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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JAMES MCINTIRE, Defendant and Appellant.	D061555 (Super. Ct. No. SCE308122)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Affirmed.

A jury convicted Michael James McIntire of resisting a peace officer (Pen. Code, § 148, subd. (a)) and possession of a controlled substance (Health & Saf. Code,[1] § 11377, subd. (a)). It found him not guilty of possession of a controlled substance for sale (§ 11378). In bifurcated proceedings, the trial court found true three prison priors and three strike priors. (Pen. Code, §§ 667.5, subd. (b), 667, subds. (b)-(i), 1170.12). At

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1 All statutory references are to the Health & Safety Code unless otherwise indicated.

sentencing, the court struck two of McIntire's three prior strike convictions in the furtherance of justice and sentenced him to the upper term of three years for possession, doubled because of his remaining strike, plus three years for his three prison priors, resulting in a total of nine years in prison.

McIntire appeals, contending the court abused its discretion by not striking all of his prior strike convictions under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) and therefore denying him probation. He further contends the court denied him due process of law by imposing the upper term for possession based on evidence relating to the failed possession for sale charge. We affirm the judgment.

BACKGROUND[2]

At McIntire's sentencing hearing, the court questioned McIntire about trial evidence indicating sales, such as a live-feed camera filming outside of his apartment, the presence of scales and packaging material inside his apartment, and his carrying as much as five to seven grams of methamphetamine on him when he was arrested. McIntire admitted the incriminating evidence "looked bad," but claimed he had no intention of selling drugs. After hearing from McIntire and both counsel, the court explained that once McIntire had gotten out of prison, he returned to "business as usual" by selling drugs, despite having spent extensive time in prison throughout his 25 years of selling and manufacturing methamphetamine. The court stated it could not "quarrel with the

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2 Because the issues on appeal relate only to McIntire's sentence, we need only discuss the underlying facts of the offenses to the extent they are relevant to the court's sentencing decisions.

jury's verdict," but nonetheless it reiterated that the evidence, including a magnetic key holder designed to hide drugs, indicated McIntire was again selling or manufacturing drugs.

The court declined to impose a 25-year-to-life sentence, and partially granted McIntire's *Romero* motion by striking two of his three strikes. It did not believe the drugs McIntire possessed were for personal use and, in light of his numerous felony convictions, imposed the upper term for the possession conviction.

DISCUSSION

I.

McIntire contends the trial court abused its discretion in not striking all of his prior strike convictions under *Romero*. He maintains his conviction for possession of a controlled substance was minor in nature; such violations are usually misdemeanors in the absence of prior convictions for possession and are routinely resolved via drug treatment, as his parole officer had recommended; and a nine-year sentence was excessive. We disagree.

There is a "legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law." (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) Departure from this presumption will be justified by extraordinary circumstances only. (*Id.* at p. 378.) 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.' " (*Id.* at p. 377.) We review the trial court's decision to not strike a prior strike conviction for abuse of discretion. (*Id*. at p. 376.)

Our review is guided by two legal principles: First, " ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational and arbitrary." ' " (*People v. Carmony*, *supra*, 33 Cal.4th at p. 376.) If this is not shown, the trial court " ' "is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' " (*Id.* at pp. 376-377.) Second, a " ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' " (*Id.* at p. 377.) Thus, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*) " '[W]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Id.* at p. 378.)

We conclude that the court acted well within its discretion in striking only two of McIntire's three strike priors. The probation report describes McIntire's extensive criminal history, drug use, and numerous narcotics related convictions, including a 1980 conviction for possession of a dangerous drug with intent to deliver; a 1988 conviction for misdemeanor possession of a controlled substance; a 1988 conviction for felony transporting a controlled substance; a 1992 misdemeanor conviction for being under the

influence of a controlled substance; a 1993 conviction for felony possession of a controlled substance; a 1994 conviction for felony possession of a controlled substance; and a 2011 conviction for misdemeanor possession of marijuana and narcotics paraphernalia. McIntire had additional convictions unrelated to drugs, including 1988 convictions for first degree robbery, false imprisonment with weapon use, assault causing great bodily injury and grand theft property, for which McIntire received all three of his strikes. Although the current offense was not violent, the probation officer was not confident McIntire would refrain from committing violent crimes in the future. The report noted that McIntire was "not a novice to the criminal justice system," and he was undeterred by his strikes when he was paroled.

In assessing McIntire's *Romero* motion to strike, the court discussed both the evidence of sales presented at trial and its belief the drugs McIntire possessed were not for personal use, and relied on McIntire's extensive criminal history, including this case, which was his "seventh or eighth" felony conviction and was committed while McIntire was on parole. In light of McIntire's extensive criminal history, violations of parole, and circumstances of the current offense, the court reasonably applied that he fell within the spirit of the three-strikes sentencing scheme. We conclude the court balanced the relevant facts and did not abuse its discretion in striking only two of his three prior strike convictions.

Because we affirm the court's decision to strike only two of McIntire's three prior strike convictions, McIntire was ineligible for probation as a matter of law under Penal Code section 667, subdivision (c)(2).

II.

McIntire contends that under the Fifth, Sixth, and Fourteenth Amendments of the federal Constitution, the court violated his due process rights by disregarding the jury's findings and sentencing him to the upper term for possession of a controlled substance, while referring to evidence presented for the charge of possession of a controlled substance for sale. We disagree.

The California Supreme Court addressed this precise issue in *People v. Towne* (2008) 44 Cal.4th 63. In that case, the defendant was convicted of joyriding but acquitted of all other charges, ranging from kidnapping to robbery. (*People v. Towne*, *supra*, 44 Cal.4th at p. 70.) Nonetheless, the trial court imposed the upper-term sentence for his joyriding conviction, in part because it found the victim was afraid for his life. (*Id.* at p. 73.) The defendant argued the sentence conflicted with the jury's findings of not guilty on all charges involving violence or force and claimed the court violated his due process rights. (*Id.* at pp. 74, 83.) The Supreme Court stated that nothing in California sentencing law or constitutional principles regarding double jeopardy, due process, or the right to a jury trial prevented a trial court from considering this evidence, and explained that under the trial court's broad discretion in sentencing, it could consider evidence related to an acquittal on one or more charges. (*Id.* at pp. 85-86.) The Court stated that the lower court's consideration of evidence related to an acquittal did not undermine the jury, which still determined the maximum authorized sentence through its verdict. (*Id*. at p. 87.) Even if the trial court used evidence of a crime the defendant was acquitted of, it was not "correcting" any perceived errors by the jury because the court could only

sentence the defendant based on crimes for which the defendant was convicted by the jury. (*Id.* at pp. 87-88.) The Court concluded there was no "unfairness in permitting the trial court, in selecting the sentence most appropriate for the crime, to take into account all of the evidence related to defendant's conduct in committing that offense." (*Id.* at pp. 88-89.)

Although McIntire was acquitted of possession with intent to sell, the court did not err in considering evidence regarding sales to sentence McIntire to the upper term for his possession conviction. Contrary to McIntire's arguments that this evidence undermined his due process rights, the jury was still able to set the maximum sentence McIntire was subject to, and the court did not go beyond that maximum. As in *Towne*, the trial court here was not "correcting" any perceived errors in the jury's verdict, as the court was only able to sentence McIntire regarding the charges for which he was convicted. (*People v. Towne*, *supra*, 44 Cal.4th at pp. 87-88.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.