S237801

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re C.B., a minor

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

C.B.,

Defendant and Appellant.

S237801

First District Court of Appeal Case No. A146277
Contra Costa County Superior Court Case No. J1301073
The Honorable Thomas Maddock, Judge

OPENING BRIEF ON THE MERITS

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The Honorable Thomas Maddock, Judge

OPENING BRIEF ON THE MERITS

ISSUES PRESENTED FOR REVIEW

1. Whether, when a juvenile has a felony reclassified as a misdemeanor pursuant to Penal Code section 1107.18, the statute's directive that the reclassified offense be treated as a misdemeanor "for all purposes" mandates that courts grant the juvenile's request that the DNA sampled collected pursuant to the original felony adjudication be expunged from the state's DNA database.

2. Whether Assembly Bill 1492 was an amendment to Proposition 47, such that it should not be retroactively applied to juveniles who petitioned the court for expungement prior to its enactment.

3. Whether, when enacting Assembly Bill 1492, which courts have interpreted to prohibit expungement of a juvenile defendant's DNA following reclassification of an offense from a felony to a misdemeanor, the legislature impermissibly amended Proposition 47, because AB 1492 contravened the purpose of Proposition 47.

STATEMENT OF THE CASE

On September 20, 2013, the Contra Costa District Attorney filed a petition under Welfare and Institutions Code section 602, alleging that appellant Cody Buffum had committed one count of second degree robbery and personally used a knife in that robbery (Count 1; Pen. Code § § 211/212.5(c) & 12022(b)(1)), and one count of first degree burglary (Count 2; Pen. Code § 459/560(a)). (I CT 1-3.) [1] On October 1, 2013, the District Attorney amended the petition to charge one count of grand theft from a person (Count 3; Pen. Code §487(c)), and one count of misdemeanor second degree burglary (Count 4; Pen. Code §459/460(b)). (I CT 3, 8.) The court then dismissed counts 1 and 2. (I CT 8.) On October 1, 2013, appellant admitted the remaining allegations in the amended petition, felony theft and misdemeanor second degree burglary. (I CT 8.)

On October 15, 2013, appellant was made a ward of the court, placed on juvenile probation with no termination date, and ordered into out of home placement. (I CT 10.) As part of his disposition, he was ordered to submit samples for DNA collection pursuant to Penal Code section 296.1. (I CT 12.) On August

[1] CT refers to Clerk's Transcript on appeal and RT refers to Reporter's Transcript on appeal.

17, 2015, the juvenile court vacated the wardship order and ordered appellant's probation terminated unsuccessfully. (RT 28; II CT 351.)

On July 6, 2015, after the passage of Proposition 47, appellant petitioned the juvenile court to reduce his felony theft adjudication to misdemeanor petty theft under Penal Code section 490.2,[2] recalculate his maximum confinement period, reduce fines imposed to be consistent with a misdemeanor adjudication, and expunge his DNA from the state's DNA database, all pursuant to Penal Code section 1170.18.[3] (RT 9; II CT 289-290; 297-303.) At the July 21, 2015 hearing on the motion, the juvenile court reduced the grand theft to a misdemeanor petty theft, a violation of Penal Code section 490.2. (RT 10-11; II CT 294.) The court

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[2] Because the amount of the items stolen in the theft was less than $950, appellant was eligible for relief under Proposition 47. Penal Code section 490.2 states: (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, 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. Appellant has none of these disqualifying prior offenses.

[3] Section 1170.18, was implemented by Proposition 47 in 2014. Subdivision (a) of that section states: "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." (Pen.Code, § 1170.18.) The subsequent subsections lay out the procedures for filing that petition.

denied appellant's expungement request, incorporating by stipulation the argument and ruling found in *In re S.B.*, which had been decided by the court on June 4, 2015. (RT 10; II CT 295, 338-339; Transcript from In Re S.B., 6/4/15 1-21.)

Appellant filed a timely notice of appeal from the denial of his expungement request on September 14, 2015. (II CT 360-361.) Division Three of the First District Court of Appeal issued a published two-to-one opinion on August 30, 2016. The majority opinion affirmed the ruling of the juvenile court, holding that reclassification of appellant's offense from a felony to a misdemeanor did not entitle him to have his DNA expunged from the state's DNA database. In his dissent, Justice Pollak held that appellant's DNA should have been expunged upon the grant of his motion to redesignate his offense as a misdemeanor for all purposes except firearm restriction. A true and correct copy of that opinion is attached hereto as Appendix A.[4] Appellant filed a timely Petition for Review and this court granted review on November 19, 2016.

STATEMENT OF FACTS

Appellant incorporates the summary of the facts included in the Court of Appeal's majority opinion in footnote no. 2 (Opn. at 2, n. 2.)

SUMMARY OF ARGUMENT

When the voters passed the Safe Neighborhoods and Schools Act, "Proposition 47" in 2014, they unequivocally intended to "[r]equire misdemeanors

[4] Cites to the Court of Appeal opinion will reference the page numbers in the copy of the opinion attached hereto as Appendix A.

instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession unless the defendant has prior convictions for specified violent or serious crimes." (Proposition 47, § 3.) As relevant here, the voters effected that intent by: 1) redefining the misdemeanor offense of petty theft to include obtaining any property by theft where the value of goods taken does not exceed $950, and 2) enabling a person who has completed his sentence/disposition "who would have been guilty of a misdemeanor under this act had this act been effect at the time of the offense" to petition the court to have the offense designated a misdemeanor. (Proposition 47, §§ 3, subd. (2), 8, 14, Pen. Code §§ 490.2, 1170.18, subd. (f)-(g).) The voters also stated that once a former felony is designated a misdemeanor, it "shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [certain gun possession statutes]." (*Id.* § 14, Pen.Code § 1170.18, subd.(k).) Thus, the voters declared that certain non-violent offenses that were formally felonies should now be considered misdemeanors for all purposes except one - gun possession restrictions and law violations.

The penal Code requires that people convicted of, or adjudicated for, felonies submit DNA samples to the state's DNA databank. (Pen. Code § 296.) Misdemeanants with arson and sex offense convictions/adjudications are also required to submit DNA samples. (*Id.*) No other misdemeanants are required to submit DNA samples. Read together with Proposition 47's redesignation of

certain nonserious, nonviolent offenses as misdemeanors and the state's existing DNA collection requirements show that for people whose felony offenses have now been designated misdemeanors, the state should no longer be able to maintain their DNA samples in the state's DNA database.

Yet, courts, and now the legislature, have created an additional exception to the misdemeanor treatment of the offenses that now been deemed misdemeanors, by requiring that people whose offenses have been reclassified continue to have their DNA samples maintained in the state's DNA database, even when they are no longer guilty of having committed an offense requiring them to submit a DNA sample. That exception is contrary to both the plain language of Proposition 47, and the intent of the voters in enacting it.

Appellant was entitled to have the DNA sample he submitted with the original adjudication expunged from the state's database under the plain language of Proposition 47. An order to that effect is consistent with the intent and purpose of the voters in enacting Proposition 47. Nonetheless, the trial court denied appellant's request to have his DNA expunged and the Court of Appeal affirmed that decision. In so doing, the courts relied on both the fact that Proposition 47 was silent on the issue of DNA expungement, and on a subsequent amendment to the DNA collection statute, Assembly Bill 1492. That reliance was misplaced.

The plain language contained in Penal Code section 1170.18, subdivision (k) clearly states that redesignated offenses should be treated as misdemeanors for all purposes except for one. Multiple well-established principles of statutory

construction required the court below to give the plain language of section 1170.18, subdivision (k) its plain meaning. That application would result in a finding that appellant now falls squarely within the provisions of Penal Code section 299, subdivision (a) which entitles anyone who "has no past or present offense or pending charge which qualifies that person for inclusion in" the state's DNA database to have his DNA sample destroyed and expunged. (Pen. Code §299, subd. (a).)

The lower court's contention that redesignation of appellant's offense does not entitle him to expungement because redesignation is akin to reduction of a wobbler from a felony to a misdemeanor under Penal Code section 17, subdivision (b) fails to account for the fact that the very nature of redesignated offenses under Proposition 47 have been changed. They are simply no longer felonies for any purpose. That puts them in a fundamentally different category than wobblers which remain chargeable as felonies now, and at any time in the future. That difference mandates a different approach to analyzing the collateral consequences, including DNA expungement, that flow from the original convictions in the two types of cases.

Moreover, a finding that appellant and those similarly situated are entitled to DNA expungement is wholly consistent with the public policy underlying both Proposition 47 and Proposition 69, the DNA and Forensic Identification Act passed in 2004. The majority opinion's assertion that denial of appellant's request for expungement is necessary to harmonize the two propositions, or to ensure

public safety, is incorrect.

Finally, the amendment to Penal Code section 299, subdivision (f) enacted by Assembly Bill 1492 in 2016 by its plain language does not apply to expungement requests because that subdivision of the statute, applies to the duty to provide the DNA, not the state's obligation to expunge a misdemeanant's DNA. Even if that were not the case, however, the changes made by AB 1492 should not be applied to appellant's case. First, because it was enacted after he requested relief, to which he was clearly entitled under the caselaw in place at the time of his motion. Second, AB 1492 was an impermissible amendment to Proposition 47 because it did not further the intent of the statute.

ARGUMENT

I. BECAUSE THE PLAIN LANGUAGE OF PENAL CODE SECTION 1170.18 MANDATES THAT REDESIGNATED OFFENSES BE CONSIDERED MISDEMEANORS FOR ALL PURPOSES EXCEPT FOR RESTRICTIONS ON THE USE AND POSSESSION OF FIREARMS, AND BECAUSE JUVENILES ADJUDICATED AS DELINQUENTS FOR MISDEMEANORS OTHER THAN SEX AND ARSON OFFENSES ARE NOT REQUIRED TO PROVIDE DNA SAMPLES, APPELLANT WAS ENTITLED TO HAVE HIS DNA EXPUNGED WHEN HIS OFFENSE WAS REDESIGNATED AS A MISDEMEANOR.

There is no dispute that pursuant to Proposition 47, appellant's theft offense was correctly redesignated as a misdemeanor petty theft for all purposes except firearm restrictions. (See Pen.Code, § 1170.18, subds. (f), (g); Opn. at 5.) The issue before the juvenile court, the Court of Appeal, and this Court is whether appellant's DNA should be expunged - his DNA sample destroyed and his DNA profile removed from the data bank - because he no longer has an offense qualifying for DNA submission, and his redesignated offense is to be treated as a "misdemeanor for all purposes except for firearm restrictions. (See Pen.Code, secs.1170.18, subd. (k), 296, 299, subd. (a); Opn. at 5.) The plain language of Penal Code sections 1170.18[6] and 299 mandated that the Court of Appeal find that appellant was entitled to have his DNA sample expunged from the state's database.

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[6] All further statutory references are to the Penal Code.

A. APPLICABLE LAW.

The issue in this case involves judicial interpretation of an initiative statute, specifically Penal Code section 1170.18, enacted pursuant to Proposition 47. Where an appeal involves the interpretation of a statute enacted as part of a voter initiative, the issue on appeal is a legal one, which courts review de novo. (*People v. Sledge* (2017) 7 Cal.App.5th 1089.) Appellate courts independently review the decision of the trial court concerning statutory interpretation. (*People v. Taylor* (1992) 6 Cal.App.4th 1084, 1090-1091.)

1. Proposition 47.

In November 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, intending to "[r]equire misdemeanors instead of felonies for nonserious nonviolent crimes like petty theft and drug possession unless the defendant has prior convictions for specified violent or serious crimes." (Proposition 47, § 3.) Consistent with that intent, the initiative designated a number of non-violent, non-serious felony offenses as misdemeanors. Appellant's offense of theft from a person of property valued at less than $950 was redignated as misdemeanor petty theft. (Pen.Code § 490.2.)[7]

People who were convicted of, or adjudicated for, of any of the reclassified offenses prior to passage of the act can petition the court to have their conviction

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[7] Proposition 47 applies to juveniles who were found to be delinquents, under Welfare and Institutions Code section 602, when they were found to have committed one of the reclassified offenses. (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1226.)

designated as a misdemeanor, even after they have served any sentence or disposition associated with the original felony offense. (Pen. Code § 1170.18, subds. (f), (g).) The mechanism for petitioning the court for redesignation, as appellant successfully did in this matter, is contained in Penal Code section 1170.18. Subdivision (k) of section 1170.18 addresses the impact of redesignation. It provides:

> Any felony conviction that is recalled and resentenced...or designated as a misdemeanor...*shall be considered a misdemeanor for all purposes, except that* such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [the firearm restriction statutes.]

(Pen.Code § 1170.18, subd. (k), emphasis added.)

Thus, the plain language of Proposition 47 makes clear that redesignated offenses are to be treated as misdemeanors for all purposes except restrictions on firearm ownership and possession. There are no other exceptions to this pervasive misdemeanor treatment in the statute, and courts are not free to create additional exceptions.

2. The California DNA Act.

In 2004, the voters passed Proposition 69, which amended the California DNA Act to require certain groups of offenders to submit to the collection of their DNA samples for the purpose of creating identifying DNA profiles and retaining those profiles in a state-maintained data base. (See *Haskell v. Brown* (N.D. Cal.

2009) 677 F. Supp. 2d 1187, 1190-91.) The following people must submit DNA samples: Any person convicted of or adjudicated for a felony; any adult arrested for, or charged with, a felony; and any person required to register as a sex offender or arsonist as a result of a felony or misdemeanor conviction or adjudication. (Pen.Code §§ 295, 296.) Juveniles who are adjudicated wards of the court for misdemeanors other than sex and arson offenses, are not required to submit DNA samples. (*Id.*) As long as the person's DNA profile remains in the database, the state is required to retain and store his entire DNA sample. (*United States v. Kriesel* (9th Cir. 2013) 720 F.3d 1137, 1141-45.)

Penal Code section 299 lays out the criteria and procedure by which a person may request that his/her DNA be expunged after collection. Subdivision (a) of section 299 states:

> A person whose DNA profile has been included in the databank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program pursuant to the procedures set forth in subdivision (b) *if the person has no past or present offense or pending charge which qualifies the person for inclusion within the state's DNA and Forensic Identification Database and Databank Program* and there otherwise is no legal basis for retaining the specimen or sample or searchable profile.

(Pen.Code § 299, subd. (a), emphasis added.) Subdivision (b) of the statute lists the circumstances under which someone may have their DNA expunged because they no longer have a qualifying offense or qualifying pending charge, even though they had a qualifying arrest or conviction at the time of DNA collection. Subdivision (b) does not list redesignation pursuant to section 1170.18 as one of

those circumstances.[8] (Pen. Code §299, subd. (b).) Multiple courts have, however, recognized that the list in subdivision (b) is not exhaustive. (*In re Alejandro N., supra,* 238 Cal.App.4th at 1228-1229; *Coffey v. Superior Court* (2005) 129 Cal.app.4th 809, 817.)

Subdivision (e) of section 299 provides that the state is not required to remove the DNA profile from the data base or destroy the DNA sample if the person's duty to register as a sex or arson offender ha been terminated. (Pen. Code § 299, subd. (e).) Subdivision (f) of section 299 states that a judge is not authorized to relieve certain categories of persons from the duty to provide DNA to the state if they were convicted of or adjudicated for a qualifying felony or misdemeanor sex or arson offenses, but thereafter were relieved of punishments and penalties. (Pen. Code § 299, subd. (f).) At the time of appellant's successful July 2015 motion to redesignate his felony theft offense as misdemeanor petty theft, that section read:

Notwithstanding any other law, including Sections 17, 1203.4, and 1203.4a,

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[8] Section 299(b) states: Pursuant to subdivision (a), a person who has no past or present qualifying offense, and for whom there otherwise is no legal basis for retaining the specimen or sample or searchable profile, may make a written request to have his or her specimen and sample destroyed and searchable database profile expunged from the databank program if any of the following apply:(1) Following arrest, no accusatory pleading has been filed within the applicable period allowed by law, charging the person with a qualifying offense as set forth in subdivision (a) of Section 296 or if the charges which served as the basis for including the DNA profile in the state's DNA and Forensic Identification Database and Databank Program have been dismissed prior to adjudication by a trier of fact;(2) The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed;(3) The person has been found factually innocent of the underlying offense pursuant to Section 851.8, or Section 781.5 of the Welfare and Institutions Code; or(4) The defendant has been found not guilty or the defendant has been acquitted of the underlying offense.

> a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296, or was found not guilty by reason of insanity or pleads no contest to a qualifying offense as defined in subdivision (a) of Section 296.

(Pen.Code § 299, subd. (f).)[9]

3. Case Law

***Alejandro N. v. Superior Court* (2015) 238 Cal. App. 4th 1209.**

In *In re Alejandro N.* (2015) 238 Cal.App.4th 1209[11] (*Alejandro N.*) Division One of the Fourth District Court of Appeal held that Proposition 47's redesignation provisions were applicable to juveniles, a holding that has not been contested by the Attorney General in subsequent cases. (*Id.* at 1226.) The court then considered whether a juvenile who successfully petitioned a court to redesignate his felony as a misdemeanor should also be able to have his DNA sample expunged from the state's DNA database pursuant to Penal Code section 299.

The juvenile court in *Alejandro N.* had denied the appellant's request to expunge his DNA from the state's DNA database because reclassification of an offense under Proposition 47 was not one of the grounds for expungement listed in

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[9] In 2015, the legislature passed Assembly Bill 1492 and it became effective on January 1, 2016. Among other things, that legislation amended section 299(f) to add "section 1170.18" to the list of statues that do not relieve a person of the duty to provide DNA samples. In Arguments II, appellant argues that 1) the statutory changes made by AB 1492 are not applicable to appellant's case because his motion was granted before the bill was enacted and 2) AB 1492's amendment to section 299(f) was an impermissible amendment of Proposition 47.

[11] The Petition for Review of *Alejandro N.* was denied by this court on October 14, 2015.

Penal Code section 299, subdivision (b). (*In re Alejandro N.*, *supra*, 238 Cal.App.4th at 1226-1227.) The Court of Appeal was not persuaded by that reasoning. The court focused on the language in section 299, subdivision (a) which "provides for DNA expungement when a person '*has no past or present offense or pending charge which qualifies* that person for inclusion within' the DNA databank." (*Id.* at 1228, emphasis in original.) The court read that language, along with section 1170.18's broad directive that redesignated offenses are "misdemeanors for all purposes" except for restrictions on the ownership and possession of firearms, and reasoned that reclassified offenses "are therefore disqualified for DNA retention" under the plain language of section 299, subdivision (a). (*Id.* 1229)

The court held that by creating one specific exception to the misdemeanor treatment of reclassified offenses, the voters "directed courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offenses." (*Alejandro N.* at 1227.) The court also recognized that voters were presumed to have been aware of the existing law precluding DNA collection for most misdemeanors but "did not include DNA collection as an exception to the misdemeanor treatment of the [redesignated] offenses." (*Id.* at 1227.)

The court in *Alejandro N.* declined to apply the earlier decision in *Coffey v. Superior Court* (2005) 129 Cal. App. 4th 809, to the circumstances of the case before it. In *Coffey*, the defendant was charged with a wobbler offense and pled guilty to a felony. His offense was reduced to a misdemeanor at sentencing

pursuant to Penal Code section 17, subdivision (b).[12] The defendant had argued that he was not "convicted" until sentencing, and that since he was sentenced as a misdemeanant, he had no duty to provide his DNA to the state. He sought expungement as a remedy, which the Court of Appeal ruled was unavailable under those facts. (*Id.*)

Coffey held that the duty to provide DNA arose at the time the defendant pled guilty to a felony, and the section 17(b) reduction to a misdemeanor at sentencing did not obviate that duty, as the offense would only be treated as a misdemeanor from the time of sentencing onward. Thus, the defendant was not entitled to expungement of his DNA. (*Coffey v. Superior Court, supra*, at 821, 823; *Alejandro N., supra*, at 1229.)

In declining to apply *Coffey* to the facts before it, the court in *Alejandro N.* found substantive differences between the reduction of wobblers under section 17(b) and reclassification of offenses under section 1170.18, stating that reclassified offenses were "distinct from wobbler offenses" in that, unlike wobblers, which remain chargeable as felonies or misdemeanors, "the offenses now classified as

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[12] The text of that statute states: (b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.