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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RONDEL DELBERT GARDNER,

Defendant and Appellant.

D060706

(Super. Ct. No. JCF26539)

APPEAL from a judgment of the Superior Court of Imperial County, Donal B. Donnelly, Judge. Affirmed.

A jury found Rondel Delbert Gardner guilty of first degree burglary with a person present and receiving stolen property. The jury later found true three prior strike conviction allegations. After denying Gardner's motion to dismiss any of the prior strike convictions, the trial court sentenced him to a prison term of 25 years to life on both counts, but stayed the punishment on the count for receiving stolen property under Penal Code section 654. Gardner asserts the trial court erred in refusing to strike one or more of his prior strike convictions and claims that the

resulting sentence of 25 years to life is cruel and unusual. We reject his contentions and affirm the judgment.

FACTUAL BACKGROUND

On a morning in December 2010, Richard Knights walked into his living room and saw Gardner, a person he had never seen before. After Gardner fled, Knights used his cell phone to dial 911 and then got into his car to follow Gardner. The police eventually stopped Gardner and arrested him. Police officers searched Gardner and found a set of keys and a bottle of prescription medication that had been taken from Knights's home.

DISCUSSION

I. Motion to Strike Prior Convictions

A trial court is permitted to exercise its discretion and dismiss a prior strike conviction if the dismissal is in furtherance of justice. (Pen. Code, § 1385, subd. (a); *People v. Garcia* (1999) 20 Cal.4th 490, 499, 502; *People v. Williams* (1998) 17 Cal.4th 148, 158; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529–530.) We review the trial court's ruling under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Under this standard, the party challenging the sentence has the burden of clearly showing the sentencing decision was irrational or arbitrary. (*Id.* at p. 376.) In the absence of the requisite showing, we will presume the court acted to achieve legitimate sentencing objectives and will allow the sentencing decision to stand. (*Id.* at pp. 376–377.) Moreover, we have no authority to substitute our judgment for that of the trial court

and cannot reverse a sentencing decision merely because reasonable people might disagree. (*Id.* at p. 377.)

In exercising its discretion to deny the motion, the trial court noted that the Legislature defined Gardner's current crime of first degree burglary as a serious and violent felony. (Pen. Code, §§ 459, 460, subd. (a), 1192.7, subd. (c)(18), 667.5, subd. (c)(21).) It found that Gardner did not suffer from a mental illness at the time of the crime, but that he had the "faculties to unlawfully enter the home, take property, and flee from the scene." The court concluded that Gardner displayed a "consistent pattern" of crime over a 20-year period that was "uninterrupted by any substantial period of crime-free activity." Gardner contends the trial court abused its discretion in refusing to strike his first degree burglary and assault with a firearm on a peace officer or a firefighter convictions from 1990 and 1992. We disagree as the trial court's ruling was neither irrational nor arbitrary.

In 1979, when he was 20 years old, Gardner committed his first misdemeanor crime of resisting arrest. He committed the misdemeanor offenses of fourth degree assault, petty theft, and being under the influence of a controlled substance in 1983, 1989 and 1990. In 1990, he committed his first prior strike conviction for residential burglary. He received a two-year prison sentence for this offense. In 1992, he received his second prior strike conviction for assaulting a peace officer or firefighter with a semiautomatic firearm and received a four-year prison sentence. In 1995, he committed the offense of receiving stolen property. In 1996, he committed another assault and received a 128-month prison sentence. In

2005, he suffered a third prior strike conviction for another first degree burglary and received a nine-year prison term. He committed the instant offenses in 2010 while on parole.

While Gardner claimed to be developmentally disabled, a mental condition is a mitigating factor in sentencing only if that condition "significantly reduced culpability for the crime[.]" (Cal. Rules of Court, rule 4.423(b)(2).) Through its findings that Gardner had his faculties during the crime and did not suffer from a mental illness, the trial court impliedly rejected Gardner's contention that any mental condition significantly reduced his culpability for the crimes.

Gardner has a lengthy and virtually continuous history of criminal conduct, undeterred by repeated incarcerations. This history puts him well within both the spirit and the letter of the three strikes law. Moreover, in the absence of an affirmative record to the contrary, we presume the court considered all of the relevant factors in exercising its discretion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Gardner points to nothing in the record which suggests the trial court did not properly consider all of the relevant factors in exercising its discretion. On this record, the trial court did not abuse its discretion in refusing to strike one or more of Gardner's prior convictions.

II. *Cruel and/or Unusual Punishment*

Gardner contends that his sentence of 25 years to life for the current offense constitutes cruel and unusual punishment under the federal and California Constitutions. (U.S. Const., 8th Amend. [prohibits infliction of "cruel and unusual"

punishment.]; Cal. Const., art. I, § 17 [prohibits infliction of "[c]ruel or unusual" punishment.].) Although Gardner asserted in his motion to dismiss strikes that a life term in prison would constitute cruel and unusual punishment, he did not raise this objection at the sentencing hearing and therefore waived it. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.) In any event, we exercise our discretion to consider his contention on its merits to avoid a claim of ineffectiveness of counsel. (*Id.* at p. 230.)

Generally, the Eighth Amendment prohibits only those sentences that are grossly disproportionate to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 23–24 (*Ewing*)). Similarly, the California Constitution is violated when the punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*)). Lengthy prison sentences imposed under a recidivist statute have long survived scrutiny under both constitutions. (See, e.g., *In re Rosencrantz* (1928) 205 Cal. 534, 539–540; *People v. Weaver* (1984) 161 Cal.App.3d 119, 125.)

We examine three factors to determine whether a sentence is proportionate to the offense and the defendant's circumstances such that it does or does not constitute cruel and unusual punishment: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed for other crimes in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. (*Ewing, supra*, 538 U.S. at p. 22; *Lynch, supra*, 8 Cal.3d at pp. 425–427

[comparable three-prong test].) Gardner does not address any comparison of penalties for similar offenses in other states. Accordingly, he fails to demonstrate disproportionality on that basis. Nor has he shown the sentences imposed for other crimes in California are disproportional. While Gardner cites a comparison of sentences done in *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony*), this sentence comparison was done for first-time offenders. (*Id.* at p. 1081.) Needless to say, Gardner is not a first-time offender.

This leaves us with analyzing the gravity of the offense and the harshness of the penalty. "The gravity of an offense can be assessed by comparing the harm caused or threatened to the victim or society and the culpability of the offender with the severity of the penalty." (*Carmony, supra*, 127 Cal.App.4th at p. 1077.) Gardner analogizes his situation to that of the defendant in *Carmony*, where a three strikes sentence for failing to register as a sex offender, was deemed cruel and unusual punishment. (*Id.* at pp. 1073, 1084.) In *Carmony*, the defendant registered his correct address with the police a month before his birthday, but failed to update his registration with the same information when his birthday arrived. (*Id.* at p. 1073.) Because the defendant's address had not changed and his parole officer knew where he was residing, the appellate court characterized the offense as a harmless technical violation of a regulatory law that did not warrant a three strikes sentence of 25 years to life. (*Id.* at pp. 1071–1072.) Additionally, the defendant "had recently married, maintained a residence, participated in Alcoholics

Anonymous, sought job training and placement, and was employed." (*Id.* at p. 1073.)

Gardner is far removed from the defendant in *Carmony*. Gardner's first degree burglary conviction is not similar to the harmless technical violation at issue in *Carmony* and he has not shown the existence of any of the positive social factors displayed by the *Carmony* defendant. Gardner had committed three strike prior offenses and the instant offense was his fourth strike. In considering the harshness of the penalty, we take into consideration that Gardner is a repeat offender whom the Legislature may punish more severely than it punishes a first-time offender. (*Ewing, supra*, 538 U.S. at pp. 24–26.) Additionally, Gardner incorrectly characterizes his current crimes as minor because they did not involve violence or threats. This argument ignores that the very nature of residential burglary makes it a highly dangerous crime. (*People v. Lewis* (1969) 274 Cal.App.2d 912, 920; also, *People v. Cruz* (1996) 13 Cal.4th 764, 775–776 [distinction between first and second degree burglary is founded upon perceived danger of violence and personal injury involved when a residence is invaded].) Finally, Gardner's situation is not similar to the defendants in the federal cases he cites as the crimes at issue in those cases were not strikes or were wobblers. (*Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875, 877 [not registering under California's sex offender registration statute]; *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964, 965 [perjury for making misrepresentations on a driver's license application]; *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 758 [wobbler offense].)

We conclude that Gardner's sentence does not constitute cruel and unusual punishment under both the state and federal constitutions.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.