§ 496, subd. (a).)

“Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be ‘resentenced to a

misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.18, subd. (b).)” (*Rivera, supra*, 233 Cal.App.4th at p. 1092.) Franco argues that the trial court should have resentenced him, treating his forgery and his receiving stolen property convictions as misdemeanors, based on his oral petition.

A. Petition Requisites

The Attorney General argues that Franco was ineligible for resentencing because his request was oral and not written. Although some language in the statute suggests that its drafters anticipated that petitions would be in written form, section 1170.18 contains no express requirement that a resentencing petition be made in writing. We therefore agree with the court in *People v. Amaya* (2015) 242 Cal.App.4th 972 at page 975, that there is “no statutory requirement for the filing of a written petition.” Moreover, the Attorney General has not demonstrated that the prosecutor objected in the trial court to Franco’s petition on the ground that it was oral rather than written. ““An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court. . . .”” (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

B. Forgery Conviction

Franco’s argument for resentencing is premised on his view that the \$950 value amount set forth in section 473, subdivision (b) corresponds not to the stated amount on the face of the forged instrument but to the intrinsic value of the instrument itself. He relies upon *People v. Cuellar* (2008) 165 Cal.App.4th 833 (*Cuellar*), in which the Court of Appeal concluded that there was sufficient evidence to support a conviction for grand theft from the person of another where the defendant took what was described as a “bogus check” from the hand of a department store salesperson. The *Cuellar* court reasoned that the check did not have a value equal to the amount for which it had been written, but that for the purposes of a grand theft conviction, it nonetheless had some

intrinsic value by virtue of the paper it was printed on and as a negotiable instrument that, if legally drawn, would entitle its holder to payment on demand. (*Id.* at pp. 838-839.) Franco reasons that the forged check he possessed, because it was illegally drawn and was not exchanged for value, had no actual value despite the check's face value being \$1,500, and that the court therefore should have resentenced him for forgery as a misdemeanor..

We are not persuaded that the trial court interpreted section 473, subdivision (b) incorrectly. While *Cuellar, supra*, 165 Cal.App.4th 833 and similar cases stand for the principle that a forged check does not have an actual value corresponding to the face value of the check, section 473, subdivision (b) does not specify that it is the actual value of the check, as opposed to the face value of that instrument, that is the value that is used to determine whether the offense is a felony or a misdemeanor. The value of forged checks, bonds, bank bills, notes, cashier's checks, traveler's checks, and money orders, the items listed in section 473, subdivision (b), may or may not correspond to the face value of the instrument, depending on the existence of a secondary market or other evidence of value. When viewed in the context of forgery, however, the word "value" as used in section 473, subdivision (b) must correspond to the stated value or face value of the check in order to avoid absurd consequences. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 578 [courts avoid statutory constructions that would produce absurd consequences].) The trial court did not err in declining to resentence him on the forgery conviction.

Franco argues that even if we "do not follow" *Cuellar, supra*, 165 Cal.App.4th 833 and similar cases concerning the value of the forged check, at the time he committed his offenses he "had a federal constitutional due process right to rely on" this line of cases such that we must consider the forged check here to have had only a nominal value and may only apply our reasoning prospectively. Our conclusion that section 473, subdivision (b) refers to the face value of the forged instrument is not a departure from those cases holding that the actual value of a forged instrument is *de minimis*, and we are therefore not failing to follow *Cuellar* and similar authority such that our decision may

only be applied prospectively. Moreover, at the time that Franco committed his offenses, Proposition 47 had not been enacted and all forgery was punishable as a felony regardless of the value of the instrument in question. Therefore, even if our understanding of *Cuellar* and related cases could be considered as constituting a change in interpretation, this change could not have had any impact on Franco's pre-Proposition 47 decision to plead guilty.

C. Receiving Stolen Property Conviction

Franco argues that he should have been resentenced on his conviction for receiving stolen property as a misdemeanor based upon the same argument concerning value that he made in the context of his forgery conviction. Franco, however, has not demonstrated on this record that he petitioned the trial court to resentence him on this offense. Franco's petition for resentencing was made orally and off the record, and the record lacks any description of what counsel sought when he made this request. The argument and the decision of the court contained in the reporter's transcript concern solely the question of whether the forgery conviction was subject to resentencing as a misdemeanor. Neither the court nor either party mentioned the conviction for receiving stolen property. As there is no indication that Franco petitioned the court to resentence him on his felony conviction for receiving stolen property as a misdemeanor, Franco has not established any error by the trial court in failing to resentence him for this offense.

II. Abstract of Judgment

Both Franco and the Attorney General agree that the abstract of judgment contains a typographical error in the representation of the date of Franco's sentencing hearing. The first page of the abstract of judgment states that the sentencing hearing was held on November 19, 2013, when in fact the hearing occurred on November 19, 2014. We may correct this clerical error on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186-187.)

DISPOSITION

The judgment is affirmed. The superior court is ordered to prepare an amended abstract of judgment as set forth in this opinion and to forward a copy to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.

DECLARATION OF SERVICE BY MAIL

RE: People v. RUBEN PHILIP FRANCO.; B260447; Los Angeles County Superior Court VA125859; I, Allison H. Ting, declare I am over 18 years of age, not a party to the within cause; my business address is 1158 26th Street, # 609, Santa Monica, CA 90403; I served a copy of the attached **PETITION FOR REVIEW** on each of the following, in envelope(s) addressed to:

**L.A. County District
Attorney
6230 Sylmar Ave. # 201
Van Nuys, CA 91401**

**RUBEN PHILIP FRANCO
(address on file)**

**Clerk for Delivery to:
Hon. ROGER ITO, Judge
Los Angeles County
Superior Court
12720 Norwalk Blvd.
Norwalk, CA 90650**

**California Appellate Project
520 S. Grand Ave -4th Fl.
Los Angeles, CA 9007**

Each said envelope was then, on **April 18, 2016**, sealed and deposited in the United States Mail at Los Angeles, California, with the postage thereon fully prepaid. In addition, I electronically served from my electronic notification address of ting164933@gmail.com , the same document, on **April 18, 2016**, at _____ **a.m./p.m.**, to the following entity and electronic notification address[es]: CALIFORNIA APPELLATE PROJECT capdocs@lacap.com and ATTORNEY GENERAL, docketingLAAWT@doj.ca.gov; and I electronically served the Court of Appeal on the website www.courts.ca.gov/8872.htm#tab17043 (Court of Appeal, Second Appellate District). I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 18, 2016**, at Los Angeles, California.

Declarant