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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

EARL MACK,

Defendant and Appellant.

C067897

(Super. Ct. No.
10F03264)

Defendant appeals from the sentence imposed following his plea of no contest to possession of marijuana in prison and admissions of a prior strike conviction and having served two prior prison terms. Defendant contends the trial court abused its discretion in denying his *Romero*¹ motion. We affirm.

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

FACTUAL AND PROCEDURAL BACKGROUND

On February 17, 2010, while in custody at Folsom State Prison, defendant was found in possession of 1.2 grams of marijuana, which had been secreted between his buttocks.

Defendant was charged with possession of marijuana while in prison (Pen. Code, § 4573.6).² It was further alleged defendant had suffered a prior strike conviction (§§ 1170.12, 667, subds. (b) through (i)) and served two prior prison terms. (§ 667.5, subd. (b).) Defendant pled no contest to the possession charge and admitted the prior strike allegation and the prior prison term allegations.

Defendant filed a *Romero* motion, requesting the court dismiss the prior strike conviction in the interests of justice. To support his motion, defendant offered information on his background. When defendant was a teenager, he was in a serious bicycle accident. As a result, he was in a coma for nine to ten days and had to relearn his cognitive skills. Defendant also became addicted to street narcotics and alcohol at a young age. He graduated from high school in 1996 and had been continuously employed as an adult, most recently as a warehouseman.

As to the facts and circumstances of the current offense, defendant argued the conduct in this case was minimal. He was working as part of a minimum security landscaping detail. As he was leaving a portable toilet, he was stopped and found in

² Further undesignated statutory references are to the Penal Code.

possession of "a very small amount of marijuana." Under other circumstances, possession of this amount of marijuana would be a misdemeanor with a small fine. Defendant was compliant and cooperative with officers throughout the incident.

Defendant's criminal history began in 1993, as a juvenile. He had adjudications in 1993 for attempted grand theft (§§ 664/487), in 1995 for vehicle theft (Veh. Code, § 10851) and in 1996 for attempted robbery. (§§ 664/211.) As an adult, in May 2001, defendant was convicted of vehicle theft (Veh. Code, § 10851) and granted three years formal probation conditioned on serving 16 months in state prison. Defendant was released on parole in December 2002. He was returned to custody on 11 occasions, for two new convictions and nine parole violations. In May 2004, defendant was convicted of burglary (§ 459) and sentenced to 28 months in state prison. In November 2006, defendant was convicted of robbery. (§ 211.) Defendant and a female accomplice went in to a grocery store together and stole expensive bottles of alcohol. Loss prevention officers were waiting for them outside the store. When defendant realized the loss prevention officers were there, he yelled "Run, baby" and tried to stab two of the officers with a screwdriver. Defendant was arrested after he fled the scene.

In addition to his felony offenses, between 1997 and 2006, defendant had seven misdemeanor convictions, five for theft (§ 484), one for evading a police officer (Veh. Code, § 2800.1) and one for disorderly conduct. (§ 647, subd. (f).) As a result of

convictions and parole violations, defendant was in custody for some period of time almost every year between 1997 and 2010.

On the circumstances surrounding his strike conviction, defendant explained he committed the robbery the same year his mother died and he was suffering from a deep depression. He and his female accomplice were drinking and using drugs, when she decided to steal some alcohol from a store. She filled her backpack and left the store with the alcohol. The loss prevention officers threw her to the ground and defendant came forward to defend her. Defendant acknowledged wrongdoing at an early stage of the proceedings, was cooperative with law enforcement and admitted his addiction problems.

Defendant acknowledged he had a significant heroin addiction and most of his convictions were to support that addiction. In December 2010, while these charges were pending, defendant was drug tested and the results revealed defendant had marijuana and methamphetamine in his system.

In considering the *Romero* motion, the court specifically relied on the standards enunciated in *People v. Williams* (1998) 17 Cal.4th 148, 161 and recognized the ultimate determination was whether defendant came within the spirit of the three strikes law. The court noted defendant was not just on parole when he committed the current offense, but actually in prison for the same strike which he was seeking to have dismissed. The court agreed defendant was in possession of a "minimal amount of marijuana" and acknowledged that the same offense committed in a non-custodial setting would be a misdemeanor. Nonetheless, the

court observed the Legislature had specified and maintained distinct punishment for those convicted of possession offenses while in prison and the court found even in the most secure setting, defendant could not follow the most basic rule, "you can't have drugs in prison." Accordingly, the court could not find defendant was outside the spirit of the three strikes law and denied the *Romero* motion.

Relying on the relatively small amount of marijuana and the specifics of defendant's record, the court exercised its discretion under section 1385 to strike the two prior prison term offenses. Defendant was sentenced to the low term of two years, doubled because of the strike, and the mandatory statutory fines and fees were imposed.

DISCUSSION

Defendant contends the trial court abused its discretion in denying his *Romero* motion, as he does not fall within the spirit of the three strikes law. We disagree.

A trial court has the discretion to strike a prior serious felony conviction for purposes of sentencing only if the defendant falls outside the spirit of the three strikes law. (§ 1385; *People v. Williams, supra*, 17 Cal.4th at p. 161; *Romero, supra*, 13 Cal.4th at pp. 529-530.) In ruling on a *Romero* motion, 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 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.” (*Williams, supra*, at p. 161.) The court's discretion is limited by the concept of “furtherance of justice,” requiring the court to consider both the defendant's constitutional rights and the interests of society. (*Romero, supra*, 13 Cal.4th at p. 530.) Dismissal of a strike is a departure from the sentencing norm. That is, “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.”” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

We will not reverse the ruling on a *Romero* motion for an abuse of discretion unless the defendant shows the decision was “so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike or refused to do so, at least in part, for impermissible reasons. (*Id.* at p. 378.) But where the trial court was aware of its discretion, “balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling . . . ’ [citation].” (*Ibid.*)

It is defendant's burden to affirmatively establish that the "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.]" (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

To meet his burden, defendant claims he is outside the spirit of the three strikes law because he suffered a serious head trauma at an early age which may have contributed to his criminality and reduced his culpability, his criminal record stems from his drug addictions, his prior strike offense "is not as serious as it may first appear", and he has not repeatedly committed violent felonies.

The record contains evidence that defendant suffered a severe head trauma when he was 15 years old, and currently suffers from migraines and blurred vision. There is no evidence of any continuing effect on defendant's cognitive abilities or that he suffers from any condition which reduces his culpability. Accordingly, there is no support in the record for defendant's claim that it is "likely [his] offenses are the unfortunate aftermath of a serious bicycle accident in 1994, when [defendant] was in a coma for 9 or 10 days." Nor does defendant's claim that his commission of offenses "stem[s] from his drug problems and his inability to control his addiction" act as a mitigating circumstance removing him from the spirit of the three strikes law. It does appear defendant's drug

addictions may be an underlying factor in his criminality. While drug addiction may be considered a mitigating factor for purposes of determining whether to strike prior convictions, it loses that distinction when, as here, a defendant consistently fails to make any effort at rehabilitation. (*People v. Williams, supra*, 17 Cal.4th at pp. 155, 163; *People v. Gaston* (1999) 74 Cal.App.4th 310, 322.) Defendant attempts to minimize the seriousness of his prior strike conviction, claiming he was just trying to "protect his co-perpetrator/girlfriend." We reject this view. Defendant's prior strike conviction came as a result of his committing a theft to feed his alcohol addiction. In seeking to evade capture, defendant's "co-perpetrator/girlfriend" shoved one of the loss prevention officers from behind and defendant tried to stab two loss prevention officers with a screwdriver. After his "co-perpetrator/girlfriend" was placed in custody, defendant fled the scene. This is not minimal conduct.

Lastly, defendant's claim that he is not a violent recidivist is not persuasive. The three strikes law does not require multiple violent offenses. (*People v. Strong* (2001) 87 Cal.App.4th 328, 340.) Where the defendant has one qualifying felony, a "virtually uninterrupted" record of additional non-qualifying offenses over the course of a long period of time will not be a mitigating circumstance removing defendant from the spirit of the three strikes law. (*Ibid.*)

Defendant's criminal history dates back 17 years, covering more than half his life. Over the years, in addition to the strike offense, he has sustained multiple convictions for a variety of offenses, including burglary, vehicle theft, attempted robbery, attempted grand theft, theft, and willfully evading police. Since turning 19 years old, defendant has sustained seven misdemeanor and three felony convictions. During this criminal history, he has had only relatively brief periods of time between convictions and periods of incarceration. He has been in custody for some portion of almost every year since 1997, has violated parole nine times and sustained two new convictions while on parole. His latest felony was committed while in custody on the strike offense. The record demonstrates almost two decades of virtually continuous criminal conduct, undeterred by repeated incarcerations. Defendant's recidivist history puts him well within both the spirit and the letter of the three strikes law.

Moreover, in the absence of an affirmative record to the contrary, we presume the court considered all of the relevant factors in exercising its discretion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The record here makes clear the court was aware of its discretion in this matter and the legal standards governing the exercise of that discretion. The court considered the parties' written and oral arguments and the probation report, which included all of the facts defendant now claims as mitigation. Defendant points to nothing in the record which suggests the court did not properly consider the nature

and circumstances of defendant's present and past felonies, his background, character and prospects. Rather, as defendant acknowledges "the trial court thoughtfully reviewed the law and facts" of the case in reaching its decision. On this record, there was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

DUARTE, J.