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

THE PEOPLE,

Plaintiff and Respondent,

v.

DONYA GORE,

Defendant and Appellant.

F063519

(Super. Ct. No. DF10281A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

John F. Schuck, 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, Sean M. McCoy and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

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

Appellant, Donya Gore, pled no contest to first degree robbery (Pen. Code, §§ 211, 212.5, subd. (a); count 1),¹ inflicting injury upon a person at least 65 years of age (§ 368, subd. (b)(1); count 2), and receiving stolen property (§ 496, subd. (a); count 3), and admitted the following special allegations: she personally inflicted great bodily injury (§ 12022.7, subd. (a)) in committing each of the three offenses; she had suffered two prior felony convictions, each of which qualified both as a “serious felony” conviction within the meaning of section 667, subdivision (a) and as a “strike”;² and she had served three separate prison terms for prior felony convictions (§ 667.5, subd. (b)). Appellant entered her pleas and admissions with the understanding that the maximum sentence the court would impose would be 26 years.

Thereafter, pursuant to section 1385, the court struck one of appellant’s strikes and two of the prior prison term enhancements, and imposed a prison term of 26 years, calculated as follows: on the count 1 substantive offense, the upper term of six years, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)), for a total of 12 years; three years on the count 1 great bodily injury enhancement; five years on each of the two prior serious felony enhancements; and one year on the one remaining prior prison term enhancement. On each of counts 2 and 3, the court imposed, and stayed pursuant to section 654, an eight-year term on the substantive offense and three years on the accompanying great bodily injury enhancement.

On appeal, appellant contends the court abused its discretion in imposing the 26-year prison term. We affirm.

¹ All statutory references are to the Penal Code.

² We use the terms “strike,” in its noun form, and “strike conviction,” as synonyms for “prior felony conviction” within the meaning of the “three strikes” law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

FACTUAL AND PROCEDURAL BACKGROUND

*Facts*³

Raul Rodriguez testified to the following: On February 28, 2011, appellant and a man entered Rodriguez's mobile home, looking for Rodriguez's granddaughter. Appellant used to live in the mobile home, but Rodriguez had "kicked her out" the previous night. At one point, while Rodriguez, who is 77 years old, was sitting in his recliner, appellant, who was standing, hit Rodriguez in the face and took his wallet and \$9.00 in cash out of his breast pocket. Rodriguez suffered a cut to his face requiring three stitches.

City of Delano Police Officer Travis Brewer testified to the following: On February 28, 2011, he was employed as a police officer by the City of Bakersfield. On that date, at Rodriguez's home, he made contact with Rodriguez, who was bleeding from his left eye and "possibly" from his nose.

Additional Factual Background

From June 1988 through February 23, 2011, appellant had suffered convictions of three felonies, two of which qualified as strikes, and 15 misdemeanors.

The report of the probation officer (RPO) listed a single circumstance in mitigation, viz., that appellant's prior performance on probation in one of her misdemeanor cases was "satisfactory." The RPO listed the following three circumstances in aggravation: appellant had suffered "numerous" prior convictions; she was on misdemeanor probation at the time she committed the instant offenses; and "[her] prior performance on misdemeanor probation and parole was unsatisfactory in that she failed to abide by her terms and conditions and continued to re-offend."

³ Our factual summary is taken from the transcript of the preliminary hearing.

Eugene T. Couture, Ph.D., as part of a court-ordered competency evaluation, performed a psychological evaluation. In his report of that evaluation, he stated that appellant “displays many of the signs and symptoms of a serious mood disorder,” and suffers from “Bipolar Disorder, which is a serious and persistent mental disorder....” The RPO states appellant “is taking Risperdol and Depakote for depression”

Procedural Background

At sentencing, after the court stated it would strike one of appellant’s strikes and imposed the indicated 26-year sentence, defense counsel stated: “I will submit to the court that 26 years for her conduct in this case is still a little bit on the high side. I would ask the [c]ourt to consider lowering the sentence. I’ll submit on those comments.”

DISCUSSION

Appellant’s claim that the court abused its discretion in imposing the 26-year indicated sentence consists of four parts.

Dual Use Prohibition

First, she argues, based on what is commonly called the “dual use” prohibition contained in section 1170, subdivision (b) and California Rules of Court, rule 4.420,⁴ that the court erred in imposing the upper term on count 1 because, she asserts, the court (1) used the fact of her numerous prior convictions as a basis for imposing the upper term and (2) imposed sentence under the three strikes law based on one of those convictions.⁵

⁴ All rule references are to the California Rules of Court.

⁵ Section 1170, subdivision (b) provides that when a “statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.” Rule 4.420(b) provides in relevant part: “In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” The dual use prohibition is set forth in section 1170, subdivision (b), as follows: “[T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any

Appellant, however, has forfeited her dual use claim by failing to specifically raise it below. Appellant contends her counsel’s statement at sentencing that the 26-year term was “a little bit on the high side” was sufficient to preserve this claim for appeal. We disagree.

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), our Supreme Court first enunciated the rule that “complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*Id.* at p. 356.) “Included [within the waiver doctrine] are cases in which the stated reasons allegedly do not apply to the particular case, and *cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.*” (*Id.* at p. 353, italics added.) In articulating the reason behind the rule, the Supreme Court stated: “Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.” (*Ibid.*)

The court in *People v. de Soto* (1997) 54 Cal.App.4th 1 (*de Soto*), applied *Scott* in a case in which defense counsel raised various “boilerplate” (*de Soto*, at p. 4) objections to the sentence pronounced by the trial court.⁶ The appellate court “contrast[ed] the

provision of law.” Rule 4.420(c) provides, in relevant part: “To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so.”

⁶ “[D]efense counsel [in *de Soto*] made the following ‘objection’: ‘Judge, as a formality under the recent case of *People vs. Scott*, I’m required to explicitly state on the

broad brush, general nature of the objections raised at sentencing to the very specific nature of those raised on appeal.” (*Id.* at p. 7.) The defendant’s appellate claims included a ““dual use”” argument under former rule 420(c), the predecessor to rule 4.420(c). (*de Soto*, at p. 7) Citing *Scott*, the court held the defendant’s challenges to the sentence were waived. The court reasoned: “We conclude that defendant’s general objections did nothing to give the trial court a meaningful opportunity to correct any sentencing errors.... Without any *specifically articulated* reasons for the objections, the court has no real basis upon which he could evaluate the claims and correct the errors, if any existed.” (*de Soto*, at p. 9; accord, *People v. Steele* (2000) 83 Cal.App.4th 212, 226 [failure to object to aggravating factor relied on by sentencing court waives the issue on appeal].)

As demonstrated in footnote 6, *ante*, appellant’s objection at sentencing was even less specific than that raised by the defendant in *de Soto*. Therefore, as in *de Soto*, appellant’s “dual use” argument is waived. Moreover, for a variety of reasons, this claim fails on the merits.

First, the dual use prohibition limits a sentencing court’s reliance on the “fact of any *enhancement*” (§ 1170, subd. (b)) and “a fact charged and found as an *enhancement*” (rule 4.420(c)). (Italics added.) “[T]he three strikes provisions[, however,] articulate an alternative sentencing scheme,” not a sentencing enhancement (*People v. Cressy* (1996) 47 Cal.App.4th 981, 991), and according to the express language of the three strikes law, its provisions apply “in addition to any other enhancements or punishment provisions

record objections to your sentencing decisions; otherwise, they’re deemed waived on appeal. So I am not stating necessarily that I have even found these things to be true, but I feel I need to make a record on appeal. So therefore, I would formally object to your selection of an upper term as the base term for the underlying offense. [¶] I would also object to your imposition of consecutive sentences. And I would also object to your using the same facts both to aggravate the base term and to impose an enhancement. And again, just basically to your use of any fact constituting an element of the offense to aggravate or enhance the sentence.” (*de Soto, supra*, 54 Cal.App.4th at p. 7.)

which may apply” (§ 1170.12, subd. (c)(1)). Therefore, the dual use prohibition does not preclude a court from imposing an aggravated term based on facts upon which it bases the imposition of a sentence under the three strikes law.

Second, even if the increased sentencing provisions of the three strikes law constitute an enhancement under section 1170, subdivision (b) and rule 4.420(c), the RPO shows that in addition to the strike conviction upon which appellant’s three strikes sentence was based, appellant has suffered two other prior felony convictions—one of which the court struck in order to allow appellant to avoid the more severe sentencing provisions applicable to a defendant with two or more strikes—and 15 misdemeanor convictions. Thus, there was a “surplus of pertinent prior convictions,” exclusive of the prior conviction the court did not strike and that made appellant subject to the three strikes law, sufficient to constitute a valid factor in aggravation. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1758.)⁷ When a trial court finds that the defendant has an extensive criminal record with numerous convictions, we do not presume the trial court impermissibly made dual use of a prior conviction that also served to enhance a sentence, unless the record affirmatively establishes such dual use. (*People v. Bejarano* (1981) 114 Cal.App.3d 693, 706.) There is no such affirmative showing in the record in the instant case.

Finally, and perhaps most fundamentally, the major premise of appellant’s argument—that the court relied at least in part on appellant’s numerous convictions in

⁷ We note that striking one of appellant’s strike convictions in order to avoid a mandatory indeterminate life sentence under the three strikes law (§ 1170.12, subd. (c)(2)(A)) would not preclude the use of that strike conviction for other sentencing purposes. “[W]hen a court has struck a prior conviction allegation, it has not ‘wipe[d] out’ that conviction as though the defendant had never suffered it...” (*People v. Garcia* (1999) 20 Cal.4th 490, 499.) A trial court may “strike a prior conviction allegation in one context, but use it in another.” (*Id.* at p. 496.)

imposing the upper term on count 1—is invalid. Although the RPO listed three circumstances in aggravation, the court did not refer to the RPO or in any way state its reasons for imposing the upper term.⁸ Therefore, assuming for the sake of argument that imposition of sentence under the three strikes law made the numerous convictions factor unavailable as a basis for imposing an upper term, appellant, in any event, has not demonstrated error because she has not established the court based the imposition of the upper term in any way on appellant’s numerous prior convictions. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [“All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown”].)

Probation-Related Circumstances in Aggravation

Appellant also argues that the second and third aggravating factors listed in the RPO—that appellant committed the instant offenses while on probation and that her performance on probation and parole was unsatisfactory—“effectively encompass the same conduct” and therefore constitute one, not two aggravating factors.

We fail to see how the characterization of aggravating factors *in the RPO* establishes that *the court* abused its discretion. In any event, this claim, which is in essence an attack on the RPO, is waived by appellant’s failure to object below. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235 [“failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal”].) Moreover, the claim fails on the merits. The RPO shows

⁸ Although the sentencing court is not required to find “facts” in mitigation or aggravation, it must state its “reasons” for imposing the upper, middle or lower term. (Rule 4.420(e); *People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Any claim of error based on failure to state reasons for imposition of the upper term, however, is waived. (*Scott, supra*, 9 Cal.4th at p. 353.)

appellant committed the instant offenses *and* that she committed multiple violations of probation and parole, independent of the instant offenses.

Weighing of Mitigating and Aggravating Factors

Appellant argues the court erred in imposing the upper term because the “one arguably applicable aggravating factor,” viz., the commission of the instant offenses while on probation, is outweighed by two mitigating factors, viz., appellant successfully completed probation in one case and she suffers from bipolar disorder.

For the reasons discussed in connection with appellant’s dual use argument, this claim is waived by appellant’s failure to specifically raise it below. (*Scott, supra*, 9 Cal.4th at p. 353 [complaints that a sentencing court “misweighed the various factors” cannot be raised for first time on appeal]. In addition, this claim is without merit.

Sentencing courts have wide discretion in weighing the aggravating and mitigating factors. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) “Sentencing courts ... may balance them against each other in qualitative as well as quantitative terms.” (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) “[E]xercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316; accord *People v. Giminez* (1975) 14 Cal.3d 68, 72 [a court abuses its sentencing discretion “whenever the court exceeds the bounds of reason, all of the circumstances being considered”].) “The 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.” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

We assume without deciding that both mitigating factors cited by appellant are valid. However, as demonstrated earlier, the record shows multiple valid aggravating factors. The court's implicit conclusion that the aggravating factors predominated was well within the bounds of reason.

Great Bodily Injury Enhancement

Appellant suggests the court abused its discretion in imposing the 26-year sentence because, she asserts, “there were justifiable grounds for striking the punishment for the great bodily injury enhancement” because the “victim was not seriously hurt,” and therefore the “trial court also could have stricken” that enhancement.

This challenge to the sentence is also waived by appellant's failure to raise it below. (*Scott, supra*, 9 Cal.4th at p. 353.) And, like appellant's other claims, it fails on the merits.

It is well established that, as a general matter, a court has discretion to “dismiss or strike an enhancement” (*People v. Bonnetta* (2009) 46 Cal.4th 143, 145) or “instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a) [of section 1385]” (§ 1385, subd. (c)(1)). However, it does not follow that the court here abused its discretion by failing to do so. The trial judge has broad discretion in this regard, and, as with any discretionary power vested in the trial judge, the judge's exercise of that discretion will not be disturbed on appeal except on a showing that the court acted in “an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan, supra*, 42 Cal.3d at p. 316.) Appellant has made no such showing here.

DISPOSITION

The judgment is affirmed.