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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Appellant,

v.

BOBBIE BEAL,

Defendant and Respondent.

B232984

(Los Angeles County
Super. Ct. No. BA373655)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norm Shapiro, Judge. Affirmed in part; reversed in part with directions.

Steve Cooley, District Attorney, Brentford Ferreira and Beth Widmark, Deputy District Attorneys, for Plaintiff and Appellant.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

The People of the State of California (People) appeal from the judgment entered following defendant Bobbie Beal's conviction by jury of possession of hydrocodone with the intent to sell. (Health & Saf. Code, § 11351.) The People contend the trial court abused its discretion when it dismissed nine of defendant's prior serious felony convictions and sentenced him to eight years. We agree and order defendant's sentence to be changed to a term of 25-years-to-life. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

This case is before this court for the second time. Because this appeal involves the imposition of sentence, we set forth an abbreviated version of the facts.

On October 19, 2010, defendant was charged by an amended information with the sale of hydrocodone and possession of the same drug with the intent to sell. (Health & Saf. Code, §§ 11352, 11351.) The information also alleged that defendant had suffered 12 prior serious felony convictions within the meaning of the "Three Strikes" law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)¹ Trial on the charged crimes and the prior allegations was bifurcated.

On October 28, 2010, while the jury was deliberating with respect to the charged crimes, defendant waived his right to a jury trial on the prior allegations. On October 29, the jury found defendant guilty of possessing hydrocodone with the intent to sell, but was unable to reach a verdict on the sale charge. A mistrial was declared as to that count. Trial on the prior allegations and sentencing was continued.

On January 28, 2011, the court trial on the prior allegations was held. The People called a fingerprint expert who compared defendant's prints with prints in a section 969b prison packet for a Bobbie Beal and found they matched. The People presented no evidence with respect to two of the alleged priors, the 1979 and 1980 convictions for first degree burglary. The court took the matter under submission.

¹ All further undesignated statutory references are to the Penal Code.

On February 24, 2011, the court found defendant had suffered the following 10 serious felony convictions: (1) three for first degree burglary, one for forcible rape, and one for attempted forcible rape, all occurring in 1966; and (2) one each for robbery, forcible sodomy, forcible rape, forcible oral copulation, and first degree burglary, all occurring in 1985.

The court proceeded to sentence defendant. The People cited defendant's numerous convictions of violent felonies, the circumstances of the underlying crimes and the fact that he had spent virtually the entire time in custody since the age of 15, and sought a sentence of 25 years to life. Defendant, pointing to the circumstances of the current offense and his age (63), requested a determinate sentence.

The court made the following findings: (1) defendant's age justified a lesser sentence; (2) the current offense was minor and nonviolent; (3) defendant's prior convictions were the result of "two series of events where there was abhorrent behavior"; (4) defendant had been "out of prison for a couple years without any other criminal conduct until this very low-level offense"; and (5) the 1966 and 1985 convictions were remote in time. It dismissed nine of defendant's prior serious felony convictions and sentenced him to eight years (the high term of four years doubled as a result of defendant's remaining prior serious felony conviction).

Both defendant and the People filed timely appeals.

In his appeal, defendant claimed the trial court erred in finding his challenge pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 untimely. In a February 24, 2012 unpublished opinion, we agreed with defendant and remanded the matter for the trial court to consider whether the prosecutor exercised her peremptory challenges improperly. (*People v. Beal*, B231175 [nonpub. opn.].) On March 14, 2012, we took the People's appeal off calendar.

On June 4, 2012, the People advised this court that on May 24, 2012, the trial court conducted a hearing and concluded the prosecutor properly exercised her peremptory challenges. As instructed in the prior opinion, the court reinstated the judgment. On June 7, we granted the People's request to reset this matter on calendar.

DISCUSSION

The People contend the trial court abused its discretion by striking nine of defendant's 10 prior serious felony convictions that were pled and proven. They argue that his priors are numerous and the crimes he committed involved cruel and brutal conduct. Defendant counters by arguing that the trial court has broad discretion when deciding whether to strike prior convictions. He urges the court correctly relied on his age, the de minimus nature of the present offense, and the fact that his criminal activity was confined to two discrete periods of time in concluding that an eight-year sentence was sufficient punishment.

“A court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385[, subdivision] (a), and is subject to review for abuse. . . . [¶] ‘The trial court's power to dismiss an action under section 1385, while broad, is by no means absolute.’” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, quoting *People v. Orin* (1975) 13 Cal.3d 937, 945.)

“‘[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders.’ [Citation.] To achieve this end, ‘the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.”’ [Citation.]

“Consistent with the language of and the legislative intent behind the Three Strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. ‘[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own

motion, “in furtherance of justice” pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question 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.’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

We review the trial court’s decision with these principles in mind. We begin by analyzing the reasons it gave for dismissing nine of the 10 proven prior serious felony convictions.

The court noted defendant was 63 years old and concluded that an eight-year sentence was appropriate for a man his age. We will assume that defendant’s age is a factor in his favor, although we observe that he was 62 when he committed the present offense. We concur with the trial court’s determination that the present offense was not serious.

We move to whether defendant’s record was accumulated during two periods of abhorrent behavior in his life. The trial court’s finding in this regard is unsupported by the record. The court focused solely on the five felonies defendant was convicted of in 1966 and the five felonies he was convicted of in 1985. Perhaps it did so because those were the prior serious felony convictions proven by the People. Nonetheless, the court was required to examine defendant’s entire record, not merely those felony convictions that were pled and proven. (*People v. Carmony, supra*, 33 Cal.4th at p. 377 [court to consider a defendant’s “prior serious and/or violent felony conviction”].)

Defendant’s virtually nonstop criminal history as an adult began in 1966.² That year he was convicted of committing three separate first degree burglaries. During one

² We note that as a juvenile, defendant was sent to the California Youth Authority in 1963 for a robbery for which he had been on probation and three burglaries. Five months after he was paroled, he committed another burglary and was returned to the Youth

he committed forcible rape and during a second he attempted to rape the victim. He was paroled in the summer of 1977, as evidenced by his registration as a sex offender in July of that year. Less than a year later, defendant committed another first degree burglary for which he pled guilty in 1979 and received a prison commitment. He was paroled in April 1980. Less than three months later, he committed yet another first degree burglary. He was found guilty by a jury and sentenced to state prison for six years in December 1980. Defendant was on parole and out of prison for a matter of months when, in July 1984, he broke into a home. Inside, he raped and sodomized the victim and ordered her to orally copulate him. After stealing the victim's property, he bound and gagged her and made his escape. In 1985, defendant was convicted and sentenced to 46 years in prison. He was paroled in February 2008. Eighteen months later, he committed the present offense.

Defendant's record makes one point clear. His criminal history is not the result of two periods of abhorrent behavior in his life. It is an accumulation of the events of his entire life. In the past 46 years, he has been out of custody for less than three years. Unlike the trial court, we do not agree that defendant should be given credit for the fact that 18 months passed from the time he was paroled from his sentence on the burglary, robbery, and sex crimes convictions to the time he committed the present offense. If anything, the present crime demonstrates that despite years of incarceration, defendant is simply incapable of conforming to the laws of our society. For this same reason, defendant's 1966 and 1985 convictions are not remote in time. "Where, as here, the defendant has led a continuous life of crime after the prior [convictions], . . . there is simply nothing mitigating about a [45- or 26]-year-old prior. Phrased otherwise, the defendant has not [led] a 'legally blameless life' since the [1966] prior." (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813; see also *People v. Gaston* (1999) 74 Cal.App.4th 310, 321 [age of prior was "not significant in light of Gaston's continuous crime spree, which has substantially spanned his entire adult life"].)

Authority. After being paroled, he was out seven months before committing the crimes that led to his 1966 convictions.

In the final analysis, defendant's life of crime demonstrates that "he is the kind of revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Gaston, supra*, 74 Cal.App.4th 320.) On this record, a conclusion that defendant is outside the spirit of the Three Strikes law is unwarranted.

Despite the error, a remand for resentencing is unnecessary. Once defendant's prior serious felony convictions are reinstated, the only legal sentence that can be imposed is 25 years to life. Accordingly, we may correct the error without remanding for further proceedings in the presence of defendant. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 946 [Supreme Court refused to remand for new sentencing hearing in the interest of judicial economy where no "realistic possibility" of relief appeared to exist].)

DISPOSITION

The order dismissing defendant's nine prior serious felony convictions is reversed. Defendant's sentence is changed from eight years in the state prison to a term of 25 years to life. The clerk of the superior court is directed to prepare a corrected abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.