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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

DOUGLAS H. HORN,

Defendant and Respondent.

E054849

(Super.Ct.No. INF1100297)

OPINION

APPEAL from the Superior Court of Riverside County. John Davis, Judge.

Affirmed.

Paul E. Zellerbach, District Attorney, and Alan D. Tate, Deputy District Attorney,
for Plaintiff and Appellant.

Victoria S. Cole, under appointment by the Court of Appeal, for Defendant and
Respondent.

Defendant, Douglas Horn, pled guilty to failing to register as a sex offender within five days of changing his residency (Pen. Code, § 290, subd. (b))¹ and failing to update his sex offender registration (Pen. Code, § 290.011, subd. (a)). He also admitted having suffered four prior offenses for which he served prison sentences. (§ 667.5, subd. (b).) He was sentenced to prison for seven years. The People appeal from his sentence, claiming it was unlawful, because, they assert, the court below improperly dismissed allegations that defendant had suffered five strike priors.² We reject their contentions and affirm.

FACTS

The facts related to defendant's crimes are taken from the declaration in support of the arrest warrant, which defendant stipulated at the time of entering his pleas served as their factual basis. That declaration states that defendant had been convicted in 1987, inter alia, of forcible rape and forcible oral copulation and, as a result, had been ordered to register as a sex offender for the rest of his life. In 1998 and 1999, he was convicted of failing to register. From December 2009 to his incarceration in April 2010, for a

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

² Despite so stating in their opening brief, relying on section 1238, subdivision (a)(10), in their reply brief, the People concede that their appeal may not be expressly authorized by this subdivision, which provides for an appeal from the imposition of an unlawful sentence, including a sentence based upon an unlawful order of the court which strikes the effect of an enhancement or prior conviction. In their reply brief, they assert that this appeal is authorized by section 1238, subdivision (a)(1) which addresses an "order setting aside . . . any portion of the . . . complaint." Because making this assertion in their reply brief has deprived defendant of the opportunity to address it, we will bypass the parties' arguments whether the magistrate's dismissal of the strikes constitutes an appealable order and address the merits of the People's contentions.

violation of parole, defendant had registered every 30 days as a transient. He was released from custody in June 2010, but again violated parole and was returned to prison on July 15, 2010. On August 13, 2010, while incarcerated, he was informed of his registration requirements. Defendant was released from prison on October 28, 2010, and the following day was outfitted with a GPS ankle monitor at the parole office. A parole agent reminded defendant that he needed to register within 5 days with the local police department. Defendant told the agent that he would be living on the streets. Defendant later told the agent that he had made an appointment for November 4, 2010 to register with an investigator at the Indio Police department. However, he failed to show up and did not call to reschedule. Using information relayed by the ankle monitor, the parole agent followed defendant's movements over the week after October 29, 2010, and noticed that defendant was frequenting downtown Indio. On November 5, 2010, the agent was notified that defendant's ankle monitor had been removed. It was later found in a brown paper bag, in a tree, along with a note addressed to the agent in defendant's handwriting, bearing his initials that said that he had been threatened several times because he had been wearing the monitor. Defendant said he understood the consequences of removing the monitor, but he had to think about his survival first. He said he had already secured a ride out of the state. Defendant added the following postscript, "What? Did you think I wasn't going to be prepared this time? You're not as smart as you think you are. Adios!!"

PROCEEDINGS BELOW

Defendant was charged by complaint with the two offenses to which he pled guilty, along with allegations that he had suffered the five strike priors and the four priors for which he had served prison sentences. Before the preliminary hearing could take place, defendant moved, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to dismiss all five of his strike priors. The court below, sitting as a magistrate, granted the motion. The People thereafter conceded that they had failed to challenge this ruling in a timely fashion by moving to reinstate the complaint pursuant to section 871.5³ or by petitioning the appellate division of superior court for a writ. Nevertheless, the People brought a motion to reinstate the strike priors or to be allowed to dismiss the entire case and refile it with the dismissed strike priors once again alleged. Defendant had previously stated his wish to plead to the complaint as it then stood (without the five strike priors) and the People had objected.⁴ The court below eventually denied the People's motion. Defendant then pled guilty and admitted the four section

³ The same deputy district attorney who signed the motion in which this concession was made and who previously appeared with the prosecutor now represents the People on appeal. However, on appeal, he asserts that he is unaware of any authority for a motion under section 871.5 to challenge the dismissal that occurred here. It is notable that yet a third deputy district attorney conceded at the hearing on the People's motion to reinstate the strike priors or to dismiss the entire case and refile to include the dismissed strikes that 871.5 was "the proper remedy to reinstate th[e] charges" and the prosecutor's office "blew it" by not filing a section 871.5 motion.

⁴ According to the defense, defendant had also stated his willingness to plead guilty to the charges and admit the prison priors previously, at the first opportunity after the court below granted his *Romero* motion.

667.5, subdivision (b) allegations. The case was then certified to the Superior Court and defendant was sentenced to the maximum sentence.

ISSUES AND DISCUSSION

1. Error of Law

The People first assert that the court below committed legal error in granting defendant's motion to dismiss his strikes because, they assert, such a motion should be limited to the sentencing proceeding and should not be permitted in a situation where dismissing strikes will unnecessarily restrict the discretion of a different sentencing judge. As to the latter, we observe that before the People's motion challenging the dismissal was submitted, it was noted by another judge, and not disputed by the prosecutor, that defendant "had a right to enter a plea at the time he was here with [the judge]" who dismissed the strikes. In fact, it was the same judge who dismissed the strikes who eventually accepted defendant's plea and sentenced him. Therefore, in this particular case, we cannot see how the dismissal of defendant's strikes interfered with the discretion of the judge who eventually sentenced defendant.

The People's other assertion is that motions to dismiss should take place only in the context of sentencing proceedings. For authority, the People cite *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*); *Romero, supra*, 13 Cal.4th at page 504; *People v. Williams* (1981) 30 Cal.3d 470, 478, 479 (*Williams*); *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1215 (*Burgos*); *People v. Cressy* (1996) 47 Cal.App.4th 981, 991 (*Cressy*) and *People v. Sipe* (1995) 36 Cal.App.4th 468, 476 (*Sipe*).

The People draw our attention to the statement in *Carmony* that the three strikes law was intended to restrict the trial court's discretion in sentencing repeat offenders. We do not see this as a general mandate (because it was not an issue here) that the same judge who ultimately sentences a defendant be the one who also determines whether to dismiss any of the defendant's strikes. The same is true of *Romero's* statement, at page 504, that the Supreme Court has held that the power to dismiss an action under section 1385 includes the lesser power to dismiss factual allegations relevant to sentencing, such as the allegation that the defendant has prior felony convictions. Of course, the presence of strike allegations is purely a sentencing matter. However, this does not mean that only the sentencing judge should have the power to dismiss them. The statement in *Williams* at pages 478 and 479, to which the People draw our attention, was made in the context of the legality of a trial court dismissing an allegation of a prior conviction, admitted by the defendant, which would have resulted in him receiving a greater sentence for the crime for which he was convicted. Because the defense had asked the trial court to dismiss the finding that defendant had committed the prior "for the purpose of sentencing" the Supreme Court held that section 1385 was applicable to the dismissal of the prior in that "The procedure of . . . dismissing[] a charge of a prior conviction . . . at the time of sentencing is not expressly provided for by statute but it is commonly used in trial courts . . . where the fact of the conviction has been shown but the trial court has concluded that "in the interests of justice" defendant should not be required to undergo a statutorily increased penalty which would follow from judicial determination of that fact.' [Citation.]" (*Williams, supra*, 30 Cal.3d at p. 478.) Contrary to defendant's assertion,

this does not constitute a declaration that the power to dismiss under section 1385 should exist only in the context of sentencing, but was merely a statement that a dismissal under section 1385 is appropriate for a finding that a defendant suffered a prior which, if not dismissed, would result in a greater sentence. In *Burgos*, the appellate court held that where two strikes arose from the same act, it would constitute an abuse of discretion for the trial court not to dismiss one of them. (*Burgos, supra*, 117 Cal.App.4th at pp. 1214, 1216.) The appellate court’s statement that “[w]hether to strike a prior conviction in furtherance of justice under section 1385 is within the discretion of the trial court at sentencing” was merely a statement of the context of the case then before it, not a declaration that such a dismissal is appropriate *only* at sentencing. After all, as the People conceded below, a motion to dismiss may be granted by a magistrate and “[d]ismissals under section 1385 may be proper before . . . trial.” (§ 1385, subd. (a); *People v. Orin* (1975) 13 Cal.3d 937, 946.) Finally, if the People seek a declaration that only the judge who sentences the defendant should be the one to rule on a *Romero* motion, this is not the case in which we should make such a declaration because the judge that granted the motion also sentenced defendant. *Cressy’s* and *Sipe’s* declarations that the Three Strikes Law is an alternative sentencing scheme, while a well-established fact, does nothing to persuade us that, outside the context of a sentencing hearing, a strike may not be dismissed under section 1385. (*Cressy, supra*, 47 Cal.App.4th at p. 991; *Sipe, supra*, 36 Cal.App.4th at p. 476.)

The People’s argument that allowing a magistrate to dismiss a strike would permit the decision to be made, in some instances, on incomplete information, is a reason for a

magistrate to deny such a motion. It is, however, not an argument that no such power exists, when section 1385 clearly states that it does. Nor is this power an infringement on prosecutorial discretion to charge, as the People assert.

2. Abuse of Discretion

Defendant's strikes occurred on August 14, 1987 and August 28, 1987, when defendant was 20 years old. During the first occasion, defendant entered the victim's home and hit her repeatedly in the head with a mallet while she slept. He took her purse and wristwatch as he left. The victim did not require medical attention for her injuries. During the second occasion, defendant accosted a woman in the early morning hours near an ATM, told her he had a gun, and forced her to return and withdraw \$300 from the ATM. He then made her drive to a church and he fondled her under her clothes as she did. At the church, he forced her to get out of the car and remove all her clothes. He threatened to shoot her if she looked at him. When he was unable to penetrate her with his penis, he did with his finger, then orally copulated her and forced her to orally copulate him. He then raped her. As a result, defendant was convicted of first degree burglary, assault with a deadly weapon during which he inflicted great bodily injury, first degree robbery, false imprisonment, second degree robbery, two counts of kidnapping, two counts of forced oral copulation, forcible rape, false imprisonment and possessing a dirk or dagger. Only five of these were alleged as the strikes in the instant case. Defendant was sentenced to prison for 12 years for these crimes.

In 1995 and 1997, defendant violated his parole. In March 1998 and in October 1999, defendant was convicted of failing to register and was granted probation for three

years in the first case and sentenced to prison for four years in the second.⁵ Defendant violated parole in 2000, 2001, 2002, 2003 and twice in 2004. In 2006, he was convicted of possessing methamphetamine and paraphernalia and was sentenced to prison for four years and eight months. According to the defense, defendant had a drug problem at the time of this conviction. He violated parole in 2008, twice in 2009 and three times in 2010, one of those times due to the instant offenses.

Defendant was 43 at the time of sentencing in this case. The defense made the following assertions: Defendant was attempting to address his employment problems and homelessness; defendant has three children with whom he maintains regular contact; defendant was engaged to a woman who was willing to provide support and assistance and he planned to adopt her two children upon their marriage; while homeless, defendant volunteered his time to a ministry that counseled offenders; defendant regularly attended AA and NA meetings and a recovery center and has been substance free for 10 years, and defendant cut off his ankle monitor because he was being threatened by other homeless people who assumed he was a child molester.

During argument to the court below, defense counsel pointed out that the nature of the violations of parole were not known, as was unknown whether defendant had hearings on them, whether they were sustained or whether defendant served time for

⁵ Defendant was sentenced to two years for the 1999 failure to register and his probation was revoked for the 1998 failure to register and he was sentenced to a consecutive two year term for it.

them. Defense counsel pointed out that some of the parole violations listed by the People may not have been valid.

The court below observed that some of the parole violations did not have new charges associated with them, so they were not very serious. The court also said that there was a difference between a career criminal, i.e., one who commits new crimes, and one who repeatedly violates parole.⁶ The court found that sentencing defendant to a 25-years-to-life term for the current offenses would be a miscarriage of justice. The court added that all of defendant's violent crimes were committed 24 years ago and were, therefore, remote in time. The court found that they all arose out of one period of aberrant behavior and were prior to the enactment of the Three Strikes Law. The court also found that the current offenses were not violent ones and the severity and dangerousness of defendant's crimes decreased over time, despite the fact that he continued to violate his parole.⁷ The court said that defendant's current age is much different than his age when he committed the strikes. The court added that if defendant were to commit a new violent offense, a 25-years-to-life term would be justified. The

⁶ We agree with defendant that this refutes the People's assertion that the court below was inconsistent in finding, on the one hand, that defendant was an "ongoing criminal" "who thumbed his nose at" the parole officer, and, on the other, that he was not deserving of a 25-years-to-life term.

⁷ The court added that defendant's "thumbing his nose" at his parole agent was not a good thing. The court also gave little credence to defendant's claim that he removed his ankle monitor because he had been threatened by other homeless people due to it.

court concluded that defendant's current offenses fell outside the parameters of the intent of the Three Strikes Law and it dismissed all five strikes.

The People here assert that the court below abused its discretion in dismissing the strikes. “. . . [I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385, [subdivision] (a), . . . the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony conviction, 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.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

“. . . [A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at pp. 367, 377.) It is not enough that reasonable people may differ about whether a defendant falls outside the intent of the Three Strikes Law. (*Id.* at p. 379.) It is error for an appellate court to reverse the ruling of the court below on a *Romero* motion simply because we disagree with it. (*Ibid.*)

The record does not support the People’s assertion that the court below felt it lacked discretion to dismiss *any* of defendant’s strikes, not just all of them. The fact remains that at the time the court originally granted the *Romero* motion, the defense had asked that all five strikes be dismissed. When, during the People’s subsequent motion,

the prosecutor announced that he was seeking reinstatement of anywhere between one and five of the strikes, the court did not say that it would not consider such alternatives and it expressly stated that it was reconsidering the *Romero* motion. We also disagree with the People's characterization that the court below felt a 25 years to life sentence would be inappropriate merely because the instant crimes did not involve violence. The court listed a number of factors it considered in making its decision, only one of which is based on the non-violent nature of the current offenses. We acknowledge the holding in *Williams* that the circumstances in which a career criminal may be deemed to be outside the spirit of the Three Strikes Law must be extraordinary, but in so doing, we come face to face with the dilemma of the court below in this matter, i.e., what constitutes a "career criminal?" The court below concluded that defendant's concededly regular parole violations, the nature and outcome of some unknown,⁸ and defendant's two convictions for failing to register and one conviction for possessing methamphetamine did not render him a career criminal. We cannot say that this conclusion is arbitrary, irrational or something that no reasonable person could make. The People's efforts to take each factor the court below relied on in making its decision and cite a case holding that this factor, alone, or it and one other, is insufficient to support the dismissal of one or more strikes is unhelpful. The court below cited numerous factors and absent a California Supreme Court case holding that the same collection of factors do not justify the exercise of the

⁸ We note that despite this issue being presented at the time the *Romero* motion was granted, the People offered no information to inform the court below about the nature and outcome of these violations at the time of their subsequent motion.

court's discretion, we cannot say so either. As defendant correctly asserts, considerations such as the fact that defendant's priors occurred during a single period of aberrant behavior, that his prior violent offenses were remote in time, that the offenses were related to drug addiction, that his criminal history is non-violent and that he is older at the time of sentencing for the instant crimes and, therefore, will be in the penal system long enough to render it unlikely that he will reoffend once released are proper considerations for the granting of a *Romero* motion. (*People v. Garcia* (1999) 20 Cal.4th 490, 503; *Williams, supra*, 17 Cal.4th at p. 161, *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250, 1251.)

In their written motion to reinstate the strike priors, or dismiss the case and refile to include the strike priors, the People made an interesting concession about the conclusion of the court below. They said, "This Court may be right that sentencing defendant to 25 years to life would be a 'miscarriage of justice.'" At the hearing on this motion, the People conceded that what the court had done was "entirely within [its] discretion." And so it is. While what the court below did here may not have been what this court would have done under the circumstances, that is not the test.

Having concluded that the court below did not abuse its discretion in dismissing defendant's strikes, we need not address the issue whether a 25-years-to-life term in this case would have violated the constitutional ban on cruel and unusual punishment.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.