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

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH WAYNE ROYSTER,

Defendant and Appellant.

F062810

(Super. Ct. No. BF134869A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

Lynette Gladd Moore, 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, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Levy, Acting P.J., Kane, J. and Franson, J.

Appellant, Kenneth Wayne Royster, pled no contest to a count of forgery (Pen. Code, § 470, subd. (d)) and admitted a prior prison term allegation and a prior strike allegation. After the court denied Royster's motion to strike the prior strike allegation, it sentenced him to the midterm sentence of two years, doubled to four years for the prior strike offense, plus one year for the prior prison term, for a total of five years in prison. Royster contends the trial court abused its discretion in denying his motion to strike the prior strike allegation, and he was provided ineffective assistance of counsel in the presentation of that motion. We will affirm.

FACTS

Both parties stipulated to a factual basis for the plea based on the police report. The facts are also described in the probation officer's report.

On September 2, 2010, Shelly Whygle, a fraud investigator for the Kern Schools Federal Credit Union (KSFCU), reported a series of suspicious transactions at the KSFCU automated teller machine (ATM). Numerous checks were deposited made payable to "Ken Royster" from the accounts of Steven C. Horvath, Production Data Inc.; Doby Hager Trucking Incorporated; and Kathy Sento. Some funds were withdrawn from the ATM at the time of the deposits, and other funds were withdrawn from the bank at a point of sale purchase. The checks were returned as counterfeit and totaled approximately \$193,314.92. KSFCU suffered an approximate loss of \$3,107.89 from the transactions.

The Kern County District Attorney charged Royster with 13 counts of forgery (Pen. Code, § 470, subd. (d)) and three counts of grand theft (§ 487, subd. (a)). The complaint also alleged Royster had served three separate prior prison terms. He originally pled not guilty to all counts and denied the special allegations.

At a pre-preliminary hearing, Royster changed his plea to no contest, admitted a prison prior, and an unalleged strike prior. The trial court granted the People's motion to amend the complaint, adding the alleged strike prior. The remaining charges and allegations were dismissed.

At sentencing, Royster moved to strike the prior strike allegation based on the age of the strike, pursuant to Penal Code section 1385. The trial court denied the motion after considering Royster’s criminal history and sentenced him to five years in prison: the midterm of two years for forgery, doubled to four years for the prior strike offense, plus one year for the prior prison term.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE *ROMERO* MOTION

Royster asserts the trial court abused its discretion in denying his motion to strike the prior strike conviction. Specifically, he argues the trial court failed to properly consider the nature of the current offense, the nature of the strike offense, and the remoteness in time between the two offenses. We disagree.

Penal Code section 1385, subdivision (a) provides in pertinent part, “The judge or magistrate may, ... in furtherance of justice, order an action to be dismissed.” Our Supreme Court in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) concluded that “section 1385(a) does permit a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law.” (*Id.* at pp. 529-530.)

“[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ..., or in reviewing such a ruling, the court in question 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, ..., 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.)

A trial court’s refusal or failure to dismiss or strike a prior conviction allegation under Penal Code section 1385 is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no

reasonable person could agree with it.” (*Id.* at p. 377.) A “““decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citations.]” (*Ibid.*)

Royster contends the trial court failed to properly weigh all the appropriate factors listed in *People v. Williams, supra*, 17 Cal.4th at page 161. At sentencing, Royster’s counsel asked the court to consider a *Romero* motion based on the age of the strike. Contrary to Royster’s claim on appeal, the trial court did weigh the appropriate factors when it denied Royster’s motion. The trial court was well aware of its discretion to strike the prior serious felony conviction pursuant to *Romero*, but declined to do so, noting Royster’s long criminal history. The trial court stated:

“With regard to the *Romero* motion, [Royster] was convicted of assault with a deadly weapon on a peace officer in 2001 and served a five-year sentence. He was paroled in ’03.

“In 2005, he was convicted of [illegal gun possession (Pen. Code, § 12021.1)] with a strike prior, received a four-year sentence. Was paroled in ’05. Violated parole, paroled again in ’08. Violated parole in 2010. And then this crime was committed in 2010. So it does not appear that he has rehabilitated himself and become a law-abiding citizen, so he’s not outside the spirit of the three strikes law. I will reject the *Romero* motion.”

Given Royster’s long criminal history, the trial court did not abuse its sentencing discretion in denying appellant’s request. The record shows that the trial court understood its discretionary authority. It weighed the competing factors and came to a reasonable conclusion. In view of these facts and circumstances, Royster has failed to show abuse of discretion. (See *People v. Carmony, supra*, 33 Cal.4th at pp. 378-380.)

II. ROYSTER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Royster also claims he was provided ineffective assistance of counsel in the presentation of his *Romero* motion. He argues his trial counsel had persuasive arguments to make in support of his *Romero* motion, which counsel failed to present. We disagree.

To establish ineffective assistance of counsel, it must be shown that trial counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and that the alleged error prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

Royster fails to prove both the deficient performance of his trial counsel and prejudice. Royster's counsel did in fact raise the *Romero* motion. While Royster argues on appeal that his trial counsel should have argued the motion more fully, the record indicates, as discussed above, the trial court weighed all the appropriate factors before denying the motion. Thus, it is not reasonably probable the trial court would have struck Royster's prior strike conviction had counsel fully articulated the reasons for raising the *Romero* motion. Royster was not provided with ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.