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

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMIRO BERUN JUAREZ,

Defendant and Appellant.

F062857

(Super. Ct. No. F10100578)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Cheryl Rae Anderson, 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, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Cornell, Acting P.J., Gomes, J., and Franson, J.

## STATEMENT OF THE CASE

On May 25, 2011, appellant, Ramiro Berun Juarez, was charged in a first amended information with possession of a weapon while in the custody of a penal institution (Pen. Code, § 4502, subd. (a), count one).<sup>1</sup> The information also alleged 11 prior serious felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)) and four prior prison term enhancements (§ 667.5, subd. (b)).

At the conclusion of a jury trial on May 31, 2011, appellant was found guilty of count one and the jury found the special allegations true. On June 28, 2011, at the sentencing hearing, the trial court declined to strike any of the prior serious felony convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court sentenced appellant to prison for 25 years to life plus a consecutive term of one year for each prior prison term enhancement.

Appellant argues, and respondent concedes, the trial court erred in imposing a sentence on one prior prison term enhancement. Appellant contends the trial court abused its discretion in denying his *Romero* request. Appellant further contends the trial court abused its discretion in imposing all of the strikes from his 1984 convictions, improperly sentenced him on both the strikes and the prior prison term enhancement for those crimes, and that his trial counsel was ineffective for failing to object on these grounds. We disagree with appellant's latter contentions and affirm the trial court's sentence for appellant's violation of section 4502, subdivision (a).

## FACTS

At 10:22 a.m. on August 27, 2009, Samnang Chan, a correctional officer at Pleasant Valley State Prison, and other officers were conducting random pat-down searches of inmates entering the prison yard. As Chan patted down appellant, he found a

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

pen wrapped in a white cloth with a sharpened metal tip at the end inside appellant's waistband. Chan instantly knew it was a weapon. Appellant was ordered down to the ground and handcuffed. Chan searched appellant further and found another inmate manufactured weapon. This weapon was also a pen with a sharp metal pointed tip that was wrapped in a white cloth.

### ***Appellant's Criminal History and Sentencing Hearing***

According to the probation report, appellant was convicted of felony vehicle theft (Veh. Code, § 10851, subd. (a)) in 1984 and placed on probation. At trial, there was testimony concerning appellant's subsequent criminal history. In November 1984, appellant was arrested for and subsequently convicted of four counts of robbery (§ 211) with personal use of a firearm (§ 12022.5), an additional count of robbery, three counts of attempted robbery (§§ 664, 211), one count of attempted murder (§§ 664, 187, subd. (a)), one count of assault on a peace officer with a deadly weapon (§§ 245, subd. (c), 12022.5), and assault on a peace officer (§ 245, subd. (c)).<sup>2</sup>

In 1993, appellant was paroled from prison and was convicted in two separate cases of presenting false identification to a peace officer, a misdemeanor (§ 148.9, subd. (a)) and felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). Appellant was sentenced to state prison for the drug offense. Appellant was paroled in June 1994.

Appellant was convicted in July 1995 for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and sentenced to prison. Appellant was paroled in 1998 and in March 2001, he was convicted of two felony narcotics offenses

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<sup>2</sup> According to the probation officer's report from these convictions, appellant acted as the getaway driver for a codefendant who robbed several individuals in an apartment building, went into a tavern in San Pedro where he robbed more individuals, and then walked across the street into a liquor store where he robbed two more people. Appellant may have been under the influence of phencyclidine.

(Health & Saf. Code, §§ 11352, subd. (a), 11350, subd. (a)). Appellant was convicted in 2004 for possession of drugs in prison (§ 4573.6).

Appellant's counsel filed a request for the trial court to strike appellant's prior serious felony convictions pursuant to *Romero*. At the sentencing hearing, defense counsel acknowledged that appellant's current offense was serious but argued that it did not warrant a life sentence. The prosecutor argued that appellant never had a period in his adult life where he spent more than five years out of prison.

The trial court noted it had discretion under *Romero* to strike appellant's prior serious felony convictions. The court found appellant had multiple strike convictions in 1984, several nonviolent felonies in the interim, and possession of contraband in prison. The court refused to strike any of the prior serious felony convictions.

#### **PRIOR PRISON TERM ENHANCEMENT**

Appellant contends, and respondent concedes, that the prior prison term enhancement for appellant's 2001 conviction had not been completed when he reoffended, while in prison for the 2001 conviction, and violated section 4573.6. One of the elements of a section 667.5, subdivision (b) prior prison term enhancement is that the defendant must have completed his term of imprisonment. (*People v. Tenner* (1993) 6 Cal.4th 559, 563; *In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) Appellant was sentenced to a 12-year prison term on March 13, 2001, and had not finished that prison term when he committed the current offense on August 27, 2009. Accordingly, the trial court erred in imposing a prior prison term enhancement for appellant's 2001 conviction.

#### **ROMERO DISCRETION**

Appellant contends the trial court abused its discretion in failing to strike his prior serious felony conviction pursuant to section 1385 and *Romero, supra*, 13 Cal.4th 497. Appellant argues that all of his offenses in 1984 resulted from a single day of aberrant behavior for which he received one prison sentence. The crimes were remote in time and

his subsequent offenses were decreasing in seriousness. Appellant posits that the trial court abused its sentencing discretion by treating all of the 1984 offenses as separate strikes. We disagree.

We review a ruling upon a motion to strike a prior felony conviction under a deferential abuse of discretion standard. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The appellant bears the burden of establishing that the trial court's decision was unreasonable or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives].) We do not substitute our judgment for that of the trial court. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers*)). "It is not enough to show that reasonable people might disagree about whether to strike one or more of [the defendant's] prior convictions." (*Ibid.*) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*)).

The trial court was well aware of its discretion to strike the prior serious felony convictions pursuant to *Romero*, but declined to do so, noting appellant's lengthy criminal history. Appellant failed to reform himself and reoffended soon after he was released from his prison commitments. Appellant's current offense had the potential to lead to serious violence in prison. Appellant is a career recidivist who continues to commit felonies in state prison.

Appellant is essentially asking this court to reweigh the evidence and substitute our judgment for that of the trial court. We decline his invitation to do so. "Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*Myers, supra*, 69 Cal.App.4th at p. 310, quoted with approval in *Carmony, supra*, 33 Cal.4th at p. 378.)

The record in this case shows that the court understood its discretionary authority and it weighed all of the competing facts to reach a reasonable conclusion. After evaluating the entirety of that information, the court drew its ultimate conclusion and declined to exercise its discretion to strike one or more of the prior serious felony convictions. In view of these facts and circumstances, appellant has failed to show abuse of discretion. (See *Carmony, supra*, 33 Cal.4th at pp. 378-380; *Myers, supra*, 69 Cal.App.4th at p. 310.)

### **ALLEGED DOUBLE PUNISHMENT**

Appellant argues that his offenses in 1984 constituted a crime spree and the court abused its discretion and improperly imposed double punishment by applying the prior convictions as strikes and imposing a prior prison term enhancement for the prison term he served for those offenses. Appellant further argues that trial counsel was ineffective for failing to object to his sentence on these grounds. We reject these arguments.

Appellant relies on *People v. Garcia* (1999) 20 Cal.4th 490, 500-503 (*Garcia*) and *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), arguing these cases compel the conclusion that the court abused its discretion in imposing double punishment for the same acts. The *Garcia* case holds that a trial court has the discretion to strike prior serious felony conviction allegations as to some counts, but not all counts, in the interest of justice. (*Garcia*, at pp. 501-504.) Nothing in *Garcia* states that a trial court is compelled to so exercise its discretion.

Appellant relies on footnote 8 of the *Benson* case. (*Benson, supra*, 18 Cal.4th at p. 36.) This footnote only states that the court did not reach the issue of whether two felony convictions are so closely connected that a trial court could abuse its discretion in failing to apply section 1385 to convictions arising from a single act during an indivisible course of conduct. (*Ibid.*) Although appellant's crimes in 1984 involve one crime spree, the course of conduct was clearly not indivisible. Appellant helped his codefendant rob

multiple victims at three different venues: an apartment, a tavern, and a liquor store. During the course of these crimes, there was an attempted murder and the felony assault on one, or possibly more, peace officers. All of the 11 counts were sentenced either consecutively, or concurrently, without the application of section 654. The trial court did not abuse its sentencing discretion in failing to apply section 1385 to appellant's lengthy crime spree in 1984, even if it did occur during a single day.

Appellant's double punishment argument is also unavailing. This court long ago rejected the argument that it is dual punishment to impose a sentence on a strike prior and to impose a section 667.5, subdivision (b) prior prison term enhancement based on a prison term served for that prior conviction. (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1517-1518 (*White Eagle*).

Finally, appellant contends trial counsel was ineffective for failing to raise the issue of dual punishment to the trial court during sentencing.<sup>3</sup> Our *White Eagle* decision is 16 years old. Counsel is not required to raise objections that would be futile. Appellant has failed to show that counsel's performance was below professional standards.

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<sup>3</sup> The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decision making is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions which are futile. (*Id.* at p. 390; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 166.)

## **DISPOSITION**

The trial court's sentence of one year based on the prior prison term enhancement for appellant's conviction in 2001 is reversed. The case is remanded for the trial court to strike appellant's prior prison term enhancement based on his 2001 felony conviction and to reduce his sentence by one year. The court shall prepare an amended abstract of judgment reflecting this change and forward it to the appropriate authorities. The judgment is otherwise affirmed.