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

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ROBERT ORTEGA,

Defendant and Appellant.

C069867

(Super. Ct. No.
10F01556)

Defendant Paul Robert Ortega pleaded guilty to assault with a deadly weapon while confined in state prison (count one; Pen. Code, § 4501)¹ and possessing a sharp instrument while confined in state prison (count two; § 4502, subd. (a)), and admitted four prior strikes (§§ 667, subds. (b)-(i), 1170.12).² The trial

¹ Further undesignated section references are to the Penal Code.

² Defendant asserts that he admitted the prior strikes "as part of an indivisible transaction committed against three

court denied defendant's request to strike three strikes (§ 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)) and sentenced defendant to a term of 25 years to life, consecutive to his current term.³

Defendant contends the trial court abused its discretion by denying his request for *Romero* relief because (1) the severity of his overall sentence warranted striking one or more strikes, and (2) his strikes resulted from a single act or indivisible course of conduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's Present Offenses

According to the parties' stipulation, on or about November 2, 2009, defendant, an inmate at California State Prison, Sacramento, assaulted the victim with a metal weapon over six inches long and sharpened to a point. Defendant chased the victim down, making stabbing motions. When the victim fell to the ground, defendant got on top of him and stabbed him 10 or more times.

Defendant's Strikes

On or about March 5, 2004, defendant was convicted of three counts of attempted murder (§§ 664/187) and one count of shooting at an occupied vehicle (§ 246).

individuals." However, the trial court did not find that the strikes constituted "an indivisible transaction."

³ Sentence on count two was stayed. (§ 654.)

Defendant's Request for Romero Relief

After entering his plea, defendant filed a request that the trial court strike all but one of his strikes for sentencing purposes. He argued: (1) Because he was already serving a life sentence, the lowest possible term on the current offense would defer his earliest possible parole date until he was in his sixties. Therefore, even if the court struck all but one strike, defendant's punishment would remain substantial and within the spirit of the "Three Strikes" law, but if the court did not strike the strikes his punishment would be excessively severe. (See *People v. Garcia* (1999) 20 Cal.4th 490, 503 (*Garcia*); *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250 (*Bishop*).)⁴ (2) Because defendant's prior strikes arose from an indivisible course of conduct, the court had discretion to strike one or more of them. (*People v. Benson* (1998) 18 Cal.4th 24, 36.) (3) Because the prior strikes were based on a single act, it would be an abuse of discretion not to strike all but one of them. (*People v. Burgos* (2004) 117 Cal.App.4th 1209, 1215-1216.)

The People replied that defendant clearly fell within the parameters of the Three Strikes law under the test of *People v. Williams* (1998) 17 Cal.4th 148. They also asserted: in

⁴ In this context, defendant admitted that he had "another case pending." The prosecutor asserted at the sentencing hearing, without contradiction from defense counsel, that the other case was also an inmate stabbing, which allegedly took place over a year after the current offense.

addition to his four strikes, defendant, a gang member, was convicted in the same case of possession of a loaded firearm and possession of an assault rifle; when defendant committed those offenses, he was on probation for a drug offense; while in prison, defendant incurred a rules violation for gang activity; and his current offense was a two-on-one assault.

The Trial Court's Ruling

After hearing extensive argument, the trial court denied defendant's request for *Romero* relief. The court expressly found that defendant's strikes were not based on a single act because he fired multiple shots into a car with multiple passengers.

DISCUSSION

Defendant renews the arguments he raised below. Like the trial court, we find them unpersuasive.

The Three Strikes law “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.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

A trial court may properly exercise its discretion to strike a defendant's prior strike or strikes under section 1385 only if it finds that “in light of the nature and circumstances of his prior 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 [Three Strikes] 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, supra*, 17 Cal.4th at p. 161.)

When a trial court decides not to strike a prior strike, we review its decision under the abuse of discretion standard. (*People v. Carmony, supra*, 33 Cal.4th at pp. 374-375.) In the context of sentencing decisions, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) Reversal is justified where the 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 court, 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 . . . ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid.*)

Here, defendant fails to show that the trial court was unaware of its discretion to strike strikes or that it used any impermissible factor to justify its decision. He also fails to show why he should be deemed outside the spirit of the Three Strikes law.

A

Defendant asserts first that the severity of his sentence warranted striking one or more strikes. But defendant cites no authority holding that a trial court should strike strikes merely because imposing them would produce a "severe" sentence, and there could be no such authority because the Three Strikes law is manifestly intended to punish severely those defendants who fall under it.

Defendant relies on *Garcia, supra*, 20 Cal.4th 490 and *Bishop, supra*, 56 Cal.App.4th 1245. His reliance is misplaced.

In *Garcia, supra*, 20 Cal.4th 490, the high court upheld, under the usual deferential standard, a decision by the trial court to strike a prior conviction allegation with respect to one count but not another. The court noted that because the resulting sentence (31 years four months to life in state prison) was not lenient, "the Attorney General cannot claim the sentence is inconsistent with the purpose of the Three Strikes law." (*Id.* at p. 503.) But *Garcia* does not hold that a trial court abuses its discretion by *imposing* strikes merely because the court could have given the defendant a long sentence without them.

In *Bishop, supra*, 56 Cal.App.4th 1245, which also upheld, under the abuse of discretion standard, a trial court decision to dismiss a strike, the appellate court stated: "The length of sentence to be imposed also presents an open-ended inquiry because, when considered in conjunction with the defendant's age, it presents the trial court with an opportunity to evaluate

factors such as how long the state maintains an interest in keeping the defendant as a public charge and after what period of incarceration he is no longer likely to offend again." (*Id.* at p. 1251.) But, like the holding in *Garcia*, this dictum does not compel the conclusion that any such "open-ended inquiry" must result in striking one or more strikes.

B

Defendant asserts: "[I]t was an abuse of discretion under *Romero* to deny the application as to all four of the strike priors when the four prior convictions resulted from an indivisible, single act, course of conduct." (*Sic.*) If defendant means that the trial court should have struck all four of his strikes, his contention is not cognizable because he requested below that the court strike only three of them. But even if defendant actually seeks only the striking of three of his strikes, his contention fails.

As the appellant, defendant has the burden of showing reversible error. Yet he does not even mention the trial court's express finding that the prior strikes, which included three counts of attempted murder and one count of shooting into an occupied vehicle, did not constitute an indivisible course of conduct, or the court's implied finding that they did not arise from a single act. Because defendant merely asserts his position without explaining why the trial court erred by rejecting it, he has failed to show grounds for reversal. (See *Estate of Palmer* (1956) 145 Cal.App.2d 428, 431 [appellant may

not win reversal by simply asserting error and challenging respondent to prove the trial court was right].)

In any event, even if defendant had made a persuasive argument below that his prior strikes constituted a single act or an indivisible course of conduct, the trial court would not have been compelled to strike any of them. In *People v. Benson*, *supra*, 18 Cal.4th 24, the high court noted in dictum, without deciding the question, that there might be circumstances under which two prior felony convictions were "so closely connected -- for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct -- that a trial court would abuse its discretion . . . if it failed to strike one of the priors." (*Id.* at p. 36, fn. 8.) However, in *People v. Scott* (2009) 179 Cal.App.4th 920, we held that where such a situation exists a defendant is entitled only to "consideration by the trial court of the closeness of the two strikes in determining whether, *in the exercise of discretion*, one should be stricken." (*Id.* at p. 931, original italics.)

As defendant admits, the trial court and the parties discussed this issue at length before the court exercised its discretion not to strike any of defendant's strikes. We see no abuse of discretion in that decision.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.