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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN ANTHONY BARAJAS, Defendant and Appellant.	F077729 (Super. Ct. Nos. MCR056420, MCR056474) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Madera County. Mitchell C. Rigby, Judge, and Frank Dougherty, Judge. (Retired Judge of the Merced County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)[†]

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill and Dina Petrushenko, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Detjen, J. and Snauffer, J.

[†] Judge Rigby accepted appellant's plea; Judge Dougherty pronounced his sentence.

In case No. MCR056420 (case No. 420), appellant John Anthony Barajas pled guilty to two counts of second degree robbery (Pen. Code, § 211)[1] and admitted allegations that he had three prior convictions within the meaning of the "Three Strikes" law (§ 667, subds.(b)-(i)). In case No. MCR056474 (case No. 474), Barajas pled guilty to two counts of second degree robbery (counts 1 & 2), and one count each of evading a peace officer (Veh. Code, § 2800.2, subd. (a)/count 3) and unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)/count 4). He also admitted in that case allegations that he had three prior convictions within the meaning of the Three Strikes law.

On appeal, Barajas contends he was denied the effective assistance of counsel by defense counsel's failure to file a *Romero*[2] motion. We affirm.

FACTS

On May 17, 2017, as Stephany Garcia assisted Barajas at a cell phone store in Madera, Barajas brought out a firearm, pointed it at Jasmin Magdaleno and ordered her to get on the floor. Barajas grabbed Garcia by her hair and walked her behind the counter. He then ordered both women to remove all the money from two cash registers and place it in a bag. After the women complied, Barajas led them to a backroom where he had them remove cell phones from a safe and place them in the bag with the cash. Before leaving, Barajas ordered the women to lie face down on the floor and count to 30. Barajas fled with over $650 in cash and cell phones with a total value of approximately $2,800 (case No. 420).

On May 19, 2017, Gurvinder Kaur was in the back storage area of a sandwich shop in Chowchilla where she worked when Barajas came in the store holding a long black handgun. Barajas walked behind the counter and ordered Kaur at gunpoint to open the cash register. She complied and he removed the money from the cash register. He

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

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

then ordered her back into the storage area, forced her to lie on the ground, and took her cell phone. Barajas told Kaur to wait 15 minutes before getting up and he left. When Kaur got up, she noticed her wallet and keys were also missing.

On May 22, 2017, Hassan Fadh was outside a vape store in Madera where he worked when he saw Barajas enter the store. Fadh followed Barajas inside and went behind the counter. When Barajas was near a cash register he pointed a long black handgun at Fadh and told him to get on the floor. He then told Fadh to put his hands behind his head and to cross his feet or Barajas would shoot him. Fadh stayed on the floor until Barajas left with four cartons of cigarettes and approximately $1,300 in cash.

On May 25, 2017, as part of a police operation to catch Barajas, a confidential informant contacted Barajas and picked him up in Fresno. However, after driving a short distance, the informant stopped the car and got out. Barajas moved over to the driver's seat and drove off, initiating a pursuit that went through several cities and continued into Madera County until the car Barajas was driving was rendered inoperable with spike strips (case No. 474).

During a police interview, Barajas admitted committing the three robberies.

On February 28, 2018, the Madera County District Attorney filed first amended complaints in both cases. The complaint in case No. 420 charged Barajas with the robbery offenses and three strikes allegations he pled to in that case. The complaint in case No. 474, in addition to charging Barajas with the charges and allegations he pled to in that case, also charged him with an enhancement for serving a prior prison term for a violent felony (§ 667.5, subd. (a)). However, in case No. 474, the district attorney dismissed the violent prison prior enhancement and Barajas entered his plea, as noted above, in exchange for an aggregate determinate term of three years eight months

followed by a consecutive indeterminate term of 50 years to life.[3] In case No. 420, Barajas entered his plea, as noted above, in exchange for a maximum indeterminate sentence of 50 years to life. Before the change of plea proceeding concluded, the court asked if the People had anything else and the following colloquy occurred:

> "[PROSECUTOR]: Only that, depending on what [Barajas] and [defense counsel] decide, they may still file a *Romero* motion. I don't know what they are going to decide on that front, but that that [*sic*] could conceivably come up.
>
> "COURT: As is the right of the Defense if they choose to do that. So that right has not been given up.
>
> "[DEFENSE COUNSEL]: After a discussion with [Barajas], he's advising me not to write that motion, but I am going to look at it further, [y]our Honor."

Defense counsel, however, never filed a *Romero* motion.

Barajas's probation report indicated that in 2001 he was convicted of misdemeanor assault with a deadly weapon or by means of force likely to cause great bodily injury (§ 245, subd. (a)(1)). In 2002, Barajas was convicted of receiving stolen property (§ 496, subd. (a)) and placed on felony probation. In 2004, his probation was terminated and he was sentenced to prison for 16 months. Barajas subsequently violated his parole twice in that case.

In 2007, Barajas was convicted of two counts of second degree robbery (§ 211) and one count each of assault with a deadly weapon (§ 245(a)(1)) and attempted robbery (§§ 664/211). Additionally, a great bodily injury enhancement (§12022.7, subd. (a)) and a personal use of deadly weapon enhancement (§ 12022, subd. (b)(1)) were found true in one robbery count, a personal use of deadly weapon enhancement was found true in the other robber count, and a prior prison term enhancement (§ 667.5(b)) was found true. On

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[3] During the change of plea proceedings, the district attorney stated that the weapon Barajas used to commit the robberies was an imitation firearm.

April 27, 2007, Barajas was sentenced to eight years four months in prison. On November 27, 2013, he was paroled. However, Barajas absconded and was returned to prison twice before being discharged from parole on April 30, 2017.

Barajas's probation report cited three circumstances in aggravation: (1) Barajas's prior convictions were numerous; (2) he had served prior prison terms; and (3) his prior performance on parole or probation had been unsatisfactory. The report did not cite any circumstances in mitigation. For both cases, the report recommended a combined, aggregate determinate term of seven years four months and a consecutive, aggregate indeterminate term of 100 years.

On March 28, 2018, after defense counsel advised the court that Barajas wanted to proceed with sentencing, the court met with counsel in chambers. After the proceeding resumed in open court, the court sentenced Barajas in both cases to a combined, aggregate determinate term of five years four months and a consecutive, aggregate indeterminate term of 100 years.[4]

DISCUSSION

Barajas contends his defense counsel should have brought a *Romero* motion on his behalf because: (1) his three strikes convictions arose out of a single incident that occurred on October 11, 2006; (2) he did not have any convictions between the prior strike convictions and the current offenses; (3) even if his *Romero* motion had been granted, he would still have served a substantial sentence; (4) his prior strike convictions were remote; and (5) in light of the enormous sentence he was facing, there was no harm in making the motion. Thus, according to Barajas, defense counsel's failure to file a

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[4] In case No. 474, the court sentenced Barajas to a doubled middle term of four years on his evading a peace officer conviction and a consecutive, doubled 16-month term on his unlawfully taking a vehicle conviction in that case. Additionally, the court imposed an indeterminate term of 25 years to life on each of his four robbery convictions in both cases for an aggregate indeterminate term in both cases of 100 years to life.

Romero motion on his behalf denied him the effective assistance of counsel in violation of his right to counsel under the Sixth and Fourteenth Amendments. We disagree.

"In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–692.) To demonstrate deficient performance, [the] defendant bears the burden of showing that counsel's performance ' " ' "fell below an objective standard of reasonableness … under prevailing professional norms." ' " ' (*People v. Lopez* (2008) 42 Cal.4th 960, 966.).) To demonstrate prejudice, [the] defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Ibid*.; *In re Harris* (1993) 5 Cal.4th 813, 833.)" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.).)

"On appeal, we do not second-guess trial counsel's reasonable tactical decisions." (*People v. Lucas* (2014) 60 Cal.4th 153, 278, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) "[A] defendant's burden [is] 'difficult to carry on direct appeal,' as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ' " 'no rational tactical purpose' " ' for an action or omission." (*People v. Mickel*, *supra*, 2 Cal.5th at p. 198, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 437.)

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; accord, *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*, at p. 375.)

" '[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.)

The record does not shed any light on why defense counsel did not file a *Romero* motion.[5] However, Barajas had a dismal criminal record. In the instant cases, Barajas committed three robberies ostensibly at gunpoint, stole a car and then led officers on a reckless chase through three cities that ended only when the officers were able to deploy a spike strip to stop his car. Although the record discloses few details of his three prior strike convictions, his probation report indicates he committed two prior robbery offenses while personally armed with a deadly weapon and that during one robbery he inflicted great bodily injury on one of his victims.

Further, Barajas was convicted of the offenses underlying his three strikes convictions in November 2007, and he committed the offenses underlying the instant cases less than three years after his release on parole and little more than a year after being discharged from parole. Thus, Barajas's strike convictions were not remote. (Cf. *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [trial court improperly struck a 20-year-old strike conviction where defendant had not led a "legally blameless life" since he suffered the conviction].)

Barajas also violated grants of misdemeanor probation twice, a grant of felony probation once, and he violated his parole several times. Moreover, aside from downplaying the negative aspects of his record, Barajas does not cite any positive circumstances the court could have relied on to determine that he was outside the scheme of the Three Strikes law.

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[5] Barajas also contends that all his convictions that antedated his three strikes convictions were misdemeanors. Although the probation report indicates his 2002 conviction for receiving stolen property was a misdemeanor, this is clearly erroneous. The abstract of judgment for that conviction and a prison packet that are part of the record on appeal show Barajas was convicted of felony receiving stolen property and sentenced to prison after he violated a grant of probation in that case.

Considering the nature and circumstances of his current offenses, his criminal history, his failure to rehabilitate, and the absence of any mitigating circumstances in the instant cases, defense counsel could reasonably have concluded that a *Romero* motion to strike any of his prior strike convictions would have been futile. (*People v. Johnson* (2003) 114 Cal.App.4th 284, 305.) Because counsel "is not ineffective for failing to make frivolous or futile motions," we reject Barajas's claim of ineffective assistance of counsel. (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

DISPOSITION

The judgment is affirmed.