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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH MILLER,

Defendant and Appellant.

B261220

(Los Angeles County  
Super. Ct. No. VA126762)

Appeal from an order of the Superior Court of the County of Los Angeles,  
Thomas I. McKnew, Jr., Judge. Affirmed and remanded with instructions.

Katharine Eileen Greenbaum, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle,  
Supervising Deputy Attorney General, Michael C. Keller, Deputy Attorney General, for  
Plaintiff and Respondent.

Defendant and appellant Joseph Miller appeals from the trial court's posttrial order denying his motion to dismiss his prior strike convictions pursuant to Penal Code section 1385<sup>1</sup> and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). According to defendant, the trial court either failed to exercise informed discretion, or abused its discretion, when it denied his *Romero* motion. In the alternative, defendant contends he received ineffective assistance of counsel in connection with his *Romero* motion. Defendant also contends that he was entitled to 94 days of conduct credit, instead of the 93 days awarded by the trial court, whereas the Attorney General argues that defendant was entitled to 92 days of conduct credit.

We hold that the trial court properly denied the *Romero* motion and that defendant did not receive ineffective assistance of counsel. We also agree with the Attorney General that defendant is entitled to 92 days of conduct credit.

## **FACTUAL BACKGROUND**

On September 8, 2012, at approximately 10:00 a.m., Henry Derussell was the customer service manager on duty at the Wells Fargo Bank on Pioneer Street when a teller asked for assistance. The teller appeared "stricken with fear or something." Derussell approached the teller's window, pushed the silent alarm button, and read a note that defendant had passed to the teller through the "bandit barrier."<sup>2</sup> The note stated, "This is a robbery. There are two sticks of C-4 explosive on the roof and the sticks of dynamite outside the building." Derussell initially told defendant "no," but when defendant gestured toward something in his front pocket as if he had a gun, Derussell gave him cash from the teller's drawer. Defendant left the bank, after which the police arrived and took Derussell's statement. In addition to identifying defendant at trial,

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

<sup>2</sup> The bandit barrier was a transparent partition wall that separated the tellers from the customers.

Derussell identified defendant's photo from a photographic line-up and later identified him on bank security videotape.

On September 13, 2012, Victor Sanchez was working at a teller station behind a bullet proof glass barrier in the Van Nuys branch of Chase Bank when defendant approached the station and passed Sanchez a note that read, "There [are] three bombs in the building. Give me 20, 50, hundred bills. The building will explode in ten minutes." Sanchez gave defendant \$6,700 from the cash drawer, which defendant put in his pocket. Sanchez informed the branch manager of the robbery after which the police arrived to take his statement. In addition to identifying defendant at trial, Sanchez identified defendant on bank security video tape.

On September 24, 2012, Patricia Bandera was working behind a glass teller window at the Chase Bank on Pioneer Street in Artesia when defendant approached her window and passed her a note. Because Bandera could not read the note,<sup>3</sup> she summoned the assistant manager who expressed shock as she read the note. Bandera became "nervous and shocked" as she realized she was being robbed. When defendant told her to "hurry," Bandera gave him all the cash in her drawer, and he said "Have a nice day" as he left. The police arrived and took Bandera's statement and, at trial, she identified defendant in court and in bank security camera photos taken during the robbery.

Los Angeles County Sheriff's Detective Kevin Forcier investigated the three robberies. When defendant called the Long Beach Police Department and turned himself in, Forcier and his partner responded to that location where they contacted defendant who told them that he "would tell [them] everything." The detectives transported defendant to the Lakewood Sheriff's Station for booking where, after waiving his *Miranda*<sup>4</sup> rights, defendant told the detectives the details of the robberies. After admitting to the robberies, defendant told the detectives that he had spent all the cash he had taken. Defendant, who

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<sup>3</sup> The only part of the note that Bandera could read stated, "Bomb won't go off if . . . ."

<sup>4</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

appeared relieved, admitted that he knew the difference between right and wrong and that he knew he had frightened the bank employees involved in the robberies.<sup>5</sup>

## **PROCEDURAL BACKGROUND**

In an amended information, the Los Angeles County District Attorney charged defendant with five counts of first-degree robbery in violation of section 211. The District Attorney alleged as to all counts that defendant had two prior serious or violent felony convictions within the meaning of section 667, subdivision (a)(1). The District Attorney further alleged as to all counts that defendant had two prior strike convictions within the meaning of the “Three Strikes” law, sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). The District Attorney also alleged as to all counts that defendant had eight prior felony convictions for which prison terms had been served.

Defendant pleaded not guilty by reason of insanity. Following a bifurcated trial, the jury found defendant guilty on the five robbery counts and that he was legally sane at the time he committed the crimes. Defendant admitted the prior conviction allegations. The trial court sentenced defendant to an aggregate term of 105 years to life. Defendant was awarded 617 days of actual custody credit and 93 days of conduct credit.

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<sup>5</sup> Defendant testified in the sanity phase of the trial that he took medication for schizophrenia and depression and that he suffered from Parkinson’s Disease. The court-appointed psychiatrist also testified that defendant had been consistently diagnosed as suffering from a “schizoaffective disorder, depressed type.”

## DISCUSSION

### A. Denial of *Romero* Motion

#### 1. Background

The probation report upon which the trial court relied in sentencing defendant showed that he had a long adult criminal history that began in 1986 at age 18.<sup>6</sup> That history was comprised of 14 criminal cases, including convictions for attempted robbery, burglary, and, in the present case, first-degree robbery. Defendant served time in prison and jail and repeatedly failed to comply with the terms of parole and probation. The report listed five factors in aggravation, but only one in mitigation—“Defendant voluntarily acknowledged wrongdoing before arrest or at an early stage in the criminal process.”

Prior to sentencing, defendant’s counsel made an oral motion to dismiss his two prior strike convictions as follows: “[Defense Counsel]: Yes, your Honor. I would ask that the court not sentence [defendant] in accordance with his prior serious felonies. I would ask that the court sentence him pursuant to this being a first strike. I understand he does have priors, but [defendant] is not—he has Parkinson’s. He’s got mental health issues. He’s 47 now. [¶] [Defendant]: Six. [¶] [Defense Counsel]: 46-years old. You know, it just seems redundant and maybe even cruel and unusual to punish him by sentencing him to something over a hundred years. I believe that a lot of the factors that have contributed to his exposure being so high are because of his prior serious violent felonies. So I would ask that the court strike his priors and sentence [defendant] in accordance with the statutory sentencing structure based on this being a first strike. [¶] The Court: All right. The so-called *Romero*-- [¶] [Defense Counsel]: Yes. I make a *Romero* motion.”

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<sup>6</sup> Defendant was 46 years old at the time of trial.

The trial court denied the motion, reasoning as follows: “The court has reviewed the preconviction report prepared by the Probation Department, and I see all of the convictions that the defendant has sustained. But there are two, two prior convictions that qualify for the imposition of the Three Strikes law. Of course, the court has to follow the law in determining which sentencing structure would be appropriate in accordance with the Penal Code section 667, subdivision (e). [¶] . . . [¶] Given the history of the defendant, I see no reason why the court in this instance should exercise any- - I have several wor[d]s I can use. I’m trying to find the most sympathetic terms. I believe that his record and priors indicate that this [Three Strikes sentence] is an appropriate sentence on count 1.” The trial court concluded that two prior strike convictions “shall not be subject to dismissal pursuant to section 1385 of the Penal Code.”

## 2. *Legal Principles*

Defendant moved to dismiss his prior strike convictions pursuant to section 1385<sup>7</sup> as permitted by *Romero, supra*, 13 Cal.4th 497. In *People v. Vargas* (2014) 59 Cal. 4th 635, our Supreme Court explained the relationship between the Three Strikes law—sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d)—and section 1385 and reiterated the factors a trial court must consider in ruling on a motion to dismiss a prior strike conviction under section 1385. “Given the intent of both the Legislature and the drafters of the initiative version of the Three Strikes law to punish repeat criminal offenders severely, to drastically curtail a sentencing court’s ability to reduce the severity of a sentence by eliminating alternatives to prison incarceration, and to limit an offender’s ability to reduce his or her sentence by earning credits, a question arose soon after enactment of the parallel Three Strikes schemes whether a trial court retained its traditional authority under section 1385 to dismiss an enhancement ‘in

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<sup>7</sup> In pertinent part, section 1385 provides: “(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.”

furtherance of justice.’ We settled the issue in *Romero*[, *supra*,] 13 Cal.4th [at pp.] 529-530, where we concluded ‘that section 1385[, subdivision ] (a) does permit a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law.’ Accordingly, the trial court below had the power under the law to grant defendant’s motion and dismiss one of her two strike convictions. [¶] In order to guide the lower courts when ruling on such motions to dismiss, *People v. Williams* (1998) 17 Cal.4th 148, 161 [69 Cal.Rptr.2d 917, 948 P.2d 429], explained that when facing a motion to dismiss a strike allegation, the trial court ‘must consider whether, in light of *the nature and circumstances* of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of [the defendant’s] 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.’ (Italics added.) We quoted this language with approval in *People v. Carmony* (2004) 33 Cal.4th 367, 377 [14 Cal.Rptr.3d 880, 92 P.3d 369], and further explained that ‘[b]ecause 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.)” (*People v. Vargas, supra*, 59 Cal.4th at p. 641, fns. omitted.)

A trial court’s ruling denying a motion to dismiss a prior strike conviction is reviewed for abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 376 [“a trial court’s failure to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 should be reviewed for abuse of discretion”].) “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its

discretionary determination to impose a particular sentence will not be set aside on review.” [Citations.] Second, a ““decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citations.].) Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.)

### 3. *Analysis*

Defendant contends, in ruling on his *Romero* motion, the trial court did not have a clear understanding of the facts surrounding his prior criminal record and therefore could not have exercised informed discretion. According to defendant, his prior offenses were not as serious as they appeared, he never used a weapon in the commission of any of those offenses or hurt anyone, he did not use significant violence in the commission of those offenses, he cooperated by turning himself in, and he had Parkinson’s Disease and serious mental issues. As defendant reads the record, because the trial court did not fully understand or consider these facts, it failed to exercise informed discretion when it denied his *Romero* motion. In the alternative, defendant argues that to the extent the trial court understood and considered these facts, it abused its discretion by denying the *Romero* motion.

There is nothing in the record to suggest that the trial court did not understand or consider the details of defendant’s past criminal history, his cooperation with the police, and his physical and mental conditions. To the contrary, the trial court indicated that it had read the probation report detailing defendant’s long criminal past and the court was aware from the trial evidence that defendant turned himself in to the police and that he suffered from Parkinson’s Disease and serious mental issues. Thus, contrary to defendant’s assertion, the trial court exercised informed discretion when ruling on the *Romero* motion.

Moreover, the nature and circumstances of defendant's current and prior offenses and the particulars of his background, character, and prospects demonstrate that the trial court did not abuse its discretion in ruling on the *Romero* motion. The current offenses—three bank robberies involving five victims in less than one month—were serious and included threats to use explosives to blow up the three banks and a threat to pull a gun. Moreover, defendant's past criminal history—which spanned nearly three decades—was not only lengthy, it involved a variety of serious crimes including attempted robbery and two burglaries. And, defendant's consistent failure to comply with the terms of his parole and probation reflected poorly on his background, character, and prospects. The trial court was therefore well within its discretion in finding that defendant was not outside the spirit of the Three Strikes law.

## **B. Ineffective Assistance of Counsel**

### *1. Legal Principles*

“In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [233 Cal.Rptr. 404, 729 P.2d 839].) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington, supra*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253 [124 Cal.Rptr.2d 473, 52 P.3d 656].) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and

failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [62 Cal.Rptr.2d 437, 933 P.2d 1134].) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. (*Id.* at pp. 266-267.)” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

## 2. Analysis

Defendant contends his counsel’s performance in connection with the *Romero* motion was deficient because counsel did not mention the mitigating factors discussed above concerning defendant’s “failure to exercise informed discretion” argument. But, as we have explained, the record reflects that the trial court understood and considered those factors in ruling on the *Romero* motion. Therefore, defense counsel’s failure to repeat or emphasize those factors during oral argument cannot be considered either deficient or prejudicial.

### C. Presentence Custody Credits

As noted, the trial court awarded defendant 617 days of actual custody credit and 93 days of conduct credit. Defendant contends that he was entitled to 94 days of conduct credit without specifying how he arrived at that number. The Attorney General disagrees and argues that defendant was only entitled to 92 days of conduct credit because, under section 2933.1, he was subject to a 15 percent limitation on the conduct credit to which he was entitled, citing *People v. Chism* (2014) 58 Cal.4th 1266, 1337. According to the Attorney General, 15 percent of the 617 days of actual custody credit is 92.55 and, when applying the 15 percent limit, the amount of conduct credit must be rounded down so as to not exceed 15 percent, citing *People v. Ramos* (1996) 50 Cal.App.4th 810, 815 to 816.

We agree with the Attorney General’s reasoning and calculations, and conclude that defendant was only entitled to 92 days of conduct credit. The abstract of judgment must therefore be modified accordingly.

## **DISPOSITION**

The order denying defendant's motion to dismiss his prior strike convictions is affirmed. On remand, the trial court is instructed to modify the abstract of judgment to reflect that defendant was awarded 92 days of conduct credit, and deliver a copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation.

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KUMAR, J.\*

We concur:

TURNER, P. J.

KRIEGLER, J.

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\* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.