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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GREG S. HARRIS,

Defendant and Appellant.

A132001

(Napa County
Super. Ct. No. CR-154459)

Defendant Greg S. Harris contests the doubling of his sentence for transporting marijuana from two to four years because of a prior “strike” conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 2, 2011, as part of a plea bargain, defendant pleaded no contest to transporting marijuana under Health and Safety Code section 11360, subdivision (a). He also admitted two prior imprisonments qualifying as “one-year” sentence enhancements under Penal Code section 667.5¹ and admitted a prior “strike”—a 1995 conviction for burglary—that would double his sentence pursuant to section 667, subdivision (e). The plea agreement allowed defendant to seek dismissal of the section 667 “strike” and relief from its doubling effect, but left the decision to the trial court.

On April 7, 2011, defendant filed his “request to strike” under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Defendant explained he was only 18 years old when he committed the 1995 burglary. According to a recent interview

¹ All further statutory references are to the Penal Code unless otherwise indicated.

with the burglary victim, defendant was the victim's next-door neighbor, played with her sons, and was generally welcome in her home. She reported defendant had a troubled family situation and believed he would not have stolen anything but for an influential "friend" who was with defendant during the robbery. She has forgiven defendant and did not want the incident to be used as a strike. Defendant's request also asserted the 1995 burglary conviction was neither violent nor serious, and defendant already faced the potential of a lengthy six-year prison term even without the strike.

The court heard argument on defendant's request on April 15, 2011. It stated it had "read and considered the probation officer's report as well as the sentencing memorandum and *Romero* motion filed by the defense." Following brief statements from counsel—defense counsel emphasizing the nature of the burglary and the prosecution emphasizing defendant's subsequent criminal behavior—the court ruled from the bench. Although it thought defendant's age at the time of the "residential" burglary "certainly bears in favor of potentially striking the strike" it weighed this against defendant's subsequent criminal history, as reported in the probation report:

"I do see sort of an uninterrupted period of criminal behavior. You have probation violations . . . all the way through 2002 with looks [*sic*] like three different probation violations. [¶] You then have the 2003 prison commitment possession for sale in two matters out of Napa, Solano, followed by another prison commitment in 2004. And then we have a prison commitment in 2008 for the possession charge. [¶] So in looking at the factors that *Romero* requires the court to consider, the court declines to strike the strike and denies the motion under *Romero*."

Ultimately, the trial court sentenced defendant to two years for the marijuana charge and doubled that sentence to four years based on the strike. It stayed a further enhancement of defendant's sentence by two more years based on his two prior incarcerations.

Defendant filed a timely notice of appeal challenging his sentence.

DISCUSSION

"If a defendant has one prior felony conviction that has been pled and proved, the determinate term" of a defendant's sentence "shall be twice the term otherwise provided

as punishment for the current felony conviction.” (§ 667, subd. (e)(1).) A court, however, retains discretion to vacate a prior felony “strike” conviction to avoid rigid application of portions of the three strikes sentencing law, when justice requires. (§ 1385; see *Romero, supra*, 13 Cal.4th 497.) In exercising its discretion, the court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the . . . [three strikes law’s] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

If a court declines to vacate a strike, we review that decision under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In light of the “strong presumption that any sentence that conforms to” the three strikes law’s “sentencing norms is both rational and proper,” “a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation].” (*Id.* at p. 378.) Thus, “ ‘[i]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations. [Citation.] Where the record is silent [citation], or ‘[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance’ [citation].” (*Ibid.*; see also *id.* at p. 376 [trial court need not give reasons when declining to dismiss strike, because its sentencing under the three strikes law is presumptively proper].)

Defendant asserts the trial court abused its discretion by failing to consider: (1) the current offense is a drug offense tied to his history of drug usage and is not remotely related to the 1995 burglary offense; (2) defendant’s full “ background,

character, and prospects,' ” including his exposure to alcohol and drugs at a disturbingly young age; and (3) the complete nature of the 1995 burglary.

The record, however, shows the trial court duly exercised its discretion. The court was aware of its discretion and, having reviewed defendant’s motion and probation report, was appraised of the facts surrounding the 1995 burglary, defendant’s history, and the drug-related nature of the current crime. The trial court’s statement of reasons for not dismissing the strike did in fact weigh aspects of the 1995 burglary against defendant’s subsequent drug-related criminal history. Even if the statement might have recited additional considerations arguably favorable to defendant and included more detail, that does not demonstrate an abuse of discretion. “[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria” for sentencing, including criteria contained in reports the trial court reviewed. (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317-1318 [“the record reflects the trial court read Holguin’s statement of circumstances in mitigation”].) “We stress . . . the requirement that error must affirmatively appear on the record. On a silent record in a post-*Romero* case, the presumption that a trial court ordinarily is presumed to have correctly applied the law should be applicable.” (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434, cited by *People v. Carmony, supra*, 33 Cal.4th at p. 378.) We see no affirmative error here. Moreover, the trial court’s weighing of the *Romero* factors to deny dismissal of the strike was rational and within its discretion.

Defendant also claims the four-year sentence is disproportionate to his crime in violation of the Eighth Amendment to the federal Constitution and article I, section 17 of the California Constitution, and the trial court further abused its discretion by not considering the sentence in his current case when denying the request to strike. The record shows the trial court did consider defendant’s sentence in connection with the request to strike. The court noted, in the same narrative in which it denied the request, “in terms of the maximum penalty” it could impose given the “prison priors and the strikes I think you’re looking at more than double what the court is ultimately going to impose as a sentence today.” The court, exercising some degree of leniency, then

imposed the minimum two-year term instead of the maximum four-year term, resulting in a doubled term of four years instead of eight. (See Health & Saf. Code, § 11360, subd. (a) [punishment is “imprisonment . . . for a period of two, three or four years”].) The court also stayed the two “prison priors,” reducing defendant’s effective sentence by another two years.

To the extent defendant may be raising a constitutional claim apart from his motion to strike, defendant provides no legal authority or argument in support of it, and this alone is fatal to the claim. (*People v. Earp* (1999) 20 Cal.4th 826, 881.) Moreover, it appears defendant never raised the claim in the trial court, and has waived the right to raise it on appeal. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.) In any event, we conclude a four-year sentence did not violate defendant’s constitutional rights in this case. It strains credulity when defendant sought a three-year sentence in the trial court, and faced a six-year sentence even without the strike, for him to now claim a four-year sentence is unconstitutionally disproportionate.

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Marchiano, P. J.

Margulies, J.