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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

LEIGHTON JAMES DUPREE,

Defendant and Appellant.

C067726

(Super. Ct.
No. CR100186)

Defendant Leighton James Dupree was found guilty by a jury of second degree burglary. (Pen. Code, § 459.)¹ The jury was unable to reach a verdict on a charge of second degree robbery. (§ 212.5, subd. (c).) In a bifurcated proceeding, the jury found true three prior strike convictions (§ 667, subds. (b)-(i)), one of which the People later conceded did not constitute a strike. Additionally, defendant admitted having served two prior prison terms. (§ 667.5, subd. (b).) Defendant was

¹ Undesignated statutory references are to the Penal Code.

sentenced to state prison for an indeterminate term of 25 years to life plus a determinate term of two years.

Defendant appeals, contending the trial court abused its discretion by denying his request to dismiss his prior strike convictions. Finding no abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 12, 2010, defendant, who was 62 years old, entered a bank and asked a teller to see the manager. When the teller asked him why he wanted to speak to the manager, defendant replied, "[B]elieve it or not, this is a robbery." Defendant followed the teller as she went to notify the branch services manager, who went to get the branch manager. Defendant then followed the teller back to her window. Approximately 30 seconds later, the bank manager approached and asked defendant what she could do for him. Defendant told her "this is a robbery" and "give me your money." The bank manager removed \$373 from the teller's cash drawer and gave it to defendant. Defendant put the money in his jacket pocket and walked out of the bank. He waited for the signal light to change, then crossed the street in the crosswalk, and proceeded down the sidewalk at a normal pace. He was apprehended as he walked down the street.

Once handcuffed, defendant stated, "[A]ll I did was rob a bank." During a police interview later that day, he explained that he had lost his job the day before and needed money, and that he decided to rob the bank before entering. Defendant

stated he had been "drinking since Christmas" and that he drank some beer that morning. However, the police detective who conducted the interview testified that defendant did not have any difficulty recalling events or communicating during the interview and did not appear to be under the influence of alcohol. Bank personnel also testified that defendant did not appear to be intoxicated during the robbery. Based on a blood test several hours after the offense, it was estimated that defendant's blood-alcohol content could have been between 0.16 and 0.19 percent at the time of the offense.

At trial, defendant testified he was first diagnosed as an alcoholic in 1970 and that he lost his job shortly before the incident at the bank because he was drinking and did not show up for work. He described himself as a binge drinker and stated that, before his arrest, he had been on a binge since a couple of days before Christmas. Defendant testified he drank beer on the morning of his arrest, as well as the night before. He maintained he recalled going out and making various stops that day, and that the next thing he remembered was sitting on the sidewalk with a police officer standing behind him. He stated he did not remember entering the bank or committing the robbery. Defendant testified he had experienced blackouts before from drinking, and he believed he had suffered a blackout on this occasion.

A forensic psychiatrist who met with defendant and had reviewed his criminal and medical records testified that

defendant's history suggested he had some tolerance to alcohol and his conduct after the robbery was consistent with impaired judgment.

Defendant had a 1987 strike conviction in Washington for first degree burglary and assault with great bodily injury, stemming from an incident in which he choked and beat his common law wife's 69-year-old father to obtain money from him and his wife. In 1996, defendant was convicted of robbery -- another strike -- in which, according to the People, he robbed a bank, then led the police on a high speed car chase during which he hit another vehicle. Defendant was sentenced to 12 years in state prison for this offense. Defendant also had convictions in 1965 for second degree burglary, in 1973 for robbery,² in 1981 for vehicle theft, in 1984 for assault and possession of a weapon, in 1993 for theft, and in 2007 for battery. In addition, defendant had a driving-under-the-influence arrest in 2009 that had yet to be resolved.

DISCUSSION

Defendant contends the trial court abused its discretion when it declined to dismiss at least one of his prior strike convictions because it did not consider all relevant factors

² This conviction initially was charged as a strike, but it was dismissed because the People conceded the elements of the offense in Washington at the time defendant committed the offense did not correspond precisely to the elements for robbery in California.

when making its ruling. As there is no evidence in the record to support this claim, we reject it.

“‘[T]he 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.”’”
(*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

“[I]n 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 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.”
(*People v. Williams* (1998) 17 Cal.4th 148, 161.)

“[P]reponderant weight must be accorded to factors intrinsic to the scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions, and the particulars of his background,

character, and prospects.” (*Ibid.*) The circumstances under which a defendant with strike priors may be found to fall outside the spirit of the three strikes law must be extraordinary. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 905.)

The trial court’s determination of whether to dismiss a strike is subject to review for abuse of discretion. (*People v. Williams, supra*, 17 Cal.4th at p. 162.) “[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation].” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.)

It is defendant’s burden to show that the trial court abused its discretion by failing to strike a prior conviction. (*People v. Carmony, supra*, 33 Cal.4th at pp. 374, 376-377.) “[A]n appellant who seeks reversal must demonstrate that the trial court’s decision was irrational or arbitrary.” (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

In the present matter, defendant’s attorney filed a request pursuant to section 1385 and *People v. Romero* (1996) 13 Cal.4th 497 (*Romero*), asking the trial court to strike defendant’s prior strike convictions. In support of the request, the attorney argued that defendant “was at the tail end of a serious alcohol binge” when he committed the current offense, the amount of

money stolen was small and was possessed only briefly, and he did not use force or threats during the crime. The attorney noted that defendant had been employed from 2006 until just before the offense, that he showed remorse and took responsibility for the actions leading to the crime, and that if he had not had an alcohol problem, the offense "likely would not have occurred." The attorney also pointed out that defendant's most recent strike conviction occurred 15 years earlier and did not involve "weapons or egregious force." Finally, defendant's attorney argued that, due to defendant's age, he would be "an elderly man" by the time of his release if any prison sentence was imposed, and that the facts of the current offense did not suggest he was a danger.

The trial court denied defendant's motion, ruling that dismissal of his prior strike convictions would not be in the interest of justice. The court explained: "Looking at [defendant's] past conduct, including the nature and circumstances of his prior strikes, and his conduct in this case, including the nature and circumstances of this offense, looking at his background, his character, and his prospects, I cannot find that he should be deemed to be outside the spirit of the three strikes law."

The trial court's denial of defendant's request to dismiss his prior strike convictions was neither irrational nor arbitrary. Defendant's history of criminal activity spans nearly 45 years and includes at least seven prior felony

convictions and numerous parole violations. Defendant's lengthy and serious criminal record and his chronic alcoholism support the trial court's exercise of discretion, as does the serious nature of his current offense. The trial court acted well within its discretion in finding defendant did not fall outside the spirit of the three strikes law.

Defendant claims the trial court abused its discretion by not taking into account various factors related to his background and current offense. To the contrary, all of the factors cited by defendant in support of this claim -- his age, his alcoholism, his employment history, the lack of violence in the current offense, the "remoteness" of the prior strike convictions, and the availability of alternatives to a third strike sentence -- were addressed in his written request to dismiss his strike convictions or in his attorney's comments at his sentencing hearing. At the hearing, the trial court stated it had read and considered the probation report, defendant's request to dismiss his prior strikes and the opposition thereto, the forensic psychiatrist's report, and a letter from defendant. The trial court also stated it had taken into consideration the nature and circumstances of the current offense and defendant's past conduct, as well as his background, character and prospects. Nothing in the record casts doubt on the trial court's statement that it considered all of this information when making its ruling. Nor is there any suggestion in the record that the trial court was unaware of its discretion or

that it relied on improper factors. "The trial court is not required to state reasons for declining to exercise its discretion under section 1385 [citation]." (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 433.) "The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers, supra*, 69 Cal.App.4th at p. 310, citing *People v. Kelley* (1997) 52 Cal.App.4th 568, 582.) "[E]rror must affirmatively appear on the record. On a silent record in a post-Romero case, the presumption that a trial court ordinarily is presumed to have correctly applied the law should be applicable." (*People v. Gillispie, supra*, at p. 434, cited with approval in *People v. Carmony, supra*, 33 Cal.4th at p. 378.)

Defendant points to an array of facts that he maintains militated in favor of dismissing one or both of his strikes. But, on appeal, the issue is not whether these factors might possibly have supported a ruling contrary to the one issued by the trial court. Rather, we review the record to determine whether the ruling the trial court made was an abuse of discretion. "[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.'"" (*People v. Carmony, supra*, 33 Cal.4th at p. 377.)

In sum, this is not "an extraordinary case -- where the relevant factors . . . manifestly support the striking of a

prior conviction and no reasonable minds could differ." (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) Accordingly, we conclude the trial court did not abuse its discretion in denying defendant's request to dismiss his prior strike convictions.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.