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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

TRACY MICHELLE MCMILLAN,

Defendant and Appellant.

F062354

(Super. Ct. No. F10800489)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Leanne Le Mon, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Gomes, Acting P.J., Detjen, J. and Franson, J.

Appellant, Tracy Michelle McMillan, and a codefendant took merchandise worth more than \$700 from a store without paying. Shortly thereafter, the vehicle in which the two were traveling was stopped by police, and the merchandise was found in it. A jury found appellant guilty of second degree burglary (Pen. Code, §§ 459, 460, subd. (b); Count 2)¹ and of misdemeanor petty theft (§ 484, subd. (a); Count 1). Appellant admitted special allegations that she had incurred a prior conviction for attempted robbery (§§ 664, 211), a “strike” under California’s Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that she had served prison terms for two other prior “non-strike” felony convictions (§ 667.5, subd. (b)). The court denied appellant’s request to exercise its discretion to strike her prior attempted robbery conviction, and sentenced her to a prison term of six years. This consisted of the middle term of two years, doubled under the three strikes law, plus one additional year for each of the two section 667.5, subdivision (b) enhancements. The court also imposed 180 days on the misdemeanor petty theft conviction, but stayed execution of the sentence on that count pursuant to section 654.

Appellant contends that the trial court erred in refusing to strike her prior conviction for attempted robbery.² As we shall explain, we find no error.

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

² Appellant also contends that the court “imposed a 180-day county jail sentence for the petty theft charged in Count I and ordered it to run concurrent to the prison term,” and that “imposition of this concurrent term violates [the] section 654 proscription against double punishment.” Appellant asks this court to “stay the jail term.” As respondent points out, however, the trial court did in fact stay imposition of the count 1 sentence pursuant to section 654. In sentencing appellant, the court stated that the 180-day sentence on the count 1 crime of petty theft “will be stayed pursuant to [section] 654, since it arose out of the same operative facts.” “When a defendant suffers multiple convictions, sentencing for some of which is precluded by operation of section 654, an acceptable procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable. Such stay is to

APPELLANT'S ROMERO MOTION³

Section 1385 grants trial courts the discretion to dismiss a prior strike conviction if the dismissal is in furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530.) “A court’s discretion to strike [or vacate] prior felony conviction allegations [or findings] in furtherance of justice is limited. Its exercise must proceed in strict compliance with ... section 1385[, subdivision](a).” (*People v. Williams* (1998) 17 Cal.4th 148, 158.) The Three Strikes law “was intended to restrict courts’ discretion in sentencing repeat offenders.” (*Romero, supra*, at p. 528; *People v. Garcia* (1999) 20 Cal.4th 490, 501 [“a primary purpose of the Three Strikes law was to restrict judicial discretion”].) The Three Strikes law establishes “a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike” *unless* the sentencing court finds a reason for making an exception to this rule. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) There are “stringent standards that sentencing courts must follow in order to find such an exception.” (*Ibid.*) In order to dismiss a prior strike conviction, “the court in question must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony

be effective pending the successful service of sentence on the more serious conviction, at which time the stay is to become permanent.” (*People v. Miller* (1977) 18 Cal.3d 873, 886; see also *People v. Duff* (2010) 50 Cal.4th 787, 796.) That is what the [fn. cont.] court did here. There was no error. Respondent correctly points out, however, that the abstract of judgment fails to mention any disposition of the count 1 conviction, and asks us to direct the trial court to correct the abstract of judgment to reflect the court’s disposition of the count 1 conviction. This is the correct procedure, and we will do so. “An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) “[W]here, as here, the Attorney General identifies an evident discrepancy between the abstract of judgment and the judgment that the reporter’s transcript ... reflect[s], the appellate court itself should order the trial court to correct the abstract of judgment.” (*Id.* at p. 188.)

³ See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

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, supra*, at p. 161.)

A trial court's decision not to dismiss a prior strike conviction is reviewed under the deferential abuse of discretion standard. (*People v. Carmony, supra*, 33 Cal.4th at p. 374.) An abuse of discretion is established by demonstrating that the trial court's decision is "irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) When the record shows the trial court considered relevant factors and acted to achieve legitimate sentencing objectives, the court's decision will not be disturbed on appeal. (*Ibid.*)

In this case appellant asked the court to exercise its discretion to dismiss her 1993 first degree burglary conviction, and the court refused to do so. Although the court was not required by law to state its reasons for refusing to strike this prior conviction (see *People v. Carmony, supra*, 33 Cal.4th at p. 376; and *In re Large* (2007) 41 Cal.4th 538, 546, fn. 6), the court did so. The court stated:

"THE COURT: All right. Well, in reviewing the probation report, the Court notes that since the conviction in 1993 of second degree robbery, the defendant has suffered three felony convictions. Each one of those convictions could have been enhanced by the serious felony prior. But it appears that neither of those was enhanced by the serious felony prior in the sense it did not double the sentencing as required under the strike law. In view of that fact, then, it would suggest that Ms. McMillan has been given a great deal of mercy in dealing with her criminal history. And frankly, the Court sees no reason to do it yet again here. So the Court is going to deny the request to exercise discretion to strike the serious felony prior based upon the fact that it has been stricken and apparently three times previously and there has been no change in the criminal conduct by Ms. McMillan."

In sentencing appellant, the court noted that this was appellant's fifth felony conviction, and that her criminal behavior has not abated. The court stated:

“The Court is selecting the middle term for the felony violation of Penal Code section 459/460(b), second degree burglary. The Court is selecting the middle term based upon this being the defendant's fourth felony conviction -- actually, the fifth felony conviction, the fourth one since the robbery conviction in September --excuse me, since October 1993. I would note that at that time she was placed on a grant of probation after having served a 90-day diagnostic and some one year after -- approximately one year after being placed on probation, she was then sent to the Department of Corrections and Rehabilitation, apparently failing to comply with the terms and conditions of probation. After that, upon her release, she then suffered a conviction for failing to provide, under Penal Code section 270, that was a misdemeanor conviction. There was then a 14601, a traffic violation conviction in 2004. In 2005 was possession of a controlled substance for sale, for which she was sent to state prison for two years. 2006, an 11550, being under the influence of a controlled substance, for which she was given a jail term and, ultimately, it appears violated on the terms and conditions of her probation and returned for a violation of probation twice. 2008, a new felony conviction for possession of a controlled substance for sale. Excuse me, that was simply possession for a controlled -- of a controlled substance, for which she was sent to prison for the mitigated term and was ultimately discharged on parole on June 7th, 2010.

“The Court notes that the offense in this case occurred on August 12th, 2010, some four months after she was released on parole. And what is very troubling is apparently a matter of days after the offense in this case, she was again arrested in Visalia on the case which resulted in her being placed on a grant of probation for petty theft with a prior. Again, that is a felony.”

Under these circumstances, we cannot conclude that the trial court's refusal to strike appellant's prior serious felony conviction was “so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) Rather, appellant “appears to be ‘an exemplar of the “revolving door” career criminal to whom the Three Strikes law is addressed.’ [Citation.]” (*Id.* at p. 379.)

DISPOSITION

The trial court is directed to correct the abstract of judgment to reflect that execution of appellant's sentence on Count 1 (the misdemeanor petty theft conviction) was stayed pursuant to section 654. (See *People v. Mitchell* (2001) 26 Cal.4th 181.)

The judgment is affirmed.