

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
)
Plaintiff and Respondent,) [REDACTED]
)
vs.) Sacramento County
) No. [REDACTED]
[REDACTED],)
)
Defendant and Appellant.)
_____)

MOTION FOR TEMPORARY STAY OF PENDING APPEAL
AND LIMITED REMAND TO PERMIT THE TRIAL COURT TO
HEAR AND RULE ON APPELLANT'S PROPOSITION 47
PETITION FILED UNDER PENAL CODE SECTION 1170.18

CENTRAL CALIFORNIA
APPELLATE PROGRAM

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TO THE HONORABLE VANCE RAYE, PRESIDING JUSTICE,
AND TO THE HONORABLE JUSTICES OF THE COURT OF APPEAL,
THIRD APPELLATE DISTRICT:

Pursuant to Penal Code sections 1170.18 and 1260, *People v. Awad*
(2015) 238 Cal.App.4th 215 and California Rules of Court, rule 8.54,
appellant moves this Court for a temporary stay of pending appeal and an
order of limited remand to the lower court to entertain appellant’s
Proposition 47 petition for misdemeanor reclassification of her felony
conviction of Penal Code section 459, a second degree burglary.

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY STAY AND LIMITED REMAND.

1. Relevant Introductory Background.

On March 20, 2013, a jury convicted Mr. [REDACTED] of possession of stolen property and burglary, and the court found priors. (CT 64; 2 RT 417.)

On July 12, 2013, the court sentenced Mr. [REDACTED] to state prison for the upper term of three years on the burglary, doubled for a strike to six years, and imposed a concurrent term of two years on the receiving stolen property count. The court further imposed an additional and consecutive one year each for four prior prison terms. The total sentence was ten years, with credit for 452 days. (RT 445-446.)

On July 12, 2013, [REDACTED] filed a timely notice of appeal. (CT 132.) On May 27, 2014, he filed an opening brief challenging the trial court's denial of his motion to suppress evidence under section 1538.5 and the court's denial of his request the court to exercise its discretion to set aside the strike under section 1385. Respondent filed a brief on September 25, 2014, requesting the judgment and sentence be affirmed. Appellant filed a reply brief on November 20, 2014. The appeal is pending.

Earlier that month, on November 4, 2014, the voters of the State of California passed Proposition 47, the Safe Neighborhoods and Schools Act. Proposition 47 added section 459.5, which reduces a commercial violation

of section 459 to a misdemeanor petty theft where the intent was to take property valued at \$950 or less, and amended section 496 similarly in cases involving receipt stolen property of \$950 or less.

Proposition 47 also added section 1170.18, entitled “Petition for recall of sentence; resentencing procedures; reduction of felonies to misdemeanors.” Section 1170.18, subdivision (a) provides a recall petition process for a defendant currently serving a felony sentence who is entitled to a reduction to a misdemeanor and resentencing under the act. Section 1170.18, subdivision (f) provides a petition process for a defendant who has already completed his or her sentence and who is entitled to re-classification of his or her offense to a misdemeanor under Proposition 47.

The Fourth District Court of Appeal, held that the Court of Appeal is authorized to order a limited remand for purposes of allowing a superior court to entertain an appellant’s section 1170.18 petition. (*People v. Awad* (2015) 238 Cal.App.4th 215, 222-223.)

Subsequently, in *People v. Scarbrough* (2015) 238 Cal.App.4th 916, 929, this Court held that a pending appeal divests the trial court of jurisdiction in the case and concluded that section 1170.18 cannot be construed to provide an exception to this general rule. Therefore, the trial court does not have concurrent jurisdiction to entertain a defendant’s

section 1170.18 while an appeal is pending. However, in *Scarborough*, this Court also acknowledged that the general rule divesting a trial court of jurisdiction for Proposition 47 petition purposes may yield harsh results to a given defendant and recognized the need for mitigating solutions for such defendants. Citing *Awad*, this Court noted the mitigating solution of an appellate stay and issuance of a limited interim remand to the superior court for purposes of conducting a hearing on a defendant's section 1170.18 petition in a situation where the lower court declined to hear the petition on the grounds it lacked jurisdiction while defendant's judgment is pending on appeal. (*People v. Scarborough, supra*, at p. 929, fn. 5.)

2. Discussion.

a. The *Awad* decision construes Proposition 47 together with section 1260 to authorize a limited remand to the trial court to hear a section 1170.18 during pendency of appeal .

Ordinarily, a trial court is divested of jurisdiction upon the filing of a valid notice of appeal until determination of the appeal and issuance of remittitur. (*People v. Perez* (1979) 23 Cal. 3d 545, 554; see *People v. Cunningham* (2001) 25 Cal. 4th 926, 1044.) This rule protects the appellate court's jurisdiction by protecting the status quo so that an appeal is not rendered futile by alteration. (*People v. Alanis* (2008) 158 Cal. App.4th

1467, 1472.)

“But jurisdiction is not necessarily unidirectional. Under appropriate circumstances, the same criminal proceeding may be simultaneously pending in the trial court and the Court of Appeal.” (*People v. Awad, supra*, 238 Cal. App.4th at p. 222, fn omitted.) For instance, the trial court may, while an appeal is pending, vacate a void judgment, correct an unauthorized sentence, recall a sentence within 120 days of judgment, correct an error in calculating presentence custody credits and hear a writ of habeas corpus on the challenged judgment so long as the process does not interfere with appellate jurisdiction in the pending matter. (*People v. Scarbrough, supra*, 238 Cal.App.4th at pp. 925-926.)

In *Awad*, the court arrived at this jurisdictional crossroads in the context of a defendant who filed a Proposition 47 petition during pendency of his appeal. The appellant in *Awad*, like appellant in this case, tried to secure immediate relief under Proposition 47 by filing a section 1170.18 petition in the trial court. (*People v. Awad, supra*, 238 Cal. App.4th at p. 221.) And, the appellant in *Awad*, like appellant in this case, was denied relief because the trial court ruled that it lacked jurisdiction because the case was pending on appeal. (*Ibid.*)

The court in *Awad* found a solution to this jurisdictional conundrum.

It construed Proposition 47 together with section 1260 to authorize the reviewing court to order a limited remand to the trial court to hear the appellant's section 1170.18 petition. (*Awad, supra*, 238 Cal. App.4th at p. 221.)

Section 1260 states, in full: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial *and may, if proper, remand the cause to the trial court for such further proceedings as may be just under any circumstances.*" (Italics added.)

"A limited remand is appropriate under section 1260 . . . *for the exercise of any discretion that is vested by law in the trial court.* (*People v. Awad, supra*, 238 Cal. App. 4th at p. 222, citing *People v. Braxton* (2004) 34 Cal.4th 798, 818-819, italics added.) Proposition 47 vests the discretion to recall and resentence a defendant in the trial court. (Sec. 1170.18.)

To protect its appellate jurisdiction upon limited interim remand to the trial court, the court in *Awad* issued a stay of the appeal. (*Awad, supra*, 238 Cal. App. 4th at p. 224.)

In this case, an order by this Court for a temporary stay of appeal and

a limited remand to allow the trial court to hear and decide appellant's proposed section 1170.18 petition would provide appellant with an appropriate mitigating solution to the jurisdictional conundrum that would otherwise result.

Appellant's underlying convictions are for the felony offenses of section 459, a commercial burglary of the 24 Hour Fitness Club, in which it was not plead that a taking of more than \$950 was intended, and section 496, receiving stolen property, where the value was clearly less than \$950, as the property, a cell phone, was returned to the victim. (CT 14-15, 64, 110-111)¹ These felony offenses are eligible for misdemeanor classification under Proposition 47. (Secs. 490.2; 496, subd. (a); sec. 1170.18, subd. (b).)

If this court grants this motion and orders limited remand to the superior court to allow it to hear and decide appellant's proposed section 1170.18 petition, and should the superior court reclassify appellant's felony burglary and receiving stolen property convictions, appellant would receive a ruling under Proposition 47 in the most expedient manner. Were all of the relief sought in the proposed Proposition petition granted the current 10-

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██████████, Assistant Public Defender in the Sacramento Public Defender's Office, represents that on ██████████, the Sacramento County Superior Court reduced the section 496 conviction to a misdemeanor. Under *People v. Scarbrough*, *supra*, 238 Cal.App.4th 929, the court's jurisdiction to grant such an order while the current appeal is pending is brought into question.

year sentence would be reduced to two misdemeanor sentences.

3. Conclusion.

For the reasons set forth herein, appellant respectfully requests this court to grant this motion to stay the pending appeal and order limited remand to allow the superior court to hear and decide appellant's section proposed section 1170.18 petition.

Dated: October 27, 2015

Respectfully submitted,

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