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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

NABIL MOHAMED AYUB,

Defendant and Appellant.

D059089

(Super. Ct. No. SCD217284)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed.

INTRODUCTION

A jury convicted Nabil Mohamed Ayub of first degree burglary (Pen. Code, § 459)¹ and receiving stolen property (§ 496, subd. (a)). The jury also found true allegations the burglary was of an inhabited dwelling (§ 460), and another person, other than an accomplice, was present during the burglary (§ 667.5, subd. (c)(21)). In addition, Ayub admitted he had a prior juvenile adjudication for robbery that qualified as a prior

¹ Further statutory references are also to the Penal Code unless otherwise stated.

strike conviction (§§ 667, subds. (b)-(i), 1170.12). The trial court sentenced him to five years four months in prison.

Ayub appeals, contending we must reverse his sentence because the trial court failed to consider all of the relevant factors and misunderstood the breadth of its discretion when it declined Ayub's invitation to dismiss the prior strike conviction finding. Alternatively, Ayub contends the trial court abused its discretion in declining the invitation as no reasonable person would disagree he fell outside the spirit of the "Three Strikes" law. We conclude there is no merit to these contentions and affirm the judgment.

BACKGROUND

Prosecution Evidence

In the middle of one night in November 2008 Albert Song broke into Aman Khosrovi's home through a backyard window.² As Song pried the window open, it made a loud screeching noise that awoke Khosrovi. As Khosrovi went downstairs to investigate, he saw the silhouette of a man outside the patio door. When Khosrovi got downstairs and entered the den, he came face to face with Song, who had just climbed into the home through the pried open window. Song looked surprised and called out an expletive. Khosrovi screamed, "What the heck?" Song immediately jumped back out through the window and ran away.

² Ayub and Song were initially tried together. After their first trial ended in a mistrial, Song pleaded guilty.

Khosrovi, intending to confront Song in the front yard ran out the front door screaming, "Help." He saw Ayub standing by the passenger door of Song's car, which was open about a half a foot, looking at Khosrovi's backyard gate. Ayub jumped into the passenger seat. Song ran out from the backyard directly to the car, jumped into the driver's seat, started the car and sped away. Khosrovi wrote down the car's license plate number and called the police. On two occasions prior to the burglary, Khosrovi had seen the car parked in the neighborhood.

The following day, police officers stopped Ayub in his own black BMW, in which Song was a passenger. An officer searched the car and found a shopping bag full of jewelry and other items. Ayub said the items belonged to a girlfriend. A receipt in the bag listed Dongling Pan as the customer's name. Pan's home had been burglarized while she was out of the country. Some jewelry and a bag of merchandise had been stolen.

A police detective interviewed Ayub twice. On both occasions, Ayub denied being with Song at Khosrovi's home on the night of the burglary.

Defense Evidence

Ayub testified on his own behalf and admitted he lied about not being with Song on the night of the Khosrovi burglary. He testified he and Song went to Khosrovi's home purportedly so Song could visit a girl. As Ayub waited outside by the car and smoked a cigarette, the homeowner came out of the front door screaming, "Help, help." At about the same time, Song ran from the side of the house and got into the car. Ayub jumped into the car as well. Song then started the car and drove away. Song never explained much about what happened.

The day after the burglary, Song called him and asked for a ride to a video store. When Ayub picked Song up, Song had bags Ayub thought contained videos, but one actually contained stolen property. Ayub admitted he initially lied to police about the origin of the bags.

DISCUSSION

A

Before the sentencing hearing, Ayub filed a motion inviting the trial court to dismiss the prior strike conviction finding. At the sentencing hearing, the trial court declined the invitation, stating it could not identify any legitimate, legal basis for dismissing the finding and did not believe a decision to dismiss the finding would withstand an appeal. The trial court based its determination on several factors, including Ayub's failure to successfully complete juvenile probation for the prior offense and the relatively short three-year period between the prior and present offenses.

In addition, the court characterized the prior offense as "one of the most serious, violent robberies that could be committed," noting it involved the use of a firearm and the same accomplice as the present offense. The court similarly characterized the present offense as very serious and further observed Ayub went from a serious, violent felony to another serious felony with only a small window of time to rehabilitate himself. The trial court indicated the only reason it would have for dismissing the finding would be to try to help Ayub avoid going to state prison for the length of time dictated by law, which is an impermissible justification.

B

The law applicable to decisions to strike prior conviction findings is now well established. A trial court has the discretion to dismiss a prior strike conviction in the furtherance of justice under section 1385, subdivision (a). (*People v. Williams* (1998) 17 Cal.4th 148, 158.) However, the trial court's discretion is limited and it must exercise its discretion in strict compliance with section 1385, subdivision (a). (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530.) Specifically, the trial 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." (*People v. Williams, supra*, at p. 161.)

We review a trial court's decision not to dismiss a prior strike conviction finding for abuse of discretion. (*People v Carmony* (2004) 33 Cal.4th 367, 371, 374 (*Carmony*).) As we presume a sentence conforming to the three strikes law is rational and proper, a trial court's decision not to dismiss a prior strike conviction finding will only be an abuse of discretion in limited circumstances, such as where the trial court was not aware of its discretion, the trial court considered impermissible factors, or a sentence under the three strikes law would, as a matter of law, produce an arbitrary, capricious, or patently absurd result under the specific facts of the case. (*Id.* at p. 378.)

The party attacking the trial court's decision has the burden to clearly show the decision was irrational or arbitrary. Absent this showing, we presume the trial court

acted to achieve legitimate sentencing objectives and will not reverse its decision. (*Carmony, supra*, 33 Cal.4th at pp. 376-377.) Moreover, because we may not substitute our judgment for the trial court's judgment, we will not reverse the trial court's decision merely because reasonable people disagree. Rather, we will only reverse the trial court's decision if it is so irrational or arbitrary no reasonable person could agree with it. (*Id.* at p. 377.)

C

Ayub contends we must reverse his sentence because the trial court did not exercise informed discretion in deciding not to dismiss the prior strike conviction finding. He bases this contention on the trial court's failure to specifically discuss the circumstances of the present offense and his positive prospects when it announced its decision. We reject this contention for two reasons.

First, the trial court is not obliged to explain its reasons for declining to dismiss a prior strike conviction finding. (*In re Large (2007)* 41 Cal.4th 538, 550.) Therefore, we cannot presume a trial court's failure to discuss particular factors on the record means the trial court did not consider them. This is particularly true where, as here, nothing in the records suggests the trial court intended its remarks to be an exhaustive analysis.

Second, and more importantly, the record simply does not support Ayub's contention. Before announcing its decision not to dismiss the prior conviction finding, the trial court indicated it had read and considered Ayub's motion papers, his statement in mitigation, letters from him and his supporters, the People's opposition papers, the People's sentencing memorandum and the probation officer's report. Collectively, these

documents thoroughly covered all of the factors the trial court was required to consider in making its decision.

In addition, the trial court allowed Ayub's sister to address it before it announced its decision and she focused her remarks almost exclusively on Ayub's positive prospects. Defense counsel then provided oral argument, in which he emphasized Ayub's subordinate role in the present offense and his young age at the time of the prior and present offenses. Consequently, the record shows the trial court was well aware of and necessarily considered the circumstances of the present offense and Ayub's positive prospects before it announced its decision.

D

Ayub next contends we must reverse his sentence because the trial court misunderstood the breadth of its discretion to dismiss the prior strike conviction finding. Ayub's bases this contention on the trial court's stated belief that a decision to dismiss the prior strike conviction finding would not withstand an appeal. In Ayub's view, the trial court's consideration of the legal validity of its decision was an extrinsic factor with no proper place in its analysis. We strongly disagree with this view. A court must always strive to make legally valid decisions informed by applicable statutes and precedents. Accordingly, a court's consideration of the legal validity of its decision is an inherent part of any decisionmaking.

Moreover, from our review of the record the trial court's statement does not reflect, as Ayub suggests, a paralyzing fear of reversal if it dismissed the prior strike conviction finding. It simply reflects the trial court's determination there was not

sufficient justification to do so. For the reasons we discuss *post*, we agree with this determination.

E

Lastly, Ayub contends the trial court abused its discretion by declining to dismiss the prior strike conviction finding as "no reasonable people could disagree that [he] falls outside the spirit of the [three strikes] law." However, because the trial court may not find that a person with a prior strike conviction falls outside the spirit of the three strikes law absent extraordinary circumstances, "the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony, supra*, 33 Cal.4th at p. 378.) Ayub has not established the existence of such extraordinary circumstances in this case.

As the trial court noted, the circumstances of Ayub's prior offense were serious. According to the probation officer's report, Ayub and Song robbed a store and a store employee at gunpoint, taking several thousand dollars. The circumstances of the present offense were likewise serious. Ayub aided and abetted Song in committing a residential burglary while the homeowner was present. The homeowner heard Song, confronted him, and pursued him. The risk of violence in such circumstances is manifest.

In addition, as the present offense occurred approximately three years after the prior offense and approximately one year after Ayub was unsuccessfully terminated from juvenile probation, Ayub's record did not demonstrate any rehabilitation. This conclusion is bolstered by the fact the prior and present offense involved the same accomplice.

Although Ayub had family support and a stable relationship, and was successfully employed during the two-year period between the present offense and the trial, these positive factors were not so extraordinary they compelled the trial court to dismiss the prior strike conviction finding. Because we cannot conclude the trial court's decision to produced an arbitrary, capricious, or patently absurd result under the circumstances of this case, we cannot conclude the trial court abused its discretion.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.