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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JULIUS CRAIG JOHNSON, Defendant and Appellant.	E054169 (Super.Ct.No. FVI1100490) OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed with directions.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Marvin E. Mizell and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Julius Craig Johnson was charged by information with second degree commercial burglary (Pen. Code, § 459, count 1)[1] and petty theft with a prior (§ 666, subd. (a), count 2).[2] He admitted having three prior convictions. The prosecution subsequently elected to proceed under section 484, subdivision (a), petty theft, on count 2. The information also alleged that defendant had suffered two prior strike convictions. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i).) A jury found defendant guilty on both counts, and found true the prior strike allegations. Defendant filed a motion to have the trial court dismiss a prior strike conviction, under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), but the court denied it. The court sentenced defendant to state prison for consecutive terms of 25 years to life on each conviction, and stayed the sentence on count 2 under section 654.

On appeal, defendant contends: (1) the court abused its discretion by refusing to strike one or both of his prior strike convictions; and (2) the court erred by imposing a consecutive term on count 2. The People concede, and we agree, that the court erred in imposing a consecutive term on count 2. We further note some corrections to be made to the sentencing minute order and abstract of judgment. Otherwise, we affirm.

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[1] All further statutory references will be to the Penal Code, unless otherwise noted.

[2] The information also alleged that defendant served three prior prison terms within the meaning of section 667.5, subdivision (b). However, those prison priors were subsequently dismissed.

FACTUAL BACKGROUND

Kity Herrera, an asset protection employee at Wal-Mart, observed defendant take three cosmetic products and conceal them in his clothes. She called the sheriff's department to report her suspicions. She next saw defendant take several body washes and deodorants and put them in his shopping cart. Defendant roamed around the store and then went into the men's restroom. Defendant was in the restroom for 15 to 20 minutes. Officer James Snow arrived and met Herrera. They followed defendant throughout the store. Defendant went into the food department and concealed the body washes and deodorants in his jacket and pants. He went to the garden department, walked past the lines of customers waiting for the cash registers, and headed toward the exit door. As defendant walked past the last cash register, he looked around to see if anyone was watching. He made eye contact with Officer Snow, who signaled for him to come over. Defendant complied. Defendant told Officer Snow that he was trying to pay for his items and that he did not have anything on him. Officer Snow searched defendant and discovered that he had two pairs of pants on. The inner pair had the cuffs tied tight to his legs, which allowed him to put items inside his pant legs without them falling through. Defendant had body washes and deodorants inside his pants. The total amount of the items found was $151.45.

ANALYSIS

I. The Trial Court Did Not Abuse Its Discretion in Declining to Dismiss Defendant's Prior Strike Conviction(s)

Defendant contends that the trial court abused its discretion in failing to consider all relevant sentencing factors and alternatives and declining to dismiss one or both of his prior strike convictions under *Romero*. He argues that the court focused exclusively on his recidivism, and failed to consider or acknowledge that: (1) his criminal history is comprised primarily of petty theft with prior offenses and drug-related misdemeanors; (2) the only violent offense he suffered was a robbery conviction, and he was not the actual perpetrator of the robbery; (3) he suffered from a drug addiction that fueled his criminality; (4) his prior strike offenses were remote in time; (5) he did not commit any felonies between 1990 and 2002; and (6) although he had been incarcerated several times, he was only sentenced to state prison twice. He further asserts that the court failed to consider alternate sentences that could have been imposed, and that the 25-year-to-life sentence for the instant offense was a "grossly excessive sentence that undermine[d] federal fairness," in violation of his federal constitutional right to due process. We find no abuse of discretion.

A. *The Trial Court's Ruling*

The defense filed a motion to strike defendant's prior strike convictions, and the People filed an opposition. The court read the motion and opposition, and allowed the parties to present oral arguments. After a few brief comments, defendant submitted. The prosecutor noted that defendant had been convicted of three felonies subsequent to his two strikes, but Los Angeles County "decided not to go down the route of the three strikes."

The prosecutor then submitted on the probation report and recommendation. The trial court ruled, as follows:

"You know, there are situations where *Romero* really has its place. And there are places that *Romero* doesn't. When you have somebody who is at a much younger age with two strikes, you would think that that person would not even spit on the sidewalk.[3] Here, we have a fellow that not only has the two strikes, but subsequently has sustained three . . . felony convictions. And for whatever reason, Los Angeles County either *Romero'd* him or didn't seek to impose the strikes. And yet, here we are in 2011 with this young man still committing crimes. *Romero* does not fit this situation. The motion under *Romero* is denied."

B. *Standard of Review*

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss three-strike prior felony conviction allegations under section 1385. (*Romero*, *supra*, 13 Cal.4th at pp. 529-530.) "[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) "[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 burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate

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[3] Defendant was 43 years old at the time of the hearing.

sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.]" (*Id*. at pp. 376-377.)

C. *The Court Did Not Abuse Its Discretion*

The touchstone of the *Romero* analysis 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.' [Citation.]" (*Carmony*, *supra*, 33 Cal.4th at p. 377.) "[T]he circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the . . . scheme . . . .'" (*Ibid*.)

This case is far from extraordinary. Defendant claims that the trial court abused its discretion in failing to strike a prior conviction by focusing exclusively on his recidivism. However, his recidivist criminal history brings him squarely within the spirit, as well as the letter, of the three strikes law. Defendant's criminal history dates back to July 31, 1989, when he was first convicted of grand theft from a person. He spent four days in jail and then was placed on probation for three years. However, on March 29, 1990, while on probation, defendant was convicted of his first strike conviction, for first degree burglary. (Pen. Code, § 459.) He was sentenced to jail for 300 days and then released on 60 months of probation. He then apparently violated probation twice. On October 9, 1990, defendant was convicted of his second strike conviction, for second degree robbery. (Pen. Code, § 211.) He was sentenced to two years in prison. Then, on October 8, 1992, defendant was

convicted of defrauding an innkeeper. (Pen. Code, § 537.) He was placed in jail for 30 days and released on 36 months of probation. On February 25, 2000, defendant was convicted of being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)) in one case, and occupying property without consent (Pen. Code, § 602, subd. (1)) and possession of drug paraphernalia (Health & Saf. Code, § 11364) in another case. He was placed on probation for three years. Less than two months later, on April 18, 2000, he was convicted of possessing drug paraphernalia (Health & Saf. Code, § 11364) again, and was placed on probation for three years again. Approximately two years later, defendant was convicted of a felony, petty theft with a prior (Pen. Code, § 666) on April 12, 2002. He was sentenced to one year in jail and released on three years of probation. While on probation, he was convicted of petty theft with a prior (Pen. Code, § 666) again, on December 8, 2004, and sentenced to 16 months in prison. Then, on April 26, 2006, defendant was convicted of two more felonies, burglary (Pen. Code, § 459) and petty theft with a prior (Pen. Code, § 666), sentenced to 70 days in jail, and released on three years of probation. Finally, on June 29, 2011, defendant was convicted of his two current offenses, second degree burglary (Pen. Code, § 459) and petty theft (Pen. Code, § 484, subd. (a)).

During his lengthy criminal history, defendant was given numerous chances to change by being placed on probation, but he repeatedly violated his grants of probation. Moreover, he had very brief periods of time between convictions, with the exception of a period between 1992 and 2000. Although his current offenses were nonviolent, when viewed in context with his criminal history, it is evident that defendant continues to present

a danger to society. In short, the record demonstrates over two decades of continuous criminal conduct, undeterred by repeated grants of probation and incarcerations.

In view of the record, we cannot say that the trial court's decision not to dismiss any of defendant's prior strike convictions was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 33 Cal.4th at p. 377.) We also do not find the sentence of 25 years to life to be "grossly excessive," as defendant claims. As the court observed, "*Romero* does not fit this situation." There was no abuse of discretion.

II. <u>The Sentencing Minute Order and Abstract of Judgment Should Be Amended</u>

During the sentencing hearing, the court imposed sentence as follows:

". . . probation is denied and [defendant] is sentenced to California State Prison as follows: For Count 1, second degree burglary in violation of Penal Code section 459, per Penal Code section 667 (E)(2)(A) and Penal Code section 1170.12(C)(2)(A), 25 years to life. The three one-year priors have been dismissed to run consecutive to the above petty theft with three priors pursuant to Penal Code section 666(A), Penal Code section 667 (E)(2)(A), Penal Code section 1170.12(C)(2)(A), 25 years to life, that's stayed pursuant to Penal Code section 654. His total commitment to state prison is 25 years to life . . . ."

The sentencing minute order and abstract of judgment indicate that the sentence on count 2 was imposed consecutive to the sentence on count 1, and that it was then stayed under section 654. It is not clear that the court actually imposed the term on count 2 consecutive to the term on count 1. In any event, when section 654 applies, the proper procedure is to impose and stay the sentence on that count, rather than to impose a consecutive or concurrent term. (See *People v. Duff* (2010) 50 Cal.4th 787, 796.) The

parties here agree that the minute order and abstract of judgment should be amended to omit any reference to count 2 having been imposed consecutive to count 1.

Although not raised by the parties, we note a few other errors. Generally, a clerical error is one inadvertently made. (*People v. Schultz* (1965) 238 Cal.App.2d 804, 808.) Clerical error can be made by a clerk, by counsel, or by the court itself. (*Ibid*. [judge misspoke].) A court "has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.]" (*In re Candelario* (1970) 3 Cal.3d 702, 705.)

In this case, when the court sentenced defendant, it made the following somewhat confusing statement regarding count 2: "The three one-year priors have been dismissed to run consecutive to the above petty theft with three priors pursuant to Penal Code section 666(A), Penal Code section 667 (E)(2)(A) and Penal Code section 1170.12(C)(2)(A), 25 years to life, that's stayed pursuant to Penal Code section 654." The court was apparently mistaken when it referred to the conviction being under section 666, subdivision (a). Defendant was originally charged with petty theft with three priors, in violation of section 666, subdivision (a). However, the parties had a discussion in open court, and defendant admitted the three prior theft convictions prior to trial. The People then elected to proceed under section 484, subdivision (a), petty theft, with the understanding that if the jury convicted defendant of petty theft, it would be considered a felony because of the admitted prior convictions. The jury was accordingly instructed on petty theft (§ 484, subd. (a)) as to count 2, and it found defendant guilty. Thus, the record indicates that the parties intended the conviction on count 2 to be for petty theft under section 484, subdivision (a), not petty

theft with a prior under section 666, subdivision (a). It is evident the court's reference to section 666, subdivision (a), was inadvertent. The sentencing minute order and abstract of judgment also mistakenly indicate that the conviction on count 2 was under section 666, subdivision (a).

Accordingly, we will direct the trial court to amend the July 28, 2011 minute order and abstract of judgment to omit any reference to the sentence on count 2 having been imposed consecutive to count 1, and to reflect that the conviction on count 2 was for a violation of section 484, subdivision (a).

DISPOSITION

The trial court is directed to amend the July 28, 2011 minute order and abstract of judgment to omit any reference to the sentence on count 2 having been imposed consecutive to the term on count 1, and to reflect that the conviction on count 2 was for a violation of section 484, subdivision (a). Copies of the amended minute order and abstract of judgment should be forwarded to the California Department of Corrections and Rehabilitation. We otherwise affirm the judgment.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

KING
J.