
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 1065 **Hearing Date:** March 13, 2018
Author: Jones-Sawyer
Version: February 27, 2018
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Theft: Organized Retail Theft*

HISTORY

Source: California Retailers Association
United Food and Commercial Workers Union Western States Council

Prior Legislation: Proposition 47, approved by California voters in 2014
AB 875 (Cooper), 2017-18, failed Assembly Public Safety
AB 392 (Lackey), 2017-18, failed Assembly Public Safety
SB 284 (Nguyen), 2017-18, failed Senate Public Safety
AB 2444 (Portantino), 2011-12, failed Assembly Public Safety
AB 2372 (Ammiano), Chapter 693, Statutes of 2010

Support: Alameda County District Attorney's Office; Association of Orange County Deputy Sheriffs; California Statewide Law Enforcement Association; Fraternal Order of Police; Long Beach Police Officers Association; Sacramento County Deputy Sheriffs' Association; San Diego District Attorney's Office; San Francisco District Attorney's Office; San Mateo County District Attorney's Office; Santa Clara District Attorney's Office

Opposition: None known

Assembly Floor Vote: Not relevant

PURPOSE

The purpose of this bill is to create the crime of organized retail theft and to make various changes to existing laws related to arrest and bench warrants for theft related offenses.

Existing law divides theft into two degrees: petty theft and grand theft. (Pen. Code, § 486.)

Existing law states that grand theft is committed when the money, labor, or real or personal property taken is of a value exceeding \$950, except in specified cases of theft authorizing a lower threshold. (Pen. Code, § 487.)

Existing law states that any other case of theft is petty theft. (Pen. Code, § 488.)

Existing law states that petty theft is a misdemeanor punishable by a fine not exceeding \$1000 or by imprisonment in the county jail not exceeding 6 months. (Pen. Code, § 490.)

Existing law states that grand theft is generally punishable as an alternate felony-misdemeanor. (Pen. Code, § 489, subd. (c).)

Existing law requires nonviolent property crimes where the amount of property taken is \$950 or less to be punished as misdemeanors, except as specified. (Pen. Code, § 490.2; Proposition 47, approved by California voters on Nov. 4, 2014.)

Existing law defines “shoplifting” as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed \$950 and states that shoplifting shall be punished as a misdemeanor except as specified. (Pen. Code, § 459.5; Proposition 47, approved by California voters on Nov. 4, 2014.)

This bill creates the new crime of organized retail theft and specifies the penalties for violations of the new provisions.

This bill defines organized retail theft as follows:

- Acting in concert with one or more persons to steal merchandise from one or more merchant’s premises or online marketplace with the intent to sell, exchange or return the merchandise for value;
- Acting in concert with two or more persons to receive, purchase, or possess merchandise stolen from one or more merchant’s premises or online marketplace knowing or believing it to have been stolen;
- Acting as an agent of another individual or group of individuals to steal merchandise from one or more merchant’s premises or online marketplaces as part of an organized plan to commit theft; and,
- Recruiting, coordinating, organizing, supervising, directing, managing, or financing another to undertake any of the acts described in the provisions above regarding acting in concert or any other statute defining theft of merchandise.

This bill creates the following penalty scheme for organized retail theft:

- If violations of the above provisions, except the recruiting, coordinating, organizing, supervising, directing, managing, or financing another provision, are committed on three or more separate occasions within a one-year period, and if the aggregated value of the merchandise stolen, received, purchased, or possessed within that period exceeds \$950 the offense is punishable as either a misdemeanor by imprisonment in a county jail not exceeding one year or as a jail-eligible felony;
- Any other violation of the above provisions, except the recruiting, coordinating, organizing, supervising, directing, managing, or financing another provision, is punishable as a misdemeanor by imprisonment in a county jail not exceeding one year; and,
- A violation of the recruiting, coordinating, organizing, supervising, directing, managing, or financing another provision is punishable as either a misdemeanor by imprisonment in a county jail not exceeding one year or as a jail-eligible felony.

This bill specifies that for the purpose of determining whether the defendant acted in concert with another person or persons in any proceeding, the trier of fact may consider any competent evidence, including, but not limited to, all of the following:

- The defendant has previously acted in concert with another person or persons in committing acts constituting theft, or any related offense, including any conduct that occurred in counties other than the county of the current offense, if relevant to demonstrate a fact other than the defendant's disposition to commit the act;
- The defendant used or possessed an artifice, instrument, container, device, or other article capable of facilitating the removal of merchandise from a retail establishment without paying the purchase price and use of the artifice, instrument, container, or device or other article is part of an organized plan to commit theft; or,
- The property involved in the offense is of a type or quantity that would not normally be purchased for personal use or consumption and the property is intended for resale.

This bill provides that in a prosecution for organized retail theft, the prosecutor shall not be required to charge any other co-participant of the organized retail theft.

Existing law provides, except as specified, that when a public offense is committed in part in one jurisdictional territory and in part in another jurisdictional territory, or the acts constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction for the offense is in any competent court within either jurisdictional territory. (Pen. Code, § 781.)

Existing law states that if property taken in one jurisdictional territory by burglary, carjacking, robbery, theft, or embezzlement has been brought into another, or when property is received in one jurisdictional territory with the knowledge that it has been stolen or embezzled and the property was stolen or embezzled in another jurisdictional territory, the jurisdiction of the offense is in any competent court within either jurisdictional territory, or any contiguous jurisdictional territory if the arrest is made within the contiguous territory, the prosecution secures on the record the defendant's knowing, voluntary, and intelligent waiver of the right of vicinage, and the defendant is charged with one or more property crimes in the arresting territory. (Pen. Code, § 786.)

This bill states that the jurisdiction of a criminal action for theft, organized retail theft, or receipt of stolen property also includes the county where an offense involving the theft or receipt of the stolen merchandise occurred, the county in which the merchandise was recovered, or the county where any act was done by the defendant in instigating, procuring, promoting, or aiding in the commission of the offense.

This bill provides that if multiple offenses of theft or other specified crimes all involving the same defendant or defendants and the same merchandise or the same defendant or defendants and the scheme or substantially similar activity occur in multiple jurisdictions, that any of those jurisdictions is a proper jurisdiction for all of the offenses.

Existing law requires a peace officer to release persons arrested for misdemeanors with a written notice to appear in court, containing the name and address of the person, the offense charged, and the time when, and place where, the person shall appear in court, except in specified circumstances. (Pen. Code, § 853.6.)

Existing law prohibits the release of persons arrested for specified violent crimes and crimes related to domestic violence and stalking. (Pen. Code, § 853.6, subd. (a)(2).)

Existing law specifies reasons that a peace officer may choose to take into custody a person charged with a misdemeanor upon a written notice to appear in court. (Pen. Code, § 853.6, subd. (a)(2).)

Existing law states that one of those reasons may be that there is reason to believe that the person would not appear at the time and place specified in the notice and the basis for this determination is specifically stated. (*Id.*)

This bill states that an arrest warrant or failure to appear that is pending at the time of the current offense shall constitute reason to believe that the person would not appear as specified in the notice.

This bill states that a peace officer may take into custody a person who has been cited, arrested, or convicted for misdemeanor or felony theft from a store or from a vehicle two or more times in the previous 12 months.

This bill provides that a peace officer may take a person into custody for failures to appear in court on previous misdemeanor citations that have not been resolved for the person.

Existing law authorizes a court to issue a bench warrant whenever a defendant fails to appear in court as required by law, and as specified.

This bill states that a court may issue a bench warrant if a defendant has been cited or arrested for misdemeanor or felony theft from a store or vehicle and has failed to appear in court in connection with that charge or those charges within the past six months.

This bill provides that its provisions are severable.

COMMENTS

1. Need for This Bill

According to the author:

In 2017, the National Retail Federation (NRF) conducted the Organized Retail Crime Survey and found that organized retail theft continues to be pervasive within the industry. The survey stated that 95% of merchants reported having been a victim of coordinated theft, resulting in revenue losses estimated at \$30 billion per year. NRF defines organized retail crime as theft/fraudulent activity conducted with the intent to convert illegally obtained merchandise, cargo, cash, or cash equivalent into financial gain, often through subsequent online or offline

sales. Organized retail crime typically involves a criminal enterprise that organizes multiple theft rings at a number of retail stores and employs a fencing operation to sell the illegally-obtained goods for financial gain. Organized retail crime can also simply involve the recruitment of others to steal on another's behalf. Despite this growing trend in various forms of "Organized Retail Crime," California has never adopted a Penal Code section making it a crime. Therefore, new laws facilitating better collaboration between law enforcement and businesses are necessary to improve our justice system's responses to chronic theft.

2. Overview and Purpose of Proposition 47

Proposition 47, also known as the Safe Neighborhoods and Schools Act, was approved by the voters in November 2014. Proposition 47 reduced the penalties for certain drug and property crimes and directed that the resulting state savings be directed to mental health and substance abuse treatment, truancy and dropout prevention, and victims' services. Specifically, the initiative reduced the penalties for possession for personal use of most illegal drugs to misdemeanors. The initiative also reduced the penalties for theft, shoplifting, receiving stolen property, writing bad checks, and check forgery valued at \$950 or less from alternate felony-misdemeanors to straight misdemeanors. Among the crimes reduced to misdemeanors by Proposition 47 "are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new [Penal Code] section 459.5." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.) The measure limited the reduced penalties to offenders who do not have designated prior convictions for serious or violent felonies and who are not required to register as sex offenders. (See Legislative Analyst's Office analysis of Proposition 47 <<http://www.lao.ca.gov/ballot/2014/prop-47-110414.pdf>>.)

After the passage of Proposition 47, opponents of the initiative have claimed that there was an increase in crime which can be attributed to the initiative. However, reports evaluating the effects of the initiative have found that Proposition 47 had little to no effect on California's crime rates overall. (*California prison reform didn't cause crime increase, study finds*, KQED (Feb. 18, 2016) <<http://www.scpr.org/news/2016/02/18/57729/study-cas-prison-reform-didnt-cause-crime-increase/>> [as of Mar. 2, 2018]; Center on Juvenile and Criminal Justice, *Urban Crime Trends Remain Stable Through California's Policy Reform Era* (2010-2016) (Feb. 2017) <http://www.cjcj.org/uploads/cjcj/documents/urban_crime_trends_remain_stable_through_californias_policy_reform_era_2010-2016.pdf> [as of Mar. 2, 2018].)

3. California Constitutional Limitations on Amending a Voter Initiative

Because Proposition 47 was a voter initiative, the Legislature may not amend the statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; see also Cal. Const., art. II, § 10, subd. (c).) The California Constitution states, "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." (Cal. Const., art. II, § 10, subd. (c).) Therefore, unless the initiative expressly authorizes the Legislature to amend, only the voters may alter statutes created by initiative.

The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent. Courts have a duty to jealously guard the people's initiative power and, hence, to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process is not improperly annulled by a legislative body. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.) Yet, despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have recognized that the Legislature is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains free to address a "related but distinct area" or a matter that an initiative measure "does not specifically authorize or prohibit." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025-1026.)

As to the Legislature's authority to amend the initiative, Proposition 47 states: "This act shall be broadly construed to accomplish its purposes. The provisions of this measure may be amended by a two-thirds vote of the members of each house of the Legislature and signed by the Governor so long as the amendments are consistent with and further the intent of this act. The Legislature may by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this act." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014), Text of Proposed Laws, p. 74.)

This bill does not amend Proposition 47's provisions because it creates a new crime for organized retail theft thereby leaving the penalties for petty theft intact. Because the bill does not affect Proposition 47, this bill does not require a 2/3 vote or have to go before the voters.

4. Threshold Value for Grand Theft was Raised to \$950 Prior to Proposition 47

The current threshold amount to constitute grand theft requires a taking or loss in excess of \$950 which was established through legislation in 2010. (AB 2373 (Ammiano) Chapter 693, Statutes of 2010.) Prior to that change in the law, the amount was \$400 or more which was established in the 1982-83 Legislative Session. (Chapter 375, Statutes of 1982.) The previous amount of \$200 was established in 1923; up to that time, the threshold amount was \$50. As pointed out by the committee analysis for AB 2372, "As measured by the change in the Consumer Price Index, goods or services with a value of \$400 today were worth only \$184 in 1983. Expressed another way, goods with a value of \$400 in 1983 are worth \$870 today. Thus, many crimes that qualify as grand theft today would not have been grand theft in 1983. Theft of property worth \$870 in 2010 dollars (for example, a leather coat) could not have been grand theft in 1983 when the current theft thresholds took effect." (Assem. Comm. on Public Safety, Analysis of Assem. Bill No. 2372 (2009-2010 Reg. Sess.) as amended Mar. 11, 2010, p. 2.)

Grand theft is punishable as a "wobbler," meaning that it may be punished as either a felony or misdemeanor. (Pen. Code, § 489, subd. (c).) Prior to Proposition 47, most theft offenses had to meet the \$950 threshold in order to be charged as a felony. This threshold did not apply to certain offenses such as receiving stolen property, fraud and forgery which were punishable as wobblers. Also, in cases of retail theft, prosecutors had the option of charging a person with second degree burglary, which was punishable as a wobbler without having to reach the \$950 threshold. However, the provisions of Proposition 47 specifically required that the crime of "shoplifting" be punished as a misdemeanor. "Shoplifting" was defined by the initiative as "entering a commercial establishment with intent to commit larceny while that establishment is

open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed \$950.” (Pen. Code, § 459.5; Proposition 47, approved by California voters on Nov. 4, 2014.)

5. Organized Retail Theft

This bill creates a new specific law prohibiting organized retail theft. Several other states have enacted this type of law such as New York, Massachusetts, and Washington.

According to a 2006 Senate Office of Research report,

A coordinated statewide effort also may have an impact on ORC [organized retail crime]. While efforts of individual police departments do not go unnoticed, the potential for ORC’s success falls exponentially when the network of participants is comprehensive; mere pockets of enforcement will not work effectively. Grocery and retail advocates are now organizing retail crime seminars to train local retailers and law enforcement on ORC methods and solutions. Early indications show the trainings are successful. In Rocklin, California, officers arrested a “booster crew” the day after police received ORC training. [Fn. deleted.] They were on the lookout for nontraditional shoplifting when they were alerted by local retail security that an ORC team might be on-site. Police detectives arrived and arrested four individuals, seizing stolen merchandise and the cell phones the boosters were using to coordinate their actions in the store.

....

Granted, law enforcement’s resources are limited, and ORC currently competes for attention with such high-profile crimes as rape, assault, burglary, and drug trafficking. However, part of the task at hand is to raise both the public’s and the legal system’s awareness that ORC is not just about mere shoplifting. This is a rapidly expanding organized crime that has the potential to spiral out of control if measures are not implemented to prevent it.

(California Senate Office of Research, *Organized Retail Crime: Shoplifting has Evolved into Big Time Business and the Crooks are Making Out Like Bandits* (May 2006), pp. 10-11.)

6. Proposed Initiative to Undo Recent Criminal Justice Reform Measures

A proposed initiative for the November 2018 ballot would make changes to recent laws enacted by Proposition 47 (approved by California voters on November 4, 2014) and 57 (approved by California voters November 8, 2016). This ballot initiative was introduced by a coalition of law enforcement and victims’ advocate groups.

Specifically, the ballot initiative would expand the list of crimes defined as a “violent felony” making persons convicted of those crimes ineligible for the earlier parole provisions of Proposition 57. Additionally, the initiative would create a new felony for any person who has committed theft for the third time for goods that are valued at more than \$250. Proposition 47 required shoplifting of goods valued at \$950 or less to be charged as a misdemeanor. The initiative would also reinstate DNA collection for offenders convicted of crimes that Proposition 47 reduced from felonies to misdemeanors.

According to the Secretary of State's website, proponents of the initiative need to submit 365,880 valid signatures by July 3, 2018, in order for this initiative to qualify for the November 2018 ballot. (See *California Violent Crime Definition, DNA Collection, and Parole Initiative*, Petition # 17-0044, <<http://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/initiatives-referenda-cleared-circulation/>> [as of Mar. 5, 2018].)

7. Arguments in Support

The California Retailers Association, the sponsor of this bill, writes:

Despite the long lasting unresolved problems in California related to sophisticated retail theft rings, often gang-related and involving multiple people, California has never had a penal code section making organized retail theft a crime. It is one of the few states in the country without such a statute. With organized retail crime activity becoming so aggressive, laws facilitating better collaboration between law enforcement and businesses are necessary to improve our justice system's responses to chronic theft. Law enforcement is under continuing budgetary constraints. Retailers are using as many internal resources to protect assets and employees; they work diligently to deter theft activity, detect losses, participate in diversion programs where feasible, install anti-theft devices, expand and augment surveillance and increase employee training. Still, there is a serious lack of deterrence that only the law can provide, which is why we support AB 1065.

-- END --