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

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO ANGEL AVILA,

Defendant and Appellant.

F071356

(Super. Ct. No. 1479898)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Linda A. McFadden, Judge.

Katharine Eileen Greenebaum, 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.

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

INTRODUCTION

Following a public altercation during which he punched and kicked his girlfriend in a restaurant parking lot, defendant Arturo Angel Avila was charged by amended information with battery on a cohabitant (Pen. Code, § 273.5, subd. (a))¹ (count I) and assault likely to produce great bodily injury (§ 245, subd. (a)(4)) (count II). The amended information further alleged defendant had a prior serious felony conviction (§§ 1192.7, subd. (c)(33), 667, subd. (d)), and served three prior prison terms without remaining free from custody for a period of five years (§ 667.5, subd. (b)).

Following jury selection, defendant pled no contest to counts I and II, and admitted the prior serious felony conviction and three prior prison terms. On count I, defendant was sentenced to the middle term of three years, doubled for the strike (§ 667, subd. (e)(1)), plus an additional year for one prison prior (§ 667.5, subd. (b)), for a total determinate prison term of seven years. On count II, defendant received the same sentence, stayed (§ 654).

On appeal, defendant argues the trial court failed to exercise informed discretion when it declined to strike his prior serious felony conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Alternatively, defendant argues his trial counsel rendered ineffective assistance of counsel by failing to bring the mitigating factor of his gang repudiation to the trial court's attention when it was considering the *Romero* issue. Finally, defendant argues the trial court improperly calculated his custody time credits.

We reject these arguments and affirm the judgment.

¹ Further references are to the Penal Code unless otherwise noted.

DISCUSSION

I. Denial of *Romero* Request

Defendant asserts that the trial court did not exercise informed discretion when it declined to strike his prior felony conviction because it, along with trial counsel and the probation officer, failed to “realize[]” he was an active gang member when he incurred his prior conviction but he had dropped out of the gang approximately five years prior to committing the present offense. We find this contention unsupported by the record.

A. Standard of Review

“Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ ” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; accord, *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

Pursuant to section 1385, trial courts have the discretion to strike prior felony convictions, either on their own motion or on request by the prosecution, “in furtherance of justice.” (*Romero, supra*, 13 Cal.4th at p. 530; *People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*)). A defendant is not entitled to make a motion to strike a conviction, but may invite the court to do so. (*Carmony, supra*, at p. 375.)

“[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.” (*Carmony, supra*, 33 Cal.4th at p. 375.) Our Supreme Court has explained that in applying the abuse of discretion standard in the present context, we are guided by two essential principles: “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 the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be

set aside on review.” ’ ’ (*Id.* at pp. 376–377.) “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.’ ” ’ [Citations.] 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.” (*Id.* at p. 377.)

“ ‘[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.’ ” (*Carmony, supra*, 33 Cal.4th at p. 377.) “To achieve this end, ‘the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.” ’ ’ ” (*Ibid.*)

The Supreme Court has established “stringent standards that sentencing courts must follow” in order to find an exception to the “Three Strikes scheme.” (*Carmony, supra*, 33 Cal.4th at p. 377.) “ ‘[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, “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.’ ” (*Ibid.*)

“Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*Carmony, supra*, 33 Cal.4th at p. 378.) Because of this presumption, “a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation].” (*Ibid.*) “[T]he 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’” (*Ibid.*)

B. Analysis

1. Background

Defendant’s present convictions arose from an incident in which he had been drinking at a restaurant bar.² He and his girlfriend left the restaurant after he tired of waiting for the food they had ordered. Defendant’s girlfriend refused to give him the car keys because he had been drinking. In response, he punched her in the face while trying to get the keys out of her hand. He then knocked her down with a second punch to the head and as he held her to the ground by her hair, he kicked her in the side. After a bystander pulled defendant away from his girlfriend, they both got into her car. A second bystander blocked the car by placing a wheelchair behind it. Defendant and his girlfriend then got back out of the car and he again punched her in the head before running off. The

² The facts are summarized from the probation report.

victim sustained a baseball size hematoma above her left eye but did not seek medical treatment.

The prior felony conviction defendant asserts should have been stricken under *Romero* was incurred in 2006. Defendant approached a 12-year-old boy who was on his own front porch and asked, “Are you banging?” Before the boy could respond, defendant slapped him in the face and took his hat. Defendant yelled, “Norte,” and fled. Approximately 10 minutes later, the boy and a friend were across the street when they heard gunshots. They saw defendant on the boy’s front porch yelling, “Where is he? Where is he?” Defendant then aimed a handgun at the window, fired a shot into the house and yelled, “Norte, Norte.” Defendant was subsequently convicted of shooting at an inhabited dwelling (§ 246).

B. No Abuse of Discretion

Trial courts must apply the three strikes law “ ‘where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.” ’ ” (*Carmony, supra*, 33 Cal.4th 377.) Here, defendant had a qualifying strike and the court correctly applied the three strikes law to him. (*Carmony, supra*, at p. 378.) Therefore, a strong presumption exists that defendant’s sentence was both rational and proper. (*Ibid.*)

The probation report included the information that defendant joined a gang at the age of 12, approximately, but had dropped out approximately five years prior to committing the crime against his girlfriend. The probation report also included the information that the probation officer confirmed defendant’s classification as a gang dropout through a jail official. This probation report was submitted prior to the court’s ruling, and it was read and considered by the trial court.

Regarding defendant's prior felony conviction and prior prison terms, the trial court stated, "[I]t looks like you were trying to do some things to improve your life and make some changes from your past. And so that is the Court's reason for striking that particular prior that I've listed here." The court also subsequently mentioned that defendant had been recently trying to improve his life in considering a mitigated term for count I. However, in declining to strike defendant's prior felony conviction, the court observed that his present convictions involved violence and the prior conviction involved "great violence."

We find this record reflects the trial court was well aware of the scope of its discretion to strike defendant's prior felony conviction and by virtue of the probation report, it was also aware of defendant's past gang status and present status as a gang dropout. Defendant's argument would require us to presume that despite considering the probation report, the trial court overlooked information therein that his prior conviction occurred during the time period he was a gang member and that he had dropped out of the gang between incurring the prior conviction and committing the present offense. We decline to do so, as this information was plainly set forth in the probation report and we presume the court considered "all of the relevant factors in the absence of an affirmative record to the contrary."³ (*People v. Myers* (1999) 69 Cal.App.4th 305, 310; accord, *Carmony, supra*, 33 Cal.4th at p. 378, citing *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) Notably, the trial court was not required to articulate any reason for declining defendant's invitation to strike the conviction and "[t]he absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law." (*Carmony, supra*, at p. 376 accord, *In re Coley* (2012) 55 Cal.4th 524, 560-561.)

³ Other factors included defendant's steady employment with an employer who considered him an asset to the company, the victim's wishes, and defendant's recognition of his drinking problem and plan to seek treatment.

Moreover, the trial court in fact exercised discretion by striking two prior prison terms, including for the 2006 conviction, and electing not to impose the five-year sentence enhancement under section 667, subdivision (a)(1). Thus, defendant's argument that the trial court failed to exercise informed discretion is directly contradicted by the record.

Defendant's disagreement with the trial court's decision does not suffice to meet his burden, as “ [i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations.” (*Carmony, supra*, 33 Cal.4th at p. 378.) We find no abuse of discretion and reject defendant's claim to the contrary.⁴

II. Custody Credit Calculation

Defendant contends he was entitled to 162 days of actual credit based on his arrest on October 17, 2014, rather than the 161 days awarded by the trial court. The People respond that the credits were properly calculated based on the date of defendant's booking.

The crime occurred on October 17, 2014, at approximately 9:30 p.m. and defendant was booked on October 18, 2014, following his arrest. Because presentence custody credits are calculated from the date the defendant is booked rather than the date the defendant is arrested, his argument that the trial court erred in failing to calculate his credits from the date of his arrest has no merit. (§ 2900.5, subd. (a); *People v. Macklem* (2007) 149 Cal.App.4th 674, 702; *People v. Ravaux* (2006) 142 Cal.App.4th 914, 919-921.)

⁴ In light of our conclusion, we do not reach defendant's alternative argument that trial counsel rendered ineffective assistance of counsel in failing to bring defendant's repudiation of his gang ties to the court's attention, either in his written *Romero* request or during the hearing.

“The very settled rule of appellate review is a trial court’s order/judgment is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record.” (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.) Defendant has not demonstrated error and we therefore reject his claim.

DISPOSITION

The judgment is affirmed.