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

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MATTHEW SEAN BALLARD,  
  
Defendant and Appellant.

C068444  
  
(Super. Ct. No.  
10F04845)

Defendant Matthew Sean Ballard pleaded no contest to driving under the influence of alcohol and driving with a blood-alcohol level at or exceeding .08 percent. He also admitted to being convicted twice for driving under the influence in the prior 10 years, serving three prior prison terms, and being previously convicted of a strike felony. Defendant was sentenced to an aggregate term of four years in state prison.

Defendant's sole contention on appeal is that the trial court abused its discretion by refusing to strike his prior strike conviction under *Romero*. (*People v. Superior Court*

(*Romero*) (1996) 13 Cal.4th 497 (*Romero*.) We disagree and affirm the judgment.

#### **BACKGROUND**

In July 2010, shortly after 9:00 p.m., defendant was seen making an illegal U-turn. He was detained and, after failing several field sobriety tests, arrested. A subsequent blood test revealed defendant's blood-alcohol level to be .13 percent.

Defendant was charged with driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)) and driving with a blood-alcohol content of .08 percent or more (Veh. Code, § 23152, subd (b)). It was alleged that defendant was twice convicted of these same offenses in the prior 10 years (Veh. Code, § 23550.5) and served three prison terms within the meaning of Penal Code section 667.5, subdivision (b). It was further alleged that defendant was previously convicted of a serious felony.

Defendant pleaded no contest to the charges and denied the enhancement allegations. Shortly thereafter, he filed a motion pursuant to *Romero, supra*, 13 Cal.4th 497, asking the trial court to strike his prior strike conviction in the interests of justice. In support of the motion, defendant argued he fell "outside the spirit of [the] three strikes law." Specifically, defendant argued the strike conviction was remote in time, his criminal history was a result of his addiction, and his prospects for the future were good. Defendant noted he maintained steady employment, raised two children, remained

married, and had the continued support of his friends and family.

The People opposed the motion to strike defendant's prior strike conviction, pointing out that, despite having resources and family support, defendant had a significant criminal history. In 1991 defendant was convicted of robbery (the strike offense); he served 210 days in jail. In 2000 defendant was convicted of driving under the influence of drugs or alcohol and sentenced to 180 days in jail. Also in 2000, defendant was convicted of possessing a controlled substance and sentenced to 32 months in state prison.

Then, in 2004, defendant was again convicted of driving under the influence of drugs or alcohol, and possessing drug paraphernalia. The following year, defendant was twice convicted of possessing a controlled substance. He also was convicted of felony driving under the influence of drugs or alcohol, and driving on a suspended license. For the 2005 convictions, defendant was sentenced to three years in state prison.

In 2008 defendant was again convicted of felony driving under the influence of drugs or alcohol. Defendant was sentenced to 16 months in state prison. The People also noted that five months after his release from prison, defendant was arrested on the charges giving rise to his convictions here.

The trial court denied defendant's motion. "The basis for the denial is that [defendant] has three prior prison convictions for which he has served time in the last ten years."

Defendant then pleaded no contest to driving under the influence and driving with a blood-alcohol content at or exceeding .08 percent. Defendant also admitted he was previously convicted for driving with a blood-alcohol content at or exceeding .08 percent, served three prior prison terms, and was previously convicted of a strike offense.

Defendant waived a referral to probation and was immediately sentenced to an aggregate term of four years in state prison. Defendant was ordered to pay various fines and fees, and was awarded 352 days of custody credit (235 actual and 117 conduct). Defendant appeals with a certificate of probable cause.

#### **DISCUSSION**

Defendant asserts the trial court abused its discretion by refusing to strike his prior strike conviction under *Romero*. We disagree.

Under Penal Code section 1385, subdivision (a), a "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." In *Romero*, our Supreme Court held that a trial court may utilize Penal Code section 1385, subdivision (a) to strike or vacate a prior strike conviction for purposes of sentencing under the "three strikes" law, "subject, however, to strict compliance with the provisions of [Penal Code] section 1385 and to review for abuse of discretion." (*Romero, supra*, 13 Cal.4th at p. 504.) Similarly, a trial court's "failure to dismiss or strike a prior conviction

allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).)

"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." (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

We are also mindful that "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." [Citation.]” (*Carmony, supra*, 33 Cal.4th at p. 377. ) “[T]he 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 (*Williams*); *Carmony*, at p. 377.)

Thus, the three strikes law “creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*Carmony, supra*, 33 Cal.4th at p. 378.) This presumption will only be rebutted in an “extraordinary case—where the relevant factors described in *Williams, supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ.” (*Carmony*, at p. 378.)

We cannot find that the trial court abused its discretion by declining to strike defendant’s prior conviction.

We acknowledge that defendant’s prior strike offense occurred roughly 19 years ago. Defendant, however, has continued a life of crime during those 19 years. As defendant himself argues, he has a significant support system and has had numerous opportunities to get sober. He has instead chosen to continue to drink and drive.

Defendant was out of prison on his prior conviction for driving under the influence for only five months before he was arrested on the charges here. Until he is sober, defendant remains a danger to himself and others. Thus, we cannot find that the trial court abused its discretion in finding defendant fell within the spirit of the three strikes law.

**DISPOSITION**

The judgment is affirmed.

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RAYE, P. J.

We concur:

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NICHOLSON, J.

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MAURO, J.