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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.

RODERICK KEITH DIRDEN,

Defendant and Appellant.

E056533

(Super.Ct.No. RIF10004205)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas Kelly, Judge.
(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed.

Nancy Olsen, 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, A. Natasha Cortina and Joy
Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Roderick Keith Dirden appeals from a judgment convicting him of three counts of robbery (Pen. Code, § 211)¹ and three counts of being a felon in possession of a firearm. (§ 12021, subd. (a)(1).) The jury found defendant guilty of two robbery counts and associated felon-in-possession counts, and also made true findings on allegations that defendant personally used a firearm in the commission of the robberies. (§12022.53, subd. (b).) The jury was unable to reach a verdict on a third set of charges, but defendant eventually pleaded guilty to these charges as well. The court subsequently found true an allegation that defendant had suffered a prior “strike” conviction within the meaning of section 667, subdivisions (b)-(i).²

Before sentencing, defendant filed a motion to have his “strike” prior stricken pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). This was denied, and the trial court imposed a sentence of 33 years 4 months.³

On this appeal defendant contends first that the trial court erred when it denied his *Romero* motion. He also contends that his sentence violates the Eighth Amendment because, as to him, it constitutes cruel and unusual punishment. We disagree, and affirm the judgment.

¹ All subsequent statutory references are to the Penal Code unless otherwise specified.

² This conviction also constituted a prior serious felony conviction within the meaning of section 667, subdivision (a), as also alleged in the information.

³ The greater part of the sentence resulted from mandatory enhancements for the firearm use and prior convictions.

STATEMENT OF FACTS

The three robberies all took place at a cell phone store on consecutive Fridays. On the third Friday, law enforcement personnel were waiting and arrested defendant.⁴

The victim of the first robbery was the store manager. On August 27, 2010, in mid-afternoon, defendant, wearing a werewolf mask, entered the store pointing a handgun at the victim. He told the victim “Give me the money or I’m going to shoot you.” The victim complied and defendant left.

The victim of the second and third robberies testified that she was working alone at the store on September 3, 2010, when defendant, wearing a Halloween mask, came in with a gun in his hand and demanded that she give him the store money. The man sounded “angry and scary.” She complied, and defendant took the money and ran out.

One week later, defendant again entered the store “with the same mask and the same gun,” which he held toward her face about a foot away. Again, he demanded money and yelled at the clerk, insisting that there must be more when the cash drawer was relatively empty. Again he took the money and fled, only to be apprehended as described above.

After his arrest, defendant spoke with law enforcement personnel and incriminated himself with respect to all three robberies. The tape of the interview was played for the jury. At trial, however, he admitted only the September 10, 2010 robbery, and claimed to have been far away at the time of the other two offenses. He explained his statements to

⁴ We refer to the man as “defendant,” because at this point there is no dispute as to identity.

police at the time of his arrest by testifying that the detective told him “that he had officers outside of my door waiting to kick down my front door. And I stay in an upscale neighborhood - - I stay in a half-million-dollar residential neighborhood with only African-Americans in that neighborhood, and I couldn’t have my family embarrassed.” He also claimed, in a somewhat garbled manner, that a neighbor had committed the first two robberies and that he had borrowed the mask and gun to try and imitate this person.

In testimony also relevant to the *Romero* motion, defendant stated that in August he was heavily using oxycodone and cocaine, and that his child’s mother threw him out of the house. After the period of time covering the first two robberies (for which he presented an alibi, see above), he returned home but was again “kicked out.” He was reduced to living in his car and needed the money “to survive.”

THE *ROMERO* MOTION⁵

Defendant’s “strike” resulted from a 1985 conviction for robbery for which he had been sentenced to four years in prison; he later served a six-month term for a parole violation. Two years after being discharged from parole, he was convicted in federal court of using a firearm in a drug trafficking crime. (21 U.S.C. § 841(a).) He served 12 years in prison for this offense, being released on “supervised release” in 2005. He was discharged in June of 2009. The instant offenses occurred approximately 15 months later.

⁵ The *Romero* motion noted that the “strike” crime took place “a long time in the past. . . . This past crime is so remote in time that it has nothing to do with the person that Mr. Dirden is today.” We note that the “strike” crime was a robbery and the instant offenses are . . . robberies.

In his motion, defendant urged that his current crimes arose from his drug problems and asserted that he knew he would have to take “personal responsibility for correcting his life.” (There was, however, no declaration in support of these assertions.) The motion also relied upon the “unusual” circumstances that defendant had been “kicked out” of his home and was concerned about his young son.

After brief argument, the trial court denied the motion. It commented that “I have very little discretion in deciding whether to strike a prior. It’s very hard to see reasons that it should be stricken.” After describing defendant’s criminal history, the court noted that the issue had been discussed before trial and “I didn’t see how *Romero* would apply in this situation.” The trial court described the crimes and the terror inflicted on the victims, and then continued “You know, folks that don’t like three strikes, they have to address it with the legislature, not the judiciary. We have a limited area we can exercise discretion. And if we go beyond that, we’re simply reversed We still have to follow the law as it’s come down to us”

DISCUSSION

A.

Defendant argues both that the trial court abused its discretion when it denied his *Romero* motion and that it misunderstood the nature of that discretion. Neither contention has merit. We deal with the second first.

As noted above, the trial court commented that its discretion was “limited.” This was a correct statement of the law; applied to “strikes,” the court’s discretion is far from unfettered. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 153, citing *Romero, supra*, 13

Cal.4th 497, 529-530.) It is clear from the comments we have quoted that this is not a case in which the trial court was unaware that it had *any* discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*); *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.) As the trial court clearly recognized, the court must base its decision on an evaluation of whether, in light of the present felonies, the past felonies, and “the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit” (*People v. Leavel* (2012) 203 Cal.App.4th 823, 837, citing *People v. Williams* (1998) 17 Cal.4th 148, 161.) It cannot be motivated by its personal belief concerning the law (*Romero, supra*, 13 Cal.4th 497, 531) or its personal views of the defendant. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 993.) Nothing in the trial court’s comments indicates that it believed its discretion was limited by anything other than “the law as it’s come down to us,” a comment that cannot be criticized.

This brings us to the merits of the decision. Our review is for abuse of discretion, which means that defendant bears the burden of showing that the decision was irrational or arbitrary, and that we, as an appellate tribunal, cannot substitute our judgment for the reasoned decision of the trial court. (*Carmony, supra*, 33 Cal.4th 367, 376-377.)

There was nothing either arbitrary or irrational about the decision not to strike defendant’s “strike” prior conviction. Although his criminal history is not extensive, it is serious. After his first robbery conviction, he violated parole on one occasion and committed his serious federal drug/weapons offense only two years after being released from parole. After serving a lengthy prison term, he apparently behaved well enough

while on parole, but committed the instant violent felonies just over a year after being released from parole.

Defendant attempts to mitigate the seriousness of his current offenses by the argument that no one was actually hurt and that his planning was less than sophisticated. He also tries to minimize them by lumping all three as the result of being “homeless, desperate, and need[ing] money to care for himself and his young son.”⁶ But as the trial court cogently commented at sentencing, most people under stress do not grab guns and rob people. Furthermore, the fear felt by the victims being threatened at gunpoint must not be trivialized. (See *People v. Gaston* (1999) 74 Cal.App.4th 310, 320-321.)

Defendant asserts that he cooperated with authorities when arrested and after being given his *Miranda* rights, and also suggests that he would have accepted responsibility sooner if he had been offered a desirable plea bargain. We decline to accept the proposition that a defendant who would have pleaded guilty in return for a reduced sentence should get credit for “accepting responsibility,” and we point out that at trial, defendant claimed that his cooperative behavior and admissions were in fact coerced by police threats.⁷

⁶ As noted above, defendant testified that he lived in a neighborhood of “half-million dollar homes.” The nexus between defendant’s crimes and his son’s immediate needs is far from clear.

⁷ We also point out that not only are defendant’s “accepting responsibility” claims untenable, but he also attempted to avoid conviction at trial by implicating his (possibly imaginary) friend in the first two robberies.

Finally, while tacitly admitting that the trial court considered evidence favorable to him, defendant attempts to rely on the court's statements that "I have no doubt that most of the time you're a pretty good guy," that "you've got some smarts." Also that defendant was devoted to his son and that his fiancée "seemed like a really sharp gal" who has "got her act together."⁸ He insinuates that with one more chance, his supportive family, and more rehabilitation, he would be a productive member of society, and that the trial court erred by eventually rejecting this position.

As defendant stresses in the next point raised, at the time of trial he was 52 years old. He had spent most of his adult life either in prison or on supervised parole, and continued to use drugs and attempt to solve his problems by committing violent crimes. His supportive family, his child and a 2010 stint in drug rehabilitation were all inadequate to prevent the current crimes. The trial court certainly did not abuse its discretion when it concluded that defendant fell well within the spirit of the "Three Strikes" law.

B.

Defendant's second argument⁹ starts with the dubious premise that his 33 1/3-year term means that he will never be released and it therefore constitutes a life without parole

⁸ The jury, however, evidently found that she testified falsely when she gave defendant an alibi defense.

⁹ The People assert that the issue was waived because defendant did not object to the sentence on this basis in the trial court. Defendant responds that he may raise issues relating to the deprivation of a fundamental constitutional right (see *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1410-1411) or, alternatively, that we should address the issue in order to avoid having it raised in a duplicative "ineffective assistance of counsel"
[footnote continued on next page]

term. We cannot agree with this position. Although he will be required to serve 85 percent of the time (Pen. Code, 2933.1, subd. (a)), defendant would be eligible for parole at about the age of 80. Nothing in the record supports the actuarial position that he will not live to that age.

But the fundamental “cruel and unusual” argument is further flawed because it depends on the age at which defendant committed his crimes and was convicted. While a long sentence—especially a life term—may be constitutionally vulnerable applied to a young person (see *People v. Caballero* (2012) 55 Cal.4th 262, 268; *People v. Dillon* (1983) 34 Cal.3d 441, 488-489 [rehg. den. Oct. 6, 1983]), it would be a slippery slope indeed that required the constitutional analysis to depend not on the defendant’s youth but his senescence. Defendant argues that a 33-year term is constitutionally excessive as to him; what if he were in his early forties instead? Would a 20-year term be excessive to a defendant in his sixties, no matter what his (nonhomicidal) crimes? Could a 90 year old commit any (nonhomicidal) crime and escape with a few months imprisonment? Could a longer sentence be imposed on a healthy defendant rather than on a sickly one? The fatal problems are obvious.

The point of the cases analyzing long terms for juveniles relative to the Eighth Amendment is that the juvenile mind is immature and the juvenile criminal may not be capable of exercising mature judgment or restraint. (*Graham v. Florida* (2010) 560 U.S.

[footnote continued from previous page]

habeas corpus petition. (See *People v. Em* (2009) 171 Cal.App.4th 964, 971 at fn. 5.) We agree that the issue is suitable for resolving at this point.

48, __ [130 S.Ct. 2011, 2026-2027].) Obviously this analysis is wholly inapplicable to the case at bar. Defendant was over 50 years of age when he committed the instant robberies. He had the advantage of as much maturity, reflection, and self-control as he is ever likely to obtain. The unfortunate fact that he may be serving a true life sentence is attributable not to the harshness of the sentence imposed, but to defendant's failure to turn himself into a responsible adult after over five decades on the planet.¹⁰

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

MILLER
J.

¹⁰ We are reminded of the defendant accused of killing his parents who sought mercy from the judge by crying that he is “an orphan!” (See *People v. Weidert* (1985) 39 Cal.3d 836, 858.) The story derives from Leo Rosten, *The Joys of Yiddish* (1971). (See *United States v. Figueroa* (2010) 622 F.3d 739, 744 (7th Cir. 2010).)