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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY DWAYNE ERICKSON,

Defendant and Appellant.

D059512

(Super. Ct. No. SCD229134)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed with directions.

A jury convicted Ricky Dwayne Erickson of assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1)), and found true the allegation that he personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). Erickson waived jury trial on the alleged prior convictions and the court found true one serious felony prior conviction within the meaning of section 667, subdivision (a)(1), two serious/violent felony prior

¹ All further statutory references are to the Penal Code unless otherwise specified.

convictions (strikes) within the meaning of section 667, subdivisions (b) through (i), and two prison priors within the meaning of section 667.5, subdivision (b).

The court denied Erickson's motion to strike one of the "strike" priors. Thereafter the court imposed an indeterminate term of 25 years to life, consecutive to a determinate term of 10 years. The determinate term consists of five years for the section 667, subdivision (a)(1), prior conviction, two years for the two prison priors and three years for the great bodily injury enhancement under section 12022.7, subdivision (a).

Erickson appeals challenging only the sentence imposed. He contends the trial court prejudicially erred in stating the three-year term for the great bodily injury enhancement was "mandatory," that the trial court abused its discretion in denying his request to dismiss one of his "strike" priors and finally that there is a clerical error in the abstract of judgment. We agree the abstract of judgment should be corrected. Otherwise we find Erickson's contentions to be without merit and affirm the judgment.

STATEMENT OF FACTS

Since Erickson does not challenge either the sufficiency or admissibility of the evidence to support his conviction we will set forth an abbreviated statement of facts in order to provide a context for the sentencing issues discussed below.

Erickson and the victim, Joseph Roiz, met in prison and remained friends after they were released. When Erickson was released in November 2009, he stayed in San Diego, at the home of Roiz's mother, Mary Roiz-McArthy (McArthy).

Erickson left McArthy's home for a while to complete his parole in San Bernardino, but returned to stay there in the spring of 2010. Erickson and McArthy developed an intimate relationship, which became a source of friction between Erickson and Roiz.

By the summer of 2010, the relationship between Erickson and McArthy began to deteriorate. There were quarrels and on one occasion Erickson smashed McArthy's computer. Erickson moved out of the house briefly but returned a few weeks later. In the first week of August 2010, Erickson took McArthy's Ford Taurus without permission. Police were called, but Erickson returned the car undamaged.

On August 9, 2010, the date of the current offense, Erickson came to McArthy's house three times. On the first occasion Erickson came with a man and a woman. There was a fight between Erickson and Roiz in which Erickson was hit in the leg with a baseball bat. Erickson in turn threw three hammers at Roiz, one of which hit McArthy in the leg.

On his third trip to the house that day, Erickson again took the Taurus without permission. Roiz, who had been watching the car, ran outside to have an angry confrontation with Erickson. Roiz shouted at Erickson who had started to drive away. Erickson stopped, turned the car around and drove back to the house. Erickson accelerated the car, drove over the center median of the street, then up over the curb and onto the lawn of the McArthy residence. Erickson, who had made eye contact with Roiz, drove the car directly at Roiz.

Roiz attempted to run away from the on-coming car, but was unable to escape. The car struck Roiz, sending him flying through the air. The car then crashed into the McCarthy residence.

Erickson then got out of the car with an axe in his hand. He yelled threats at Roiz and said: "I told you I was going to kill you." A friend of Roiz who witnessed the events stepped between Erickson and Roiz. Erickson told her the events had nothing to do with her and then left.

Roiz suffered a subdural hematoma and a fracture to his L-5 vertebrae. He was hospitalized for five days.

DISCUSSION

1. The three-year term for the great bodily injury (GBI) enhancement.

During the sentencing process, Erickson's counsel asked the court to dismiss one of the strikes priors and to strike one or more of the prison priors. Counsel did not ask the court to dismiss the GBI enhancement. During the court's oral pronouncement of the sentence, she said she was imposing the three-year term for the GBI enhancement "which is mandatory." There was no objection made to the court's statement, nor was there any request for clarification of the term "mandatory."

Erickson now contends, for the first time on appeal, that the court abused its discretion because the statement that the sentence was mandatory demonstrates the court was unaware of its authority under section 1385 to strike the enhancement. Based on that hypothesis, Erickson now contends he is entitled to a new sentencing hearing with regard

to the enhancement. We find the issue waived for failure to raise it in the trial court. In any event, even if we treat the court's remark as an error, which we do not, we would find any such error to be harmless.

Dealing first with the question of forfeiture it is well established that in order to preserve a claim of abuse of discretion by a trial judge in making a sentencing choice, defense counsel must make a timely objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 352-353.) In the present case there was not only a failure to object, but the defense never raised any question about the propriety of imposing the term for the GBI enhancement and never suggested the court should consider striking it. The probation report strongly recommended imposing the three-year term, in addition to the maximum sentence for all other sentencing choices. Plainly the issue has been forfeited by failing to raise it in the trial court.

Even if we assumed this very experienced criminal law trial judge was unaware of the power to strike the GBI enhancement, we find no conceivable prejudice. First, the circumstances of the offense are aggravated as demonstrated by the deliberate effort to run over Roiz with a car and then threaten to kill him with an axe. As we will discuss in the next section Erickson was just released from prison when he committed the current offense. He has a dismal criminal history, which includes violence and multiple parole violations. Given the trial court's decision to impose the maximum punishment possible in this case, including two years for prison priors that the defense had asked the court to

strike, it is inconceivable that the unexplained use of the word "mandatory" had any effect on the court's calculation of the sentence.

2. The trial court's decision to deny the motion to dismiss a strike prior.

Erickson requested the trial court to dismiss one of the strike priors in order to impose a determinate sentence. The trial court acknowledged its discretionary authority under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court also considered the age of the strike priors and that both arose from the same occasion, however, given the nature of the conduct in the prior offenses, the egregious nature of the current offense and Erickson's dismal criminal history, the court declined to dismiss any of the strike priors.

Erickson contends the trial court abused its discretion in denying his motion. Essentially he bases his contention on the fact that the two strike priors arose from "the same operative facts" and the "same occasion" therefore he argues it was an abuse of discretion for the court to deny the request to dismiss one of them. Based on this record we find the contention to be without merit.

In *People v. Williams* (1998) 17 Cal.4th 148, 161, the court held that a trial court, in ruling on a motion to strike a serious/violent felony prior conviction, must consider the facts of the current offense, the nature of the past offenses, the defendant's criminal history and the defendant's prospects for rehabilitation. The decision of the trial court should be based on whether, after full analysis, the court determines whether the defendant should be deemed to be outside the spirit of the three strikes law. In applying

the standards set out in *Williams*, trial courts must presume that a sentence conforming to the three strikes law mandate is rational and proper. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) The defendant bears the burden to show the trial court's decision to deny a motion to strike such priors is arbitrary and unreasonable and thus amounts to an abuse of discretion. (*Ibid.*, *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Erickson relies on his interpretation of *People v. Benson* (1998) 18 Cal.4th 24 and *People v. Burgos* (2004) 117 Cal.App.4th 1209. In *Burgos*, the court appearing to rely on *Benson*, held that in that case the fact the two strike priors arose from the same incident meant they were so closely connected that it was an abuse of discretion to deny the motion to strike one of them. (*Burgos, supra*, at pp. 1216-1217.) While the court in *Burgos* found the facts before it rendered the denial of the motion an abuse of discretion the court did not, and in our view could not, declare that all strike priors arising from the same incident must be treated as one strike.

We believe case law has established the decision to grant or deny a motion to strike a prior conviction is addressed to the sound discretion of the court. The fact that the priors are closely connected in their commission is a fact to be considered with all of the other facts to determine if the *Williams* standard has been met. (*People v. Ortega* (2000) 84 Cal.App.4th 659, 667-669; *People v. Scott* (2009) 179 Cal.App.4th 920, 931.)

In the present case the probation report, which the trial judge considered, contained considerable detail about the prior strike offenses. While they arose from the

same "incident" they involved separate acts of violence. In that case Erickson led police on a high speed chase in a stolen vehicle. During his flight he fired multiple shots at pursuing police and in fact, a bullet struck the windshield of one of the police cars. He then abandoned his car and fled from the police. During that flight he continued to shoot at police officers. The trial court could correctly conclude that the two strike priors did not merely amount to a duplication of charges. Rather there were two stages of his conduct and during each he repeatedly shot at the pursuing police officers.

Given the violent nature of the current offense, the violent nature of his past offenses and his absolutely dismal performance on parole, the trial court could easily conclude that Erickson came fully within the spirit of the three strikes law. Some might observe he could be a poster subject for that law. There was no abuse of discretion in denying his motion to dismiss one of the strike priors.

3. The abstract of judgment.

Erickson correctly notes there is a clerical error in the abstract of judgment. It identifies the two-year term for the two prison priors and authorized by section "667(b)." As Erickson points out, and the respondent does not address, the terms were imposed on convictions under section 667.5, subdivision (b). Accordingly, we will direct the superior court to amend the abstract of judgment.

DISPOSITION

The superior court is directed to amend the abstract of judgment to reflect the two years imposed for the prison priors is under section 667.5, subdivision (b), and to forward

an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.