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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.

THOMAS PATRICK SMART,

Defendant and Appellant.

A140739

(Sonoma County
Super. Ct. Nos. SCR636340,
SCR638624)

Thomas Patrick Smart appeals from a judgment following his no contest plea to petty theft with a prior conviction and forgery. He contends the trial court abused its discretion by denying his request pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to dismiss a prior strike conviction. We find no merit in his contention, and affirm.

I. BACKGROUND

A. Case No. SCR636340

On May 5, 2013, defendant entered a Wal-Mart, selected a box of Epson ink cartridges and a printer, and placed both in his shopping cart. As he walked down an aisle in the housewares department, he opened the ink cartridges box and concealed them in his waistband. Defendant walked to the cash register, paid for the printer, but failed to purchase the concealed ink cartridges.

A first amended felony complaint filed on October 15, 2013 charged defendant with petty theft with a prior conviction for theft. (Pen. Code,¹ § 666.) It was further alleged defendant suffered a prior strike conviction in 1993 for first degree burglary. (§ 1170.12.) Less than a month later, on November 1, 2013, defendant pled no contest to petty theft with a prior theft conviction and admitted the prior strike. The court indicated a sentence “top” of 32 months to run concurrent with case No. SCR638624.

B. Case No. SCR638624

On August 16, 2013, defendant was contacted by a police officer after exiting a vehicle. The officer searched the vehicle and on the back seat located a black plastic container with “ ‘washed \$1.00 bills.’ ” Defendant admitted the container belonged to him. Methamphetamine was located where defendant had been seated.

Defendant was charged in a first amended felony complaint with one count of forgery (§ 476) and one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The complaint also alleged defendant had suffered a prior strike conviction in 1993 for first degree burglary. (§ 459.) Defendant pled no contest to the forgery count, and admitted the prior strike conviction. The remaining count was dismissed. The court indicated a sentence “top” of 32 months to run concurrent with case No. SCR636340.

In both cases, defendant moved under *Romero* to strike the 1993 prior strike conviction for first degree burglary. The court denied the motion, explaining: “[F]rom your conviction in 1991,^[2] your conviction in 2004 and your conviction in 2006, all— your prior strike was struck on all three of those times. And based on that, I cannot strike your strike at this time.” The court, pursuant to the indicated sentence, imposed a concurrent sentence of 32 months in state prison.

Defendant filed a timely appeal.

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

² It appears the trial court misspoke when it referred to “conviction in 1991.” Defendant had a prior felony conviction for auto theft in 1999, in addition to the two other felony convictions in 2004 and 2006.

II. DISCUSSION

Defendant contends the trial court abused its discretion when it denied his *Romero* motion because it did not properly evaluate the application of the *Romero* criteria to the facts.

Section 1385, subdivision (a) permits a trial court to strike a prior felony conviction used to enhance a sentence under the “Three Strikes” law “in furtherance of justice.” (*Romero, supra*, 13 Cal.4th at pp. 529–530.) In considering a motion to dismiss a strike allegation, 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 scheme’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 (*Williams*)). “ ‘The striking of a prior serious felony conviction is not a routine matter. It is an extraordinary exercise of discretion, and is very much like setting aside a judgment of conviction after trial.’ ” (*People v. McGlothlin* (1998) 67 Cal.App.4th 468, 474; see *People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*) [circumstances must be extraordinary to deem defendant outside the spirit of the Three Strikes law].)

We review the trial court’s denial of a *Romero* motion for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 374.) “It is not enough to show that reasonable people might disagree about whether to strike one or more of [defendant’s] prior convictions.” (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony*, at p. 377.)

The trial court did not abuse its discretion here. Defendant amassed a substantial criminal history. Following his conviction for first degree burglary in the early 1990’s, defendant was convicted of three additional felonies: auto theft in 1999, possession of a controlled substance in 2004, and receiving stolen property in 2006. Additionally, he suffered numerous misdemeanor convictions over the period of 1988–2009. Prior to

defendant's convictions for petty theft with a prior conviction and forgery in 2013, defendant had accumulated 14 felony and misdemeanor convictions. Moreover, the court noted defendant's prior strike conviction was struck on three previous occasions. In short, defendant was repeatedly granted leniency, and repeatedly reoffended.

Defendant's contention the trial court ignored the pertinent factors required by *Williams*—the nature and circumstances of defendant's present offenses represent low-grade felonies, the 1993 first degree burglary conviction is remote in time, and the positive aspects of his background, character, and prospects (he married in 2010, has three children, and has a supportive spouse)—is unavailing. It is defendant's burden to demonstrate an abuse of discretion (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433–1434), and reviewing courts will not infer sentencing error if the record does not affirmatively show it. (*Carmony, supra*, 33 Cal.4th at pp. 376–378 [presumption that court ordinarily is presumed to have correctly applied the law applies to ruling on *Romero* motions].)

The record reflects the trial judge considered all relevant circumstances brought to her attention by the parties and the probation department. She had reviewed “everything again,” including defendant's felony presentence report and a letter submitted by defendant. The trial judge explained, “I was struggling whether or not I was gonna be able to follow that indicated sentence; but based on all that you've done and based on your letter, I am gonna be able to follow that indicated sentence.”³ In our view, the denial of defendant's *Romero* motion was not “an ‘arbitrary, capricious or patently absurd’ result” under the specific facts of this case. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.)

Defendant urges this court to follow *People v. Bishop* (1997) 56 Cal.App.4th 1245 (*Bishop*), asserting he deserves a lesser punishment. In *Bishop*, the trial court dismissed two of three strikes where all three crimes (robberies) were committed 17 to 20 years

³ According to the felony presentence report, defendant “has been proactive while incarcerated and has gained acceptance into TASC, thus showing he is willing and has an apparent plan in place to maintain sobriety following his release.”

before the defendant's current offense for petty theft. (*Id.* at p. 1248.) The Court of Appeal upheld the trial court's dismissal of the prior strikes finding it could not "say that the trial court's decision . . . constituted an abuse of discretion" because "the nature and timing of a defendant's crimes may also operate as mitigation, such as in this case where the present crime is a petty theft and the prior violent offenses are remote." (*Id.* at p. 1251.)

Defendant's reliance on *Bishop* is misplaced. *Bishop* is not only distinguishable from our case, "but it also predates *Williams* and thus was not informed by the relevant standard." (*People v. Strong* (2001) 87 Cal.App.4th 328, 342 (*Strong*)). First, *Bishop* is distinguishable because the defendant in *Bishop* had a shorter criminal record (three remote strikes, one battery, and four subsequent petty thefts) than our 14-time convicted defendant whose felony and misdemeanor convictions spanned over two decades, and the *Bishop* defendant's 12-year sentence precluded his release until he was 60 years old, whereas our 43-year-old defendant's substantially shorter 32-month sentence will conclude with his release at age 46. (*Strong*, at p. 342.)

Second, as emphasized in *Strong*, "since *Bishop* predates *Williams*, it did not apply those distinguishable facts to the applicable standard under *Williams* [citation]. Instead, the *Bishop* court merely suggested that the nature of the present crime (petty theft) and the remoteness of the defendant's prior violent offenses may operate to mitigate his Three Strikes sentence. It never addressed the overall question whether the defendant should be deemed to fall outside the scheme's spirit." (*Strong, supra*, 87 Cal.App.4th at p. 342.) While defendant here, like the defendant in *Bishop*, focuses on the remoteness of his 1993 strike conviction, the Three Strikes law provides: "The length of time between the prior serious and/or violent felony conviction and the current felony conviction shall not affect the imposition of sentence." (§ 667, subd. (c)(3).) This subdivision thus suggests "remoteness alone cannot take a defendant outside the spirit" of the Three Strikes law. (*Strong*, at p. 342.) Nor do we adopt defendant's argument the trial court abused its discretion because the offenses for which he was sentenced were nonviolent, wobbler offenses undeserving of application of the Three Strikes law.

Defendant's prior strike framed within his lengthy and continuous history over two decades of felony and misdemeanor convictions brings this case within the letter and spirit of the Three Strikes law.

III. DISPOSITION

The judgment is affirmed.

Margulies, J.

We concur:

Humes, P.J.

Dondero, J.