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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMONT HOLMAN,

Defendant and Appellant.

D061122

(Super. Ct. No. SCS249670)

APPEAL from a judgment of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Affirmed.

Lamont Holman pleaded guilty to carrying a loaded firearm on his person while an active participant in a criminal street gang (former Pen. Code, § 12031, subds. (a)(1) & (a)(2)(C), now § 25850, subds. (a), (b)(3)).<sup>1</sup> He also admitted a prior strike conviction allegation (§§ 667, subds. (b)-(i), 1170.12).

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

On appeal, Holman contends: (1) the court abused its discretion when it denied his motion to dismiss the prior strike conviction allegation; and (2) the state and federal equal protection clauses require retroactive application of section 4019, as amended effective April 4, 2011, operative October 1, 2011, to increase Holman's presentence conduct credits. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

On July 11, 2011, a home in National City was burglarized. Various pieces of jewelry and two firearms were taken from the home. The next day, San Diego police officers saw a group of men, including Holman, drinking and gambling in a local park. As the officers approached the group, Holman began to walk away. One of the patrol cars pulled onto the grass and started to follow Holman, who ran through the park near children. As Holman was running away, police saw him holding his waistband. He also threw an object away as he continued to flee the police. Police recovered the object—a handgun with six live rounds in it. Police checked the serial number of the firearm and found it was one of the firearms stolen in the home burglary the day before. Holman also had other items stolen from that home.

Holman was charged with burglary (§ 459), receiving stolen property (§ 496, subd. (a)), and carrying a loaded firearm on his person while an active participant in a criminal street gang (former § 12031, subd. (a)(1)). As part of the plea agreement,

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<sup>2</sup> Because Holman pleaded guilty to count 1 and the remaining counts were dismissed, the factual background is taken from the probation report and other details reported at the sentencing hearing.

Holman pleaded guilty to the firearm offense and admitted the prior strike conviction allegation for a gang-related robbery in 2009. The prosecutor dismissed the balance of the charges and agreed not to ask for more than four years in state prison.

The court stated at the change of plea hearing that it would consider dismissing the prior strike conviction allegation, but made no promises it would do so. At Holman's sentencing hearing, defense counsel presented a statement in mitigation, including a letter from Holman's girlfriend and a psychological evaluation, and moved to dismiss the prior strike conviction allegation pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. After reviewing the record, the court declined to dismiss the prior strike conviction allegation based on Holman's background, future prospects, criminal history, and the facts of the current and past offenses. The court sentenced Holman to the lower term of 16 months, and doubled the sentence to 32 months pursuant to the three strikes law.

## DISCUSSION

### I

Holman argues the trial court abused its discretion when it denied his *Romero* motion to dismiss his prior strike conviction allegation. He asserts that his youth and the absence of prior prison terms place him outside the spirit of the three strikes law, and that his lack of candor regarding the date he received the stolen property should not have resulted in a denial of probation.

The trial court has limited discretion under section 1385 to dismiss prior felony conviction allegations in cases brought under the three strikes law. (*People v.*

*Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) The language of section 1385 permits dismissals "in furtherance of justice." (§ 1385, subd. (a).) The court in *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), elaborated on when a court has discretion to dismiss a prior strike offense allegation "in furtherance of justice": "[T]he court in question 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." (*Id.* at p. 161.)

We review the trial court's denial of a *Romero* motion for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 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 appellate court must determine "whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Williams, supra*, 17 Cal.4th at p. 162.)

The court in this case thoroughly considered the factors applicable to its discretion to dismiss the prior strike conviction allegation. In deciding not to dismiss that allegation, the court considered Holman's criminal record, the nature and circumstances of his prior felony conviction and the present offense, as well as his background, character, and prospects if granted probation. The court noted Holman has been involved in the criminal justice system for five years, which shows he is a person committed to a criminal lifestyle who continues to affiliate with gang members.

Holman's prior strike conviction in 2009 was a gang-related robbery. The court also noted two loaded firearms were found in a backpack belonging to either Holman or his accomplice, a known gang member.

Regarding the current offense, the court noted (without considering whether Holman was involved in the burglary of the house) that Holman was with known gang members in the park, ran from police carrying a loaded firearm where children were present, lied to police about when he had obtained the firearm,<sup>3</sup> and had items from the home burglary on his person.

Regarding Holman's background, character, and prospects, the court noted Holman lied about when he obtained the firearm. It also commented that he was "cavalier" in his attitude toward the current crime. Holman's psychological report diagnosed him with antisocial personality disorder and stated he exhibits "irresponsibility" relative to his work and school history. The psychologist also noted that "[g]iven his history . . . there is certainly some possibility relative to his posing a continued threat to the community." Holman had been given several chances to change his lifestyle with several different programs through the juvenile courts. The court concluded Holman would not be a good candidate for probation, the prior strike conviction allegation would not be dismissed, and a prison sentence was appropriate.

(*Williams, supra*, 17 Cal.4th at pp. 162-163.)

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<sup>3</sup> The probation report notes that when Holman was asked where he obtained the firearm, he told the probation officer he had purchased it from someone a couple of days prior to his arrest. The court agreed with the prosecution that this was a lie, because the firearm had been stolen from the victims' home the day before Holman's arrest.

Based on the factors considered by the court, we cannot conclude its "decision [was] so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) In denying Holman's request to dismiss the prior strike offense allegation, the court properly considered the nature and circumstances of his 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.

## II

Holman also argues equal protection principles require the most recent amendments to section 4019 regarding presentencing conduct credits (effective October 1, 2011) should apply to him. He asserts he is a similarly situated offender and the July 12, 2011, date of his offense does not provide a rational basis for a lesser credit award.

## A

We first consider Holman's retroactivity claims under principles of statutory construction. Section 4019 has been amended in recent years, increasing or decreasing the rate at which prisoners can earn conduct credits, raising the issue regarding whether the amendments should be applied retroactively.

At section 4019's inception in 1976, if a prisoner followed rules and regulations of confinement and earned all possible conduct credits, six days would be deemed served for every four days in actual custody. (Former § 4019, subd. (b)(1) & (2); Stats. 1976, ch. 286, § 4, p. 595.) From January 25, 2010, through September 27, 2010, the conduct

credit rate was increased—four days would be deemed served for every two days in actual custody. (Former § 4019, subs. (b)(1), (c)(1) & (f); Stats. 2010, 3rd Ex. Sess. 2010, ch. 28, § 50, pp. 5270-5271, eff. Jan. 25, 2010.) However, the January 25, 2010, increase in the conduct credit rate was eliminated beginning on September 28, 2010, reverting back to the six day/four day rate. (Stats. 2010, ch. 426, § 2, p. 2187, eff. Sept. 28, 2010).<sup>4</sup>

On October 1, 2011, the Legislature amended section 4019 to increase the conduct credit rate back to the four day/two day rate. (Stats. 2012, 1st Ex. Sess. 2011, ch. 12, § 35, pp. 3945-3946, eff. Sept. 21, 2011, oper. Oct. 1, 2011.) The Legislature also added to section 4019 subdivision (h), which provided: "The changes to this section enacted by the act that added this subdivision *shall apply prospectively* and shall apply to prisoners who are confined . . . *for a crime committed on or after October 1, 2011*. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (Italics added, fn. omitted.)

The California Supreme Court recently addressed whether the January 25, 2010, amendment to section 4019 should be given retroactive effect. (*People v. Brown* (2012) 54 Cal.4th 314.) In the absence of specific legislative intent to the contrary, the court reiterated the long-standing principle of statutory construction that the amendment

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<sup>4</sup> At that time, the Legislature also added subdivision (g) to section 4019, which stated: "[t]he changes in this section as enacted by the act that added [subdivision (g)] shall apply to prisoners who are confined . . . for a crime *committed on or after the effective date of that act*." (§ 4019, subd. (g), italics added, fn. omitted.) Similar language was added to section 4019 in October 2011, when subdivision (h) was added to the statute.

applies prospectively. (*Id.* at p. 318.) The court noted section 3 requires prospective-only application unless it is " 'very clear from extrinsic sources' " that the amendment should apply retroactively. (*Brown*, at p. 319.) *Brown* found no cause to apply the January 25, 2010, amendment retroactively, and found "prisoners whose custody overlapped the statute's operative date . . . earned credit at two different rates." (*Id.* at pp. 320-322.)

However, in the case of the October 1, 2011, amendment to section 4019, the Legislature did expressly state the changes were to apply prospectively and added further limitations to its application. The new increased conduct credit rate would apply only to prisoners who committed crimes on or after October 1, 2011, and any prisoner who earned days before that date would earn them at the rate required by the prior law. (§ 4019, subd. (h).) This language unambiguously conveys the Legislature's intent regarding which prisoners could earn conduct credits at the increased rate. Relying on the reasoning in *Brown*, the court in *People v. Ellis* (2012) 207 Cal.App.4th 1546 held "the amendment to Penal Code section 4019 that became operative October 1, 2011 . . . applies only to eligible prisoners whose crimes were committed on or after that date." (*Id.* at p. 1548.)

Here, Holman was arrested on July 12, 2011, for offenses committed on or around that same day. Therefore, the October 1, 2011, amendment would not apply to him. He is not entitled to retroactive application of the amendment.

B

Holman's argument that prospective-only application of the October 1, 2011, amendment of section 4019 violates the equal protection clauses of the federal and state Constitutions has been resolved by *Brown*. (*People v. Brown, supra*, 54 Cal.4th at p. 328; *People v. Ellis, supra*, 207 Cal.App.4th at pp. 1550-1552; see *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 [declining to find equal protection violation with prospective application of Oct. 1, 2011, amendment].) The court in *Brown* explained "[t]he obvious purpose' [of a law increasing conduct credits] 'is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.' [Citation.] '[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.'" (*Brown*, at p. 329, quoting *In re Strick* (1983) 148 Cal.App.3d 906, 913.) "[P]risoners who serve their pretrial detention before such a law's effective date, and those who serve their detention thereafter, are not similarly situated with respect to the law's purpose." (*Lara*, at p. 906, fn. 9.)

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.