

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN CHRISTOPHER MENDOZA,

Defendant and Appellant.

F070811

(Super. Ct. No. CRF40497)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Judge.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Doris A. Calandra, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Poochigian, Acting P.J., Franson, J. and Smith, J.

Appellant Ryan Christopher Mendoza pled guilty to possession of methamphetamine in a custodial facility (Pen. Code, § 4573.6)¹, admitted a prior prison term enhancement (§ 667.5, subd. (b)), and admitted that he had a prior strike within the meaning of the “Three Strikes” law (§ 667, subd. (b)-(i)).

On appeal, Mendoza contends the court abused its discretion when it denied his *Romero*² motion. We affirm.

FACTS

On October 6, 2012, while Mendoza was incarcerated at the Sierra Conservation Center a correctional officer found a twisted piece of plastic containing 0.07 grams of methamphetamine in Mendoza’s locker. A urine sample provided by Mendoza tested positive for amphetamine and methamphetamine.

On May 1, 2013, the district attorney filed a criminal complaint charging Mendoza with the possession offense and allegations he pled to and admitted.

On November 12, 2013, Mendoza entered his plea in this matter pursuant to a negotiated plea. The plea agreement provided that if the court did not grant a *Romero* motion that Mendoza intended to file, Mendoza would receive the stipulated prison term of four years, the mitigated term of two years, doubled to four years because of Mendoza’s strike conviction, and a stayed term on the prior prison term enhancement. He would also have to serve 80 percent of his sentence. If the court granted the motion, it could sentence Mendoza to a lid of five years and Mendoza would serve 50 percent of his sentence.

Prior to entering his plea, Mendoza executed a change of plea form that included a waiver of his right to appeal which stated, “I understand that I will be waiving my right to

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

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

appeal and I will not be able to appeal from this Court's sentence based on the plea that I enter into in this matter.”

On January 9, 2014, Mendoza filed a *Romero* motion with several exhibits asking the court to strike his prior strike conviction.

On December 29, 2014, in a lengthy argument defense counsel contended, in pertinent part, that the court should strike Mendoza's prior strike conviction because it involved breaking into an automobile in a parking structure and his current offense involved only 0.07 grams of methamphetamine. The court denied Mendoza's *Romero* motion stating:

“[T]he issue for the Court on the *Romero* motion is not whether the—I'm not going to go back and look at the prior strike; whether it's a valid strike or not. The Court assumes it is. The defendant admitted it was, and it was clear at the time of the entry of the plea in Los Angeles that it was a residential burglary and qualified as a serious felony. And, in fact, the court notes in the probation report that in 2010, when the defendant was sentenced to prison, that prison sentencing got doubled because of the prior strike. That's the only reason it could have got[ten] doubled.

“The court is convinced that . . . [the prosecutor] has correctly stated the law. You can look at the current offense, [defense counsel]. I just don't share your view that possession of methamphetamine inside a state prison facility is any less serious regardless of the amount, because it's more serious because of where it occurs. I think the [L]egislature has shown that because of the nature of the triad that's attached to it and the fact that it has to be served consecutive to any other term currently being served.

“The question for the court is does the defendant—looking at his entire history—should fall outside the spirit of the three strikes law here. I got the strike occurring in 2006. [*Sic.*] Clearly he was a young man at the time, but when he's originally given probation, he quickly violates probation and he's sent to state prison.

“In 2007, he gets out and commits another felony and [is] given probation again. He violates again by being an ex-felon in possession in quick succession and winds up going to state prison for [32] months. [He] gets out and commits another crime in Los Angeles. It's a misdemeanor [section] 261.5, but the court maxes him out on that charge.

“So what I have is since the time of the serious felony conviction, I’ve got a continuing pattern of criminality that is unabated. I can’t find, based on that, that the defendant falls outside the spirit of the three strikes law. And for that reason, the Court is going to decline to exercise its discretion to strike the strike.” (Italics added.)

The court then sentenced Mendoza, in accord with his plea agreement, to the stipulated term of four years.

DISCUSSION

The Waiver of Appeal

A defendant’s express waiver of the right to appeal made pursuant to a negotiated plea agreement is valid provided that the waiver is knowing, intelligent and voluntary. (*People v. Panizzon* (1996) 13 Cal.4th 68, 80 (*Panizzon*).) As previously stated, Mendoza executed a change of plea form. The form included a written waiver of his right to appeal, which stated: “I understand that I will be waiving my right to appeal and I will not be able to appeal from this Court’s sentence based on the plea that I enter into in this matter.” Respondent argues that through this express waiver of his right to appeal Mendoza waived his right to appeal from the court’s sentence. Mendoza contends the waiver did not extend to the denial of his *Romero* motion because it involved a discretionary sentencing choice that would occur in the future, and he had no way to predict how the court might decide.

The key issue before us is the scope of appellant’s waiver. The scope of a defendant’s express waiver of appeal rights, entered as part of a plea agreement, is approached like a question of contract interpretation—“to what did the parties expressly or by reasonable implication agree?” (*In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157.) Using the paradigm of contract law, we consider the specific language of the plea agreement to ascertain the expressed intent of the parties, and we seek to carry out the parties’ reasonable expectations under the circumstances. (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120.)

Some basic principles have emerged from the case law in this area. Because a waiver is an intentional relinquishment of a known right (*Panizzon, supra*, 13 Cal.4th at p. 85), a defendant’s general waiver of appeal rights (i.e., “I waive my right to appeal”) in connection with a negotiated plea agreement does not apply to future error that was outside of the defendant’s contemplation and knowledge at the time the waiver was made. (*Ibid.*; *People v. Mumm* (2002) 98 Cal.App.4th 812, 815; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1661-1663.) Similarly, a general waiver of appellate rights does not apply to future sentencing matters that were unaddressed or left open by the plea bargain *if those matters were outside of the defendant’s contemplation at the time of the express waiver.* (*Panizzon, supra*, at pp. 85-86; *In re Uriah R., supra*, 70 Cal.App.4th at p. 1159.)³

If, however, a defendant agrees to a plea bargain that includes a specified or indicated sentence, and that sentence is actually imposed, the defendant’s waiver of the right to appeal from the sentence will foreclose appellate review thereof. (*Panizzon, supra*, 13 Cal.4th at pp. 85-86.) In *Panizzon*, the Supreme Court explained why the defendant’s specific waiver applied to the appeal in that case: “Not only did the plea agreement in this case specify the sentence to be imposed, but *by its very terms the waiver of appellate rights also specifically extended to any right to appeal such sentence.*”⁴ Thus, what [the] defendant seeks here is appellate review of an integral

³ Mendoza notes that in *People v. Buttram* (2003) 30 Cal.4th 773, the Supreme Court held that “[a]n appellate challenge to the exercise of the discretion reserved under the bargain is . . . a postplea sentencing matter extraneous to the plea agreement.” (*Id.* at p. 777; see *id.* at pp. 785-786.) That holding is clearly distinguishable because it was made in the context of a plea agreement in which there was no express waiver and, further, the precise issue before the court was the necessity of obtaining a certificate of probable cause. (*Id.* at pp. 777-778, 787.)

⁴ The defendant’s waiver in that case stated, in part: “ ‘I hereby waive and give up my right to appeal from the sentence I will receive in this case.’ ” (*Panizzon, supra*, 13 Cal.4th at p. 82.)

element of the negotiated plea agreement, as opposed to a matter left open or unaddressed by the deal. *Since both the length of the sentence and the right to appeal the sentence are issues that cannot fairly be characterized as falling outside of [the] defendant's contemplation and knowledge when the waiver was made, the reasoning of [other cases] is inapposite.*" (*Ibid.*, italics added.)

We now turn to the particular waiver at issue in the present case. The plea agreement provided that Mendoza would receive a stipulated sentence of four years if the court did not grant his *Romero* motion and a maximum sentence of five years if the court granted it. Again, in entering his guilty plea on these terms, appellant expressly gave up his right to appeal the sentence, by initialing the "ADVISEMENT AND WAIVER OF RIGHTS," which read: "I understand that I will be waiving my right to appeal and *I will not be able to appeal from this Court's sentence* based on the plea that I enter into in this matter." (Italics added.)

Mendoza's appeal is, in substance, an attack on the sentence—he seeks to gain a more favorable sentence by challenging the *Romero* ruling. In light of Mendoza's definite and express waiver of the right to appeal from the trial court's sentence, it was reasonably contemplated that the trial court's future decision on the *Romero* motion was within the scope of the waiver. Once Mendoza expressly and specifically surrendered his right to appeal from the sentence, he thereby waived his right to challenge exercises of judicial discretion that were (or would be) integral to the sentencing outcome, including the *Romero* ruling. *Mendoza waived his right to appeal. Even assuming the right to appeal was not waived, we reject his claim that the Romero motion was erroneously denied, as we explain below.*

The Romero Motion

Mendoza contends his criminal record prior to the current offense was limited, his strike offense was "a marginally residential burglary," and his current offense "involved scarcely more than the amount" held unusable in People v. Leal (1966) 64 Cal.2d 504.

*Thus, according to Mendoza, the court abused its discretion when it denied his Romero motion because these circumstances rendered him, at least in part outside the spirit of the Three Strikes law.*⁵

In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court explained that under section 1385, subdivision (a), a trial court may, in the furtherance of justice, strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony. (*Romero, supra*, at p. 504.) The court's exercise of discretion in the furtherance of justice " "requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the People" " (Id. at p. 530, italics omitted.)

In *People v. Williams* (1998) 17 Cal.4th 148, the Supreme Court articulated the standard for striking prior convictions under the Three Strikes law, as follows: "We therefore believe that, in 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, 'in furtherance of justice' pursuant to . . . section 1385[, subdivision](a), 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, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such

⁵ Additionally, Mendoza contends that although the trial court considered a post-current offense in denying his motion, i.e., his 2013 statutory rape conviction, the denial of his *Romero* motion should be reviewed as of the time he committed his current offense.

allegation or finding, it must pass on the reasons so set forth.” (*People v. Williams, supra*, at p. 161.)

A trial court’s decision whether or not to strike a prior conviction for purposes of the Three Strikes law is subject to review under the deferential abuse of discretion standard. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433-1434.) Under this standard, the ruling will be upheld unless it “ ‘falls outside the bounds of reason’ under the applicable law and the relevant facts.” (*People v. Williams, supra*, 17 Cal.4th at p. 162.) As explained in *People v. Carmony* (2004) 33 Cal.4th 367 at pages 376-377 (*Carmony*):

“In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘ “[t]he 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.” ’ [Citation.] Second, 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.’ ” ’ [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.”

The court’s decision to deny Mendoza’s *Romero* motion was not “so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at p. 377.) Although Mendoza was only 27 years old when he committed the current offense he had an extensive criminal history. In March 2006, Mendoza was convicted of possession of a concealed dirk or dagger (former § 12020, subd. (a)) for which he was placed on two year’s misdemeanor probation. Later that year while on probation, he was convicted of first degree burglary (§ 459), placed on three year’s felony probation, and ordered to serve 110 days in jail. In 2007, he was convicted of possession of a hypodermic needle (Bus. & Prof. Code, former § 4140) and ordered to serve 60 days in custody. Additionally, his probation in the burglary case was apparently violated based

on that conviction and he was sentenced to a two-year prison term. Following his release from prison in 2009, Mendoza was convicted of being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)) and sentenced to 90 days in jail. In 2010, he was convicted of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and placed on three year's felony probation. Later that year, he violated his probation when he was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1)) and was sentenced to a 32-month prison term on both offenses. In September 2013, Mendoza was convicted of statutory rape (§ 261.5, subd. (c)) and sentenced to a year in jail. Even without considering his 2013 statutory rape conviction, which he committed after his current offense, Mendoza has had a substantial criminal record that continued unabated for several years and included two prison terms and two violations of probation. Further, the record shows the court was aware of its discretionary authority to strike a prior felony conviction allegation in this case. It also shows the court conducted a thorough analysis of the relevant factors as mandated by the California Supreme Court in *People v. Williams, supra*, 17 Cal.4th 148.

Mendoza's attempt to minimize the seriousness of his current offense and his first degree burglary offense underlying his strike conviction are not persuasive. Possession of any drug in prison is a more serious offense than possessing methamphetamine outside of prison. Mendoza tries to downplay the egregiousness of his current offense by emphasizing that the amount of methamphetamine found in his cell was barely above the amount found not to be a usable amount in *People v. Leal, supra*, 64 Cal.2d at pp. 505, 512 (possession of 32 milligrams of crystalline residue of heroin found to be insufficient to sustain conviction for possession of heroin). Mendoza's possession of methamphetamine, however, is not as innocuous as he purports it to be because a urine test disclosed that Mendoza had methamphetamine in his system. Thus, even though only 0.07 of a gram was found in his cell, it is clear he possessed a greater amount before ingesting the portion that caused his urine to test positive for methamphetamine.

Mendoza also fails in his attempt to lessen the seriousness of his prior residential burglary conviction. In *People v. Thorn* (2009) 176 Cal.App.4th 255, a defendant who entered a car parked in an open carport located below the car owner's apartment was convicted of first degree burglary. (*Id.* at pp. 259, 265.) In granting the defendant's motion to strike a prior conviction the court stated that the burglary, although " 'not . . . trivial,' would have been a misdemeanor if the vehicle had 'been parked five or six feet outside of that carport.' " (*Id.* at p. 259.) Mendoza tries to equate the seriousness his prior first degree burglary offense to that of the defendant's burglary in *Thorn*. The comparison, however, is not apt because the burglary in *Thorn* did not involve the entry into a structure whereas Mendoza's residential burglary conviction did involve such entry. As noted by the court in *Thorn*:

“ “ “ “Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety.” [The burglary statute], in short, is aimed at the danger caused by the unauthorized entry itself.’ ” ’ [Citation.]” (*People v. Thorn, supra*, 176 Cal.App.4th at p. 264.)

The above concerns and the danger inherent in an unauthorized entry into a residential structure are greater when entry is made into an enclosed structure like an enclosed garage rather than an open carport. Thus, in concluding that the court did not abuse its discretion when it denied his *Romero* motion, we also reject Mendoza's contention that his prior burglary conviction involved "a marginally residential burglary."

DISPOSITION

The judgment is affirmed.