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

THE PEOPLE,

Plaintiff and Respondent,

v.

DAISY BANDA,

Defendant and Appellant.

F063626

(Super. Ct. No. F11904359)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Tara K. Hoveland, 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 Gomes, Acting P.J., Poochigian, J. and Franson, J.

On July 27, 2011, police officers conducted a probation compliance search of a house known to be a hangout for Bulldog gang members. When they arrived, one individual fled the scene. Daisy Banda and another individual, both in gang clothing, remained in the front yard. For safety reasons, officers attempted to search Banda. She resisted and struggled with officers, but they were eventually able to search her and discovered 1.93 grams of methamphetamine on her person.

On September 13, 2011, Banda pled nolo contendere to one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and admitted a prior 2002 residential burglary strike conviction. (Pen. Code, § 667, subds. (b)-(i).)¹ The trial court noted a maximum of six years, but did not indicate a sentence. In exchange, the trial court dismissed one count of obstructing or delaying a peace officer (§ 148, subd. (a)(1)).

At sentencing on October 14, 2011, the trial court denied Banda's *Romero*² motion, denied probation, and sentenced her to state prison for two years eight months – the low term of one year four months doubled because of the prior strike. The trial court awarded 120 days credit and imposed various fines and fees.

On appeal, Banda contends only that the trial court abused its discretion when it denied her *Romero* motion. We disagree and affirm.

DISCUSSION

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss three-strike prior felony conviction allegations under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) The touchstone of the analysis is “whether, in light of the nature and circumstances of [her] present felonies and prior serious and/or violent felony

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

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

convictions, and the particulars of [her] 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 [she] had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony, supra*, 33 Cal.4th at p. 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.)

"Because the circumstances must be 'extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable person could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony, supra*, 33 Cal.4th at p. 378.)

Banda complains that the trial court abused its discretion by failing to consider all relevant circumstances in denying her *Romero* motion. We reject this contention. There is nothing in the record to indicate the trial court failed to consider and balance the factors outlined above. Moreover, there is a "'strong presumption' [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation." (*In re Large* (2007) 41 Cal.4th 538, 551.) "On appeal the basic rule is that it will be assumed that the trial court impliedly found every fact, necessary to support its ruling, to be true. [Citations.]" (*People v. Castaneda* (1969) 1 Cal.App.3d 477, 484.)

Here, prior to the sentencing hearing, defense counsel made an oral motion inviting the trial court to exercise its discretion to strike the prior strike for sentencing

purposes. Defense counsel noted the nonviolent and nonserious nature of the current offense; the age of the prior strike (nine years earlier); the fact that Banda was only 20 years old at the time; that, although the offense was a residential burglary, it was not violent and no one was home at the time; that the value of the items taken from the home was only \$102; and that all of Banda's other offenses were for simple possession. Defense counsel also noted that Banda had taken a plea in this case and had tried to get help for her and her daughter through Family Foundations, but because of her prior strike she was ineligible.

The trial court questioned the benefit of Family Foundations, noting that, according to the probation report, Banda's children had either been placed with their respective fathers, extended family members or foster care and adoption. Banda claimed she still had custody of two of her five children.

Banda's probation report further stated that she had only a sixth grade education; she was molested by a maternal uncle from age 8 to 10; she had been "on her own" since being abandoned at age 12 by her alcoholic mother; she had been a gang member since age 13; she smoked methamphetamine daily since age 16; and she had never been employed. Banda was living with her brother, a registered sex offender, at the time of her current arrest. Banda's juvenile record consists of receiving stolen property and unlawful possession of tear gas at age 16. Her adult criminal record consists of possession of methamphetamine twice in 2000; first degree burglary in 2002; and possession of methamphetamine in 2004, with violations of parole in 2005, 2006, 2007, and 2008.

The trial court, in denying Banda's motion stated, in part:

"One of the key things that over and over judges look at is the rehabilitation of a person. How old they were when [the] prior offense occurred. How much time has gone by. What they have done with their life in that period of time. Have they truly turned over a new leaf in other words. Have they truly changed their lifestyle from the young immature reckless behavior to

one that's a little bit more conventional. In the sense that no new convictions between that point and the current one. As much as I think that your prior personal history shows a very very dysfunctional background. One that hurt you over the years when you were a young lady yourself and your children obviously ended up getting the short end of that deal. I show when you were on parole as recently as five and a half six years and over and over again you ... violated [and were] sent back to prison.... This tells me when you were out you were not changing your lifestyle and the circle of people you were hanging out with. The gang members. The drugs and abusive relationships that you found yourself in over and over again. This of course is the product of your lifestyle but I have to rely on these reasons to decide whether or not I should give you this benefit and I have ground my findings and reasons that is reasonable and just. I cannot do that in your case Ms. Banda.”

We cannot conclude the trial court abused its discretion in declining to strike Banda's prior strike conviction, and we reject Banda's claim to the contrary. The relevant considerations support the trial court's ruling, and there is nothing in the record to show that the court declined to exercise its discretion on improper reasons or that it failed to consider and balance the relevant factors, including Banda's personal and criminal background.

DISPOSITION

The judgment is affirmed.