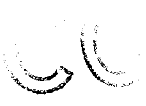

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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S231171
Plaintiff and Respondent,	(Fourth Dist., Div. 1, No. D067554)
v.	(Imperial County Superior Court No. JCF32479)
GIOVANNI GONZALES,	
Defendant and Appellant.	

Appeal from the Superior Court of Imperial County
Hon. L. Brooks Anderholt, Judge

APPELLANT'S SUPPLEMENTAL BRIEF ON NEW AUTHORITIES (Cal. Rules of Court, rule 8.520(d))

Oral argument: January 4, 2017

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TABLE OF CONTENTS

Table of Authorities iii

APPELLANT'S SUPPLEMENTAL BRIEF ON NEW AUTHORITIES 1

A. The intent to commit theft by false pretenses is a qualifying target crime for shoplifting 1

B. The possibility that a defendant could have been charged with or convicted of identity theft is irrelevant 7

C. The People have forfeited any reliance upon a purported intent other than to commit theft 10

D. A bank is a commercial establishment 10

E. Adjunct rooms or offices are not necessarily part of the commercial establishment 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

People v. Abarca (2016) 2 Cal.App.5th 475, review granted October 19, 2016, S237106 7
People v. Bias (2016) 245 Cal.App.4th 302, review granted May 11, 2016, S233634 10
People v. Colbert (2016) 5 Cal.App.5th 385 12
People v. Franco (March 14, 2016, B260447) [nonpub. opn.] review granted June 15, 2016, S233973 4
People v. Garner (2016) 2 Cal.App.5th 768, review granted October 26, 2016, S237279 ..... 2, 3, 4, 7
People v. Gonzales (2015) 242 Cal.App.4th 35, review granted February 17, 2016, S231171 1
People v. Hallam (2016) 3 Cal.App.5th 905 12
People v. Holm (2016) 3 Cal.App.5th 141 11
People v. Hudson (2016) 2 Cal.App.5th 575, 578, review granted October 26, 2016, S237340 ..... 4, 10
People v. Huerta (2016) 3 Cal.App.5th 539 ..... 8, 9
People v. Martin (December 12, 2016, F071654) __ Cal.App.4th __ 6, 7
People v. Pak (2016) 3 Cal.App.5th 1111 ..... 1, 2, 5, 7, 9
People v. Parson (2008) 44 Cal.4th 332 ..... 2, 3
People v. Smith (2016) 1 Cal.App.5th 266, review granted September 14, 2016, S236112 ..... 3, 4, 5, 11
People v. Stylz (2016) 2 Cal.App.5th 530 11
People v. Vidana (2016) 1 Cal.5th 632 ..... 5, 6, 7
People v. Williams (2013) 57 Cal.4th 776 ..... 1, 3

Statutes

Pen. Code, § 459 ..... 1, 5
Pen. Code, § 459.5 ..... 1, 3, 4, 5, 6, 9, 11
Pen. Code, § 484 ..... 5, 6
Pen. Code, § 490a 5, 6, 7
Pen. Code, § 503 5

Rules

Cal. Rules of Court, rule 8.1115 4
Cal. Rules of Court, rule 8.520 1

Appellant's supplemental brief on new authorities

Several relevant opinions have been issued since the filing of the reply brief on July 29, 2016. (See Cal. Rules of Court, rule 8.520(d).)

A. The intent to commit theft by false pretenses is a qualifying target crime for shoplifting.

The Court of Appeal below, relying on People v. Williams (2013) 57 Cal.4th 776, held that theft by false pretenses did not constitute "larceny" as used in the burglary and shoplifting statutes (Pen. Code, § 459; Pen. Code, § 459.5). (People v. Gonzales (2015) 242 Cal.App.4th 35, 39-40, review granted February 17, 2016, S231171.) Several new opinions support Gonzales's position that Williams is inapposite and that theft by false pretenses is indeed a qualifying intended crime for burglary and shoplifting.

In People v. Pak (2016) 3 Cal.App.5th 1111, 1115, defendant "pawned a stolen projector during the first pawn shop burglary and a stolen camcorder, watch, and earrings during the second," and was convicted of two counts of burglary. The Court of Appeal observed that these burglaries were qualifying crimes for reduction to shoplifting under Proposition 47 even though they involved theft by false pretenses:

> Courts including this one also have concluded that the more broadly defined crime of theft by false pretenses ([Pen. Code,] § 484) satisfies the "intent to

commit larceny" element of the shoplifting statute. (Id. at p. 1117, fn. 4.) (Pak affirmed the denial of Proposition 47 relief, without prejudice, only because defendant had not yet provided proof that the value was $950 or less. (Id. at pp. 1120-1121.))

In People v. Garner (2016) 2 Cal.App.5th 768, 770, review granted October 26, 2016, S237279, defendant, who had "entered a grocery store and attempted to purchase items with a forged $100 traveler's check," pleaded guilty to burglary and forgery. The trial court granted her petition under Proposition 47 to reduce the forgery counts, but not the burglary count, reasoning that entering the store with intent to commit theft by false pretenses, unlike "larceny," was not a qualifying crime under section 459.5. (Ibid.) The Court of Appeal held that under this Court's precedent, "an 'intent to commit theft by a false pretense' can support a burglary conviction." (Id. at p. 772, quoting People v. Parson (2008) 44 Cal.4th 332, 354.) The voters were presumed to be aware of this construction when they enacted Proposition 47. (Ibid.) The court also relied on the fact that its holding was consistent with the voters' intent:

> Appellant's second degree commercial burglary conviction based on using a forged $100 traveler's check is a nonviolent offense, not demonstrably more serious than classic shoplifting, viz., entering a store and filching $100 worth of items. Reclassifying it as a misdemeanor is thus consistent with the articulated purposes behind Proposition 47.

(Id. at p. 773.)

In People v. Smith (2016) 1 Cal.App.5th 266, 269, 274, review granted September 14, 2016, S236112, defendant, who had entered a check-cashing store with intent to commit theft by false pretenses, pleaded guilty to burglary. The trial court denied his petition to reduce the burglary to shoplifting, reasoning that entry into the check-cashing store with intent to present counterfeit bills was not a qualifying crime under section 459.5. (Id. at p. 270.) The Court of Appeal held that "larceny as the term appears in section 459.5, subdivision (a) includes theft by false pretenses and does not require a trespassory taking." (Id. at p. 274.) The court observed that under this Court's precedent, "an intent to commit theft by a false pretense or a false promise without the intent to perform will support a burglary conviction." (Ibid., quoting People v. Parson, supra, 44 Cal.4th at p. 354, internal brackets omitted.) The intent element of section 459.5 (the "intent to commit larceny") "mirrors the intent element in the general burglary statute," which Parson had broadly construed. (Smith at p. 274.) Accordingly, "the voters intended section 459.5 to include theft by false pretenses," such as "entering a check cashing establishment and passing counterfeit bills." (Ibid.)

Smith explained that People v. Williams, supra, which dealt with robbery, was inapposite. (Smith at p. 274, fn. 5 ("We conclude that neither Williams nor section 211, which does not contain the term 'larceny,' governs the meaning of that term in

the new shoplifting statute").)[1]

In People v. Hudson (2016) 2 Cal.App.5th 575, 578, review granted October 26, 2016, S237340, defendant, who had "entered a bank, falsely impersonating another person, with the intent to commit a felony by signing someone else's name to a check," pleaded guilty to burglary. The Court of Appeal held that the crime was encompassed by section 459.5. The court rejected the People's reliance on "the common definition of 'shoplifting,'" explaining:

> The People erroneously focus on the word "shoplifting," which is not an element of the crime. Rather section 459.5 gives shoplifting a more technical definition involving four separate elements, including entry into a commercial establishment. Significantly, the Act does not define shoplifting according to its common meaning and there is nothing in the text of the Act to support a conclusion that the voters intended to adopt the common meaning of shoplifting.

(Id. at p. 581.)[2]

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[1] Smith, Garner, and other published opinions for which review was granted on or after July 1, 2016, are cited for their persuasive value. (See Cal. Rules of Court, rule 8.1115(e)(1).) This Court has deferred further action in both cases pending the decision in this case. (See orders granting review.)

[2] This Court has deferred action in Hudson pending a decision in People v. Franco (March 14, 2016, B260447) [nonpub. opn.] review granted June 15, 2016, S233973, dealing with the value of an uncashed forged check.

This Court recently recognized that Penal Code section 490a expands the scope of "larceny" to encompass any theft, even though the specific elements of each type of theft remain distinct. In People v. Vidana (2016) 1 Cal.5th 632, 648-650, this Court, citing section 490a among other authorities, held that "larceny under [Penal Code] section 484(a) and embezzlement under [Penal Code] section 503 are different statements of the same offense," so that multiple convictions for the same conduct are not permissible. Vidana recognized that the elements of the two crimes are not identical. (Id. at p. 648 ("Larceny and embezzlement have different elements and neither is a lesser included offense of the other").) Yet, they remain merely different statements of a single offense, just as premeditated murder and felony murder "are not distinct crimes but simply alternative means of committing the single offense of murder" even though the elements are not identical. (Ibid.) Vidana thus supports the authorities holding that under section 490a, theft by false pretenses is encompassed by "larceny" in both section 459 (burglary) and section 459.5 (the new crime of shoplifting), though the elements differ. (See, e.g., People v. Pak, supra, 3 Cal.App.5th at p. 1117, fn. 4; People v. Smith, supra, 1 Cal.App.5th at p. 274.)

Vidana specifically noted that section 490a remains effective even though its literal meaning does not apply in every case. (Id. at p. 647 ("Nonetheless, although section 490a should not be read literally, this circumstance does not reduce its import

in signaling the Legislature's intent with regard to the concomitant 1927 amendment to section 484").) Moreover, contrary to the apparent argument of the People (respondent's supp. brief filed September 30, 2016, at p. 1), Vidana did not hold that section 490a cannot change or expand a statutory term (such as "larceny" in the burglary statute); Vidana merely observed that its own cases had not theretofore had occasion to do so. (Vidana at p. 647 ("Although this court long ago said that the essence of section 490a is simply to effect a change in nomenclature without disturbing the substance of any law, it does not appear we have ever applied section 490a to effect a change in nomenclature or to change the language of any statute"), internal quotation marks and citations omitted).) In Vidana itself, as noted above, this Court relied in part on the expansive intent of section 490a to hold that larceny and embezzlement are two statements of the same crime, notwithstanding their different elements.

One court has cited Vidana to support its position that entering a commercial establishment with intent to acquire merchandise by means of a forged check does not constitute shoplifting under section 459.5. (People v. Martin (December 12, 2016, F071654) __ Cal.App.4th __ [slip opn. 2, 10-12].) Martin relied on Vidana's observation that this Court had not theretofore applied section 490a to change or expand a statutory term. (Martin at pp. 11-12, citing Vidana at p. 647.) As explained above, Vidana was merely making an historical observation, not precluding application of section 490a to expand the definition of

larceny, and in fact Vidana relied in part on the expansive intent of section 490a to support its holding that larceny and embezzlement are two statements of the same crime, though with different elements. (See Vidana at pp. 647-648.)

Martin also relied on its determination of voter intent. (Martin, supra, slip opn. at pp. 12-17.) Its analysis is adequately addressed by cases such as People v. Garner, supra, 2 Cal.App.5th at pp. 772-773 and People v. Pak, supra, 3 Cal.App.5th at pp. 1118-1119.

B. The possibility that a defendant could have been charged with or convicted of identity theft is irrelevant.

As noted in the opening brief, although attempting to cash a forged check in a bank may be a violation of several possible statutes, the only relevant statute is the count of conviction. (See AOB 21-24.) Several new opinions support Gonzales's position. In People v. Abarca (2016) 2 Cal.App.5th 475, 478, review granted October 19, 2016, S237106, defendant walked into a bank during business hours and attempted to cash a forged check. He was charged with burglary and forgery. (Ibid.) He pleaded guilty to burglary, and the forgery count was dismissed pursuant to the plea agreement. (Id. at pp. 478-479.) The court granted Proposition 47 relief, reducing the burglary conviction to shoplifting. (Id. at p. 479.) On the People's appeal, the People argued that the crime did not qualify for Proposition 47 relief because it was in fact identity theft. (Id. at p. 483.) The Court of Appeal rejected this theory because the only relevant crime was

the count of conviction, not another crime that hypothetically could have been charged and to which defendant might have pleaded guilty:

> The statutory language is entirely focused on resentencing offenders for existing, but reclassified, convictions. It does not require a petitioner to examine the Penal Code for other offenses his conduct would have supported and prove he would not have been convicted of those in addition. Nor does it suggest the superior court must examine the Penal Code to assure itself before granting a petition that an offender could not have been convicted of a different felony for the same underlying conduct.

(Id. at pp. 483-484, internal citation omitted; see also id. at p. 483 ("identity theft played no role in the prosecution of [defendant]. The People charged him with burglary and forgery. The prosecution entered a plea bargain with [defendant] whereby he pled guilty to burglary, and the People agreed to dismiss the forgery count").)

Similarly, in People v. Huerta (2016) 3 Cal.App.5th 539, 541, defendant and a companion stole some bottles of fragrance from a department store. Defendant pleaded guilty to burglary. (Id. at p. 542.) The trial court granted her petition to reduce the crime to shoplifting, but the People appealed, arguing that the intended crime was conspiracy, not larceny. (Id. at pp. 541-543.) The Court of Appeal disagreed: "C]onspiracy played no role in the prosecution" of defendant, who was charged only with burglary

and theft, and who pleaded only to burglary. (Id. at p. 545.)

Separately, Huerta observed that even if there had been a conspiracy, under the plain terms of section 459.5 the People would have been required to charge defendant *only* with shoplifting. (Id. at p. 545.) This is because section 459.5 restricts the prosecutor's discretion:

> Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.

(Pen. Code, § 459.5, subd. (b), quoted in Huerta at p. 545; cf. People v. Pak, supra, 3 Cal.App.5th at p. 1117 ("Such a defendant no longer may be charged with burglary").) Accordingly, the purported fact that defendant's conduct might have violated a nonqualifying statute was irrelevant:

> The alleged conspiracy was directed at the theft of the same bottles of perfume as [defendant's] intent to commit larceny. It follows under the plain text of the statute that prosecutors would have been required to charge her with shoplifting and could not have charged her with burglary predicated on conspiracy had Proposition 47 been in effect at the time of her offense. She therefore qualifies to have her burglary conviction redesignated as misdemeanor shoplifting.

(Huerta at p. 545.) Even if defendant had harbored multiple intents, she could only have been charged with shoplifting, and therefore was entitled to Proposition 47 relief. (Id. at p. 545, fn. 5

("The People's contention [defendant] would be entitled to have her felony conviction redesignated as misdemeanor shoplifting only if her 'sole intent' was to commit larceny fails for the same reason").)[3]

C. The People have forfeited any reliance upon a purported intent other than to commit theft.

Even if a nonqualifying crime could have been charged, the People's failure to charge such a crime in the initial case and the subsequent failure to rely upon that ground at the resentencing hearing constitutes a forfeiture. (People v. Abarca, supra, 2 Cal.App.5th at p. 482-483.)

D. A bank is a commercial establishment.

Several new opinions support Gonzales's position that the Bank of America branch where he cashed the checks during business hours was a commercial establishment. (See AOB 25-26.) "The term 'commercial establishment' includes a bank." (People v. Hudson, supra, 2 Cal.App.5th at p. 582. Hudson explained:

> We acknowledge that a common understanding of the word "commercial" encompasses the buying and

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[3] A case on this general issue cited in the opening brief (AOB 21) was superseded by a grant of review prior to July 1, 2016, and is therefore no longer citable for precedential or persuasive value. (People v. Bias (2016) 245 Cal.App.4th 302, review granted May 11, 2016, S233634 (grant and hold behind this case, People v. Gonzales).)

> selling of merchandise in a retail establishment. However, nothing in the text of the Act supports this narrow interpretation and we reject it.

(Ibid.; see also People v. Abarca, supra, 2 Cal.App.5th 475, 482, ("a business like U.S. Bank provides financial services in exchange for fees, and is therefore a commercial establishment within the ordinary meaning of that term"); cf. People v. Smith, supra, 1 Cal.App.5th at p. 273 (a check-cashing business is a commercial establishment because it "provides financial services in exchange for fees"); see generally People v. Holm (2016) 3 Cal.App.5th 141, 148 (" 'commercial establishment' within the meaning of section 459.5 means a business that is primarily engaged in the buying and selling of goods or services regardless of whether these goods or services are sold to 'members' or the general public").)

E. Adjunct rooms or offices are not necessarily part of the commercial establishment.

The People have argued that Gonzales's interpretation of section 459.5 would "[l]ead to [a]bsurd [r]esults" because it might encompass theft from a manager's office or from a locked pharmacy in a supermarket. (RB 21-23.) Several new opinions demonstrate that such scenarios are easily dealt with on a case-by-case basis and the crimes do not necessarily qualify for Proposition 47 relief. (See People v. Stylz (2016) 2 Cal.App.5th 530, 534-535 (a specific locked storage unit within a commercial establishment did not qualify as shoplifting); People v. Colbert

(2016) 5 Cal.App.5th 385, __ (entry into office area of commercial establishment did not qualify as shoplifting); People v. Hallam (2016) 3 Cal.App.5th 905, 908, 913-914 (employee restroom, which defendant had permission to use, was part of a commercial establishment under section 459.5 under the particular facts of the case).)

CONCLUSION

For these reasons and the reasons set forth in the opening and reply briefs and the answer to the amicus brief of the district attorney of San Diego County, appellant Gonzales respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: December 14, 2016. Respectfully submitted,

____

Richard A. Levy
Attorney for
Giovanni Gonzales

CERTIFICATION OF WORD COUNT

I certify that the word count of this computer-produced document, calculated pursuant to rule 8.520(c)(1) of the Rules of Court, does not exceed 2800 words, and that the actual count is: **2769** words.

Richard A. Levy

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