

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY GENE FLORENCE,

Defendant and Appellant.

E063246

(Super.Ct.No. FWV1203111)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller,
Judge. Affirmed.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P.
Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

On August 26, 2014, defendant and appellant Bobby Gene Florence pled guilty to possession of a controlled substance under Health and Safety Code section 11377, subdivision (a), and possession of drug paraphernalia under Health and Safety Code section 11364.1, subdivision (a).

On February 18, 2015, the trial court denied defendant's *Romero*¹ motion. Thereafter the court sentenced defendant to an indeterminate term of 26 years to life in state prison.

On April 7, 2015, defendant filed a timely notice of appeal. On appeal, defendant challenges the trial court's order denying his *Romero* motion. For the reasons set forth below, we shall affirm.

FACTUAL AND PROCEDURAL HISTORY²

A. CURRENT CONVICTION

On December 9, 2012, at about 11:07 p.m., Officer Richard Madrid of the Upland Police Department responded to a location to investigate a person reportedly wandering around a trailer park and knocking on residential doors. There, Officer Madrid made contact with defendant. An hour later, Officer Madrid took defendant to jail.

Before placing defendant in the patrol car, Officer Madrid searched defendant and did not find anything. However, when they arrived at the jail and defendant was

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

² The facts are taken from the preliminary hearing transcript, which was the factual basis of defendant's plea.

getting out of the patrol car, a napkin fell out of defendant's pants pocket. Officer Madrid looked inside and found a glass pipe used for smoking methamphetamine, and a baggie of methamphetamine of usable quantity.

B. PRIOR STRIKES

Defendant admitted (1) two 1996 prior strike convictions arising from the same incident—forcible rape under Penal Code section 261,³ subdivision (a)(2), and kidnapping under section 207, subdivision (a); and (2) a 1992 robbery under section 211.

In a probation report for the 1996 convictions, the probation officer noted that defendant approached two minors under the age of 14, whom defendant believed to be prostitutes. When the minors told defendant that they were not prostitutes, defendant ordered the girls into his car at gunpoint, drove them to a residence, forced them to orally copulate him, raped one of the girls, and digitally penetrated the other. Defendant then transported the minors and dropped them off at an unknown location. Defendant also discharged his gun during the incident.

C. SENTENCING IN THIS CASE

1. *MOVING AND OPPOSING PAPERS*

Defendant filed a *Romero* motion to dismiss his prior strike convictions in the interests of justice, which the People opposed. Defendant conceded that he was ineligible for resentencing under Proposition 36 or Proposition 47 because of his prior

³ All further statutory references are to the Penal Code unless indicated.

sex offenses. Nevertheless, he asked the court to exercise its discretion under section 1385 to dismiss some of his prior convictions or reduce his current drug conviction to a misdemeanor under section 17, subdivision (b)(3).

Defendant argued that the court should grant his motion because his current conviction was for a minor offense; his only prison-rule violation had been for making Pruno⁴; his parole violations had been drug-related; he had complied with all his sex offender registration requirements; and he had been unable to attend drug treatment while on parole because of his sex offender status.

The People opposed because of defendant's criminal records, which dated back to 1987, and included a subsequent uncharged robbery arrest and a conviction for auto theft, in addition to the prior strike offenses. The prosecutor opined defendant should not receive any leniency because he was a habitual offender and posed a public safety risk. The prosecutor also argued defendant's drug addiction was not an appropriate consideration in a *Romero* motion, where a defendant exhibited "a long-term problem" and was "unwilling to pursue treatment." The prosecutor also asked the court to consider the facts of the current offense, and in particular, evidence defendant illegally possessed drugs, "while knocking randomly on the residence doors of innocent citizens" after 11:00 p.m.

⁴ Wine made from fruit and sugar.

2. HEARING

At the hearing, Agent Juan Perez testified. Perez had worked for the Department of Corrections and Rehabilitation for 15 years. He had been a parole officer monitoring sex offenders since 2004. Perez supervised defendant from April 2013 to May 2013. Perez never met or spoke with defendant, and was unaware about defendant's efforts to seek drug treatment while on parole or in custody.

Perez testified that inmates with a mental illness were classified by prison psychiatrists as high-risk offenders. In Los Angeles County, where defendant lived when he was on parole, housing for high-risk and registered sex offenders was unavailable, and it was very difficult to place such parolees in inpatient drug treatment programs due to liabilities associated with housing such persons and because other parolees did not take kindly to them. As a result of these issues, sex offender parolees were mostly transients.

Perez also testified the only drug treatment option for sex offender parolees was the STAR program, which was held for 20 days or a month at the parole office. On occasion, the program could be offered a second time to parolees testing positive for drugs, but not beyond that. More recently, Los Angeles County implemented an inpatient drug treatment program for sex offenders. The program was not available to anyone with a child molestation or rape conviction.

Sex offender parolees were required to wear an ankle monitor, which had to be charged twice daily, and report to their parole officer once a week. Finding a location to charge the ankle monitor was challenging for transient parolees, but according to Perez,

parole violations for failing to charge ankle monitors did not occur often because parolees did not want to go to jail.

Defendant testified that, while in custody in 2005, he had lost his mother, sister, grandmother and uncle, all within a month. Around that time, defendant was diagnosed as paranoid schizophrenic. He was also later classified as a high-risk offender because of his mental health issues. Defendant had a long history of taking medication to treat his psychiatric issues.

Defendant was initially paroled in April 2009. Soon after his release, he began to use methamphetamine, and consumed alcohol almost daily; he was once arrested by his parole officer for possession of beer in his motel room. After living in a motel for three weeks, defendant moved into a studio apartment. Two months later, defendant tested positive for drugs or alcohol, and was returned to prison for a six-month sentence.

After his release, defendant found housing in Rosemead. He was unable to find a job so he remained in Rosemead for only five months—until his welfare benefits ran out. Thereafter, defendant was homeless for about one month. During that time, defendant checked-in with local law enforcement on a weekly basis, as required by law. In 2010, defendant tested positive again and returned to prison for another six months.

After being released, defendant was once again homeless for two months until he found housing in Pomona. He lived there for six or seven months. Thereafter, he and his fiancé at the time moved into an apartment. Defendant sold goods and received government benefits. At one point, defendant secured a job; he was terminated after his employer completed a background check.

Defendant violated parole for a third time when he failed to charge his ankle monitor; he received an eight-month sentence. Five days after his release, he was arrested for the current drug possession. Defendant was homeless at the time and had gone to a mobile home park looking for a friend he had once visited at that location. He knocked on the doors of the different trailers because he could not remember either the woman's name or her trailer location.

Defendant explained he was simply attempting to pass the time until the next day, when he was scheduled to resume receiving his general relief benefits and he could find a motel for himself and his fiancé, who was returning to Southern California to be reunited with him. Defendant admitted he had the methamphetamine on him to get high the rest of the night.

In response to the court's inquiry, the prosecutor said that defendant was knocking on the doors of both trailers and regular homes in a mobile home park on Foothill Boulevard near Campus. Defendant was wearing his ankle monitor at the time and knew the parole officer would know defendant's location. His parole terms did not include confinement to any particular location.

Defendant also testified regarding his efforts to seek financial assistance and treatment for both his psychiatric and substance abuse problems. While on parole, he saw a psychiatrist once a month in the parole office. Sometime in 2010 or 2011, defendant was assigned a "high-risk therapist" in Baldwin Park. For approximately one year, defendant saw this therapist once a week at the therapist's office. There, he took a

lie detector test and participated in group counseling. Defendant was also prescribed anti-psychotic medications. He took the prescriptions the entire time he was on parole.

Defendant also went to the social security office and applied for SSI; he was denied benefits. Earlier, Perez had testified that the parole office provided assistance to parolees seeking to obtain SSI benefits. Defendant testified that he received no such guidance.

While in custody, defendant participated in a drug treatment program. While on parole, however, he received only one day of drug treatment in the STAR program. Defendant tested positive at the end of the day and was taken into custody. Thereafter, defendant's parole officer could not find him a drug treatment program and he was not offered the STAR program again. Defendant also did not attend any NA or AA meetings because he did not know they were free.

Defendant testified he could not stay clean even though both his parole officer and psychiatrist told him he should. He was an addict and it was "not that easy." Defendant felt assistance from an assigned social worker would have made a difference. He promised to do better if given another chance. However, he acknowledged that he would still be facing the same difficulties in finding a rehabilitation program due to his status as a sex offender.

Defendant was first arrested when he was 19 years old. He was 47 years old at the time of his trial. In 1992, defendant pled guilty to robbery with a handgun and received a two-year sentence. Defendant testified he did not personally use a gun; his

codefendant had the gun and defendant was driving. He recalled that the victim was scared.

In 1996, defendant pled guilty to one count of kidnapping for sexual purposes, one count of forcible rape, and one count of discharge of a firearm. The victims were two girls under the age of 14. Defendant denied there was a gun involved, but he admitted the gun charge because he was told this was the best deal he could receive. Defendant received 15 years eight months.

Defendant expressed remorse for the horrible crimes he committed in 1996 and asked for forgiveness. He testified he was high on cocaine when he committed the rape. He had since stopped using cocaine; he was currently addicted to methamphetamine, not cocaine. Defendant understood there was a link between his drug addiction and his criminality, although he did not blame drugs for committing his 1996 crimes.

Defendant served roughly 12 or 13 years for the 1996 crimes. While in prison, he received monthly counseling and treatment for his mental health issues. He was interviewed and evaluated twice as to whether he was a sexually violent predator. At no time was he written up for any acts of violence. As the parties stipulated, defendant was cited twice in 2006 or 2007, once for making Pruno, and another time for making gambling or booking materials for a football pool. The gambling citation was reduced to an infraction. Defendant admitted that in prison he drank alcohol at least twice a week and used drugs about five times a week.

By stipulation, the defense introduced defendant's prison records which he had received from the Department of Corrections and Rehabilitation, as exhibit No. 1.

After hearing witness testimony and argument from counsel, the court took the matter under submission and continued the hearing. On February 18, 2015, the court stated defendant could not benefit from the new provisions under Propositions 36 and 47 because of his disqualifying prior rape conviction. The court, therefore, focused on the “Three Strikes” law. The court denied defendant’s *Romero* motion. The court concluded defendant was not outside the spirit of the Three Strikes law because he had a long history of drug problems that he failed to address; he had been unwilling to comply with his parole conditions; at the time of the sex offenses, defendant had been using marijuana and amphetamines for two years and committed the crimes while he had been under the influence; he was “never going to change”; and he continued to pose “an extreme liability to the community.”

DISCUSSION

A. DEFENDANT’S *ROMERO* MOTION

Defendant contends the trial court abused its discretion by denying his *Romero* motion to dismiss his prior strike convictions.

“[A] court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Defendant has the burden of demonstrating an abuse of discretion and, in the absence of such a showing, we presume the trial court acted correctly. (*Id.* at pp. 376-377.) Even if we might have ruled differently in the first instance, we will affirm the trial court’s ruling as long as the record shows the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law.

(*Id.* at p. 378.) An exercise of discretion to strike a prior conviction pursuant to section 1385 requires the trial court to balance the legitimate societal interest in imposing longer sentences for repeat offenders and the defendant's constitutional right against disproportionate punishment. (*Romero, supra*, 13 Cal.4th at pp. 530-531.) Trial courts "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." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) There is a "'strong presumption' [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation." (*In re Large* (2007) 41 Cal.4th 538, 551.) The circumstances must be "extraordinary" for a career criminal to be deemed to fall outside the scheme of the Three Strikes law. (*Carmony*, at p. 378.)

In this case, the record shows that the trial court considered the nature and circumstances of defendant's current offenses and his prior serious felony convictions, his performance on parole, as well as his failure to remedy his drug abuse problems.

As discussed in detail above, at the time defendant committed the current offense, he was 46 years old and had a 28-year criminal record. Defendant's criminal record began in 1987, at the age of 19, when he was arrested for possession of narcotics. In 1992 he was convicted of robbery, his first strike; defendant was sentenced to two

years in prison. After defendant's sentence, he violated his parole when officers arrested him for possession of a needle and sent defendant back to prison.

In 1996, defendant was convicted of his second, third, and fourth strikes when he kidnapped and raped two girls, under the age of 14, at gunpoint. Defendant served 12 years of his 15-year sentence; he was released on parole. His release, however, was short-lived as he violated his parole on three separate occasions and returned to prison. After his most recent release from prison, he immediately resumed using methamphetamine on a daily basis.

Even in prison, defendant violated prison disciplinary rules several times for gambling and making Pruno. He admitted drinking alcohol twice a week and using drugs at least five times per week in prison. Defendant has shown that he is unable to abstain from criminal activity, even while incarcerated. The current case involving methamphetamine possession occurred only five days after his release from prison.

While defendant understandably emphasizes the victimless and nonviolent nature of his present offense of drug possession and his drug problems, we do not reweigh the factors. (See *People v. Carmony*, *supra*, 33 Cal.4th at pp. 374, 378.) Moreover, defendant's failure to address a substance abuse problem may be a negative indication of a defendant's background, character, or prospects. (See *People v. Williams*, *supra*, 17 Cal.4th at p. 163 [lack of follow through in efforts to control a substance abuse problem as factor toward there being "little favorable about [defendant's] background, character, or prospects"].) Furthermore, defendant's prior serious and violent felony convictions (rape and kidnapping of minors under the age of 14 years) placed him

within the spirit of the Three Strikes law. Accordingly, defendant has failed to overcome the “‘strong presumption’ [citation] that the trial judge properly exercised his discretion.” (*In re Large, supra*, 41 Cal.4th at p. 551.)

In conclusion, the trial court exercised its discretion when it refused to dismiss defendant’s prior strikes. The court properly sentenced defendant in light of defendant’s extensive violent criminal history; defendant failed to show that he fell outside the spirit of the Three Strikes law.

B. CONSTITUTIONALITY OF THE SENTENCE

Defendant contends that his Three Strikes sentence of 25 years to life violates the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution. We disagree.

1. *FEDERAL*

A sentence violates the Eighth Amendment of the United States Constitution if it is “‘grossly disproportionate’ to the crime.” (*Ewing v. California* (2003) 538 U.S. 11, 12.) However, the protection afforded by the Eighth Amendment is narrow. It applies only in the “‘exceedingly rare’” and “‘extreme’” case. (*Ewing*, at p. 21.) In the context of a 25-year-to-life sentence imposed pursuant to the three strikes law, even if the current offense is not serious, the sentence can be “‘justified by the State’s public-safety interest in incapacitating and deterring recidivist felons, and [the defendant’s] own long, serious criminal record.” (*Id.* at pp. 29-30.) In *Ewing*, the United States Supreme Court upheld a sentence of 25 years to life under California’s Three Strikes law for a defendant who shoplifted golf clubs worth approximately \$1,200, because seven years

earlier the defendant had been convicted of three residential burglaries and one first degree robbery. (*Id.* at pp. 17-18, 30.)

Comparing defendant's current crime and his criminal history with those of the defendant in *Ewing*, we cannot say that defendant's sentence is grossly disproportionate to his criminal culpability so as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

2. STATE

Under the state constitutional standard, "we must examine the circumstances of the crime, as well as the defendant's personal characteristics. [Citation.] If, given these factors, 'the penalty imposed is "grossly disproportionate to the defendant's individual culpability [citation], so that the punishment "“shocks the conscience and offends fundamental notions of human dignity”" [citation], [we] must invalidate the sentence as unconstitutional.'" (*People v. Boyer* (2006) 38 Cal.4th 412, 488.)

As long as a punishment is proportionate to a defendant's individual culpability (intracase proportionality), there is no requirement that it be proportionate to the punishment in other similar cases (intercase proportionality). (*People v. Horning* (2004) 34 Cal.4th 871, 913.) Accordingly, the cruel-and-unusual determination may be based solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10, and cases cited.)

Defendant's prior convictions were both serious and violent (raping and kidnapping two minors under the age of 14 while under the influence of drugs). Then,

throughout defendant’s incarceration, he continuously committed crimes by making and drinking illegal alcohol, gambling, and using illegal drugs. In fact, defendant’s parole officer reported defendant’s unwillingness to conform to expectations, and reported that defendant was a liability to the community. Additionally, as discussed above, defendant committed his current offense just five days after he was released from prison. Based on defendant’s recidivism, a Three Strikes sentence—even for his nonviolent offense—“is not constitutionally proscribed.” (*People v. Stone* (1999) 75 Cal.App.4th 707, 715.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.