

NOT TO BE PUBLISHED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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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
(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK ALLEN QUINN,

Defendant and Appellant.

C073331

(Super. Ct. No. P12CRF0300)

Defendant Mark Allen Quinn pled no contest to two counts of robbery (counts 1 and 2; Pen. Code¹, § 211) and one count of conspiracy to commit robbery (count 3; § 182, subd. (a)(1)), and admitted three prior strikes (§§ 667, subds. (b)-(i); 1170.12) and four prior serious felony convictions (§ 667, subd. (a)(1)), reserving the right to request that the trial court strike one or more prior strikes before imposing sentence (§ 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497). The court thereafter denied defendant’s request to strike his prior strikes and imposed a prison sentence of 50 years to

¹ Undesignated section references are to the Penal Code.

life plus 20 years (25 years to life on counts 1 and 2, with count 3 stayed (§ 654), plus five years consecutive for each prior conviction).

Defendant contends (1) the trial court abused its discretion and deprived him of due process by declining to strike one or more prior strikes, and (2) his sentence constitutes cruel and unusual punishment. (U.S. Const., 8th Amend.) We conclude there was no abuse of discretion by the trial court. While defendant forfeited his cruel and unusual punishment contention because he did not raise the contention before the trial court, we nonetheless reach the merits and reject defendant's contention. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged defendant with committing two second degree robberies (count 1 on or about April 16, 2012, at Bank of America in South Lake Tahoe; count 2 on or about March 22, 2012, at JPMorgan Chase Bank in El Dorado County) and of conspiring with another person to commit a bank robbery on or about March 22, 2012, in the El Dorado Hills Town Center (count 3). The information alleged as to all counts defendant had been convicted of the following strikes: first degree robbery, first degree burglary, and assault with a deadly weapon (§§ 211, 459, former 213.5,² 245, subd. (a)(2)) on March 12, 1984, and five counts of robbery (§ 211) on May 6, 1982. The information also alleged these convictions as to counts 1 and 2 as prior serious felony convictions.

Because there is no probation report and the parties did not recite a factual basis for defendant's plea on the record, we take the facts from the parties' filings on defendant's request to strike the prior strikes.

² Former section 213.5 (repealed by Stats. 1986, ch. 1428, § 2; see now §§ 212.5, 213, subd. (a)(1)) specified robbery of an inhabited dwelling house or trailer coach was to be sentenced as first degree robbery.

Defendant's Current and Prior Offenses

Count 1³

On March 22, 2012, defendant and his minor son, D.Q., robbed the JPMorgan Chase Bank in El Dorado Hills. D.Q. entered the bank alone and gave the teller a note saying: "This is a robbery. I have a gun. Give me your money." He threatened to hurt and shoot the teller if she did not hurry. He escaped with \$2,871.

After defendant's arrest on May 30, 2012, he told the police he and D.Q., both high on heroin, had decided to rob a bank because they needed money. D.Q. volunteered to go into the bank. Defendant wrote the robbery note and gave it to D.Q.

Defendant also told police that before this robbery, he had learned of warrants for his arrest for construction fraud in Santa Clara County and realized he could be sentenced to prison for 25 years to life; therefore, he decided to go on the run. He started using heroin and could not find a job. He intended to use \$1,000 from this robbery to rent a house for his family in Oregon.

Count 2

Around April 16, 2012, defendant's wife called him and said she had no money. Defendant decided to rob another bank.

Defendant entered a Bank of America branch in South Lake Tahoe, handed the teller a note demanding "all your \$100s and \$50s," put the note back in his wallet, then pointed at the teller's vault buy-back stack of money and said: "I'll take that too." When the teller hesitated, defendant handed her the note again; this time she saw that it ended: "[I]f you don't everyone will d[i]e." The teller complied with defendant's demands. Defendant escaped with \$10,703.

³ This is apparently the offense also charged as a conspiracy in count 3.

After defendant's arrest, he told police he got a job in Sacramento on May 29, 2012 (the day before his arrest), using the name and identification of John Tambini, a former business acquaintance. Defendant blamed Tambini for getting him in trouble with the contractor's license board.⁴

Prior Offenses

In 1982, defendant was convicted of five robberies arising out of offenses committed at five different liquor stores. He was sentenced to serve three years in state prison.

In 1984, defendant was convicted of residential burglary, armed robbery, assault with a firearm, false imprisonment, and theft. He was sentenced to serve nine years in state prison. He was paroled in 1988.

Pending Charges in Other Jurisdictions

In addition to the alleged Oregon bank robbery, defendant was charged with construction fraud in Santa Clara County in August 2011. The complaint alleged six felonies during the period of September 2009 to September 2010: two counts of first degree burglary (§ 459); two counts of theft, embezzlement, forgery, or fraud against elderly victims (§ 368); and two counts of false personation (§ 529). Defendant was charged with using another person's contractor's license without authorization, taking payment from the victims to work on their homes, and failing to complete the work or refund the victims' money.

⁴ Defendant also told police about a bank robbery he committed in Oregon on March 27, 2012. Defendant, wearing a wig, entered the bank with his 18-year-old son, Mike. Defendant asked a teller about opening an account, then demanded "all your money." The teller saw the butt of a pistol in defendant's waistband area under his jacket. Defendant and Mike escaped with \$17,413. Charges against defendant for this offense were pending in another jurisdiction.

Defendant's Account

According to defendant's motion, supported by declarations from himself and numerous members of his family, he had lived a law-abiding life except for two aberrant periods.

Raised by an abusive, alcoholic father, defendant won a football scholarship at California State University, Fullerton, and hoped to play professionally. But after a career-ending injury, he succumbed to depression and began associating with other "disgruntled young men." In 1982, when defendant was 21 years old, he and his friends committed a string of unplanned, impulsive liquor store robberies. Defendant was never armed "with an actual firearm," and no one was hurt. After his arrest, he was sentenced to serve three years in state prison, but "some time in 1983, he walked away from the camp where he was finishing his sentence."

After escaping, defendant "had nowhere to go. He was essentially on the run, living day to day. He had no resources and no place to stay. He resorted to theft to obtain a vehicle and money to live on until he could find an ' "under the table" ' job where his identity and location would not be provided to the authorities." In November 1983, armed with a pellet gun, he committed vehicle theft and two more liquor store robberies; no one was injured in any of these offenses. In March 1984, he was convicted on four counts and sentenced to serve nine years in state prison. He was paroled in June 1988.

After defendant's release on parole, he married, had a son, and found work. He was successfully discharged from parole in June 1989.

Defendant and his wife divorced in 1992. In 1993, he remarried and had two children with his second wife; they also obtained custody of a child fathered by defendant during an extramarital relationship.

Around 1992, defendant began working as a salesman for a construction contractor, while moonlighting for six years as a professional boxer. He spent his free

time with his sons, teaching them sports and trying to provide them a safe and healthy home life.

In 1993, defendant started his own business, "Southland Mobile Home Service." His partner was a licensed contractor; defendant was not.

In 2010, partnering with a different licensed contractor, defendant started a new business, "Allstate Mobile Home Company." He was "essentially the salesman or marketer." Hired crews did the actual contracting work.

Early in 2011, defendant learned of months-old complaints about his company's work. Since the whereabouts of defendant's partner were unknown, "attention was focused on [d]efendant."

Defendant was charged with operating without a contractor's license in Santa Clara County. "Ultimately, the case was resolved for a misdemeanor when [d]efendant paid \$4,055.00 in restitution."

Several months later, defendant learned of new charges for contracting without a license in Napa. This time his prior strikes were alleged and he realized he could be sentenced to serve 25 years to life in prison if convicted. Unable to obtain money to compensate the aggrieved homeowner or to return the homeowner's fee, and unable to work for fear of being charged again, defendant "panicked and went on the run."

Defendant then learned charges for contracting without a license had also been filed against him in Sacramento, Riverside, and San Diego Counties. He "was in a perpetual panic, not only from the pending charges, but also from his inability to obtain work to support his wife and children."

Defendant and his family, in "dire [straits]," rented a house in a town north of Yosemite. They found temporary work, but were laid off. They went to "soup kitchens" for meals.

On March 21, 2012, they were served with an eviction notice. They had nowhere to stay. Defendant's elderly parents had medical problems. Defendant feared the family would wind up homeless or separated from each other.

Defendant and D.Q. came up with the notion of robbing a bank to get money for a place to stay. Though initially a joke, it finally "seemed like the only option."

After committing the El Dorado Hills bank robbery, they used the money to rent a house in Rancho Cordova. They told defendant's wife that defendant had gotten a job and earned the money.

Defendant and D.Q. went to Oregon. Thinking the family would be all right if he could get them enough money to get through the spring, defendant committed the Oregon and South Lake Tahoe bank robberies.

Instead of fleeing, defendant returned to Rancho Cordova to be with his family and sought legitimate employment. When a company decided to hire him, he told them he had applied under the name of his "friend" John Tambini, but they hired him anyway.

For 23 years after his release on parole, defendant lived a law-abiding life, contributed to the community, supported his family, raised four sons, coached their sports teams, and paid his taxes. His first period of criminality stemmed from the psychological damage caused by his abusive childhood. His second period of criminality resulted from his fear his family would become homeless. He took care not to harm anyone at the banks. He did not carry a weapon or threaten to use one. He did not seek to enrich himself, but to support his family. He voluntarily acknowledged wrongdoing at an early stage by confessing immediately on arrest and cooperated fully with law enforcement. For all these reasons, the trial court should exercise its discretion to strike his prior strikes in order to avoid a life sentence.

Trial Court Ruling

At the sentencing hearing, after statements by defendant and members of his family and argument from counsel, the trial court denied defendant's request to strike the prior strikes, reasoning as follows:

"In order for me to strike the strikes and vacate the findings under [section] 1385 or *Romero*, I have to make findings that a dismissal of any of the actions in is the interest of justice or in furtherance of justice and set forth on the record the specifics on which the Court relied in exercising that power.

"In this particular case, your conduct and the crimes that you were convicted of that resulted in the strikes that are pending before you were serious, violent crimes.

"I take a look at the facts of what I'm aware of with respect[] to this case, and I note that the crimes here involve a threat of great bodily injury. The crimes here induced others to participate in these crimes, including a son.

"The manner in which these crimes were carried out indicate[s] that they were planned. It wasn't a spur of the moment ' "I've got to do something" ' and I run and do something.

"The crimes involved the taking of a great deal of money. I don't know what the total was, but it was thousands of dollars.

"I think that those actions indicate a threat to society, a continuing threat that is identical to what you went to prison for in the first place.

"Your prior convictions are numerous, they're increasing in seriousness, and you have served prior prison terms.

"In this case, in considering all of the factors presented to the Court in the motion and the opposition and the declarations that I received in support of you and the comments from the folks here today, I don't see how I can possibly come up with a sufficient statement that would state that it is in the interest of justice or in the furtherance of justice to strike any of these prior strikes.

“I do recognize that you were cooperative with law enforcement when you were apprehended. I do recognize that you were early to acknowledge the wrongdoing, and I do recognize that you had successfully completed your parole.

“But other than those three things, there’s nothing else that I can really find -- I mean, the fact that you didn’t get arrested for the 22 years in the interim, I don’t know that that’s commendable. That’s what we’re required to do. We’re required to comply with the law. There’s nothing special about that.

“I believe you are a good father, at least as far as your family is concerned. However, I have questions about how could a father involve his son in this type of criminal activity, knowing especially what you know about the consequences of this. Your son that you involved in this was younger than you were at the time that you committed the initial crimes.

“I also understand, at least from some of the information that was provided to me, that you had stated that you were using heroin at the time.^[5] [¶] . . . [¶]

“Based on the amounts taken in the robberies and the dates -- I understand what everybody has said and what you have said about your desperation to try and provide for your family, but that argument doesn’t fit with the amount of money that was taken and the times that the funds were taken.”

DISCUSSION

I

Prior Strikes

Defendant contends the trial court abused its discretion by refusing to strike the prior strikes, and furthermore denied defendant due process at sentencing. (U.S. Const., 14th Amend.) Both arguments rest on the premise that the court failed to understand its

⁵ The trial court stated its understanding that defendant had induced his son to use heroin. Defendant denied that, and the court conceded it might be in error on that point.

discretion because it disregarded the facts defendant's prior strikes were remote in time and he had remained crime free for a long period. We are not persuaded.

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 [or she] actually fell outside the Three Strikes scheme.” ’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*)).

A trial court may properly exercise its discretion under section 1385 to strike a defendant's prior strike only if it finds that “in light of the nature and circumstances of his [or her] prior felonies and prior serious and/or violent felony convictions, and the particulars of his [or her] 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 [or she] had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review a trial court's decision not to strike a strike under the abuse of discretion standard. (*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. 388.) But where the record indicates the court was aware of its discretion and did not state any impermissible reasons for ruling as it did, but instead balanced the relevant facts properly, we will affirm “ ‘even if we might have ruled differently in the first instance’ [citation].” (*Ibid.*)

Here, defendant committed many strikes as an adult, and the second set occurred after he absconded from custody. Although he maintained an apparently crime-free

record for some years after his release on parole, when he committed his current crimes he was once again “on the run” from prosecution, this time for alleged offenses evincing a pattern of dishonesty and exploitation of vulnerable elderly victims. He claimed he ran partly because he could not reimburse the alleged victims, but made no attempt to do so with the proceeds of his crimes. His purported motive for the bank robberies was to provide for his family, but although he allegedly gained over \$30,000 from the robberies (including the alleged Oregon robbery), he did not provide any verifiable account of how he had used the money. He was using heroin at the time he robbed the banks. He enticed his minor son into committing the crimes along with him.

Thus, neither defendant’s current offenses nor his history, considered as a whole, placed him outside the spirit of the three strikes law. On the contrary, defendant’s history shows he has the habit, whenever he feels sufficiently pressured by circumstances, of committing felonies for personal gain. The trial court’s refusal to strike defendant’s prior strikes was not “so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at p. 377.)

Relying on *People v. Bishop* (1997) 56 Cal.App.4th 1245 (*Bishop*), defendant asserts the trial court misunderstood the scope of its discretion because the court dismissed as insignificant that defendant’s prior strikes occurred in the early 1980s and he had lived a law-abiding life since then. We disagree.

There is no absolute cutoff point beyond which a prior offense becomes remote as a matter of law (see *People v. Branch* (2001) 91 Cal.App.4th 274, 284), and *Bishop* is not to the contrary. Applying the abuse of discretion standard, the appellate court in *Bishop* upheld a trial court’s decision to dismiss two of the defendant’s prior strikes, based partly on the trial court’s finding the strikes (17 to 20 years old) were remote. (*Bishop, supra*, 56 Cal.App.4th at p. 1248.) However, the defendant’s current offense, like most of his more recent offenses, was petty theft. (*Id.* at pp. 1247-1248 & fns. 1, 3.) The *Bishop*

court did not state anywhere in its opinion that offenses over 20 years old “must be considered remote” regardless of what the defendant has done since then.

Furthermore, what defendant has done since then includes not only committing the current offenses, but fleeing from justice rather than face pending construction fraud charges and obtaining a job by means of identity theft. Thus, it cannot be said defendant has lived a law-abiding life aside from the current offenses.

Under all the circumstances, the trial court could properly determine defendant’s lack of convictions between his second set of strikes and his latest felonies was relatively insignificant. This determination did not show the court misunderstood its discretion.

Defendant’s claim that his sentencing violated due process depends on the premise the trial court did not understand the scope of its discretion. Because we have rejected this premise, we also reject defendant’s due process claim.

II

Cruel and Unusual Punishment

Defendant contends his sentence was cruel and unusual under the Eighth Amendment to the United States Constitution. We disagree.

Defendant has forfeited this contention because he did not raise it in the trial court. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Nevertheless, we reach the merits “in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim.” (*People v. Norman*, at p. 230.)

Under the federal proscription of “cruel and unusual punishment,” a “ ‘narrow proportionality principle’ . . . ‘applies to noncapital sentences.’ ” (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 117] (lead opn. of O’Connor, J.), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 [115 L.Ed.2d 836, 866].)

Objective factors guiding the proportionality analysis include “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals

in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” (*Solem v. Helm* (1983) 463 U.S. 277, 292 [77 L.Ed.2d 637, 650].) Defendant does not make a case for disproportionality as to any of these factors.

Defendant asserts: “The maximum sentence for [defendant]’s current offense, absent any prior serious felony enhancements, is six years, consisting of the upper term of five years for count one, with an unstayed consecutive term of one year for count two. . . . With a low term sentence and concurrent sentencing, [defendant] could have been sentenced to only two years in state prison.” However, defendant did not commit one “current offense” but three (one of them stayed under § 654), in addition to the pending similar offense in Oregon. He had four prior serious felony convictions. And he does not explain how any trial court could have appropriately exercised discretion on these facts to give him “a low term sentence and concurrent sentencing.” Nor were any of his current offenses trivial or non-crimes, like those hypothesized in two Supreme Court opinions defendant cites *Rummel v. Estelle* (1980) 445 U.S. 263, 274, fn. 11 [63 L.Ed.2d 382] (overtime parking); *Robinson v. California* (1962) 370 U.S. 660, 667 [8 L.Ed.2d 758] (“ ‘crime’ of having a common cold’ ”).

Defendant asserts his punishment was greater than the punishments for murder, mayhem, and other violent felonies. As has been pointed out many times, this apples-to-oranges comparison of single offenses to recidivist offenses is unavailing. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512 [cruel or unusual punishment under California Constitution].) If persons convicted of the crimes defendant cites were subject to three strikes, their sentences might well exceed his. Defendant fails to show his sentence is disproportionate in light of his recidivist history.

Lastly, defendant makes no attempt to show disproportionality under the third *Solem* factor (sentences imposed for commission of the same crime in other jurisdictions). (*Solem, supra*, 463 U.S. 277.)

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.