In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	Case No. S231765
Plaintiff and Respondent,	)	
	)	
v.	)	(2d Crim. B262023)
	)	
STEVENSON BUYCKS,	)	(Sup. Ct. No. NA097755)
	)	
Defendant and Appellant,	)	
	)	
	)	

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGLES COUNTY
THE HONORABLE CHRISTOPHER G. ESTES, JUDGE

RESPONDENT'S BRIEF ON THE MERITS

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By appointment of the Supreme Court

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STATEMENT OF THE CASE

On August 28, 2014, appellant Stevenson Buycks waived his constitutional rights and pled no contest to petty theft with a prior in violation of Penal Code section 666, subdivision (a) (count 3) and evading a police officer in violation of Vehicle Code section 2800.2, subdivision (a) (count 4). Buycks also admitted he was on bail, within the meaning of Penal Code section 12022.1, in Superior Court case number BA418285 when he committed these two offenses and that he had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). The court sentenced Buycks to the agreed upon sentence of seven years, eight months calculated as follows: the upper-term of three years for count 3, plus one-third the mid-term or eight months for count 4, plus two years for the on-bail enhancement, plus two years for two prior prison term enhancements. (C.T. pp. 83 - 87.)

On January 8, 2015, the Superior Court, in case number BA418285, granted Buycks' Proposition 47 petition to reduce his conviction for possession of a controlled substance, in violation of Health and Safety Code section 11350, subdivision (a), to a misdemeanor. (1A.C.T. pp. 8 - 9.)[1]

On January 28, 2015, the Superior Court in this case granted Buycks' Proposition 47 petition and reduced his conviction for petty theft with a prior (count 3) to

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[1] 1A.C.T. refers to the Augmented Clerk's Transcript that was filed on May 22, 2015, and 2A.C.T. refers to the Augmented Clerk's Transcript filed on August 14, 2015.

a misdemeanor. As count 3 had been the principle term, the Superior Court had to completely resentence Buycks. During the resentencing hearing, defense counsel argued that the on-bail enhancement, imposed because of Buycks' felony conviction in case number BA418285, had to be struck because the conviction in that case had been reduced to a misdemeanor by operation of law. The Superior Court disagreed, finding that it is the status of the primary conviction at the time of the plea in the secondary case which controls whether an on-bail enhancement can be imposed. Since the charge in BA418285 was a felony when Buycks pled guilty in the current case, the Superior Court reimposed the two-year enhancement when it resentenced Buycks in to an aggregate sentence of seven years in this case.[2]

In a published opinion, the Court of Appeal reversed and ordered the two-year on-bail enhancement struck, thereby reducing Buycks' sentence to five years. (Slip Opn. p. 10.) In finding that the on-bail enhancement could not be reimposed, the court limited its holding to situations where the granting of a Proposition 47 petition necessitated a full resentencing in the secondary case. (Slip Opn. pp. 5 - 7.) In footnote 2 of the opinion, the Court of Appeal stated that "[i]t is important to note this case does not involve a *collateral* challenge to an on bail enhancement not otherwise part of a resentencing in a second case. That could raise different issues and suggest a different conclusion, points we do not address here." (Slip Opn. p. 7, fn. 2.) To the Court of

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[2] Buycks is expected to be released by the end of June, 2016.

Appeal, it was only the fact that a full resentencing was required in the secondary case that entitled Buycks to have the on-bail enhancement struck.

ISSUE RAISED BY THE COURT

After the time in which the parties could have filed a petition for review expired, this Court granted review on its own motion and limited briefing to the following issue: "Was defendant eligible for resentencing on the penalty enhancement for committing a new felony while released on bail on a drug offense even though the Superior Court had reclassified the conviction for the drug offense as a misdemeanor under the provisions of Proposition 47?"

ARGUMENT

WHEN THE PRIMARY OFFENSE IS REDUCED TO A MISDEMEANOR UNDER THE PROVISIONS OF PROPOSITION 47, AN ON-BAIL ENHANCEMENT MUST BE STRUCK REGARDLESS OF WHETHER A FULL RESENTENCING IS REQUIRED IN THE SECONDARY CASE.

This Court has unequivocally held that a conviction for a felony charge on the primary offense is an essential prerequisite to the imposition of an on-bail enhancement. (*In re Jovan B.* (1993) 6 Cal. 4th 801, 814; see also *In re Ramey* (1999) 70 Cal.App.4th 508, 512.) Further, Penal Code section 12022.1, subdivision (g) requires said enhancement to be stayed should the conviction for the primary offense later be reversed on appeal. Despite respondent's arguments to the contrary, a similar result should occur **in all cases** where the primary offense is reduced to a misdemeanor pursuant to Proposition 47.

Other than the result, appellant does not agree with, nor endeavor to defend, the Court of Appeal's narrow opinion.[3] Appellant agrees with respondent that the Court of Appeal's limited opinion would be both difficult to administer for lower courts and will result in inequitable results. (O.B. p. 32.) Appellant, however, disagrees with respondent on how this Court should address these two concerns.

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[3] Neither side argued in favor of, or even suggested, striking the on-bail enhancement only in cases where a complete resentencing was required. Both sides expected the Court of Appeal to chose between requiring all on-bail enhancements to be struck when the primary conviction was reduced to a misdemeanor or permitting all such enhancements to stand where the secondary conviction remained a felony.

A. The Alleged Benefits Of Respondent's Proposed Rule, That All On Bail Enhancements Remain Valid Even Though The First Offense Is Reduced To A Misdemeanor Under Proposition 47, Is Negated By A Legally Necessary Exception To The Proposed Rule.

Respondent would have this Court declare, in the context of Proposition 47, that an on-bail enhancement always remains valid regardless of whether resentencing is required in the second case or not. To respondent, the validity of the on-bail enhancement is to be determined as of the original sentencing date in the second case and its continued applicability is unaffected by any subsequent reduction of the convictions in the primary and/or secondary case. (O.B. pp. 22 - 24.) In a footnote, however, respondent admits that "[t]his case does not present the question whether an on-bail enhancement should be maintained in a case where no felony conviction remains after the Proposition 47 resentencing." (O.B. p. 32, fn. 15.) Hence, while arguing for a uniform rule in order to ease the administrative burdens placed on the Superior Court, respondent subtly admits that there may be the need for an exception to the uniform rule it proposes – just not the exception formulated by the Court of Appeal below.

Respondent is forced to suggest the need for an exception to its proposal because of the unequivocal rule that an enhancement cannot be imposed nor continue to exist in the absence of a valid, base term for a felony conviction. Enhancements are defined in California Rules of Court, rule 4.405(3) as additional terms of imprisonment added to the base term. They cannot exist separate and apart from the base term. "That there must be a substantive crime and a punishment for that crime in order to constitute a

criminal offense has been long recognized." (*People v. Vasilyan* (2009) 174 Cal.App.4th 443, 449 - 450, citing *People v. McNulty* (1892) 93 Cal. 427, 437.)

By its own terms, Penal Code section 12022.1 requires that the secondary offense, to which the on-bail enhancement applies, must be a felony. (Pen. Code, § 12022.1, subd. (a)(2).) Hence, if there ceases to be a valid felony conviction, the continued imposition of the two-year, on-bail enhancement, becomes an unauthorized sentence. This is true regardless of whether, at the time the on-bail enhancement was imposed, there was a valid felony conviction. In short, the exception respondent hinted at in a footnote actually defeats the ease of administration rationale for the general rule it proposed. The only rule which truly makes for ease of administration is one which declares that all on-bail enhancements must be struck where either the first or secondary offense is reduced to a misdemeanor. Any other rule results into the creation of necessary exceptions, which is a consequence of the Court of Appeal's opinion that respondent finds unacceptable.

Respondent's proposed rule, and the necessary exception thereto, would also create the same kind of unfair and somewhat random result as the Court of Appeal's opinion would if it is allowed to stand. In the case of the opinion below, defendants who had their primary offense reduced to a misdemeanor under Proposition 47 before seeking such relief and in the secondary case, would have their on-bail enhancement struck if the relief in the secondary case caused mandatory resentencing. Where the defense obtained

Proposition 47 relief in the secondary case first, the on-bail enhancement would remain in effect.[4] (O.B. p. 34.) Likewise, under the Court of Appeal's opinion, defendants who did not need to be resentenced in the secondary case, either because they had no Proposition 47 eligible convictions or did not receive additional time for such convictions at the time they were originally sentence, would not have their on-bail enhancement struck even though the conviction in the primary case was reduced to a misdemeanor. As respondent argues, the Court of Appeal's opinion unduly benefits defendants who committed more than one offense in their secondary case to the exclusion of all other defendants. (O.B. p. 33.)

Respondent's proposed rule, however, does not rectify the inequity of the Court of Appeal's opinion; it simply changes the inequity. Because of the necessary exception to the proposed rule, any defendant who had all of his offenses in both the primary and secondary case reduced to misdemeanors would be entitled to have the on--bail enhancement struck in the secondary case. This would be true even though the enhancement was valid at the time it was imposed. The on-bail enhancement would remain valid, however, if the defendants had at least one valid remaining felony conviction in the second case. Thus, even though both types of defendants had their

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[4] Appellant can only imagine the numerous claims of ineffective assistance of counsel against lawyers who had the misfortunate of being able to schedule the Proposition 47 hearing in the second case before being able to do so in the first. What lawyer could have guessed that the timing or order of multiple Proposition 47 petitions would be so critical.

conviction in the first case reduced to a misdemeanor, only if all the convictions in the second case were also reduced to misdemeanors would the on-bail enhancement have to be struck. Since Penal Code section 12022.1, subdivision (a) requires felony convictions in both cases for an on-bail enhancement to be imposed, resentencing only defendants who have all of their convictions reduced to misdemeanors is illogical and leads to the same sort of inequities identified by respondent in its brief. For that reason, appellant urges this Court to reject respondent's proposed rule.

B. Subdivision (g) Of Penal Code Section 12022.1 Should Be Construed To Require An On-Bail Enhancement Be Struck When The Primary Offense Is Reduced To A Misdemeanor Pursuant To Proposition 47.

Subdivision (g) of Penal Code section 12022.1 offers a legislatively fashioned solution to the inequities caused by the Court of Appeal's opinion and respondent's proposed rule. Subdivision (g) of section 12022.1 specifically provide as follows: "If the primary offense conviction is reversed on appeal, the enhancement shall be suspended pending retrial on that felony. Upon retrial and reconviction, the enhancement shall be reimposed." (Pen. Code, § 12022.1, subd. (g).) Inherent in subdivision (g) is the implied condition that if the defendant is not again convicted of the primary offense, the punishment for the enhancement may not be re-imposed in the secondary case.

Appellant submits that a statutorily mandated reduction of the primary

offense to a misdemeanor has the same practical effect as a judicial reduction or complete reversal on appeal. In both instances, the lack of a presently valid felony conviction in the primary case makes an on-bail enhancement in the secondary case an unauthorized sentence. As such, when the Superior Court granted the Proposition 47 petition in case number BA418285, and reduced the lone charge to a misdemeanor, it was similar to a situation where the conviction had been reversed on appeal and the defendant only sentenced to a misdemeanor on remand. In such a case, it would be clear that the on-bail enhancement would have to be permanently struck in the secondary case. The same should happen when a conviction is reduced to a misdemeanor by operation of law. The Legislature's decision to reduce Buycks' primary offense to a misdemeanor had the secondary effect of removing him from the category of repeat offenders for whom the Legislature deemed worthy of an additional two years under Penal Code section 12022.1. As subdivision (g) makes clear, only those offenders whose primary offense remains a felony must continue to serve an on-bail enhancement on top of their base sentence for the secondary offense.

C. Even If An On-Bail Enhancement Is Still Valid After The Primary Conviction Is Reduced To A Misdemeanor, The Superior Court Still Has The Discretion To Strike It If A Full Resentencing Is Required In The Secondary Case.

When a full resentencing hearing is required because of a change in the law or reversal on appeal, the Superior Court is permitted to reconsider all sentencing options.

(*People v. Burns* (1984) 158 Cal.App.3d 1178, 1184; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1259.) Since an on-bail enhancement may be struck pursuant to Penal Code section 1385 (*People v. Meloney* (2003) 30 Cal. 4th 1145, 1149), the Superior Court would be permitted to strike a previously imposed on-bail enhancement even if the provisions of Penal Code section 12022.1 and Proposition 47 do not require it to do so. Hence, regardless of the ultimate decision as to the specific issue raised by this Court, the opinion should make clear that the Superior Court retains the discretion to strike the enhancement in cases where a full resentencing is required.

D. Conclusion.

For these reasons, Stevenson Buycks asks this Court to affirm the Court of Appeal's decision to order the two-year, on-bail enhancement struck.[5]

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[5] It should be noted that, by the time the matter is deemed submitted, Buycks will have long been released from custody. His release essentially renders the issue, as to him, moot.

CONCLUSION

For the foregoing reasons, appellant Stevenson Buycks respectfully requests this Court to affirm the Court of Appeal's opinion striking strike the two-year, on-bail enhancement imposed in Superior Court case number NA097755.

DATED: June 17, 2016

Respectfully submitted,

RICHARD FITZER

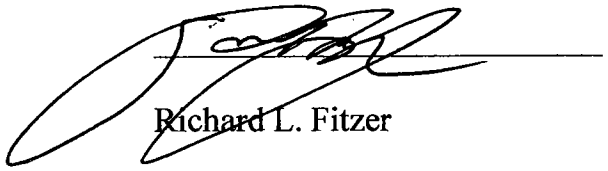
Attorney for Appellant

WORD COUNT CERTIFICATION

People v. Stevenson Buycks,

Supreme Court No. S231765

I, Richard Fitzer, certify that this brief was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 2,429 words.



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PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in Los Angeles County with my business address as stated above. I am not a party to this case. On June 20, 2016, I served the **appellant's brief on the merits,** a copy of which is attached, by mailing a copy to each addressee named below by regular United States mail at Long Beach, California.

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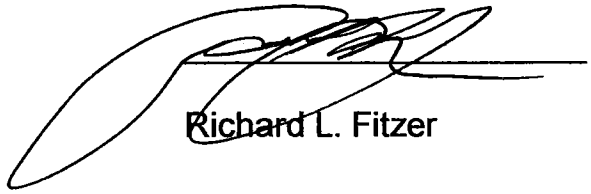
I declare under penalty of perjury that the foregoing is true and correct. Executed June 17, 2016 at Long Beach, California.



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