

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDRICK D. ROBERSON,

Defendant and Appellant.

D060207

(Super. Ct. No. SCD225297)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

I.

INTRODUCTION

Defendant Fredrick D. Roberson appeals from a judgment of conviction and sentence after a jury convicted him of being a felon in possession of a firearm. Specifically, Roberson challenges the sentence the trial court imposed, arguing that the court abused its discretion in sentencing him to 25 years to life under the Three Strikes

law. According to Roberson, the trial court inappropriately considered the fact that there were pending charges against him, including a murder charge, and failed to give proper weight to the fact that his two prior strike offenses were the result of a single incident of criminality, that he was a teenager when he committed those offenses, and that his current offense was a nonviolent offense.

We conclude that the trial court did not abuse its discretion in sentencing Roberson to 25 years to life under the Three Strikes law and therefore affirm the sentence.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

At approximately 6:00 p.m. on August 24, 2009, Officer John Carroll was on patrol at the Solola Apartments complex in San Diego. Carroll saw a group of men, including Roberson, congregating behind the apartments. The group scattered when officers approached them. Carroll saw Roberson run toward a drainage ditch and put a black handgun on the edge of the ditch. Roberson then jumped into the ditch, retrieved the gun, placed the gun in his waistband, and continued running. Carroll lost sight of Roberson.

Roberson was arrested near a house in the 4900 block of Solola Street approximately 10 minutes later. Officers did not find a gun on Roberson. They searched the backyard of the house until it was dark but did not find a gun.

The next day, Officer Laurie Black searched the backyard of the house and found a 9-millimeter Ruger handgun. Officer Carroll could not say whether the gun that Black found was the same gun that he had seen Roberson place on the edge of the ditch. However, DNA testing of the magazine of the gun revealed the DNA of three people on the magazine, one of whom was Roberson.

The parties stipulated that Roberson had previously been convicted of a felony.

B. *Procedural background*

A jury found Roberson guilty of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count 1).¹ The trial court found true the allegations that Roberson had suffered one prison prior conviction (§ 667.5, subd. (b)) and two prior strike convictions (§§ 667, subds. (c) & (e)(2)(A) & 1170.12, subd. (c)(2)(A)).

The trial court sentenced Roberson to 25 years to life in prison. In sentencing Roberson, the trial court denied Roberson's motion to dismiss one of his prior strike convictions.

III.

DISCUSSION

Roberson contends that the trial court abused its discretion when it declined to strike one of his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and imposed a sentence under the Three Strikes law.

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

A. *Additional background*

The defense filed a motion pursuant to *Romero* requesting that the trial court exercise its discretion under section 1385 to strike one of Roberson's prior strike convictions. Defense counsel argued that Roberson had sustained both of his strike convictions based on incidents that occurred within 24 hours of each other when Roberson was 16 years old. At that time, Roberson was prosecuted as an adult, and he pled guilty to two counts of carjacking, which is a violent felony under the Three Strikes law. Defense counsel asked the court to consider Roberson's age, and the fact that the two crimes were committed within a short time frame, in moving to dismiss one of Roberson's prior strikes.

At the hearing on Roberson's motion to dismiss one of his prior strikes, the trial court stated that it had read the motion papers and had considered letters from both of Roberson's grandmothers, as well as a letter from one of his grandmother's friends. Defense counsel argued in favor of striking one of Roberson's strike priors, citing Roberson's age at the time he committed his two strike priors, the fact that Roberson had grown up in a gang neighborhood and was involved with gangs, and the fact that the two carjackings had occurred within a 24-hour period.

As defense counsel was arguing, the trial court inquired as to when Roberson had been released on parole, relative to when he committed the current offense. After defense counsel informed the court that the current offense occurred within a year of Roberson's release, the court inquired further as to when the current offense occurred relative to the murder with which Roberson was charged in a separate case. Defense counsel responded

that the murder had occurred in May 2009, and the current offense occurred in August 2009. Defense counsel then stated, "Though the homicide is not before this court. It's my argument in terms of he has not been convicted, he has not pled, so there has not been a true finding as to that."

The trial court responded,

"Okay. There hasn't been a true—there hasn't been any finding by a finder of fact in connection with the homicide. Whether or not there's been a conviction, does that preclude the court from considering any of the factors in the homicide in deciding whether or not—what's the appropriate sentence in this case?"

"We're dealing with two things here: I mean, one is your motion to strike. You're asking the court to strike one of the—one of the strike priors based on the Three-Strikes law, which means that the argument needs to be made that he's somebody who doesn't fit within the spirit of the Three-Strikes law, and I'm wondering whether or not somebody who is accused of murder with a firearm and then found guilty of being in possession of a firearm is somebody who fits outside the box.

"I understand we're dealing with, you know, the priors and they are juvenile—age of a juvenile. They are from adult court, so they're not juvenile priors as such, and I understand that argument.

"I know they use the term on television, you know 'body of work,' and it seems like the body of work for Mr. Roberson when he is not in prison seems to involve guns and violence and potential violence as in the possession of a firearm, and it seems like that's what the Three-Strikes law is meant to—is designed to prevent."

After the trial court made these comments, defense counsel started to address the facts of the murder case. However, after some discussion, defense counsel reminded the court that the defense had requested to delay the determination of Roberson's strike priors and Roberson's sentencing until after the other charges were resolved, but the court had

wanted to go forward with sentencing in this case. Defense counsel argued that because the other charges remained unresolved, "we really do need to focus as to this offense and to what's happening on this—in this particular offense."

The trial court replied, "And I agree. I mean in terms of the offense, that's what I'm going to consider here in connection with—with this—with this motion, but we deal with two factors when we're talking about a motion to strike, one of which is the offense and the other is the offender, and—." At this point, defense counsel interrupted, saying that it would be unfair to consider the pending charges because Roberson had not yet had an opportunity to fully respond to the charges.

The prosecutor agreed with defense counsel, and said that his argument "would be solely based on both the offense in this case and the offender, but my argument regarding Mr. Roberson would not include any reference to the pending case because I agree that at this point, it wouldn't be fair to Mr. Roberson to include that as part of this discussion in this sentencing hearing." The trial court responded, "Okay." The prosecutor then proceeded to argue why Roberson came within the spirit of the Three Strikes law, and did not refer to any of the conduct related to the pending murder charge against Roberson.

The trial court said that it would take into account all of the arguments presented by counsel, the letters of support for Roberson, and the comments in the probation report. The court proceeded to comment on some specifics of Roberson's history, including a 1998 incident in which he took a pellet gun to school and said that he intended to shoot someone with it, as well as multiple other offenses, including the conduct related to the two strike convictions. The trial court specifically noted that Roberson had committed

the current offense relatively soon after having been released from prison, and that despite the fact that his DNA had been found on the gun, the fact that officers had witnessed him in possession of the gun, and the fact that he had been convicted by a jury, in his interview with the probation officer, Roberson maintained that he had not been carrying a gun and that he was not guilty of the crime, thus failing to acknowledge any wrongdoing in the current case.

The trial court then stated,

"Striking one strike is also part of the—part of the—when you get into the spirit, you get down to what is truly meant by the three-strikes law, why is it there, and it is there to prevent violent crime. It's there as a punishment for past violent behaviors, and were this some—were this an offense other than one involving a firearm, I would be looking at this in a totally different fashion.

"But the fact of the matter is that it was involving a firearm. There was not a long period between the commission of the strikes at age 16 and the commission of the new offense involving a gun.

"Now, yes, there's seven years that go on between those two events, but six-and-a-half of those years were spent in a—in prison. It's not like there was a long period of time when Mr. Roberson was outside of the walls of an institution where he remained law abiding and we saw the fruits of that maturity.

"I appreciate the fact that Mr. Roberson is respectful to his family, to his parents, to his grandparents, to his friends and the members of his community, but when he gets outside of that narrow group, he's violent and dangerous, he's carrying firearms and weapons, and the motion to strike a strike is denied."

B. *Applicable law*

A trial court is authorized, in its discretion, to dismiss a prior strike allegation in the interests of justice, under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529-530.)

In deciding whether to dismiss a prior strike allegation, the trial court must determine whether, considering the nature and circumstances of the current offense and the prior strike convictions, the defendant may be deemed to be outside the spirit of the Three Strikes law and should be treated as though he had not incurred one or more prior strike convictions. (*People v. Williams* (1998) 17 Cal.4th 148, 162-163.)

The trial court's decision with respect to dismissing a prior strike allegation is reviewable on appeal under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 373-375.) Under this standard, the defendant has the burden of establishing that the trial court's determination was arbitrary or irrational. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

C. *Analysis*

Roberson makes two arguments as to how the trial court abused its discretion in sentencing him under the Three Strikes law. First, Roberson argues that the trial court should have dismissed one of his prior strikes in the interest of justice because both of his prior strikes arose from a single incident of criminality, he was a teenager when he committed the prior strikes, and his current crime was a nonviolent crime. All of these factors, he argues, weigh in favor of the court striking a strike prior. Second, Roberson complains that the trial court abused its discretion by considering an improper factor in deciding not to strike one of his strike priors. Specifically, according to Roberson, the trial court considered the fact that there were pending charges against Roberson—including a murder charge—that had been severed from the charge in the current case. Neither argument is persuasive.

We initially address Roberson's contention that the trial court improperly considered other charges that were pending against him. The record belies Roberson's depiction of the trial court's analysis. Although the trial court initially posed a question about the possibility of considering the other charges that were pending against Roberson in its determination of his sentence in the present case, the court specifically acknowledged that there had been no finding of fact against Roberson with respect to those charges, and ultimately indicated that the court would consider only the current conviction in ruling on Roberson's *Romero* motion. In addition, when the trial court raised the issue of the pending charges in the context of Roberson's *Romero* motion, the prosecutor stated that it would not be proper for the court to consider those charges, and did not refer to the pending charges at all in arguing in opposition to Roberson's *Romero* motion. After this exchange, in rendering its decision on Roberson's *Romero* motion, the trial court made no mention of the pending charges. The record thus reveals that the trial court relied on proper factors in assessing Roberson's *Romero* motion, and did not consider the fact that there were pending charges, including a murder charge, against Roberson.

We next consider Roberson's contention that the trial court should have dismissed one of his prior strikes based on its weighing of the proper and relevant factors for purposes of a *Romero* motion. The record demonstrates that the trial court was aware of its discretion, that it considered the relevant factors, and that the court ultimately concluded that Roberson did not fall outside the spirit of the Three Strikes law. We see no abuse of discretion in the trial court's reasoning or its conclusion. Despite Roberson's

attempt to portray his prior strikes as having arisen out of a single instance of criminality, as the trial court correctly noted, Roberson committed two independent carjackings, against two separate victims. Although the two offenses may have occurred within a 24-hour period, there is no reason to conclude that these two carjackings were part of a single criminal episode.

Further, Roberson's contention that the trial court should have considered his current offense to be less serious because it was a "nonviolent" offense is not persuasive. One of Roberson's strike convictions was based on a carjacking in which he used a firearm. Against this backdrop, together with the fact that defense counsel connected Roberson's prior criminal activity to his ties to a criminal street gang, the trial court could reasonably have concluded that the fact that Roberson, a felon, was in possession of a gun was a crime of a serious nature. The trial court thus did not abuse its discretion in rejecting Roberson's argument that the nature of Roberson's current crime weighed against finding that Roberson came within the spirit of the Three Strikes law.

Given all of this, together with Roberson's criminal history and the particulars of his background, character, and prospects, we conclude that the trial court did not act arbitrarily or irrationally in determining that Roberson comes within the spirit of the Three Strikes law, and therefore declining to strike one of his prior strike convictions.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

McDONALD, Acting P. J.

McINTYRE, J.