

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE ISEQUIEL GARCIA,

Defendant and Appellant.

C070264

(Super. Ct. No. CRF10–491)

Following a court trial, defendant George Isequiuel Garcia was convicted of two counts of felon in possession of a firearm (Pen. Code, former § 12021, subd. (a)(1)),¹ felon in possession of ammunition (*id.*, former § 12316, subd. (b)(1) [now § 16150]), and possession of drug paraphernalia (Health & Saf. Code, § 11364), with two prior strike

¹ Undesignated statutory references are to the Penal Code; former section 12021, subdivision (a) was reenacted without substantive change as section 29800, subdivision (a)(1), which became effective January 1, 2011, and operative January 1, 2012. (Stats. 2010, ch. 711, § 6.) We will refer to the provision by its former designation.

allegations (Pen. Code, §§ 667, subs. (d) & (e), 1170.12, subs. (b), (c)). The trial court denied defendant's motion to dismiss one strike and sentenced defendant to 25 years to life in state prison.

On appeal, defendant contends the trial court should have stayed sentence on one of the felon in possession counts pursuant to section 654. He also claims the trial court abused its discretion in denying his motion to dismiss a strike. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 19, 2010, at around 2:30 p.m., Marysville Police Officer Adam Barber stopped defendant for driving with expired registration tags. Barber issued a citation and advised defendant he was going to tow the car because the registration had expired more than six months earlier. After being told to retrieve his property, defendant grabbed a long, brown wallet near the center console and got out of the car.

As Officer Barber prepared the car for an inventory search, the tow truck driver pointed out a gun in the car's trunk. Barber took the gun, which was loaded with six rounds. A search of defendant found a methamphetamine pipe in one of his pockets and a loaded .22-caliber pistol in his wallet.

According to the probation report, defendant's juvenile record consisted of seven misdemeanor convictions and a felony conviction for assault by means likely to produce great bodily injury (former Pen. Code, § 245, subd. (a)(1)) between 1994 and 1997, with a dishonorable discharge from the California Youth Authority in 1999. Later that year, defendant suffered an adult conviction for first degree burglary (*id.*, § 459) and was sentenced to four years in state prison after he broke into his ex-girlfriend's residence in the middle of the night and assaulted various family members with a bat. Between 2001 and 2003, defendant sustained two parole violations and a conviction for misdemeanor driving under the influence (Veh. Code, § 23152). In 2003, he was convicted of assault

with a firearm (former Pen. Code, § 245, subd. (a)(2)) and sentenced to seven years in state prison for firing a gun at a pizza delivery person. He was paroled in 2008, and discharged from parole on October 31, 2009.

The trial court observed that defendant was found in possession of a stolen firearm in Sutter County on September 30, 2010, shortly after the incident in the instant case. According to the trial court, officers found numerous boxes of ammunition of various calibers, and two .22-caliber rifles. In denying defendant's motion to dismiss a strike, the trial court noted this conduct, the nature of the current offense, and defendant's lengthy criminal history.

DISCUSSION

I. Section 654

The trial court sentenced defendant to 25 years to life on count 1, felon in possession of a firearm, and imposed a concurrent 25 years to life term on count 2, the other felon in possession of a firearm count, and stayed sentence on the felon in possession of ammunition count pursuant to section 654. Defendant contends the sentence in count 2 should have been stayed pursuant to section 654. The Attorney General concedes the point. We reject the concession and defendant's contention, as the claim is frivolous.

Whether section 654 prevents punishment on more than one count of felon in possession of a firearm was addressed by the Supreme Court in a case decided after defendant's sentencing, *People v. Correa* (2012) 54 Cal.4th 331 (*Correa*). As in the case before us, the defendant in *Correa* was convicted on multiple counts of felon in possession of a firearm (former § 12021, subd. (a)(1)) after being found in possession of a cache of guns. (*Correa*, at p. 334.) The trial court imposed consecutive terms for each

of the felon in possession counts. (*Correa*, at p. 335.) This court affirmed the judgment on appeal, and the Supreme Court granted review. (*Ibid.*)

The Supreme Court first considered whether section 654 applied to multiple violations of the same statute. (*Correa, supra*, 54 Cal.4th at p. 337.) Disapproving dicta from *Neal v. State of California* (1960) 55 Cal.2d 11, 18, footnote 1, the Supreme Court held that section 654 did not apply to punishment for multiple violations of the same statute. (*Correa, supra*, 54 Cal.4th at pp. 334, 338, 344.) However, since this holding was a departure from prior law and would increase punishment for crime, the Supreme Court applied the decision prospectively and, therefore, did not apply it to the defendant's claim. (*Correa*, at pp. 344-345.)

Relying on the prospective application of this holding in *Correa*, defendant contends that section 654 applies to the felon in possession of a firearm counts because he harbored a single criminal objective in possessing the firearms. The Attorney General agrees.

Defendant's contention and the Attorney General's concession overlook the result in *Correa* and the rest of the Supreme Court's decision. Although the Supreme Court held that the partial disapproval of *Neal* applied prospectively, the high court nonetheless affirmed our decision upholding the sentence. (*Correa, supra*, 54 Cal.4th at pp. 334, 335.) The Supreme Court upheld the imposition of sentence for each felon in possession count because, "[w]hile the ex post facto clause bars applying this new rule to defendant, the enactment history of former section 12021, subdivision (a) makes it clear that the Legislature intended that a felon found in possession of several firearms be liable to conviction of and punishment for each of the firearms." (*Id.* at p. 345.)

In *People v. Kirk* (1989) 211 Cal.App.3d 58 (*Kirk*), this court held that section 654 barred multiple punishment for the defendant's simultaneous possession of two sawed-off shotguns in violation of a former version of section 12020, subdivision (a). (*Kirk*, at

p. 65.) In response to our *Kirk* decision, the Legislature enacted former section 12001, subdivision (k),² which states: “For purposes of Section 12021 . . . of this code, . . . notwithstanding the fact that the term ‘any firearm’ may be used in those sections, each firearm . . . shall constitute a distinct and separate offense under those sections.” The Legislature made its intent clear. It further wrote: “The amendments to Section 12001 of the Penal Code made by this act adding subdivision[] (k) . . . thereto are intended to overrule the holding in *People v. Kirk* [(1989)] 211 Cal.App.3d 58, insofar as that decision held that the use of the term ‘any’ in a weapons statute means that multiple weapons possessed at the same time constitutes the same violation. It is the further intent of the Legislature in enacting this act that where multiple weapons are made, imported, transferred, received, or possessed, each weapon shall constitute a separate and distinct violation.” (Stats. 1994, 1st Ex. Sess. 1993-1994, ch. 32, § 5, pp. 8657-8658.)

Relying on former section 12001, subdivision (k) and its legislative history, the Supreme Court held in *Correa*: “The Legislature, in repudiating *Kirk* and specifically providing that possession of each firearm is a separate offense, effectively adopted the rule we announce today. It expressed its clear intention that a felon may be punished separately for each firearm possession count of which he is convicted.” (*Correa, supra*, 54 Cal.4th at p. 346.)

This case is indistinguishable from *Correa*. It involves essentially the same set of facts and the same statute. In asking us to reach a different result, the parties do not address the result in *Correa*, or the Supreme Court’s analysis of former section 12001, subdivision (k) and its application to felon in possession of a firearm.

² Former section 12001, subdivision (k) is now section 23510. The provision was carried over without any substantive changes. (See *Correa, supra*, 54 Cal.4th at p. 334, fn. 2.)

To agree with defendant and the Attorney General, we would have to ignore binding precedent from the Supreme Court. We cannot do this (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450) and accordingly reject this frivolous contention.

II. Section 1385

Defendant contends it was an abuse of discretion for the trial court to deny his motion to dismiss one of the strike allegations pursuant to section 1385. We disagree.

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.” ’ ” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

A trial court may properly exercise its discretion to dismiss a defendant’s prior strike or strikes under section 1385 only if it finds that “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 [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* (1998) 17 Cal.4th 148, 161.)

When a trial court decides not to dismiss a prior strike, we review its decision under the abuse of discretion standard. (*People v. Carmony, supra*, 33 Cal.4th at p. 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.)

Defendant notes he was 31 at the time of the offense, and that he suffered the prior strike convictions in 1999 and 2003. He claims to have “sought to turn his life around” since his discharge from parole in October 2009. Asserting that he “has aged considerably since having suffered the prior serious felony convictions” and “was now settling down with his family” at the time of the current conviction, defendant asks us to find the risk of recidivism is diminished and will continue to do so as he ages. Noting his strong family support and his commitment to his family,³ defendant concludes he does not come within the spirit of the Three Strikes law.

Defendant has an extensive criminal record, with numerous juvenile and adult convictions. He was paroled from his strike conviction in 2001, and sustained two parole violations before committing his second strike offense in 2003. He was paroled from his second strike conviction in October 2008, completed parole a little more than a year later, and then committed the instant offenses less than a year after that.

Defendant’s current offenses of felon in possession of a firearm and felon in possession of ammunition offenses are particularly troubling in light of his record. His record of nearly continuous criminal behavior and the significant danger posed by his present offenses places him well within the spirit of the Three Strikes law. It was not an abuse of discretion for the trial court to deny defendant’s section 1385 motion.

³ Defendant submitted letters from various family members and his pastor in support of his section 1385 motion.

DISPOSITION

The judgment is affirmed.

BUTZ _____, J.

We concur:

RAYE _____, P. J.

NICHOLSON _____, J.