

In the Supreme Court of the State of California

SUPREME COURT
FILED

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THE PEOPLE OF THE STATE OF CALIFORNIA)

Plaintiff and Respondent,)

v.)

DANIEL LEE ROMANOWSKI,)

Defendant and Appellant,)

Case No. S231405

Frank A. McGuire Clerk

Deputy

(2d Crim. B263164)

(Sup.Ct.No. MA064403)

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGELES 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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In the Supreme Court of the State of California

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STATEMENT OF THE CASE

On September 29, 2014, appellant Daniel Romanowski pled no contest to theft in violation of Penal Code section 484e, subdivision (d) and admitted serving a prior prison term within the meaning of Penal Code section 667.5, subdivision (b). On December 11, 2014, the Superior Court sentenced him to four years in county jail. On March 10, 2015, Romanowski filed a Proposition 47 petition for resentencing. On March 18, 2015, the Superior Court found Romanowski ineligible for a sentence reduction because the court believed that Proposition 47, as codified in Penal Code section 1170.18, does not apply to the theft of access cards, in violation of Penal Code section 484e, subdivision (d), as opposed to other types of thefts. Romanowski filed a notice of appeal. (Slip Opn. pp. 2- 3.)

On November 13, 2015, Division Eight of the Second Appellate District reversed and remanded the matter “for the trial court to determine whether the value of the property involved in appellant’s conviction pursuant to section 484e, subdivision (d) did not exceed \$950.” (Slip Opn. p. 10.) Respondent filed a timely petition for review, which this Court granted.

ARGUMENT

AS THE COURT OF APPEAL BELOW PROPERLY FOUND, THE EXPRESS LANGUAGE AND CLEAR PURPOSE OF PROPOSITION 47 INDICATE THAT A CONVICTION SUFFERED UNDER PENAL CODE SECTION 484e, SUBDIVISION (D) MUST BE REDUCED TO A MISDEMEANOR BECAUSE THE VALUE OF THE ACCESS CARD(S) WAS NECESSARILY UNDER \$950.

Proposition 47 contains sweeping language that is clearly intended to ensure that all thefts of property, where the value of the property is less than \$950 and the defendant has no disqualifying prior convictions, are classified as misdemeanors. Finding that it was “constrained by the unambiguous language and clear purpose of Proposition 47,” the Court of Appeal below held that Penal Code “section 490.2, subdivision (a) applies to theft of access card information under [Penal Code] section 484e, subdivision (d).” (Slip Opn. p. 9.) Appellant Daniel Romanowski urges this Court to reach the same conclusion and affirm the Court of Appeal’s decision.

A. The Language Of Proposition 47 Is Broadly Inclusive And Covers All Theft-Related Offenses Where The Property Value Does Not Exceed \$950.

The enactment of Proposition 47 resulted in the creation of Penal Code section 490.2, which provides in relevant part:

“(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.” (emphasis added)

Proposition 47 also added section 490.2 to the Penal Code, changing the definition of Grand Theft as follows:

“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,” (Pen. Code, § 490.2, subd. (a).)

The language set forth in Penal Code section 490.2 unequivocally makes *all theft crimes* in the Penal Code misdemeanors unless the value of that taken exceeds \$950.

Consequently, by its plain language, Penal Code “section 490.2, explicitly sweeps all earlier grand theft provisions into its application, reclassifying them as petty theft unless the value of the property taken exceeds \$950.” (*People v. Thompson* (2015) 243 Cal.App.4th 413, 419, citing Pen. Code, § 490.2, subd. (a).)

B. Penal Code Section 484e, Subdivision (e) Defines A Theft Offense.

The Penal Code broadly defines “theft” as a whole range of behavior, from illegally taking possession to fraudulent presentation to unlawful retention. (See Pen. Code, § 484, et. seq.) Nevertheless, as it did below, respondent attempts to redefine the

crime of theft of an access card, in violation of Penal Code section 484e, subdivision (d), as a crime of fraudulent possession and not a theft. (R.B. pp. 5 - 6.) Rather than focus upon the language of the recently enacted Proposition 47, respondent focuses on the statutory language of Penal Code section 484e, subdivision (d). (R.B. pp. 6 - 12.)

Respondent is correct that “Penal Code section 484e, subdivision (d) is part of a ‘comprehensive statutory scheme which punishes a variety of fraudulent practices involving access cards.’” (*People v. Molina* (2004) 120 Cal.App.4th 507, 512, quoting *People v. Butler* (1996) 43 Cal.App.4th 1224, 1232.) Respondent is incorrect, however, when it puts forth that, [a]lthough section 484e(d) is punished as grand theft, it does not primarily define a ‘theft’ crime.” (R.B. p. 8.) As the Court of Appeal found below, “whatever the *elements* of a violation of section 484e, subdivision (d), the Legislature deemed the offense grand theft.” (Slip Opn. p. 8; citing *People v. Molina, supra*, 120 Cal.App.4th at p. 519; *People v. Butler, supra*, 43 Cal.App.4th at p. 1233.)

Contrary to respondent’s argument (R.B. pp. 5- 6), fraudulent possession or retention is included within the broad definition of theft. Penal Code section 484e is found in Chapter 5 of the Penal Code, which is entitled “LARCENY [THEFT].” The heading for Penal Code section 484e is: “Theft of access cards or account information.” Subdivision (a) provides that, “Every person who, with intent to defraud, sells, transfers or conveys, an access card, without the cardholder’s or issuer’s consent is guilty of grand theft.” (Pen. Code, § 484e, subd. (a).) Finally, Penal Code section 484, the first Code

section in Chapter 5, includes, within its broad definition of “theft,” fraudulent transactions; fraudulently obtaining credit; and falsely reporting wealth. Thus, in every conceivable manner, the Legislature has classified a violation of Penal Code section 484e, subdivision (d) as a theft.

In addition, Penal Code section 490a provides: “Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if word ‘theft’ were substituted therefor.” (Pen. Code, § 490a.) The Legislature has expressed both a clear intent that the term “theft” is to be broadly defined and that when it uses the word “theft” it means for it to have the common meaning expressed in Penal Code section 490a. Hence, regardless of how respondent or the Court of Appeal in *People v. Molina, supra*, 120 Cal.App.4th at p. 517, a case which predates the passage of Proposition 47 by ten years, characterize Penal Code section 484e, subdivision (d), the Legislature clearly intended it to be consider grand theft. And it is not up to this Court to change the theft classification the Legislature chose to bestow upon crimes committed in violation of Penal Code section 484e. As such, Penal Code section 484e, like other Code sections which define various types of theft, is subject to the provisions of Penal Code section 490.2, subdivision (a). (See *People v. Thompson, supra*, 243 Cal.App.4th at p. 422, citing *People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1311 [“The trial court may not refuse to reduce a defendant’s sentence based on the court’s notion of the statute’s ‘spirit.’”].)

This conclusion is not altered in the least by respondent's claim that a conviction suffered under Penal Code section 484e, subdivision (d) does not "involve obtaining money, labor, real or personal property 'by theft'[,]" as required by Penal Code section 490.2. (Slip Opn. p. 9.) In rejecting this very argument, the Court of Appeal in *People v. Thompson, supra*, 243 Cal.App.4th at p. 419, cited Penal Code section 7, which defines "personal property" as "includ[ing] money, goods, chattels, things in action, and evidences of debt." This definition of personal property has been broadly interpreted. (See *People v. Dolbeer* (1963) 214 Cal.App.2d 619, 623.) The Court of Appeal in *People v. Thompson* also quoted Black's Law Dictionary which defines "personal property" as "[a]ny moveable or intangible thing that is subject to ownership and not classified as real property." (Black's Law Dict. (9th ed. 2009) p. 1337, col. 1.) Finally, Justice Mosk, while sitting on this Court, in a concurring opinion, once referred to credit cards as "personal property." (See *People v. Ledesma* (1987) 43 Cal.3d 171, 230 (conc. opn. of Mosk, J.)) Hence, despite respondent's attempt to persuade this Court of the contrary, access cards and the information they contain do constitute "personal property" for purposes of Penal Code section 490.2.

C. The Voters' Clear Intent Also Mandates That A Violation Of Penal Code Section 484e, Subdivision (d), Unequivocally A Theft Offense, Be Subject To The Amelioratory Provisions Of Proposition 47.

Respondent also maintains that Penal Code section 484e, subdivision (d) must be read out of the amelioratory provisions of Proposition 47 because that is what

the voters intended. (R.B. pp. 12 - 14.) According to respondent, Penal Code section 484e was enacted “to provide board protection to innocent consumers.” (R.B. p. 13, quoting *People v. Molina, supra*, 120 Cal.App.4th at p. 519.) Respondent argues that in absence of “any indication that the type of property theft offenses affected by section 490.2 would include a dissimilar crime like fraudulent possession of account information, the electorate could not have intended to sweep section 484e(d) within the scope of Proposition 47.” (R.B. p. 13.)

“In construing a measure, [courts] may not undertake to rewrite its unambiguous language.” (*People v. Hoffman, supra*, 241 Cal.App.4th at p. 1312, citing *People v. Goodliffe* (2009) 177 Cal.App.4th 723, 726.) Again, subdivision (a) of Penal Code section 490.2 begins, “[n]otwithstanding Section 487 or any other provision of law defining grand theft[.]” This opening clause is exactly the express indication respondent says is needed to make Penal Code section 484e, subdivision (d) subject to amelioratory provisions of Proposition 47.

Further, both the “Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the laws in light of existing laws having direct bearing upon them. [Citations.]” (*In re Thanh Q.* (1992) 2 Cal.App.4th 1386, 1389; see also *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1067.) Penal Code section 484e has been on the books, in its present form, since 1998. Thus, “[h]ad the voters [in 2014]

intended to exempt grand theft under section 484e, subdivision (d) from section 490.2, subdivision (a), [they] would have done so expressly.” (Slip Opn. p. 9.) “If the intention were to exclude offenses under section 484e, subdivision (d), section 490.2, subdivision (a) could have been written so its introductory language was more narrow or included specified exceptions.” (*People v. Thompson, supra*, 243 Cal.App.4th at p. 421.) For these reasons, this Court should decline respondent’s invitation to read Penal Code section 484e out of the theft statutes and, as a result, out of the provisions of Penal Code section 490.2.

D. Difficulty In Quantifying The Value Of A Stolen Access Card Does Not Permit This Court To Read The Offense Out Of The Provisions Of Proposition 47.

According to respondent, because the value of a stolen access card cannot be quantified “in the way section 490.2 contemplates[,]” Proposition 47, “by its plain terms . . . does not make the acquisition or possession of access card information reducible to a misdemeanor.” (R.B. p. 6.) Again, appellant disagrees with respondent’s construction of Penal Code sections 490.2 and 484e, subdivision (d).

The fact that it is difficult to quantify the value of a stolen access card does not remove the crime of theft of an access card from the provisions of Penal Code section 490.2, subdivision (a). If section 490.2 were intended to be limited to only grand theft offenses where the value of the stolen property was easily quantified, the section “would duplicate the many statutes already drawing a line between grand and petty theft

based on the value of the property taken.” (*People v. Thompson, supra*, 243 Cal.App.4th at p. 420.) “It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided.” (*Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 220, 230.) Doing so in this case requires this Court to reject respondent’s argument that Penal Code section 490.2 should be read to apply to only theft offenses where the value of the stolen property is easily quantified.

Again, subdivision (a) of section 490.2 begins, “Notwithstanding Section 487 or any other provisions of law defining grand theft[.]” “The plain meaning of this introductory clause is that section 490.2, subdivision (a) was intended to apply to all grand theft provisions and not just section 487 offenses.” (*Ibid.*) “When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.” (*People v. Overstreet* (1986) 42 Cal.3d 891, 895; see also *People v. Hendrix* (1997) 16 Cal.4th 508, 512.) As the Court of Appeal stated below, courts “cannot ignore [the] clear commands” of the voters simply because the new law “now requires the prosecution to prove the value of access card information under section 484e, subdivision (d).” (Slip Opn. p. 8.)

E. The Value Of A Stolen Access Card, Possessed In Violation Of Penal Code Section 484e, Subdivision (d), Is Necessarily De Minimis.

The Court of Appeal below acknowledged the valuation problem when it stated that its holding “has the potential to reduce most thefts under section 484e, subdivision (d) to misdemeanors, given section 484e, subdivision (d) requires no proof of actual loss and valuing the mere acquisition and possession of access card information may be difficult.” (Slip Opn. p. 9, citing *People v. Molina, supra*, 120 Cal.App.4th at p. 516.) To solve the problem, the Court of Appeal below chose to value a stolen access card based on what it would command on the “black market” for such cards. (Slip Opn. pp. 7 - 8) Like the Court of Appeal in *People v. Thompson, supra*, 243 Cal.App.4th at p. 422, appellant finds this “black market” approach to valuation to be unworkable and unseemly.

Rather than resort to a cumbersome and somewhat random method of valuation, appellant urges this Court to find, as the Court of Appeal did in *People v. Thompson*, that “[t]he value of the access card itself is slight, only the intrinsic value of the plastic.” (*People v. Thompson, supra*, 243 Cal.App.4th at p. 422, citing *People v. Caridis* (1915) 29 Cal.App. 166, 167–168.) For this reason, the Court of Appeal in *People v. Thompson* concluded that “the value of the access card and the accompanying information was necessarily less than \$950 because the intrinsic value of acquiring and retaining access card account information is minimal, unless used” – in which case, it becomes a crime which can be prosecuted under Penal Code section 484g instead.


(*People v. Thompson, supra*, 243 Cal.App.4th at p. 423; see also R.B. p. 10 [if the access card is used to obtain things of value, the crime is separately punishable under section 484g].) If this Court adopts the *Thompson* court's reasoning, as to the value of a stolen access card, there is no reason to remand the matter for further evidentiary proceedings. This Court would simply hold that the value of a stolen access card is de minimis as a matter of law.

CONCLUSION

Appellant Daniel Romanowski respectfully requests this Court to put into effect the will of the voters and find that his conviction under section 484e, subdivision (d) eligible for reduction to a misdemeanor. He further requests that this Court hold that the value of an access card, for purposes of Penal Code section 484e, subdivision (d), is de minis and, therefore, a remand is unnecessary.

DATED: April 7, 2016

Respectfully submitted,



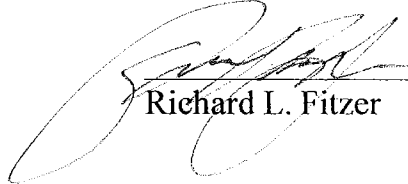
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WORD COUNT CERTIFICATION

People v. Daniel Lee Romanowski

Supreme Court No. S231405

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 2,077 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 April 7, 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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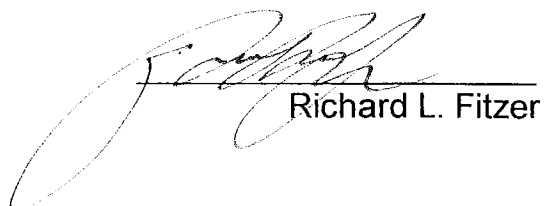
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I declare under penalty of perjury that the foregoing is true and correct. Executed April 7, 2016 at Long Beach, California.


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