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

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL LEE COX,

Defendant and Appellant.

C069781

(Super. Ct. Nos.
10F5058, 10F6764,
10F5465)

Counsel for defendant, Daniel Lee Cox, asked this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant filed a supplemental brief claiming the trial court erred in denying his *Romero*¹ motion. We disagree. Also, finding no arguable error that would result in a disposition more favorable to defendant, we affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

First Case (Case No. 10F5058)

On June 30, 2010, following a traffic stop, defendant was found in possession of 436.9 grams of marijuana in five separate baggies and a cell phone containing text messages related to drug sales. Officers also found a digital gram scale in the vehicle in which defendant was traveling.

Defendant was charged with possession of marijuana for sale, transportation of marijuana, being a felon in possession of ammunition, operating a vehicle without a functioning interlock device, driving with a suspended license, and failing to wear a seatbelt. It was further alleged that defendant was twice previously convicted of a serious or violent felony, served a prior term in prison, and committed the current offenses while out on bail or on his own recognizance in other cases.

Second Case (Case No. 10F5465)

On August 3, 2010, defendant was again stopped while driving a vehicle. On this occasion, defendant was stopped because his license plate was obstructed and the registration sticker had expired. After the traffic stop, the officer observed defendant "reaching around within the vehicle," then into a black backpack inside the vehicle. Defendant was asked to "stop digging around" and put his hands where the officer could see them.

Defendant complied with the officer's direction. The officer then told defendant why he had been stopped; defendant

told the officer the vehicle did not belong to him, but he was in the process of buying it. Defendant admitted he did not have his driver's license with him and that it was, in fact, suspended or revoked.

Defendant consented to a search of the vehicle, saying the backpack inside the vehicle was his. Inside the backpack, were a Ziploc baggie containing 14.4 grams of methamphetamine, a hypodermic needle, a digital scale, and three rounds of .25-caliber full-metal-jacket ammunition. A further search of the vehicle uncovered a glass smoking pipe on the passenger's seat. Defendant's passenger admitted the pipe was his.

Following a series of questions regarding the items found in the vehicle, a field sobriety test was performed on defendant and it was determined he was under the influence of a controlled substance. Defendant and his passenger were both arrested.

Defendant was subsequently charged with possession of methamphetamine, possession of methamphetamine for sale, transportation of methamphetamine, being under the influence of a controlled substance, being a felon in possession of ammunition, driving under the influence of alcohol or drugs, driving with a suspended license, carrying a loaded firearm on one's person in a city, and being a felon in possession of a firearm.

It was further alleged that defendant was personally armed with a firearm during the commission of these crimes, was twice previously convicted of a serious or violent felony, was personally armed with a firearm during the commission of a crime

related to controlled substances, was out on bail or his own recognizance when he committed the offenses, and previously served a term in prison.

Third Case (Case No. 10F6764)

On August 3, 2010, Billy Russell went to the Redding Police Department to report his 1988 Ford Bronco stolen. Russell did not, however, have the license plate or vehicle identification number for the vehicle. Russell told officers he was in the process of registering the vehicle in his name and did not have the paperwork. He was told to get the necessary information and return to the department.

Russell returned to the police department two days later with the appropriate information for the vehicle. Russell explained that early in the morning on August 2, 2010, he parked the Bronco in front of a motel intending to return and pick it up with a trailer because the vehicle had not yet been "smogged" and was not yet registered. When he returned later that day, the Bronco was gone.

Officers checked the registration for the Bronco and learned it was impounded on August 3, 2010, after defendant was arrested on numerous narcotics charges in the second case. Russell denied knowing defendant or the passenger with whom defendant was arrested, and he did not give either of them permission to drive his Bronco.

Defendant was later charged with the unlawful driving or taking of a vehicle. It was further alleged that defendant was twice previously convicted of a serious or violent felony,

served a prior term in prison, and committed the offense while out on bail or his own recognizance.

Plea

On August 5, 2011, defendant agreed to resolve all pending cases. He pled guilty to transporting marijuana, transporting methamphetamine, being a felon in possession of ammunition, driving under the influence of alcohol or drugs, and the unlawful taking or driving of a vehicle. Defendant also admitted being previously convicted of a serious or violent felony, committing offenses while out on bail or his own recognizance, and previously serving a term in prison.

In exchange for his plea, the People agreed to dismiss the remaining charges and allegations as well as five pending but unrelated criminal cases and terminating defendant's probation in Shasta County case No. 08CTR182. The agreement preserved defendant's right to file a *Romero* motion; provided he would not receive probation; and provided for a 15-year-8-month lid on defendant's sentence.

Romero Motion

After entering his plea, defendant filed a *Romero* motion asking the court to strike his prior conviction for burglary. In support of his motion, defendant offered numerous letters from family members and friends, as well as various educational and self-improvement certificates defendant earned while incarcerated in the county jail. At the hearing on defendant's motion, the court also heard from several witnesses speaking on

defendant's behalf, including defendant's mother, his brother, his brother-in-law, and the chaplain from the county jail.

Defendant's brother-in-law, Jim Baker, testified that defendant previously worked in construction and was a hard worker. He described the remodeling work defendant and his father were doing together when defendant's father died. He remembered that after his father died, defendant just "shut down." Defendant's mother, Barbara Cox, described a similar breakdown after defendant's father died. Where once defendant engaged with his children, after his dad died, defendant "lost interest," and he never finished their remodeling project. She said defendant and his father were "very close," and his father's death left "a big hole in [defendant's] heart."

Cox also told the court that defendant's three children were currently in her custody. Seventy years old, Cox suffered from a "heart problem" and diabetes, and recently fractured her hip. If she were to pass away, she said, defendant's children would be put "into the system," because their mother was "nowhere to be found."

The chaplain from the county jail, Henry Quenca, also testified defendant was "suffering significantly with the loss of his father." In the time he had been meeting with defendant, he saw defendant make a "dramatic transformation." According to Quenca, defendant "has always been spiritual," but after several meetings with Quenca, defendant was "more at peace." He described the transformed defendant as "[l]ess defiant," no more "chip on his shoulder," and as a man with "character."

Defendant's brother, Dean Cox, testified that defendant changed dramatically when their father died; he also offered testimony regarding defendant's prior conviction for burglary. According to Cox, defendant was Cox's tenant in the home defendant was convicted of burglarizing in 2004. Defendant was named in the rental agreement; Collette Cook, defendant's girlfriend, was added to the agreement later.

In support of his *Romero* motion, defendant argued his prior strike was the result of "poor lawyer work," rather than actual guilt. He also argued that his recent convictions were solely the result of his father's death, and the resulting emotional turmoil. Now, having overcome those circumstances, defendant said he could be a productive member of society, rather than a drain on the taxpayers.

The trial court was not persuaded. The court found defendant's crimes to be numerous and of increasing seriousness, with defendant's first conviction reaching all the way back to 1992. The court also found that defendant's prior strike was "not that old," particularly given that after three years in prison and two years on parole, defendant was convicted in 2009 of driving under the influence. The court thus ruled as follows: "In evaluating all of those things, I actually don't see any factors that weigh [in] favor of striking the strike. So the request to exercise discretion to strike the strike is denied."

DISCUSSION

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. (Pen. Code, § 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-531.) In deciding whether to do so, 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*, at p. 161.)

A trial court's ruling on a motion to strike a prior strike is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) Defendant has the burden of establishing that a trial court's denial of such motion was arbitrary or irrational, such as where the trial court was not aware of its discretion, considered impermissible factors, or imposed a sentence that is absurd under the particular facts of the case. (*Id.* at pp. 376-377.)

Defendant argues the trial court abused its discretion in refusing to strike a prior serious felony conviction because the court, in defendant's opinion, failed to consider mitigating factors. Defendant also argues the court failed to consider "pertinent facts about [his] background, character and

prospects, . . ." and failed to consider defendant's "factual[] innocen[ce]" in the prior strike.

In considering defendant's present conviction and prior strike, the trial court observed there was not one but five felony offenses committed by defendant in the current matter. The court also observed that while the five offenses were not "violent," there was "a significant seriousness associated with the crimes." The prior strike, the court noted, included a charge of assault with a deadly weapon, which suggested the burglary was committed with "violence or an attempt at violence." The trial court also cited the fact that defendant's strike occurred only seven years ago, so it was not remote in time. The court considered the fact that two years after being released from prison on the felony burglary conviction, while still on parole, defendant was convicted for driving under the influence.

The trial court also considered the present conviction and strike in the context of defendant's criminal record. The court noted defendant's first "criminal adjudication" was in 1992, and since then "has had a variety of misdemeanor and felony offenses, including a prior felony burglary."

The court heard testimony from numerous defense witnesses regarding defendant's background, character, and prospects. While the court did not expressly state it considered that testimony in evaluating defendant's motion, it is presumed that official duty is performed. (Evid. Code, § 664.) Thus, we presume the court listened to the testimony and weighed it

against defendant's lengthy criminal record before reaching its decision.

Defendant's further contention that he was factually innocent of the strike offense for which he was previously convicted and the court should have stricken the strike is without merit. Even if there were legal support for defendant's claim, there is nothing in the record from which the trial court or this court could conclude he was factually innocent of a crime to which he pled guilty.

The trial court's decision was neither arbitrary nor irrational. There was no abuse of discretion.

Having also undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

RAYE, P. J.

HULL, J.