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

THE PEOPLE,

Plaintiff and Appellant,

v.

WILLIE DAMON TAYLOR,

Defendant and Respondent.

F062693

(Kern Super. Ct. No. SF015232A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, John R. Brownlee, Judges.*

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and George M. Hendrickson, Deputy Attorneys General, for Plaintiff and Appellant.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Respondent.

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* Judge Brownlee presided over the February 4, 2011, change of plea/negotiated readiness proceedings; Judge Bush presided over the June 15, 2011, sentencing hearing and defendant's motion to dismiss prior strike convictions.

INTRODUCTION

Respondent/defendant Willie Damon Taylor, an inmate at Wasco State Prison, pleaded no contest to one felony count of being a prisoner in knowing possession of cocaine in state prison (Pen. Code,¹ § 4573.6). He also admitted that he had 19 prior strike convictions (§ 667, subds. (c)-(j); § 1170.12, subds. (a)-(e)). The court dismissed 18 of the 19 prior strike convictions, and imposed the upper term of four years, doubled to eight years based on his second strike, to be served consecutively to the 77-year 8-month sentence that defendant was already serving.

The People of the State of California have filed the instant appeal and argue that the court entered into an improper plea bargain over the prosecution's objection. The People separately contend the court abused its discretion when it granted defendant's motion to dismiss all but one of the prior strike convictions and imposed a second strike sentence instead of an indeterminate third strike term. Defendant counters that the prosecutor never objected to the proposed disposition, and the court did not abuse its discretion when it dismissed his prior strike convictions and imposed a second strike term. We will affirm.

FACTS²

In 1992, defendant was convicted in Los Angeles Superior Court case No. BA026288 of four counts of first degree burglary (§ 459); four counts of rape by force or fear (§ 261, subd. (a)(2)); sodomy by force or fear (§ 286, subd. (c)); two counts of robbery (§ 211); assault with intent to commit rape (§§ 220/261, subd. (a)(2)); and attempted rape (§§ 664/261, subd. (a)(2)). He was sentenced to 77 years 8 months in state prison.

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

² Given defendant's no contest plea in this case, the facts of the current offense are based on the prison disciplinary report.

In 1999, defendant was convicted in Riverside County Superior Court case No. BLF001385 of being a prisoner in possession of, or who manufactured, a weapon (§ 4502, subd. (a)), and sentenced to four years, to be served consecutively to the term he was already serving.

The current offense

On June 17, 2009, defendant was an inmate at Wasco State Prison and assigned to work on a paint crew. A correctional officer conducted a routine patdown and partial unclothed body search on defendant and the other inmates on the crew. The officer did not find any contraband on defendant's body.

After the officer completed defendant's body search, he directed defendant to lift his right foot. Defendant quickly reached down and pulled off his right sock. Defendant shook the sock, and two small packages fell to the floor. The officer seized the packages and determined that they consisted of three bindles of cocaine, weighing 0.91 milligrams, 0.31 milligrams, and 0.38 grams.³ Defendant also tested positive for marijuana.

The prison disciplinary hearing

On July 4, 2009, defendant appeared at a prison disciplinary hearing to address the rule violation of distribution of a controlled substance. He did not make a statement at the hearing and pleaded guilty. He was subject to disciplinary orders and forfeiture of conduct credits.⁴

³ The prison incident report states that one of the bindles weighed 0.38 grams. The probation report states the weight as 0.38 milligrams.

⁴ The minute order for the disciplinary hearing states that defendant was advised "that this charge was not referred to the Kern County District Attorney's Office, as it does not meet the criteria for felony prosecution." However, the probation report states that the matter was referred to the district attorney's office for further investigation.

The information

On November 12, 2009, an information was filed in the Superior Court of Kern County charging defendant with count I, a felony violation of being a prisoner in knowing possession of cocaine in state prison (§ 4573.6). It was further alleged that he had 19 prior strike convictions (§ 667, subds. (c)-(j); § 1170.12, subds. (a)-(e)), and two prior prison term enhancements (§ 667.5, subd. (b)). Defendant pleaded not guilty and denied the special allegations. Thereafter, the court granted defendant's numerous requests for continuances.

Plea proceedings

On February 4, 2011, Judge Brownlee convened a change-of-plea hearing. Defendant appeared with his deputy public defender, Mr. Lidgett. The People were represented by Mr. Schlaerth, a deputy district attorney.

The court stated:

“It looks like we reached a disposition. The defendant will be pleading guilty or no contest to Count 1, admit 19 strike priors. At the time of sentencing the Court has indicated it will strike 18 of the 19 strikes. Defendant will be sentenced to the upper term of eight years, to run consecutive with the sentence he's already serving. Is that correct?”

Defense counsel replied: “That is correct....” The prosecutor did not make any comments or object to the proposed disposition.

The court reviewed an advisement and waiver of rights form which defendant had already signed. The form stated the following “agreement with the District Attorney or Court indicated sentence.”

“[Defendant] will plea[d] no contest to count 1, admit 19 strike priors. At the time of sentence, the court has indicated it will strike 18 of the 19 strike priors. [Defendant] will be sentenced to the upper term of 8 yrs, to run consecutive with sentence already serving.”

The court asked defendant if he had initialed and signed the form, and defendant said yes. The court asked defendant if he had reviewed the document with his attorney, and defendant said, “Yes.”

“THE COURT: Anybody made any promises other than what you and I have discussed here today?”

“THE DEFENDANT: No.”

The prosecutor and defense counsel stipulated to a factual basis based on the police reports.

Thereafter, defendant pleaded no contest to count I, a prisoner in possession of cocaine in state prison, and admitted the 19 prior strike convictions. Defense counsel stated that the court needed to dismiss the two prior prison term enhancements. Defense counsel stated the prior prison terms were also the basis for two strike priors, and the enhancements were “going to be dismissed, assuming the plea remains in full force and effect.”

The court asked the prosecutor whether he would object to the dismissal of the two prior prison term enhancements, “in light of the fact it’s going to be a Court-indicated eight years.” The prosecutor replied:

“[C]ontingent on the continuing validity of the plea and the admissions, the People move to dismiss the prison priors.”

The court dismissed the two prior prison term enhancements, and scheduled the sentencing hearing.

Defendant’s request to dismiss the prior strike convictions

On February 4, 2011, the same day as the plea hearing, defendant filed a request for the court to dismiss 18 of the 19 prior strike convictions that he had just admitted, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Defendant asserted that he had admitted the 19 prior strike convictions “because the court indicated that it would strike 18 of the 19 previous strike convictions and sentence him to

the upper term of four year[s], doubled because of the one remaining strike for 8 years. Said sentence would run consecutive to the sentence already being served (which is approximately a 70-year sentence). *This motion is written to justify the court's indicated.*" (Italics added.)

Defendant's request stated:

"This case is not serious or violent in nature. No one was physically or psychologically harmed. No one is owed any restitution. [Defendant] was only convicted on one count because only one count was charged, simple possession of cocaine while incarcerated in a correctional facility. Moreover, the amount of the cocaine seized was minimal, less than .4 grams combined."

Defendant further argued that he immediately entered his plea when he "was given his first opportunity to take a plea that did not involve life"

"The Court's indicated sentence should be followed because it makes sense and is justified under the circumstances. [Defendant] is currently serving an approximate 70 year sentence. He now will have to serve an additional 8 years for less than .4 grams of a controlled substance. If [defendant, who was born in 1962,] is ever released from prison, he will be an elderly man that should possess no threat whatsoever to society."

The prosecution's opposition

On April 22, 2011, the prosecution filed opposition to defendant's request to dismiss the prior strike convictions and requested the court impose the third strike term of 25 years to life because it was "the only just sentence in this case." The prosecution argued that given defendant's lengthy criminal history of 19 prior strike convictions, there was nothing in defendant's background to suggest that he fell outside the spirit of the "Three Strikes" law. "[H]is criminal history dates from 1979 to 2009, spanning thirty (30) years. During this time, the defendant has been convicted of one (1) crime as a juvenile and nineteen (19) felony crimes, eighteen (18) of those nineteen (19), being prior 'strike' convictions. He has also violated probation at least one (1) time. Finally, the defendant has had at least five (5) parole violations."

The prosecution's opposition extensively discussed defendant's record, which consisted of the following: he was convicted of robbery in 1982; paroled in 1983; convicted of vehicle theft in 1983 and sentenced to a 68-month prison term; paroled in 1985; convicted of rape by force or fear in 1986 and sentenced to six years; paroled in 1988; and he violated parole twice in 1988 and returned to prison.

In 1992 and 1993, defendant was convicted of multiple counts of sexual assaults, robbery, and burglary, and sentenced to 77 years 8 months in prison. According to the prosecution, defendant committed the sexual assaults "upon four strangers in a very cold, calculating, and planned way." The prosecution's opposition provided extensive details about each sexual assault.

The prosecution asserted that the court should not dismiss any of defendant's prior strike convictions:

"The defendant's record is heinous. There are presently five (5) female victims that the defendant physically, verbally and sexually assaulted. In fact, the only time that the defendant is not committing violent crimes against women is when he is incarcerated. Further, the defendant is still committing criminal acts for which he has been convicted within the prison. [¶] ... [¶] ... Therefore, the defendant's history coupled with his actions in the instant case illustrate that the defendant clearly has no intention of changing his criminal lifestyle."

The sentencing hearing

On June 9, 2011, Judge Michael B. Lewis convened the sentencing hearing. Defense counsel stated that defendant entered a plea "to where Judge Bush would strike 18 of the 19 strikes. [Defendant] would be sentenced to the upper term of four years doubled for eight because of the one remaining strike." The prosecutor did not object to defense counsel's recitation of the plea agreement.

Defense counsel stated that defendant thought the term in this case was going to be imposed concurrently and not consecutively. In addition, defense counsel had just learned that defendant had been recently convicted of possession of a weapon by a

prisoner. Counsel was not sure if that additional conviction would jeopardize the plea agreement and asked for a continuance to determine whether defendant wanted to withdraw from the plea agreement.

The court asked the prosecutor for any comment. The prosecutor stated that defendant's potential term of eight years in this case, "if that were the sentence," should run fully consecutive to the term defendant was currently serving. The court continued the matter for defense counsel to further confer with defendant.

On June 15, 2011, Judge Michael G. Bush reconvened the sentencing hearing. The court stated that the plea was "for a court indicated eight years consec[utive]." The court acknowledged receipt of defendant's request to dismiss the prior strikes and the prosecution's opposition. Both the prosecutor and defense counsel submitted the matter on their pleadings.

The court made the following findings:

"Based on the sentence the defendant is doing now, I am going to strike all but one of the strike priors. And based upon this particular offense, which was possession of cocaine ... in prison, I think this is appropriate. So we will just leave a – one strike prior."

The court imposed the upper term of four years, doubled to eight years as the second strike term, to be served fully consecutive to the sentence defendant was already serving in case No. BA026288.

The court corrected the sentence previously imposed in case No. BLF001385, possession of a weapon by a prisoner, to a consecutive term of one year (one-third the midterm). The court determined that defendant's total fixed term was 86 years 8 months, based on defendant's previously-imposed term of 77 years 8 months, plus the additional sentences of eight years for possession of cocaine, and one year for possession of a weapon.

On June 15, 2011, the People of the State of California filed a timely notice of appeal from the trial court's dismissal of defendant's prior strike convictions.

DISCUSSION

I. The prosecutor failed to object to the negotiated disposition

On appeal, the People contend the court engaged in illegal judicial plea bargaining with the defendant over the prosecution's objection. Defendant responds that the negotiated disposition was based on an indicated sentence instead of a plea bargain. In the alternative, defendant argues that even if the negotiated disposition was a plea bargain, the prosecution never objected to the terms and has waived review of this issue.

“We review allegations of judicial plea bargaining for abuse of discretion. This is because we may void the act of a trial court that is ‘in excess of the trial court’s jurisdiction’ [citation], and ‘judicial plea bargaining in contravention of existing law are acts in excess of a court’s ‘jurisdiction’ ” ... ’ [citation].” (*People v. Labora* (2010) 190 Cal.App.4th 907, 914.)

Plea bargains and indicated sentences

“The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.]” (*People v. Orin* (1975) 13 Cal.3d 937, 942 (*Orin*)). “Judicial approval is an essential condition precedent to the effectiveness of the ‘bargain’ worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of ‘bargaining’ between the adverse parties to the case – the People represented by the prosecutor on one side, the defendant represented by his counsel on the other – which bargaining results in an agreement between them. [Citation.]” (*Id.* at pp. 942-943.)

By contrast, when a court offers “an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No ‘bargaining’ is involved because no charges are reduced. [Citations.] In contrast to plea bargains, no prosecutorial consent is required. [Citation.]” (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516 (*Allan*)).

Thus, whereas a plea bargain involves a negotiation between the prosecutor and the defendant, an indicated sentence is a unilateral proposal made by a court with sentencing discretion. In the case of an indicated sentence, “[t]he matter of ultimate sentencing is a matter of judicial discretion to be exercised within limits prescribed by the Legislature.” (*People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 916.) “An indicated sentence is just that: an indication. Until sentence is actually imposed, no guarantee is being made....” (*People v. Delgado* (1993) 16 Cal.App.4th 551, 555.)

As applied to the instant case, defendant pleaded no contest to the charged felony offense of being a prisoner in possession of cocaine, and he admitted the 19 prior strike convictions that were alleged in the information. The court indicated that it would dismiss all but one prior strike conviction and impose a second strike upper term. An indicated sentence occurs when a defendant pleads to all charges and admits all allegations, and there is no need for the People’s consent to the plea. (*Allan, supra*, 49 Cal.App.4th at p. 1516.)

In taking the plea in this case, however, the court also granted defense counsel’s motion to dismiss the two prior prison term enhancements before defendant admitted them. Defense counsel explained that both enhancements were also the basis for two of the prior strike convictions. The court asked the prosecutor to comment on the potential dismissal of the two prior prison term enhancements, and the prosecutor replied: “[C]ontingent on the continuing validity of the plea and the admissions, the People move to dismiss the prison priors.”

Based on the nature of the disposition, and the prosecution’s concurrence to the dismissal of the prior prison term enhancements, the record suggests that the court gave an indicated sentence rather than entered into a plea bargain. The prosecution’s consent was not required under these circumstances.

The prosecution's failure to object

In the alternative, even if the negotiated disposition in this case constituted a plea bargain, the prosecution failed to object and has waived appellate review. “In a plea bargain, ‘the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged.’ [Citation.] The process requires the consent of the prosecutor [citations], and the ‘traditional role of the [court] ... is one of approving or disapproving’ the bargain ‘arrived at by counsel for defendant and the’ prosecutor [citation]. If the court, however, enters into a plea bargain with the defendant *over the objection of the prosecutor*, it ‘contravene[s] express statutory provisions requiring the prosecutor’s consent to the proposed disposition, ... detract[s] from the judge’s ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and ... present[s] a substantial danger of unintentional coercion of defendants who may be intimidated by the judge’s participation in the matter.’ [Citation.]” (*People v. Turner* (2004) 34 Cal.4th 406, 418 (*Turner*), italics added, quoting *Orin, supra*, 13 Cal.4th at pp. 942-943.)

“Because a court ‘has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of “plea bargaining” to “agree” to a disposition of the case *over prosecutorial objection*’ [citation], ‘judicial plea bargaining in contravention of existing law are acts in excess of a court’s “jurisdiction” ’ [citations].” (*Turner, supra*, 34 Cal.4th at pp. 417-418, italics added.)

However, a trial court’s negotiation of a plea bargaining agreement with the defendant is only unlawful if it is imposed by the court *over prosecutorial objection*. For example, *Turner* held the trial court in that case improperly entered into a plea bargain over the prosecutor’s objections:

“Here, the trial court negotiated an agreement with defendant whereby defendant agreed to admit that he intended to kill the victims and,

in exchange, the court agreed to sentence defendant to LWOP – rather than death. *In doing so, the court entered into a plea bargain, which required the consent of the prosecutor.* [Citation.] *Because the prosecutor objected,* the court exceeded its jurisdiction, and the Court of Appeal properly vacated the sentence. [Citation.]” (*Turner, supra*, 34 Cal.4th at p. 418, italics added.)

Orin involved a similar situation, where the prosecution twice objected to the court’s acceptance of the defendant’s guilty plea to one of the counts against him, objected again to the dismissal of the remaining three counts, and then moved unsuccessfully at the sentencing hearing for the defendant’s guilty plea to be withdrawn and for trial to proceed on all counts. (*Orin, supra*, 13 Cal.3d at pp. 940-941.) *Orin* held:

“[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of ‘plea bargaining’ to ‘agree’ to a disposition of the case *over prosecutorial objection*.... In the instant case it is undisputed that the prosecution did not agree to the arrangement by which the charges against defendant were disposed of; it is therefore clear that the matter under consideration herein does not involve a plea bargain.” (*Id.* at p. 943, fns. omitted, italics added.)

In *People v. Vessell* (1995) 36 Cal.App.4th 285, the court discussed the rule against judicial plea bargaining in the following terms: “The People state the general proposition that plea bargains reached between the court and the defendant in which the court has struck a criminal charge over the objection of the prosecutor have been uniformly overturned, citing [*Orin, supra*,] 13 Cal.3d 937 ...; *People v. Woodard* (1982) 131 Cal.App.3d 107 ...; and *People v. Anderson* (1982) 129 Cal.App.3d 491 *In each of those cases, the People did not agree to the arrangement by which the charges against the defendant were disposed, objected to the plea bargain at the time it was entered, and stated that the People were ready to proceed to trial.* [Citations.]” (*Id.* at p. 296, italics added.)

In *Allan*, the defendant was charged with two narcotics counts and was alleged to have suffered a prior strike and five prison priors. When the case was called for trial, the trial court dismissed the prior strike allegation and informed the defendant that she would

receive a three-year prison term if she pleaded guilty to one of the two counts. (*Allan, supra*, 49 Cal.App.4th at pp. 1510-1511.) The defendant entered the plea, and the court imposed the three-year prison term “[p]ursuant to the *agreed disposition offered by the court,...*” and dismissed the remaining count and allegations. (*Id.* at p. 1512, italics in original.) The prosecutor objected to the dismissal of the prior strike conviction, and the court noted the prosecutor’s objection for the record. (*Ibid.*) In a People’s appeal, *Allan* held the trial court’s actions were “strikingly similar” to those of the trial court in *Orin*, and concluded that it was an improper judicial plea bargain and reversed the judgment. (*Allan, supra*, 49 Cal.App.4th at p. 1515.)

In *People v. Woosley* (2010) 184 Cal.App.4th 1136 (*Woosley*), the defendant was charged with two counts of burglary and one count of petty theft, and an on-bail enhancement was alleged. Over the prosecutor’s objection, the court offered to grant probation with a suspended prison term if the defendant pleaded, and clarified that the defendant could withdraw his pleas and admission if the court, after reviewing the probation report, decided not to proceed as offered. (*Id.* at pp. 1140-1141.) After receiving the probation report, the court was not willing to proceed. The defendant then made another “ ‘conditional plea,’ ” premised on the court agreeing to a state prison term of two years eight months. The court accepted this conditional plea with the same proviso. (*Id.* at pp. 1142-1143.) The court then imposed the agreed prison term, which required it to dismiss the on-bail enhancement. (*Id.* at pp. 1144.) In a People’s appeal, *Woosley* held the trial court had engaged in “unlawful judicial plea bargaining” when it “induced defendant to plead guilty in exchange for a commitment to dismiss the on-bail enhancement to reach the agreed-upon sentence.” (*Id.* at pp. 1144-1145; see also *People v. Labora, supra*, 190 Cal.App.4th 907, 910-911, 914-916 [judicial plea bargain improper over the prosecutor’s objections].)

This series of cases demonstrates that the issue of an alleged improper judicial plea bargain is waived by the prosecution’s failure to timely raise the matter in the trial

court: “Neither deputy district attorney objected at anytime in the respondent courts based on a violation of the aforementioned plea bargaining prohibitions. Hence, the prosecution has waived the contention that there was improper plea bargaining. [Citations.]” (*People v. Superior Court (Pipkin)* (1997) 59 Cal.App.4th 1470, 1476, fn. 3.)

In this case, the prosecution had numerous opportunities to object to the negotiated disposition and claim that the court engaged in an illegal plea bargain but repeatedly failed to do so. At the change-of-plea hearing, the court recited the terms of the negotiated disposition and the prosecutor did not object. Instead, the prosecutor stipulated to a factual basis for the plea. Moreover, when the court asked the prosecutor if he objected to the dismissal of the prior prison term enhancements, the prosecutor concurred and stated: “[C]ontingent on the continuing validity of the plea and the admissions, the People move to dismiss the prison priors.”

While the prosecution filed opposition to defendant’s *Romero* request to dismiss the prior strike convictions, that opposition was based on the argument that dismissal of the prior strikes would be an abuse of discretion based on defendant’s lengthy and serious prior record. The prosecution never argued that the dismissal of the prior strike convictions was improper because it was based on an illegal judicial plea bargain.

At the initial sentencing hearing, there was some discussion between the court and defense counsel as to whether a second strike sentence of eight years would be consecutive or concurrent to the lengthy term defendant was already serving. The court asked the prosecutor for any comment. The prosecutor stated that defendant’s potential term of eight years in this case, “if that were the sentence,” should run fully consecutive to the term defendant was currently serving. In making these statements, however, the prosecutor never claimed that imposition of an eight-year term would be the result of an improper judicial plea bargain.

At the continued sentencing hearing, the court stated that defendant's plea was "for a court indicated eight years consec[utive]." The court acknowledged receipt of defendant's request to dismiss the prior strikes and the prosecution's opposition. Both the prosecutor and defense counsel submitted the matter on their pleadings.

Given these numerous opportunities, the prosecution never objected to the terms of the negotiated disposition or argued that defendant's plea was the result of an illegal judicial plea bargain. Indeed, the prosecution gave every indication that it concurred with the disposition as recited by the court. The record fails to disclose any prosecution objections to defendant's disposition before he entered his plea, or any contention by the People prior to this appeal that the court's plea offer was unlawful.

Thus, even assuming that the negotiated plea agreement would have been improper under *Orin, Turner, Allan, and Woosley*, the People have waived appellate review of the issue given the People's failure to object to the disposition, and failure to contend at any time prior to this appeal that it was unlawful. (*People v. Superior Court (Pipkin)*, *supra*, 59 Cal.App.4th at p. 1476, fn. 3.)

II. Dismissal of the prior strike convictions

The People next contend that the court abused its discretion when it dismissed 18 of defendant's 19 prior strike convictions pursuant to section 1385 and *Romero*, and imposed a second strike term. The People cite to defendant's lengthy record of prior convictions, particularly the violent sexual assaults committed upon multiple victims, and argue that the court should have imposed a third strike indeterminate term.

Section 1385, subdivision (a) authorizes the trial court to dismiss a prior strike conviction in furtherance of justice. (*People v. Carmony* (2004) 33 Cal.4th 367, 373; *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*); *Romero, supra*, 13 Cal.4th at pp. 529-530.) In deciding whether dismissal of a prior strike conviction is in furtherance of justice, "the court ... must consider whether, in light of the nature and circumstances of [the defendant's] 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 ... spirit [of the Three Strikes law], in whole or in part....” (*Williams, supra*, 17 Cal.4th at p. 161.) A court’s discretionary decision to dismiss a prior strike conviction under section 1385 is subject to review for an abuse of discretion. (*Romero, supra*, 13 Cal.4th at p. 531.)

Defendant was 47 years old when he committed the instant offense, and already serving a substantial sentence of 77 years 8 months for his prior sexual assault, burglary, and robbery convictions. While his prior record consists of serious, violent, and disturbing crimes, the instant offense – possession of cocaine by a prisoner – did not involve any harm, violence, or victimization of correctional officers or other inmates. The court decided to dismiss 18 of the 19 strikes and imposed a consecutive second strike upper term, “[b]ased on the sentence the defendant is doing now,” and “based upon this particular offense, which was possession of cocaine ... in prison, I think this is appropriate. So we will just leave a – one strike prior.” After correcting defendant’s sentence on another prior offense, the court determined that his total fixed term was now 86 years 8 months.

The “furtherance of justice” language of section 1385 “ ‘ ‘requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the People, in determining whether there should be a dismissal. [Citations.]’ [Citations.] At the very least, the reason for dismissal must be “that which would motivate a reasonable judge.” [Citations.]’ [Citation.]” “ ‘Courts have recognized that society, represented by the People, has a legitimate interest in “the fair prosecution of crimes properly alleged.” [Citation.] “ ‘[A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion.’ [Citations.]’ [Citation.]” (*Romero, supra*, 13 Cal.4th at pp. 530-531, italics omitted.) This is not a simple case where the court dismissed a prior conviction for a clearly improper reason, such as judicial convenience, court congestion, to reward a defendant for pleading guilty,

or out of personal antipathy toward the Three Strikes law. (*Id.* at p. 531.) Here, substantial considerations weigh in favor of and against the dismissal of defendant's prior convictions. We may not overturn an exercise of discretion in such circumstances merely because this court might have reached a different determination. (*People v. Bishop* (1997) 56 Cal.App.4th 1245, 1249-1250.)

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Gomes, Acting P.J.

Kane, J.