

S249495

Supreme Court No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff-Respondent,

v.

ERNEST OROZCO,

Defendant-Appellant.

Court of Appeal No.D067313

Superior Court No. SCN335521

Appeal From the Superior Court of San Diego County
Honorable Michael J. Popkins, Judge

PETITION FOR REVIEW

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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
assisted case system

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PETITION FOR REVIEW

To The Honorable Tani Cantil-Sakauye, Chief Justice, and the
Honorable Associate Justices of the Supreme Court of the State of
California:

Petitioner and appellant, Ernest Orozco, seeks review in this Court
following a published decision of the Court of Appeal, Fourth Appellate
District, Division One, filed May 24, 2018, affirming the denial of his
petition to reduce his conviction from a felony to a misdemeanor under
Penal Code section 1170.18.¹

¹All further statutory references are to the Penal Code, unless otherwise
noted.

Issues Presented

1. Section 496 makes buying or receiving “any property that has been stolen” a misdemeanor, if the property is worth less than \$950 and the defendant is not disqualified. Section 496d applies to receiving a certain type of stolen property, an automobile. Is a conviction under section 496d reducible to a misdemeanor, if the automobile was worth less than \$950 and the other requirements are met?

Grounds for Review

The published opinion in this case addresses an issue currently dividing the Courts of Appeal: Whether Proposition 47 applies to possession of a stolen vehicle under section 496d. This Court previously granted review in several cases addressing this precise issue, then remanded those cases after issuing the opinion in *People v. Romanowski* (2017) 2 Cal.5th 903, 910 (*Romanowski*). (*People v. Williams* (2018) 23 Cal.App.5th 641, 648, fn. 4 (*Williams*).)

Romanowski held that theft of access card information under section 484e was covered by Proposition 47, even though that statute was not specifically enumerated. Section 484e covers theft-related conduct, and Proposition 47’s “clear purpose” was to reduce theft of property less than \$950 to a misdemeanor. (*Romanowski, supra*, 2 Cal.5th at p. 909.)

Even after *Romanowski*, however, the Courts of Appeal remain split: the court here and in *People v. Varner* (2016) 3 Cal.App.5th 360 held that section 496d is not covered by Proposition 47. A different Court of Appeal in *Williams, supra*, recently held that it is. (*Williams, supra*, 23 Cal.App.5th at p. 651.) Review is necessary to secure uniformity of decision and settle an important question of law. (Rule 8.500(b)(1).)

Statement of the Case and Facts

Orozco adopts the statement presented in the Court of Appeal’s decision for purposes of this petition. (Appendix, pp. 2–3.) No petition for rehearing was filed.

Argument

The Court of Appeal held that section 496d is not covered by Proposition 47 because section 496d is “not among the statutes listed in section 1170.18[.]” Proposition 47’s resentencing provision. (Appendix, p. 7.) As this Court has recognized, however, the mere fact a code section is not enumerated in section 1170.18 is “not fatal” to a petition for resentencing. (*People v. Martinez* (2018) 4 Cal.5th 647, 652.)

“One of Proposition 47’s primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative.” (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.) The Act directs that it should be “liberally construed to effectuate its purposes[.]” (*People v. Tidwell* (2016) 246 Cal.App.4th 212, 219.) In *Williams*, the Court of Appeal held that applying Proposition 47 to section 496d is consistent with its purposes. (*Williams, supra*, 23 Cal.App.5th at p. 650.)

This application is also consistent with the statutory text: “Section 496d is not expressly listed in section 1170.18. However, section 1170.18 does permit resentencing to a misdemeanor under section 490.2 for obtaining property by theft if the property is worth \$950 or less. Thus, our Supreme Court has held that theft crimes involving property of a value of \$950 or less come within the ambit of Proposition 47 even if they are not expressly listed in section 1170.18. (*People v. Page* (2017) 3 Cal.5th 1175 []; *People v. Romanowski* [*supra*, 2 Cal.5th at p. 910].)” (*Williams, supra*,

23 Cal.App.5th at p. 647.) “Proposition 47 reduced the section 496 offense of receiving stolen property to a misdemeanor in cases in which the property involved is valued under \$950. However, Section 496d which applies to a person who buys or receives a stolen vehicle is not explicitly listed. There does not seem to be any logical basis to distinguish between the receipt of stolen property and receipt of a stolen vehicle under Proposition 47. In *Page*, the Supreme Court noted that an automobile is personal property. (*Page, supra*, 3 Cal.5th at p. 1183.) Relying on the reasoning in *Romanowski*, we see no reason to assume that a reasonable voter would conclude that receipt of a stolen vehicle worth less than \$950 is a serious and violent crime outside the reach of Proposition 47 when receipt of any other form of stolen property is not. (*Romanowski, supra*, 2 Cal.5th at p. 909.)” (*Williams, supra*, 23 Cal.App.5th at p. 649.)

Applying Proposition 47 to section 496d is consistent with both the voters’ intent and the text of the statutes. The Court of Appeal’s contrary holding conflicts with the logic of this Court’s opinions in *Page* and *Romanowski*, and with other opinions from the Courts of Appeal. Review is necessary.

Conclusion

Orozco respectfully requests the Court grant his petition for review.

Respectfully submitted,



BENJAMIN KINGTON
Attorney for Appellant
ERNEST L. OROZCO

Dated: July 3, 2018

Certificate of Word Count

I, Benjamin Kington, hereby certify in accordance with California Rules of Court, rule 8.360(b)(1), that this brief contains 856 words as calculated by the WordPerfect software in which it was written.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 3, 2018, at San Diego, California.



BENJAMIN KINGTON
Attorney for Appellant
ERNEST L. OROZCO

Proof of Service

I, the undersigned declare that: I am over the age of 18 years and not a party to the case; I am a resident of the County of San Diego, State of California, where the mailing occurs; and my business address is 934 23rd Street, San Diego, California 92102.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On July 3, 2018, I caused to be served the following document: PETITION FOR REVIEW, by placing a copy of the document in an envelope addressed to each addressee, respectively, as follows:

Ernest Orozco
Booking Number 16136110
San Diego Central Jail
1173 Front Street
San Diego, CA 92101

I then sealed each envelope and, with postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

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PROOF OF SERVICE BY ELECTRONIC SERVICE

Furthermore, I declare that I electronically served from my electronic service address of mj@boyce-schaefer.com on July 3, 2018, to the following entities:

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Hon. Michael Popkins
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Court of Appeal, Fourth District, Division One
(served via truefiling)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 3, 2018, at San Diego, California.

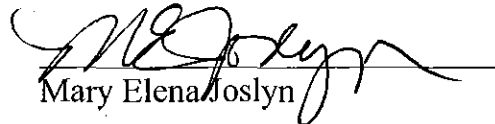

Mary Elena Joslyn

EXHIBIT A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNEST OROZCO ,

Defendant and Appellant.

D067313

(Super. Ct. No. SCN335521)

APPEAL from an order of the Superior Court of San Diego County, Michael J. Popkins, Judge. Affirmed.

Benjamin B. Kington, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Meagan

Beale, Kristen Kinnaird Chenelia, and Daniel Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

Ernest Orozco pled guilty to one count of unlawfully driving a vehicle of another without permission (Veh. Code, § 10851, subd. (a)), and one count of receiving a stolen vehicle (Pen. Code,¹ § 496d, subd. (a)). Subsequently, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act of 2014, which among other things, established a procedure for specified classes of offenders to have their felony convictions reduced to misdemeanors and be resentenced accordingly. (§ 1170.18.)

In a previous unpublished opinion, we affirmed the trial court's denial of Orozco's petition for resentencing under Proposition 47. (*People v. Orozco* (May 25, 2016, D067313) [nonpub. opn.].) In this opinion, at the direction of the California Supreme Court, we reconsider the matter in light of *People v. Page* (2017) 3 Cal.5th 1175 (*Page*). We affirm the trial court's order denying Orozco's petition without prejudice to consideration of a subsequent petition providing evidence of eligibility.

FACTUAL AND PROCEDURAL BACKGROUND

On August 7, 2014, the police pulled Orozco over and a routine license plate check showed the car Orozco was driving had been reported stolen. Orozco was the vehicle's sole occupant, the car's ignition was damaged, and it was running without a key. The police report listed the car's value at \$301.

¹ Statutory references are to the Penal Code unless otherwise specified.

After his arrest, Orozco pled guilty to one count of unlawfully driving a vehicle of another without permission (Veh. Code, § 10851, subd. (a)), and one count of receiving a stolen vehicle (§ 496d, subd. (a)). Orozco also admitted three prior convictions for violations of Vehicle Code section 10851, subdivision (a), and eight prison priors under section 667.5. His prior felony conviction under Vehicle Code section 10851 required him to be sentenced as a felon under section 666.5 for both of his present violations. (§ 666.5, subd. (a).)

After Orozco entered his guilty plea, California voters passed Proposition 47. Orozco then filed a petition under Proposition 47 to reduce the felonies to misdemeanors. The trial court denied Orozco's petition, finding Proposition 47 does not apply to section 496d and Vehicle Code section 10851, subdivision (a), and sentenced him to one year in prison with mandatory supervision for three years after his release. The trial court stayed the sentence for Orozco's section 496d violation under section 654. Orozco timely appealed the order.

In our previous opinion in this matter, we affirmed the trial court's order, concluding that the trial court correctly determined Orozco to be ineligible for relief under Proposition 47. (*People v. Orozco, supra*, D067313.) Orozco sought review in the California Supreme Court. The court issued a "grant and hold" order deferring further briefing pending its decision in *Page*. (See *People v. Orozco*, review granted Aug. 10, 2016, No. S235603.) On November 30, 2017, our high court issued its opinion in *Page, supra*, 3 Cal.5th 1175. On March 21, 2018, the Supreme Court transferred this case back to this court for reconsideration in light of *Page*.

DISCUSSION

I

UNLAWFULLY DRIVING A VEHICLE OF ANOTHER WITHOUT PERMISSION

Orozco asserts that the superior court erred when it denied his petition to reduce his felony under Vehicle Code section 10851, subdivision (a). Although we conclude the superior court did not err, as we explain below, Orozco is entitled to bring a new petition and establish his eligibility for relief under Proposition 47.

In *Page*, the California Supreme Court determined that "Proposition 47 makes some, though not all, [Vehicle Code] section 10851 defendants eligible for resentencing." (*Page, supra*, 3 Cal.5th at p. 1184.) Specifically, the court held that a Vehicle Code section 10851 conviction may be resentenced to a misdemeanor "if the vehicle was worth \$950 or less and the sentence was imposed for theft of the vehicle." (*Page, supra*, at p. 1187; see *id.* at pp. 1184-1185 [similar eligibility criterion for resentencing and for redesignation after the sentence has been completed].)

Our high court explained that a person who has been convicted of grand theft is "clearly eligible" for resentencing under section 1170.18 if the value of the property taken was \$950 or less. (*Page, supra*, 3 Cal.5th at p. 1182; see Pen. Code, § 490.2, subd. (a).) The court observed that "while Vehicle Code section 10851 does not expressly designate the offense as theft, the conduct it criminalizes includes theft of a vehicle. . . . And to the extent vehicle theft is punished as a felony under section 10851, it is, in effect, a form of grand, rather than petty, theft." (*Page, supra*, at pp. 1186-1187.)

The court further explained: "Theft . . . requires a taking with intent to steal the property—that is, the intent to permanently deprive the owner of its possession." (*Page, supra*, 3 Cal.5th at p. 1182.) " 'Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under [Vehicle Code] section 10851[, subdivision] (a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction. . . . On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete. . . . Therefore, a conviction under section 10851[, subdivision] (a) for posttheft driving is not a theft conviction. . . .' [Citation.] The same is true when a defendant acted with intent only to deprive the owner temporarily of possession. Regardless of whether the defendant drove or took the vehicle, he did not commit auto theft if he lacked the intent to steal. But if the defendant was convicted under Vehicle Code section 10851, subdivision (a), of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession, he has, in fact, 'suffered a theft conviction.' " (*Page, supra*, at p. 1183; italics omitted.) Consequently, "[a] person convicted before Proposition 47's passage for vehicle theft under Vehicle Code section 10851 may . . . be resentenced under section 1170.18 if the person can show the vehicle was worth \$950 or less." (*Page, supra*, at p. 1180.)

"A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility." (*Page, supra*, 3 Cal.5th at p. 1188.) If

the defendant fails to meet this burden, the trial court's order denying the petition must be affirmed, even if the trial court expressed a different reason for denying the petition.

(People v. Perkins (2016) 244 Cal.App.4th 129, 139.) "[O]n appeal we are concerned with the correctness of the superior court's determination, not the correctness of its reasoning. [Citation.] "[W]e may affirm a trial court judgment on any [correct] basis presented by the record whether or not relied upon by the trial court." ' ' ' (*Ibid.*)

To establish eligibility for resentencing or redesignation for a Vehicle Code section 10851 conviction, the defendant must show that (1) the conviction was based on theft of the vehicle, rather than on posttheft driving or on a taking without the intent to permanently deprive the owner of possession, and (2) the vehicle was worth \$950 or less. (*Page, supra*, 3 Cal.5th at p. 1188.) In *Page*, the court found that the defendant's "uncounseled petition" was properly denied where it contained "no allegations, testimony, or record references to show either that his Vehicle Code section 10851 conviction rested on theft of the vehicle or that the vehicle's value was \$950 or less." (*Page, supra*, at pp. 1180, 1189.) The court determined, however, that the defendant was "entitled to an opportunity to file a new petition" because "the proper allocation of the burden of proof and the facts necessary to resentencing on a Vehicle Code section 10851 conviction were not set out expressly in the text of Proposition 47, and . . . neither had yet been judicially articulated when defendant submitted his petition." (*Page, supra*, at p. 1189.) The court concluded that the trial court's order denying the defendant's petition should be "affirmed without prejudice to consideration of a petition providing evidence of his eligibility." (*Id.* at p. 1190.)

Here, like *Page*, Orozco's petition contained no allegations, testimony, or record references showing that (1) his Vehicle Code section 10851 conviction was based on the theft of the vehicle, and (2) the vehicle's value was \$950 or less. Instead, Orozco asked the superior court to examine the record to determine whether the violation was a theft, and if the value of the subject vehicle was \$950 or less. Therefore, the court properly denied Orozco's petition. (*Page, supra*, 3 Cal.5th at p. 1189.) However, because his petition was filed before "the proper allocation of the burden of proof and the facts necessary to resentencing on a Vehicle Code section 10851 conviction" were clearly established, Orozco is "entitled to an opportunity to file a new petition" to "allege and, where possible, provide evidence of the facts necessary to eligibility for resentencing under section 1170.18." (*Page, supra*, at p. 1189.)

II

RECEIVING A STOLEN VEHICLE

Additionally, Orozco contends the court should have reduced his violation of section 496d, subdivision (a) from a felony to a misdemeanor under section 1170.18. Section 496d is not among the statutes listed in section 1170.18, subdivision (a). Yet, Orozco argues this felony offense should have been reduced to a misdemeanor because a violation of section 496d, subdivision (a) is subject to the provisions of section 496, which is one of the enumerated statutes per section 1170.18, subdivision (a). Put differently, Orozco maintains that that the voters intended that all theft-related offenses be treated as misdemeanors where the value of the property is less than \$950.

Similar arguments were rejected in *People v. Varner* (2016) 3 Cal.App.5th 360 (*Varner*).² There, the court found "no indication that the drafters of Proposition 47 intended to include section 496d." (*Varner, supra*, at p. 366.) The court distinguished "the changes made by Proposition 47 to the crimes of grand theft and petty theft," which were accomplished in part by the addition of section 490.2, which defines petty theft and references " 'any other provision of law defining grand theft.' " (*Varner, supra*, at p. 367.) The court noted that no such broad language had been included in the changes made to section 496, subdivision (a), and that section 496, subdivision (a) "contains no reference to section 496d." (*Varner, supra*, at p. 367.) This indicated that "the drafters [of Proposition 47] intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies." (*Varner, supra*, at p. 367.) The court also rejected the notion that section 490.2 applied to receiving stolen property offenses, finding that if so, there would have been be "no need to amend section 496." (*Varner, supra*, at p. 367.)

We agree with *Varner, supra*, 3 Cal.App.5th 360 and adopt the court's analysis in that case here. Also, we observe that nothing in *Page* alters that analysis. In *Page, supra*, 3 Cal.5th 1175, the court interpreted section 490.2, subdivision (a), which specifically defines theft crimes, and there is no equivalent language in the receiving

² On November 22, 2016, the California Supreme Court granted review of *Varner* (No. S237679) and ordered further action deferred pending its decision in *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*). On August 9, 2017, after the *Romanowski* opinion was filed, the California Supreme Court dismissed review in *Varner*, leaving the case published. (See Cal. Rules of Court, rule 8.1115(e).)

statutes. The Supreme Court concluded that Proposition 47 applies to certain violations of Vehicle Code section 10851 because of the broad, preemptive language of section 490.2. Yet, Proposition 47 did not enact similar language in the context of receiving stolen property. Thus, *Page* does not provide support for Orozco's claim regarding section 496d, subdivision (a).

DISPOSITION

The order is affirmed without prejudice to consideration of a new petition providing evidence of Orozco's eligibility for relief pursuant to Proposition 47 for his conviction under Vehicle Code section 10851.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.