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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH EVAN BUSH,

Defendant and Appellant.

B236677

(Los Angeles County
Super. Ct. No. NA023385)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

This case comes before us a second time. In 1996, a jury convicted defendant Joseph Evan Bush on 13 counts of second degree robbery and found he had used a deadly weapon in the commission of all but three of the offenses. In a bifurcated proceeding, the trial court found defendant had suffered a prior serious felony conviction for federal bank robbery. (Pen. Code, §§ 667, subd. (a), 1170.12.)¹ Defendant was sentenced to an aggregate state prison term of 43 years. He appealed, and this court affirmed the judgment (*People v. Bush* (Apr. 14, 1997, B100672) [nonpub. opn.]). The California Supreme Court denied defendant's petition for review.

On September 27, 2010, defendant filed a petition for writ of habeas corpus in the trial court, challenging the sufficiency of the evidence to support the strike allegation. The trial court granted the petition on February 8, 2011, vacated defendant's sentence and ordered a retrial of the strike allegation.

Following the retrial on May 26, 2011, the trial court found defendant's federal bank robbery conviction qualified as a prior serious felony conviction under California law. In anticipation of resentencing, defendant filed a motion to dismiss the strike allegation in light of his post-conviction behavior while incarcerated in this case (§ 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497). On August 16, 2011, the trial court heard and denied the motion and re-imposed the aggregate state prison term of 43 years. Defendant appeals, contending the trial court abused its discretion in declining to dismiss his prior strike in the interest of justice. We affirm.

¹ All further statutory references are to the Penal Code.

DISCUSSION

It is well established that “in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, 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] 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.)

We review the trial court’s decision not to dismiss a prior strike allegation under section 1385 for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) “[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] . . . [¶] . . . ‘[I]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations. . . . Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Id.* at p. 378.)

Several factors emphasized by defense counsel and acknowledged by the trial court arguably supported defendant’s request to dismiss the prior strike allegation in the interest of justice, based on his post-conviction behavior: Notwithstanding his 10 year history of disciplinary actions for assaultive behavior, defendant had been misconduct-free during the most recent five years of incarceration in protective custody, having

provided information to authorities in 2005 to thwart attacks on correctional officers.² Defendant had earned an associate degree from a community college in 2008, mentored and tutored other inmates and began receiving mental health services and psychotropic drugs. According to defendant and his counsel, defendant intended to continue his rehabilitative efforts.

On the other hand, as the trial court found in declining to exercise its discretion to dismiss the strike allegation, defendant had engaged in a crime spree, committing 13 robberies while on federal parole. He had been armed with a deadly weapon at the time, albeit a pellet gun. The court also noted defendant had made similar assurances that he would engage in rehabilitation prior to being sentenced in federal court on his bank robbery conviction.

Defendant contends the trial court abused its discretion by failing to consider all relevant factors because it failed to address some particulars of his background, which placed him outside the primary purpose of the Three Strikes law. Specifically, defendant faults the court for failing to consider his age at the time of sentencing, 47 years, and the fact he faced a substantial term of incarceration even if the strike allegation were dismissed, making it unlikely defendant would reoffend upon his release from prison. Additionally, defendant maintains the trial court failed to consider his rehabilitative efforts (college degree, mentoring and tutoring other inmates) demonstrating he no longer posed a danger to society.

Defendant points to no requirement that the trial court specifically address every factor he raises in his request to dismiss his prior strike conviction. At the sentencing hearing, the court entertained argument from the prosecutor and defense counsel, both of whom addressed the probability of defendant's recidivism in light of his age and

² The trial court held an in camera hearing with a representative from the California Department of Rehabilitation and Corrections to review confidential documents relating to this claim by defendant. After reviewing the sealed transcript of the hearing, we find it is of no assistance to defendant.

rehabilitative efforts. Defendant brought these factors to the court’s attention, and we presume the court considered them in the absence of an affirmative record to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310; cf. *People v. Carmony*, *supra*, 33 Cal.4th. at p. 378 [“the law creates a strong presumption that any sentence that conforms to [the Three Strikes law’s] sentencing norms is both rational and proper”]) Since the trial court considered the relevant factors, and there was a basis for the court’s decision not to dismiss defendant’s prior conviction, we find no abuse of discretion in that decision. (See *Carmony*, *supra*, at pp. 374-375.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.