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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS PATRICK,

Defendant and Appellant.

G052450

(Super. Ct. No. 14WF2141)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Conviction affirmed, sentence reversed and remanded for resentencing.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Nicholas Patrick of possession of methamphetamine for sale. (Health & Saf. Code, § 11378.) At the sentencing hearing, the trial court stayed his two prior prison term enhancements and struck all but one of his prior strike convictions. It sentenced him to prison for four years, i.e., twice the midterm for a violation of Health and Safety Code section 11378.

On appeal defendant contends the trial court erred by *staying* his prison term enhancements, rather than striking them. But he argues the trial court *intended to strike* the prison term enhancements; he therefore urges us to strike them on appeal.

The Attorney General agrees the trial court erred by staying defendant's prison term enhancements. She contends, however, the matter must be remanded to the trial court with instructions to either (1) impose the prison term enhancements, or (2) strike them *and* state in the minutes its reasons for striking them. She asserts Penal Code, section 1385, subdivision (a) requires a court to enter in the minutes its reasons for dismissing an enhancement.<sup>1</sup>

Section 1385, subdivision (a), however, no longer requires a court to enter a statement of reasons in the minutes for its decision to dismiss an action or an enhancement. Rather, in the aftermath of a 2014 amendment of the statute, a court may generally state its reasons orally on the record rather than in the minutes. (*Ibid.*)

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<sup>1</sup>

All statutory references are to the Penal Code unless otherwise stated.

In her respondent's brief, the Attorney General raises the contention the court erred by striking three of defendant's prior strike convictions without stating its reasons for doing so in the minutes. Although section 1238, subdivision (a)(10) authorizes the People to appeal from an unlawful sentence, they did not file a notice of appeal to become a cross-appellant. Accordingly, the People are foreclosed from urging error on appeal. (See *People v. Jordan* (1986) 42 Cal.3d 308, 312, fn. 2; *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 585.)

But here, the court failed to state its reasons, either orally or in the minutes, for dismissing, in the interests of justice, defendant's prior prison terms. Accordingly, we remand the case to the trial court. On remand, the trial court should strike or impose defendant's prior prison term enhancements. If the court strikes one or both of the prior prison term enhancements, it must issue a statement of reasons in accordance with section 1385, subdivision (a).

## FACTS

On May 28, 2014, a police officer arrived at a hotel in response to a woman's report of an altercation with a male in room 116. The woman asked the officer to help her obtain her clothes and belongings from the room.

The officer knocked on the door of room 116. Defendant opened the door clad only in his underwear. "He seemed agitated, nervous, sweating profusely, . . . kind of upset" — "possibly under the influence." The officer told defendant that the woman believed her personal property was inside the room. Defendant denied it. At the officer's request, defendant allowed him to enter the room. Defendant agreed to let the officer check a few of the drawers in the room.

Immediately, defendant walked to a nightstand and opened the top drawer. The officer saw a "glass pipe and a large plastic baggy" containing "a crystal-like substance" that looked like methamphetamine. Defendant slid the baggy to the corner of the drawer and closed it. The officer asked defendant what the substance was. Defendant said it was his "stash," a slang word meaning contraband or narcotics. The officer opened the drawer and verified the substance looked like methamphetamine. The officer also found a small black digital scale in the drawer. He arrested defendant.

In a police interview at the jail, defendant was advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and then admitted he sells methamphetamine.

At trial, the parties stipulated the baggy contained 24 grams of methamphetamine. The officer testified that, based on his training and experience, it was his opinion defendant possessed the methamphetamine for sale.

A jury convicted defendant of possessing for sale a controlled substance. (Health & Saf. Code, § 11378.) The court found defendant had suffered four prior convictions within the meaning of the “Three Strikes” law, consisting of three robberies committed in 1990, and one attempted robbery committed in 1995. The court also found he had served two prior prison terms.<sup>2</sup>

The minutes reflect the following sentencing actions taken by the court. The court sentenced defendant to prison for four years, “which is double the middle term pursuant to” section 667, subdivisions (d) and (e)(1) and section 1170.12, subdivisions (b) and (c)(1). The court “stayed” punishment for defendant’s two prior prison terms. The court struck, for sentencing purposes only, defendant’s prior strike convictions for the three robberies he committed in 1990. It declined, however, to strike his remaining prior strike conviction for attempted robbery in 1995.

The court made lengthy oral comments at the July 31, 2015 sentencing hearing to explain its decision *not* to strike one of defendant’s prior strike convictions. Those comments are transcribed in the reporter’s transcript. Essentially, the court found “nothing about the defendant’s personal character, or prior history, or current crime [to cause it] to exercise its discretion pursuant to” *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and instead found numerous aggravating facts about defendant himself under California Rules of Court, rule 4.421(b), including that he had engaged in violent

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<sup>2</sup>

The court found the People had failed to prove defendant served a third prison term.

conduct and had an extensive criminal background. (Cal. Rules of Court, rule 4.421(b)(1).)

## DISCUSSION

Defendant contends the trial court erred by staying, rather than striking, his prior prison term enhancements. He urges this court to strike them on appeal, contending “it is clear” the trial court intended to strike them.

The Attorney General agrees the trial court erred by staying defendant’s prior prison term enhancements. She contends the matter must be remanded to the trial court to either impose or strike them.

Under section 1385, subdivision (a), a court may dismiss an action in furtherance of justice on its own motion or upon the prosecutor’s application. This statutory authority includes the discretion to dismiss or strike enhancements. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 145.) Section 1385, subdivision (a) requires a court to state the reasons for the dismissal “orally on the record” and also “in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. . . .”<sup>3</sup>

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<sup>3</sup> Prior to January 1, 2015, former section 1385, subdivision (a) required the reasons for the dismissal to be set forth “in an order entered upon the minutes.” (Former § 1385, subd. (a); Stats. 2000, ch. 689, § 3; amended by Stats. 2014, ch. 137, § 1.) The Attorney General contends California law requires a court to “include a statement of reasons in its minute order when it strikes a sentence enhancement,” relying on *People v. Bonnetta, supra*, 46 Cal.4th at p. 153. But *Bonnetta* predates the 2014 amendment of the statute, which “obviate[d] the need for written reasons in a minute order” (*People v. Jones* (2016) 246 Cal.App.4th 92, 97), “except on request of the parties or where the proceedings are not being recorded” (*Conservatorship of Christopher B.* (2015) 240 Cal.App.4th 809, 817). The court sentenced defendant on July 31, 2015, i.e., after the January 1, 2015 effective date of the 2014 amendment.

Here, the court stated orally on the record the reasons for its decision *not* to grant a request to dismiss one of defendant's prior strike convictions. At the outset of its lengthy enunciation of reasons, the court stated it had decided to deny the request that it exercise its "discretion [to strike a strike] pursuant to *Romero*." The court stated it had reviewed the probation report and the sentencing briefs and that it had presided over the trial. The court noted "defendant was convicted of two felonies within the state" and cited section 1203, subdivision (e)(4) (under which a person convicted of two felonies within the state is ineligible for probation).

The court found "nothing about the defendant's personal character, or prior history, or current crime that would cause this court to exercise its discretion pursuant to *Romero*," stating: "The nature of the defendant's prior crimes, the violence involved in many of them, the lack of understanding by the defendant at his responsibility for these acts as reflected by the probation report where he does not express any remorse for his prior history, or either doesn't recall it, or has a reason or an excuse for each action are all facts upon which the court relies . . . for this decision."

Turning to the aggravating circumstances enunciated in California Rules of Court, rule 4.421 (rule 4.421), the court found no such circumstances concerning defendant's current possession of methamphetamine for sale offense. But as to defendant himself, the court found the existence of aggravating circumstances under each category listed in rule 4.421(b). The court found defendant had engaged in violent conduct that indicated a serious danger to society. (Rule 4.421(b)(1).) The court found defendant's "prior convictions as an adult for sustained petitions are numerous, not necessarily increasing in severity, but just numerous." (Rule 4.421(b)(2).) The court found "defendant has served a prior prison term." (Rule 4.421(b)(3).) The court found defendant "was on two grants of probation when he committed this crime." (Rule 4.421(b)(4).) The court found defendant's prior performance on parole or

probation had been good and had been bad, “but overall it has not been consistently good by any means.” (Rule 4.421(b)(5).)

The court concluded, “So the sentencing[] structure on count 1 is [16 months, two years, and three years as to the low, mid, and upper terms, respectively, for violating Health & Saf. Code, § 11378] with four strikes, and [two prior prison terms,] times two for another two so the tentative that I gave . . . was four years . . . . And what I had stated I would do is impose midterm of two times two for imposing the strike and go ahead and double it. [¶] I would go ahead and strike three strikes and stay with the prison prior terms of [section] 667.5[, subdivision] (b) to give him a total of four years and that’s what I will do at this time.”<sup>4</sup> As to this last statement, the court enunciated no reasons for its decision (apparently) to stay the prior prison terms.

As the parties agree, the court erred by staying defendant’s prior prison term enhancements. The court’s choices as to those enhancements were to impose or strike them: “Prior prison term enhancements may be imposed or stricken but not stayed.” (*People v. Jordan* (2003) 108 Cal.App.4th 349, 368.)

Defendant argues “it is clear” the court intended to strike the prior prison terms and therefore this court should strike them. But “[t]here is a fundamental difference between striking and staying a prior; the difference is not merely linguistic. [Citation.] Striking an enhancement is tantamount to dismissing it. [Citation.] By contrast, “A stay is a temporary suspension of a procedure in a case until the happening of a defined contingency.”” (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 284.) Here,

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<sup>4</sup> Although the court’s statement it would “stay with” the prior prison terms could be interpreted alternatively to mean it intended (1) to maintain in place at least temporarily those enhancements or (2) to impose them, the actual sentence the court imposed of four years, as well as the statement in the minutes that the court “stayed” punishment for defendant’s prior prison terms, suggest the court’s use of the phrase “stay with” is either a typographical error or that the court meant it would “stay” execution of the prior prison terms enhancements.

the court chose to “strike” three of defendant’s prior strike convictions, but to “stay” his prior prison term enhancements, thus deliberately using different terminology as to each. Furthermore, as noted in footnote 4 of this opinion, the court’s apparent actual statement that it would “stay with” the prior prison terms further leaves the court’s intentions in doubt. And, although it correctly points out defendant’s crimes “were not increasing in severity,” the court also pointed out defendant had suffered convictions for driving under the influence of drugs or alcohol in 2006, 2012, and 2013. In sum, we have no basis to conclude the court merely misspoke and intended to strike defendant’s prior prison terms. Because the court exceeded its jurisdiction by staying defendant’s prior prison term enhancements, its order “staying the enhancements must be reversed, and the cause . . . remanded to the trial court for a new sentencing.” (*People v. McCray* (2006) 144 Cal.App.4th 258, 267.)

Accordingly, the Attorney General is correct that, on remand, the court must determine whether to impose or strike defendant’s prior prison term enhancements. If the court decides to strike one or both of them, the court should follow section 1385, subdivision (a)’s directive and state its reasons for the dismissal either orally and, if necessary, in the minutes in accordance with the statute. (*People v. Jones* (1992) 8 Cal.App.4th 756, 758.)

## DISPOSTION

We remand the case for resentencing. The trial court is directed (1) to strike or impose defendant's prior prison term enhancements, (2) if it chooses to strike one or both of those enhancements, to state its reasons for doing so in accordance with section 1385, subdivision (a), and (3) if necessary, to resentence defendant. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.