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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PATRICK FRANCEL,

Defendant and Appellant.

F071399

(Kern Super. Ct. No. BF156995A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Sara E. Coppin, 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, Kathleen A. McKenna and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Peña, J. and Smith, J.

Appellant Michael Patrick Francel appeals from his convictions for burglary in the second degree (Pen. Code, § 460, subd. (b))¹ and theft (§ 666, subd. (a)). Appellant contests the sentence imposed for his convictions, alleging the trial court wrongly refused to strike a prior conviction. Appellant further requests we conduct an independent review of the *Pitchess*² hearing conducted by the trial court. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant has a long criminal history. Relevant to this appeal, appellant has one prior serious or violent felony conviction from 1975, for robbery (§ 211). In addition, appellant has at least 18 criminal cases resulting in convictions from 1974 through 2013. Appellant's convictions include two instances of trespassing (§ 602, subds. (o), (j)); one instance each of reckless driving (Veh. Code, § 23103), assault with a deadly weapon (§ 245, subd. (a)(1)), exhibiting a firearm (§ 417), burglary (§ 459), possession of a firearm by a felon (former § 12021), and carrying a concealed weapon (former § 12025, subd. (d)); five instances of petty theft (§§ 484, 488, 666); two instances of indecent exposure (§ 314.1); two instances of driving under the influence (Veh. Code, § 23152, subd. (b)); and one instance each of being under the influence of a controlled substance (Health & Saf. Code, § 11550), receiving stolen property (§ 496), unlawfully taking a vehicle (former Veh. Code, § 10851), distribution of hypodermic needles (former Bus. & Prof. Code, § 4149), and possession of a controlled substance (Health & Saf. Code, § 11377). As a result, appellant has suffered multiple incarcerations and has rarely had a period of more than a few years without being incarcerated or arrested for a new crime.

Appellant's current convictions arise from a September 5, 2014, incident at a FoodMax in Kern County. While appellant was shopping at the FoodMax, an undercover

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

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

loss prevention agent saw him place a bottle of vodka inside of a backpack. Appellant proceeded to check-out and paid for several items he had placed in his cart but did not remove the vodka from the backpack or pay for it. Appellant was stopped by the loss prevention agent, handcuffed, and searched. Along with the vodka, the backpack contained two packages of meat and a bottle of vinegar. The items were valued at \$35.61. In his defense, appellant claimed he had noticed the vodka was not rung up before he exited the store and was intending to return to pay for it when he was grabbed from behind by the loss prevention agent and pulled out of the store.

Appellant was convicted by a jury and, in a bifurcated proceeding, found to have one prior serious or violent felony conviction due to his 1975 robbery conviction, and one prior prison term due to his 2008 possession of a controlled substance conviction. Ahead of sentencing, appellant made a *Romero*³ motion to strike his prior serious or violent felony conviction. Appellant argued his current crime, the theft of approximately \$35 in food, was relatively minor and did not involve violence; that his prior conviction was over 40 years old and his intervening convictions were not violent or serious felonies; and that he had been working to improve himself as shown by the 35 exhibits he attached, consisting of various certificates and awards.⁴

The trial court denied appellant's request. At the outset, the court explained it had "read and considered all the points and authorities, the numerous attachments to the defense motion or request for the Court to exercise its discretion to strike the strike prior, and also the People's points and authorities." The court then took additional argument before summarizing the relevant standards and pronouncing its decision. Recounting appellant's criminal history, the trial court concluded appellant was "what we call the

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

⁴ Most certificates and awards (33 of 35) are from the 2008 to 2010 time period; one is from 1973 and one is from 2012.

unfortunate revolving-door criminal who just keeps going in and out of prison, in and out of jail, and has not maintained any substantial period of time where he's been a law-abiding, productive citizen. [¶] So having considered all the circumstances, all the evidence before the Court, the Court does not find that the defendant may be deemed outside the scheme's spirit." Appellant was subsequently sentenced to a seven-year term of imprisonment. This appeal timely followed.

DISCUSSION

Denial of Appellant's Romero Motion

Appellant contends the trial court abused its discretion when denying his *Romero* motion because it focused exclusively on his criminal history.

Standard of Review and Applicable Law

In *Romero*, the California Supreme Court held that trial courts have discretion to dismiss or strike allegations of prior felony convictions. (*Romero, supra*, 13 Cal.4th at pp. 529–530.) “[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.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The analysis whether an offender may be deemed outside the spirit of the law is a stringent one. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) And there is a strong presumption that any sentence that conforms to the Three Strikes law’s sentencing scheme is rational and proper. (*Id.* at p. 378.) “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 people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Ibid.*)

We review the trial court’s decision for an abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 375.) An abuse of discretion is not shown merely because reasonable people might disagree about whether to strike a prior conviction. Where the record is silent, or where it “ ‘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.’ ” (*Id.* at p. 378.)

The Trial Court Did Not Abuse Its Discretion

In this case, the trial court was presented with argument and evidence showing the nature of appellant’s current offense (which was generally minor and non-violent), the particulars of his background, character, and prospects (which included substantial efforts in the 2008-2010 timeframe at rehabilitation), and his prior criminal history (which was extensive). The court acknowledged receiving and reviewing this evidence and properly stated the required analysis for striking a prior conviction. It found that appellant’s long and extensive criminal history and recidivism demonstrated that appellant did, indeed, fall within the spirit of the Three Strikes law. We do not agree with appellant that no reasonable jurist could reach this conclusion. Although appellant’s current criminal conduct was minimal, his criminal history was not. While appellant submitted evidence of certificates suggesting rehabilitation, all but one was from before 2012. The evidence could, therefore, be reasonably viewed as failing to demonstrate a lack of future recidivism risk given that appellant suffered three different convictions after receiving virtually all of his certificates.

Appellant further argues it was improper for the trial court to focus exclusively on appellant's criminal history when declining his motion. We do not agree the trial court was so singularly focused. As noted, the trial court explicitly stated it had reviewed the arguments and evidence appellant had submitted in his motion, which included arguments that the current offense was minimal and non-violent and that appellant had made substantial efforts at rehabilitation. That the trial court focused in its oral pronouncement on the fact that appellant's criminal history overwhelmingly supported denying the *Romero* motion does not render its prior statements moot.

Regardless, it was not improper for the court to focus on appellant's extensive criminal history in this analysis. The specific test in these cases requires as much, as the court must determine whether appellant falls outside the spirit of a statutory scheme designed to increase punishment for habitual criminals. Appellant's long history of consistently reoffending when freed from incarceration was sufficient, alone, to allow a reasonable jurist to conclude he fell within the spirit of the law.⁵

Having considered the full scope of appellant's argument on appeal and having found no abuse of discretion, we need not reach his ineffective assistance of counsel argument. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1010, fn. 12.)

Independent Pitchess Review

During the course of discovery, appellant requested and was granted review of confidential personnel files relating to the officer who ultimately arrested him. No

⁵ *People v. Superior Court (Alvaraez)* (1997) 14 Cal.4th 968 is not to the contrary. In the context of the trial court's discretion to reduce a wobbler from a felony to a misdemeanor under the Three Strikes law, our Supreme Court held that the existence of a prior strike was not an automatic basis to refuse to reduce the crime charged, but was a valid factor to consider. (*Alvaraez*, at p. 979.) The case does not stand for the proposition that the trial court cannot rely upon this valid factor as the basis for its decision. Rather it holds a nonstatutory presumption that criminal history precludes reduction would wrongly eliminate a trial court's sentencing discretion under the law.

documents were produced from that review. Appellant requests we independently review the *Pitchess* hearing conducted by the trial court.

Standard of Review and Applicable Law

Pitchess motions are the well-settled mechanism by which defendants can screen law enforcement personnel files for evidence that may be relevant to their defense without compromising the officer's reasonable expectation of privacy in those records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225 (*Mooc*)). Subject to various restrictions not relevant here, a trial court must conduct an in camera review of potentially relevant personnel files if the defendant makes a showing of good cause for the discovery. (*Id.* at p. 1226.)

This process is effectuated by having a custodian of records collect all potentially relevant documents from identified personnel files and present them to the trial court. The custodian "should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*Mooc, supra*, 26 Cal.4th at p. 1229.)

The trial court must then make a record of what documents it has examined to permit future appellate review. (*Mooc, supra*, 26 Cal.4th at p. 1229.) "If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined." (*Ibid.*) These proceedings are then sealed. (*Ibid.*)

Upon appeal, we independently examine the record made by the trial court "to determine whether the trial court abused its discretion in denying a defendant's motion for disclosure of police personnel records." (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

The Trial Court Did Not Abuse its Discretion

We have reviewed the full set of transcripts, files, and statements relevant to this issue. The trial court complied with the required *Pitchess* procedures. A custodian of records was present and placed under oath. The custodian testified that no responsive documents were found. Regardless, the court independently reviewed the relevant personnel file, which had been provided. The court created an accounting of what was reviewed and its determination that there were no documents to produce. And these proceedings were stenographically recorded. (*Mooc, supra*, 26 Cal.4th at p. 1229.) Our independent review finds the trial court did not abuse its discretion in determining no documents should be produced. There are no responsive documents to produce.

DISPOSITION

The judgment is affirmed.