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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.

FREDDIE GEORGE GARCIA,

Defendant and Appellant.

E064233

(Super.Ct.No. RIF1405099)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Irma Poole Asberry,
Judge. Affirmed.

Steven A. Torres, 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, and Charles C. Ragland and Scott
C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Freddie George Garcia, is serving a “Three Strikes” law sentence of 25 years to life plus 13 years for burglarizing a home while the family was present. Defendant appeals from the trial court’s order denying his motion to strike a strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We find no error and affirm.

I. FACTS AND PROCEDURE

On November 8, 2014, sometime after 9:00 p.m., the extended Mendoza family went to bed after hosting a get together so family and friends could spend time with the terminally ill grandmother before she went to Mexico for hospice care. At the home were the two grandparents, their son (Mendoza), Mendoza’s wife, and two of their children. The grandfather was sleeping on the floor in the living room, so as not to disturb his ill wife. He felt someone trip over him. He thought it was his grandson and so he asked him what happened. The person said, “Oh, sorry.” The person then went into another room, using some sort of small flashlight and appeared to be looking for something. The grandfather heard noises, like objects falling. A few minutes later he saw a man running from the back of the house and out the door.

Mendoza and his wife were in their bedroom in bed when they heard someone in the bedroom where one of their sons slept. It sounded like someone picking things up and dropping them. The couple was waiting for one of their sons to come home from a school event, so they were talking about who could be making the noises. As Mendoza was about to get out of bed, the couple’s bedroom door was opened by a man they did not

recognize. Mendoza yelled, “Who the fuck are you?” and the man ran away quickly. Mendoza noticed the man looked “high” and was holding a small flashlight in his mouth. Mendoza got up and went into the grandmother’s bedroom to retrieve a gun. Mendoza’s wife started chasing the man and yelling at the grandfather that there was somebody in the house. Mendoza saw the grandmother coming out of her bathroom and excitedly told her what had happened. Mendoza, along with the grandfather and mother, ran out into the front yard and all the way to the street, but could not see the man. Mendoza’s wife called 911 as Mendoza walked around the house and property holding the gun.

The family noticed that a television in the living area had been moved, and later found that the cable had been disconnected from the grandmother’s television. A sweater and a trumpet had been moved outside. Later, the family realized that a watch and a cell phone were also missing. The cell phone and watch were later recovered from defendant.

On June 12, 2015, a jury convicted defendant of residential burglary (Pen. Code, § 459)¹ and misdemeanor receiving stolen property (§ 496, subd. (a)). The jury found true an allegation that there was another person in the home at the time of the burglary. (§ 667.5, subd. (c)(21).)

On August 7, 2015, the trial court found true allegations that defendant had four prison term priors (§ 667.5, subd. (b)), three serious felony priors (§ 667, subd. (a)), and

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

three strike priors (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)). Also on that date, the court denied defendant's *Romero* motion² and sentenced him to a determinate term of 13 years, to be followed by an indeterminate term of 25 years to life, as follows: 25 years to life for the burglary under the Three Strikes law, plus two consecutive terms of five years each for two of the three serious felony convictions, plus three consecutive terms of one year each for three of the four prison term priors. The court imposed but stayed pursuant to section 654 a one-year term for receiving stolen property.

This appeal followed.

II. DISCUSSION

Defendant argues the trial court abused its discretion when it denied his motion to strike three of his four strikes. Defendant contends that, despite his many contacts with the law, his main problem is with drugs and alcohol, and he would benefit more from ongoing substance abuse treatment than from serving a sentence that would imprison him at least into his 70's. The People respond that there was no basis for the trial court to find that defendant fell outside the spirit of the Three Strikes sentencing scheme. We agree with the People.

The "Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders." (*Romero*,

² Defendant first filed a written *Romero* motion prior to trial, on June 4, 2015, before a different judge. The People filed a response on that same date. The judge denied the motion. Defendant here appeals from the trial court's denial of his renewed motion on August 7.

supra, 13 Cal.4th at p. 528.) Thus, when a court is asked to dismiss prior strikes in “furtherance of justice” (§ 1385, subd. (a)), it “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.) Examples of factors that a court may consider include the defendant’s age (*People v. Gaston* (1999) 74 Cal.App.4th 310, 321-322), the length of time between the commission of the prior strikes and the current crime (*People v. Bishop* (1997) 56 Cal.App.4th 1245, 1251), or whether the current or past offenses involved violence (*People v. Myers* (1999) 69 Cal.App.4th 305, 308-310). Most importantly, the court must look to the defendant’s conduct between the commission of the strike and the current crime. (*People v. Williams, supra*, at p. 163.) Whether a defendant has suffered misdemeanor violations, or violated parole or probation, are aggravating factors that the court may consider in denying a *Romero* motion. (*People v. Barrera* (1999) 70 Cal.App.4th 541, 553-555; *People v. McGlothlin* (1998) 67 Cal.App.4th 468, 475.)

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.) ““[T]he 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 sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.””” (Id. at pp. 376-377.) Any error in declining to strike a prior felony conviction must affirmatively appear on the record. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.)

Here, defendant has a 25-year history of committing felonies, misdemeanors, and parole violations, beginning with a conviction in 1990 for misdemeanor car theft and ending with the current convictions. The probation report’s listing of these crimes shows 18 discrete dates of conviction. During that time span, defendant was convicted of six felonies, of which four are strikes—residential burglary (Pen. Code, § 459)³ and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) in 1993 (seven years prison, two strikes), firearm possession by a felon (Pen. Code, former § 12021, subd. (a)(1)) in 1998 (four years prison), attempted criminal threats (Pen. Code, §§ 664, 422) in 2002 (16 months prison, one strike), spousal abuse in 2008 (Pen. Code, § 273.5, former subd. (e)(2)) (four years prison), and the current burglary in 2014, also a strike. He served four prison terms, which, combined with 13 jail sentences, resulted in sentences totaling more than 19 years in the 25-year time period. Defendant performed poorly on parole and

³ This burglary conviction is also referred to in the record variously as one or two counts of robbery, and the People initially alleged the offense as a robbery in the felony complaint filed November 13, 2014. The abstract of judgment for the 1993 conviction lists the offense as a burglary. Defense counsel characterized this offense as a “home-invasion situation where weapons are involved.” On August 7, 2015, the People filed an amended information alleging this prior conviction as one count of residential burglary.

probation—he was returned to prison nine times from 1996 to 2006 on parole violations after his seven-year prison sentence, and was on probation for drug use (Health & Saf. Code, § 11550, subd. (a)) when he committed the current crimes. Defendant’s 20 misdemeanors, including the current conviction, are for vehicular manslaughter, battery (3), spousal battery, battery on a peace officer, resisting arrest (2), car theft, receiving stolen property, drug use and possession (6), driving under the influence (2), driving on a suspended license, and driving without a license.

We now consider defendant, his current and prior strike crimes, and his criminal history under the criteria set forth above. The prior strikes were committed in 1993 (residential burglary and assault with a deadly weapon) and 2002 (attempted criminal threats). Defendant committed the crimes that resulted in his four strikes at the approximate ages of 21, 30, and 42. Although, as defendant argues, the first two strikes from 1993 are remote in time, defendant does not seem to have learned from his mistakes, even in middle age. Not only has he been convicted of a strike crime more or less each decade since 1993, but in the very short intervals over the past 25 years that he has been at liberty he has managed to be convicted of 20 misdemeanor crimes and two additional felonies. Over that time, defendant has had, in addition to drug crimes, also crimes that involved committing violence upon others, such as a manslaughter, six instances of various batteries, resisting a peace officer, and assault with a deadly weapon.

While the instant crime of residential burglary did not involve a weapon on his part, defendant knowingly entered a home in which multiple people were sleeping,

continued into the home after tripping over one person, and likely entered all three bedrooms,⁴ picking up the family's possessions as he went and putting them at the exit. Even though defendant carried no weapon, residential burglary poses a unique threat because of the potential for violence by both the perpetrator and the homeowner. (*People v. Hines* (1989) 210 Cal.App.3d 945, 950-951, overruled on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 864.) The family was traumatized by the event; the responding deputy described the scene as he entered the home as “[t]hey’re kind of freaking out.”

Defendant argues that what he truly needs is a drug and alcohol program to deal with his addiction problems, rather than a third-strike sentence that will keep him imprisoned into his 70's. We do not discount the probability that substance abuse is a major cause of defendant's truly life-long crime spree. However, we also do not discount the physical and psychological damage defendant has inflicted on so many people by his numerous crimes, including the persons he battered and assaulted, the death that defendant caused and for which he was convicted of involuntary manslaughter, and the traumatized family in the current crime.

Further, this residential burglary was not the aberrant act of a person with a criminal past who had managed to mostly cease his life of crime. Defendant's last

⁴ At trial, Mendoza testified that he and his wife heard defendant moving around in his son's bedroom before defendant entered their bedroom. The family later found that the grandmother's television had been disconnected from the cable in the back of the television.

conviction for a crime involving violence (spousal battery) was in 2008, for which he served four years. However, he racked up four subsequent convictions for drug use, three resulting in jail time, over the next two years, until he committed the instant burglary. This history indicates that defendant would likely have continued committing crime after crime after crime if he had not been caught.

Given that defendant committed so many crimes during his short intervals of freedom, without respite and without seeming to slow at the time he was arrested for these latest offenses, we cannot say that the trial court abused its discretion when it found that he did not fall outside the spirit of the Three Strikes law.

III. DISPOSITION

The judgment is affirmed.

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CUNNISON

J.*

We concur:

McKINSTER

Acting P. J.

SLOUGH

J.

* Retired judge of the Riverside Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.