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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE,

Plaintiff and Respondent,

v.

ARLEF DAI WEAVER,

Defendant and Appellant.

C068594

(Super. Ct. No.
101906)

Following a jury trial, defendant Arlef Dai Weaver was convicted of arson of property (Pen. Code, § 451, subd. (d); undesignated statutory references that follow are to the Penal Code) and misdemeanor vandalism (§ 594, subd. (b)(1)). Defendant admitted a strike allegation and the trial court sentenced defendant to four years in state prison with 271 days of presentence credit (181 actual and 90 conduct).

On appeal, defendant contends the trial court abused its decision by denying his motion to dismiss the strike. In a

supplemental brief, he contends that the prospective application of the Criminal Justice Realignment Act of 2011 (the Realignment Act) (Stats. 2011, ch. 15) violates his right to equal protection of the law. We affirm the judgment.

FACTS AND PROCEEDINGS

In December 2010, defendant lived in a house with Kevin Ramsey and his girlfriend Rachel Kirk. Tensions developed between defendant and his roommates after Ramsey informed defendant of Kirk's unhappiness with his lack of cleanliness and failure to share in the cooking.

Defendant began removing his items from the house on the evening of December 26, 2010. Asked if he was leaving, defendant told Ramsey, "I'm out of here." They argued about settling some debts and defendant said, "no one is living here."

Before defendant left, Ramsey joined Kirk in the living room to watch television. Defendant soon entered the room carrying a yellow gasoline can. The room contained a stove that was burning a large quantity of wood. Defendant walked to the stove and poured gasoline on top of it, causing a large fireball to erupt. Defendant immediately ran out of the house. Ramsey was able to put out the fire with bed sheets and water. The fire burned the carpet surrounding the stove and discolored the ceiling around it.

DISCUSSION

I

Penal Code Section 1385 Request

Defendant contends the trial court erred in denying his section 1385 motion to dismiss the strike allegation.

The probation report stated that defendant had a 1980 conviction for second degree murder in Michigan with a prison sentence of four to 15 years, and a 1998 conviction for possession of marijuana in Livonia Michigan, with an unknown disposition.

Defendant made an oral motion to dismiss the strike allegation at the sentencing hearing. Counsel argued that the strike, a 1980 Michigan conviction for second degree murder, was 31 years old and happened when defendant was 19. According to defense counsel, defendant received the statutory minimum sentence of four years. It was a negotiated plea that, according to counsel, must have contained mitigating factors. Counsel asserted defendant had no contact with law enforcement since his release from prison. Since defendant would warrant probation if not for the strike, defense counsel concluded that the court should dismiss the strike allegation.

The prosecutor argued that defense counsel was wrong regarding defendant's criminal record, and invited the court to continue the matter so defense counsel could look at defendant's rap sheet. Counsel objected to the rap sheet as it was not in the probation report and was not reflected in discovery. The

prosecutor replied that counsel was responsible by making an oral motion on the day of sentencing without giving advanced notice to the People. The rap sheet had not been made available because the prosecution had no intention to introduce evidence of prior criminality based on the disposition of the case.

The trial court overruled defendant's objection and asked the prosecutor for an offer of proof. The prosecutor said the rap sheet contained: a 1994 arrest in Illinois, a 1995 arrest for damage to property and battery in Danville, jurisdiction unknown, and defendant was "apparently" convicted of possession of marijuana in "the 16th District Court of Livonia," jurisdiction unknown.

The trial court accepted the offer of proof, but found it "rather vague," consisting mostly of arrests without convictions or a conviction for a relatively minor offense. While defendant's murder conviction was 31 years ago, the trial court emphasized that "a man's life was taken," and it was a "very, very, significant strike." Having conducted the jury trial in the present case, the trial court was aware that defendant's conduct for the arson of property offense "at a minimum, clearly endanger[ed] the property of the victims in this case, if not human life" Taken together, these factors persuaded the trial court that it was inappropriate to dismiss the strike.

"[A] 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*)).

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385[, subdivision] (a), 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; see *Carmony, supra*, 33 Cal.4th at p. 377.)

Defendant argues that the trial court erred in admitting the prosecution's offer of proof because defense counsel was not notified of the charges in the rap sheet before the sentencing hearing. Asserting that the possibility of determining the circumstances of the 1980 murder conviction was remote given the age of the crime, defendant argues the trial court should have dismissed the strike in light of his clean record since then.

We do not consider whether the trial court erred in accepting the prosecution's offer of proof concerning the items on defendant's rap sheet. If the trial court erred in accepting the offer of proof, the error was harmless. The offer of proof contained vague references to several arrests and a single conviction for a relatively minor offense. The trial court

properly minimized this evidence and did not rely on it in denying defendant's motion.

It was not an abuse of discretion for the trial court to conclude that defendant's prior conviction for second degree murder was a particularly significant strike. Murder is the most culpable crime; a conviction for second degree murder, even a 31-year-old conviction, involves a high degree of culpability. Defendant threw gasoline on an operating wood burning stove in an occupied house. While he was convicted of a property crime, his conduct was nonetheless dangerous to his former roommates.

In light of the nature of defendant's prior conviction and his current offense, it was not an abuse of discretion for the trial court to deny his section 1385 motion.

II

Presentence Credits

Defendant committed his crimes on December 26, 2010. He was sentenced on June 28, 2011.

The trial court sentenced defendant under the September 28, 2010, revision of the presentence credit law. Under that version, a defendant with a current or prior serious or violent felony conviction was entitled to two days of conduct credit for every four days of presentence custody. (Former §§ 2933, 4019.) Defendant's prior conviction for second degree murder is a serious and violent felony. (§§ 1192.7, subd. (c)(1), 667.5, subd. (c)(1).)

The Realignment Act amended the law, entitling defendants to two days of conduct credits for every two days of presentence

custody. (§ 4019, subds. (b), (c), (f).) The award of credits is not reduced by a defendant's prior conviction for a serious or violent felony. This provision applies prospectively, to defendants serving presentence incarceration for crimes committed on or after October 1, 2011. (§ 4019, subd. (h).)

Defendant argues that the prospective application of the conduct credit provisions of the Realignment Act violates his right to equal protection under the law. This claim was rejected by the California Supreme Court in a case after the conclusion of briefing. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.) Applying *Lara*, we reject defendant's claim.

DISPOSITION

The judgment is affirmed.

_____ HULL _____, Acting P. J.

We concur:

_____ MAURO _____, J.

_____ HOCH _____, J.