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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN GOUGH,

Defendant and Appellant.

D059551

(Super. Ct. No. SCN249797)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed.

A jury convicted Jon W. Gough of committing a lewd act upon a child (count 1; Pen. Code, § 288, subd. (a))¹ and simple assault (a lesser included offense to count 2; (§ 240.) The jury found true the allegation appended to count 1 that he had substantial sexual conduct with a child younger than 14 years of age. (§ 1203.066, subd. (a)(8).)

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

The court denied Gough's request to dismiss his prior strike conviction allegation, and sentenced him to a prison term of 11 years.

Gough's sole contention on appeal is the trial court erred in denying his request to dismiss the prior strike conviction allegation. He argues that he must be afforded another hearing because the court did not exercise an informed sentencing discretion. We affirm the judgment.

FACTS

A. The Present Offense

In 2001, Gough was alone in his apartment with his eight-year-old neighbor. Gough had the young girl masturbate him and then he laid her on her back and positioned himself on top of her. He then penetrated her with either his penis or finger. Before the victim left the apartment, Gough threatened to kill her if she told anyone. The victim was scared and waited several years to tell her parents about the incident. Eventually the victim's mother reported the incident to the police.

B. Gough's Criminal History

Gough's prior strike conviction was a 1980 conviction for first degree burglary. (§ 459.) He was then 16 years old and was charged with multiple counts of robbery, burglary, and assault. (§§ 211, 459, 245, subd. (a).) The juvenile court in that case determined Gough was unfit to be tried in juvenile court and removed him to adult court, where he was convicted of first degree burglary and sentenced to four years of formal probation. (§ 459.)

In 1982 Gough violated probation when he committed second degree burglary. (§ 459.) A warrant was issued for his arrest in that case and remained outstanding until 1994 when he was arrested for possession of marijuana for sale. (Health & Saf. Code, § 11359.) Gough pleaded guilty to the 1982 burglary, the possession of marijuana, and admitted his prior strike conviction. He was sentenced to four years in prison for the possession and a concurrent two years for the burglary in 1982. Gough was released on parole in 1997 and discharged from parole in 1998. After his 1994 arrest, Gough appeared to be law-abiding until the instant offense in 2001.

C. Request to Dismiss

Gough requested dismissal of his prior strike conviction allegation in the interests of justice under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. In his *Romero* motion, Gough argued that: (1) the strike was remote in time, (2) punishment under the three strikes law is disproportionate to the severity of the current offense, (3) he is not presently a threat to the community and has demonstrated an ability to lawfully contribute to society, and (4) his prior conviction does not fit the "spirit" of the three strikes law (§ 667, subds. (b)-(i)). In denying Gough's request, the court considered the "very, very serious crime" of molesting an eight-year-old and the "very serious and very violent" nature of Gough's prior strike conviction. The court concluded that based on the circumstances, "it would be an abuse of [its] discretion to strike the strike." However, in selecting the lower term for Gough's primary sentence, the court noted the "pretty substantial time lag" between the instant offense and his conviction in 1994.

On appeal, Gough contends the court abused its discretion by denying his request because (1) his prior strike is 31 years old, (2) his criminal history is limited, (3) the court did not properly consider the nature and circumstances of the current offense, and (4) the court did not properly consider the nature and circumstances of his prior strike conviction. Gough focuses on his last argument, claiming the court should have considered that he was 16 years old and in retrospect should have been prosecuted as a juvenile rather than as an adult.

DISCUSSION

The trial court has limited discretion under section 1385 to dismiss prior felony conviction allegations in cases brought under the three strikes law. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) The language of section 1385 permits dismissals "in furtherance of justice." The question is "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* (1998) 17 Cal.4th 148, 161 (*Williams*); *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

We review the trial court's denial of a *Romero* motion for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 376.) "[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.)

The court in this case was aware of its discretion to dismiss the prior strike conviction allegation. In deciding not to exercise that discretion, the court observed that although Gough was law-abiding for eight years prior to the current offense, he had committed two offenses between his prior strike conviction and the current offense. Gough committed his second offense in 1982 while on probation for his strike conviction, resulting in an outstanding warrant for his arrest until 1994 when he was arrested for his third offense. These facts show that Gough has not led a legally blameless life (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813), and is thus the type of recidivist who falls within the "spirit" of the three strikes law. (*Williams, supra*, 17 Cal.4th at pp. 162-163.)

The court also disputed Gough's suggestion that the current crime was "not the most atrocious" "of 288's." The court observed that "[m]olesting an eight-year-old girl in this situation is a very, very serious crime." Here, the court is fully exercising its discretion in evaluating the "nature and circumstances of [Gough's] present felonies," and to dispute its decision on the matter would be without merit. (*Williams, supra*, 17 Cal.4th at p. 161.)

Gough also asserts the court erred by not considering the nature and circumstances surrounding his prior strike conviction. Gough argues that he was 16 years old at the time and should have been adjudicated in juvenile court and not convicted in adult court for the one count of first degree burglary. Gough cites *People v. Garcia* (1999) 21

Cal.4th 1, 15 to show that his offense would not be considered a strike had he been properly adjudicated in juvenile court rather than convicted in adult court.

The court could not properly question the validity of Gough's 1980 conviction in adult court. Because Gough's prior strike conviction occurred over 30 years ago, it is too late to claim the matter should have been adjudicated in juvenile court. "The right to assert such a challenge to [a juvenile court's] order of certification, which order purports to confer on the superior court the right to take personal jurisdiction over a juvenile, may be estopped or lost by waiver" if not "properly and timely challenged." (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 713, disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1, 33-34.) If the court had questioned the juvenile court's order in Gough's prior strike case, it "would [have] afford[ed] him an opportunity to secure a reversal of a judgment of conviction even though he was found guilty after an errorless trial." (*Id.* at p. 712.) "Such a defendant should not be allowed to silently speculate on a favorable verdict and then after an adverse judgment is entered proclaim that the juvenile court's finding was erroneous." (*Ibid.*) Therefore, the court did not abuse its discretion by considering the facts of Gough's prior strike conviction to be "very serious" and "very violent."

Based on the factors considered by the court, we cannot conclude that its "decision [was] so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at p. 377.) In denying Gough's motion, the court properly considered the nature and circumstances of Gough's prior and present offenses, and his criminal

history. (*Williams, supra*, 17 Cal.4th at p. 161.) We conclude the court did not abuse its discretion by denying the request to dismiss the prior strike conviction allegation.

DISPOSITION

The judgment is affirmed.

McDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.