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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Appellant,

v.

MICHAEL ALAN KHATOONIAN,

Defendant and Respondent.

C067221

(Super. Ct. No.
CRF 02-823)

Defendant Michael Alan Khatoonian got into a heated exchange with another driver and followed the man to his residence. Defendant returned to the residence later the same night and started a fire in front of the garage, damaging the home. A friend of defendant admitted she was with him when he started the fire with a plastic container of gasoline and a rag. The other driver and his family were upstairs asleep when defendant set the fire. A man riding a bicycle by the house noticed the fire, pounded on the door, and told the family their house was burning. Defendant later admitted to police that he committed the offense.

Defendant pleaded no contest to arson of an inhabited structure (Pen. Code, § 451, subd. (b); further statutory references are to this code) and admitted an enhancement for use of an accelerant or delayed ignition device (§ 451.1, subd. (a)(5)). Defendant also admitted a prior conviction of felony battery with serious bodily injury (§ 243, subd. (a)) but reserved the right to challenge whether it constituted a serious felony conviction for the purposes of the "Three Strikes" law.

The trial court subsequently found the prior conviction was not a serious felony and granted defendant's motion to dismiss the strike allegation. The trial court sentenced defendant to a six-year prison term, consisting of a lower term of three years for arson and a consecutive three-year term for the enhancement, plus a concurrent two-year term for violating probation in another case.

The People appealed the trial court's dismissal of the strike. We reversed the trial court's order on the prior conviction and remanded for resentencing. On remand, the trial court imposed a six-year term, consisting of a lower term of three years for arson, doubled to six years due to the strike. The court struck the three-year sentence for the enhancement pursuant to section 1385 and imposed a concurrent two-year term for the probation violation.

The People appeal, contending it was an abuse of discretion to dismiss the enhancement for use of an accelerant. We affirm.

BACKGROUND

Defendant presented testimony from his psychiatrist, Dr. Albert Globus, at the initial sentencing hearing. Dr. Globus was hired by defendant's family in 2002, when defendant exhibited psychiatric symptoms while incarcerated in county jail, including four suicide attempts. According to Dr. Globus, both defendant's criminal behavior and his suicidal actions at county jail were due to his bipolar disorder. Because defendant switched rapidly from depressive to manic cycles, his illness required constant monitoring and adjustment of his medication. Without such constant treatment, he would be at high risk of suicide. In Dr. Globus's opinion, defendant could not receive adequate mental health treatment in prison because prison officials could not monitor him with sufficient frequency, nor dispense the necessary medications.

At the sentencing hearing, the trial court found that defendant's mental illness was a significant mitigating factor and imposed the lower term for arson. Finding no justification for striking the enhancement, the court imposed a consecutive three-year term, for a total term of six years.

On remand, defendant submitted records from his prison file showing he had no write-ups or gang involvement, and that his classification score dropped from an original 31 points to 19 points, the best possible score based on his offense. Defendant had been placed under prison psychiatric care, where he was given psychoactive medications for nine months before being

weaned off of them. He was drug and symptom free at the time of resentencing.

Defendant asked the trial court to strike the enhancement based on his good behavior in prison. The People argued that defendant's claim of mental illness at the initial sentencing hearing was overblown and there was no reason to strike the enhancement.

The trial court found defendant's behavior while in prison justified striking the enhancement pursuant to section 1385. The court struck the enhancement and imposed a six-year prison term.

DISCUSSION

The People contend it was an abuse of discretion for the trial court to strike the enhancement. We disagree.

"It is well established that, as a general matter, a court has discretion under section 1385, subdivision (c), to dismiss or strike an enhancement, or to 'strike the additional punishment for that enhancement in the furtherance of justice.'" (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155, fn. omitted.)

"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 the 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* (2004) 33 Cal.4th 367, 376-377.)

The People argue that the trial court abused its discretion by failing to consider the underlying public policy of section 451.1. They note that section 451.1 was enacted as part of urgency legislation to address an increase in arson through establishing meaningful deterrents. (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585-586.) The People assert that in light of the calculated nature of the arson, the danger it posed to the victims, and defendant having bragged about the offense soon after he committed it, his good behavior in prison cannot justify striking the section 451.1 enhancement.

The People further argue that the rapid recovery of defendant’s mental health in prison shows Dr. Globus either misdiagnosed defendant or deliberately misled the trial court. Since none of the other aggravating and mitigating factors have changed since the original sentencing, the People conclude that striking the enhancement was an abuse of discretion.

“[I]t is well settled that when a case is remanded for resentencing after an appeal, the defendant is entitled to ‘all the normal rights and procedures available at his original

sentencing' [citations], including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed [citation]." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 460.) A defendant's behavior in prison can be used to reduce his term on resentencing. (*People v. Foley* (1985) 170 Cal.App.3d 1039, 1049.)

The People ask us to do something we cannot do, reverse a trial court's exercise of its sentencing discretion out of simple disagreement with the result. Defendant's behavior in prison was exemplary, and this is a proper reason for dismissing an enhancement in the interests of justice. While the use of an accelerant enhancement advances an important legislative policy, it is nonetheless subject to a trial court's discretion to strike pursuant to section 1385. (*People v. Wilson* (2002) 95 Cal.App.4th 198, 200.) Since the trial court was authorized to strike the prison term for the enhancement, and relied on a legitimate reason to do so, its decision was not so irrational or arbitrary as to constitute an abuse of discretion.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.