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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ROBERT ALEXANDER,

Defendant and Appellant.

H037290

(Santa Clara County

Super. Ct. No. C1086834)

Following the filing of a third amended felony complaint, John Robert Alexander pleaded no contest to three counts of second degree robbery (Pen. Code, §§ 212, 212.5)¹ and admitted three prior strike allegations (§§ 667, subs. (b)-(i), 1170.12) and two prior serious felony conviction allegations (§ 667, subd. (a)). Before sentencing, defendant Alexander filed a *Romero* motion (see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), arguing that he had "led a life that takes him outside the spirit of the Three Strikes Law." Following a hearing, the court denied the *Romero* motion. The court sentenced defendant to a prison term of 75 years to life consecutive to a 30 year term. (See §§ 667, subd. (a), 667, subs. (c)(6), (e)(2), 1170.12, subs. (a)(6), (c)(2); *People v. Williams* (2004) 34 Cal.4th 397, 405 ["section 667(a) enhancements are to be applied individually to each count of a third strike sentence"].)

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

On appeal, defendant challenges the denial of any *Romero* relief on multiple grounds. The record on appeal does not demonstrate that the court lacked awareness of its full discretionary authority, failed to exercise its discretion, or abused its discretion in determining *Romero* relief was unwarranted. Accordingly, we affirm.

I

Background

The third amended felony complaint alleged three separate second degree robberies that occurred on or about June 2, 2010, June 14, 2010, and July 28, 2010. The complaint alleged three prior strike convictions, a California robbery conviction and two federal robbery convictions, within the meaning of three strikes law. It further alleged two prior serious felony convictions within the meaning of section 667, subdivision (a), based upon the same robbery convictions.

In his *Romero* request, filed June 24, 2011, defendant asserted that he had led a life that took him outside the spirit of three strikes law in that he had "proven himself to be a dedicated employee, friend, and teacher" and "demonstrated an ability to actively participate in and contribute to his community." He maintained that the interests of justice dictated that the court exercise its discretion under section 1385, subdivision (a), to dismiss two or all three of the strike allegations.

Defendant acknowledged that he had three prior convictions for robbery, the first involving an armed robbery of a Winchell's Donut's in 1979.² He indicated that the latter two robbery convictions were for bank robberies committed in 1985. Defendant further acknowledged that those latter two convictions were part of a plea deal and the "actual number [of] bank robberies from that time period was much higher." He also admitted

² Defendant's opening brief states, without any citation to the appellate record, that the gun did not have a round in the chamber.

that in addition to the three charges in this case, prosecutions were pending in San Mateo and Placer counties for seven additional bank robberies.

Defendant argued that he had remained crime free for substantial periods of time and "actively participated in and contributed to his community." He stated that, after he graduated high school, defendant was "a member of a successful working band from 1971 to 1978." He reportedly volunteered in an elementary school music program but was unable to continue after the school learned of his criminal record. "Most recently, he lived in Half-Moon Bay and prior to being laid off, he [had] worked [in] construction." He had helped build sets for the Coastal Repertory Theatre and he had performed in a number of musicals there.

In support of his request for *Romero* relief, defendant submitted the following: photos of his involvement in local theater, numerous letters of support from family and friends, family photos, a psychological report, a certificate of completion and a letter, both dated February 14, 2011, indicating his successful completion of the M8-H Lifeline substance abuse program while in custody, a certificate of recognition, dated March 31, 2011, for "speaking out for and modeling respect of standards" from the program, attendance sheets showing he had attended substance abuse recovery meetings from about October 2010 through March 2011, and a social history by an unnamed author.

The licensed clinical psychologist who had evaluated defendant disclosed that defendant had reported being sexually abused by a church counselor during a week-long camp in sixth grade. Defendant indicated that had been abusing cocaine, marijuana and alcohol at the time of the 1979 armed robbery and the bank robberies in the 1980's. Defendant reported that the 1997 offense was also related to drug use; he had started to abuse methamphetamine in addition to using alcohol and marijuana. He returned to robbing banks in 2010, after he had lost his job and home, to support his addictions to cocaine, marijuana and alcohol. He denied using a gun or weapon during the bank robberies.

In the psychologist's opinion, the child sexual abuse "had a significant impact on his personality development and ability to handle failure and stress." Defendant was diagnosed with a recurrent major depressive disorder, in partial remission, and dependence on cannabis, cocaine and alcohol based on defendant's reported abuse of these substances on an almost daily basis and the development of physical and psychological dependence. Use of those substances increased during episodes of depression and he reverted to criminal activities during times of acute drug use.

The People filed opposition to the *Romero* motion. It was argued that the court's discretion to strike was limited and striking the prior conviction allegations would constitute an abuse of discretion. According to the People's memorandum, defendant had actually admitted to committing 13 bank robberies in 1985 in addition to the two bank robberies to which he had pleaded guilty in federal court. The People stated that defendant had served a significant time in prison during three separate commitments. The People filed the following exhibits: the felony complaints in San Mateo and Placer counties concerning 2010 crimes, a packet regarding the 1986 federal judgment of conviction of two counts of bank robbery, the 1997 Nevada County Sheriff's crime report involving a check reportedly stolen, forged, and cashed by defendant, the Santa Clara County Sheriff's felony incident report regarding the 1979 armed robbery at Winchell's Donuts and attached documents, and the 1980 Probation Officer's Report regarding the 1979 armed robbery.

According to the probation report, defendant admitted 10 bank robberies when he was taken into custody in September 2010 following a string of robberies that occurred in northern California between June and August of that year. Three of those robberies were charged in this case and the remaining seven occurred outside Santa Clara County on various dates in June, July, or August 2010. After being taken into custody in September 2010, defendant disclosed to police that he had lost his construction job and he had turned to drugs and begun using cocaine extensively. He had estimated that he had been

spending \$400 per week on his drug habit. Following a robbery, defendant gave his drug dealer money to purchase cocaine.

The probation report described the three bank robberies to which he pleaded no contest in this case. In each of the robberies charged in count one and count two, defendant told the teller that he had a gun. In the robbery charged in count three, the teller being robbed believed that defendant had a gun because she heard a thud and noticed a metal object inside the plastic bag that defendant was holding open. The defendant told her, "hurry up" and "don't do anything stupid."

Defendant had told the probation officer that had been using cocaine daily before committing the 1979 robbery and he was "high as a kite on coke" when he committed that crime. After being released from custody, defendant was married and had a son; he was gainfully employed until 1983, when he was laid off. He began frequently using cocaine. Defendant had stated that he was convicted of two bank robberies in 1986, he served a sentence in federal prison, and he was released in 1989. His wife divorced him while he was in prison. From prison he went to a halfway house in Oakland, California. He started consuming alcohol and smoking marijuana on a daily basis.

Defendant had reported that he began using cocaine again in 1997. He was convicted of forgery in 1997 and he was released from custody in 2000.

Defendant had stated that, after his release from custody in 2000, he began using alcohol and marijuana again. He started using cocaine again in 2008 and he lost his job soon thereafter. He became extremely depressed and began using cocaine daily. Defendant decided to commit the bank robberies to support himself and his drug addiction.

At the *Romero* hearing in August 2011, defendant was 57 years of age. A number of family and friends spoke in support of defendant, indicating that the crimes were out-of-character and related to drugs. Defendant's older brother indicated that defendant had struggled with drugs but defendant was a loving and devoted father to his son. The

brother also told the court that defendant is an amazing musician and actor. Defendant's adult son said that defendant would be "the first one to give you the shirt off his back." Defendant's older brother and son agreed defendant was not a violent person.

Before ruling, the court asked the prosecutor whether defendant had ever acted in violence. The prosecutor answered, referring to the Winchell's incident, "Well, to me leveling a gun at a 17 year old's stomach would certainly be acting out in violence." Upon further questioning by the court, the prosecutor conceded that, to his knowledge, defendant had never struck anyone or committed domestic violence.

II

Romero Motion

Section 1385, subdivision (a), empowers a court, on its own or the prosecutor's motion, to "order an action to be dismissed" "in furtherance of justice."³ "Although the statute literally authorizes a court to dismiss only an entire criminal action, [the California Supreme Court has] held it also permits courts to dismiss, or 'strike,' factual allegations relevant to sentencing, such as those that expose the defendant to an increased sentence. [Citations.]" (*People v. Lara* (2012) 54 Cal.4th 896, 900-901.) A "defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385," but a defendant has "the right to 'invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.'" (*Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441)" (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376.)

³ Subdivision (c)(1) of section 1385 provides: "If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)."

In deciding whether to dismiss a prior conviction allegation under three strikes law pursuant to section 1385 and in reviewing such a ruling, courts "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.)

"While a court must explain its reasons for striking a prior (§ 1385, subd. (a); see *Romero, supra*, 13 Cal.4th 497, 531 . . .), no similar requirement applies when a court declines to strike a prior (*People v. Carmony, supra*, 33 Cal.4th 367, 376 . . .). 'The 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.' (*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.' (*Id.*, at p. 378 . . .)" (*In re Large* (2007) 41 Cal.4th 538, 550-551.)

"[A] court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony, supra*, 33 Cal.4th at p. 374.) This standard "asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

"[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]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,]

produce [] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) Unless a trial court fails to exercise its discretion or denies *Romero* relief for an impermissible reason, a defendant challenging a failure to grant such relief must establish the relevant factors under *Williams* "manifestly support the striking of a prior conviction and no reasonable minds could differ" (*Id.* at p. 378.)

A court abuses its discretion if it grants *Romero* relief to accommodate judicial convenience, address court congestion, reward a guilty plea, or express its personal antipathy to three strikes law. (See *People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 531.) Additionally, an appellate court has held that a "trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [record did not support critical inference that upon which the court relied in denying motion to strike]; see *People v. Carmony, supra*, 33 Cal.4th at p. 379 [distinguishing *Cluff*].)

"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 the 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." (*People v. Carmony, supra*, 33 Cal.4th 367, 376-377.)

III

Discussion

A. Characterization of 2010 Offenses as Violent or Potentially Violent

In ruling, the court remarked, "As much as it pains me to sentence anyone under the Three Strikes Law, in looking at the factors that I have to consider, that I have a sworn duty to consider the current offenses and there's ten of them, and they're all violent, had the potential for violence, the past crimes [are] too numerous to mention and the prospects; I can't say that your prospects are good to where when things go bad in life you won't revert to the same type of conduct that terrorizes innocent people, as in 2010."

Defendant now argues that none of the currently charged offenses involved violence or the potential for violence. He points out that he was never charged in this case with a gun enhancement. Citing *People v. Garcia* (1999) 20 Cal.4th 490, he asserts that a lack of actual violence in committing the recent robberies and prior robberies favors granting *Romero* relief.

In *People v. Garcia, supra*, 20 Cal.4th 490, the defendant was convicted of two home burglaries and he had five prior burglary convictions that qualified as strikes under Three Strikes Law. (*Id.* at p. 493.) Defendant had also served three prior prison terms, one for a conviction of receiving stolen property, a second for a conviction of possession of heroin, and a third for five prior burglary convictions. (*Id.* at pp. 493-494.) The fact that the defendant had no record of violence was a consideration in the trial court's decision to exercise its discretion under section 1385, subdivision (a), to strike all the prior conviction allegations as to one burglary count. (*Id.* at pp. 494-495.) Upon review, the Supreme Court held that "a trial court in a Three Strikes case may exercise its discretion under section 1385, subdivision (a), so as to dismiss a prior conviction allegation with respect to one count, but not with respect to another" and concluded that the trial court did not abuse that discretion. (*Id.* at pp. 503-504.)

While a criminal history not involving violence may be a consideration tending to favor *Romero* relief, this case is distinguishable from *Garcia*. None of the prior burglary crimes committed by defendant Garcia were against a person. (See *People v. James* (1977) 19 Cal.3d 99, 119 [burglary is considered a crime against property]; *People v. Gauze* (1975) 15 Cal.3d 709, 714 ["A burglary remains an entry which invades a possessory right in a building"]; but see *People v. Montoya* (1994) 7 Cal.4th 1027, 1043 [burglary poses "some risk of danger to human life and safety" regardless whether a structure is inhabited "because the intrusion may give rise to a confrontation between the intruder and persons lawfully on the premises"].) Robbery is considered to be "a crime of violence committed against a person. (*People v. Ramos* (1982) 30 Cal.3d 553, 589)" (*People v. Scott* (2009) 45 Cal.4th 743, 749; see *People v. Ramos* (1982) 30 Cal.3d 553, 587, judg. vacated on other grounds and cause remanded sub. nom. *California v. Ramos* (1983) 463 U.S. 992, 1014 [103 S.Ct. 3446], sub. opn. *People v. Ramos* (1984) 37 Cal.3d 136.)

Although defendant may have denied using a gun or weapon during any of the present robberies to the evaluating psychologist to whom he was referred by his own defense counsel and makes the same assertion in his briefs, defendant has not referenced any affirmative evidence in the appellate record establishing that claim aside from his own statements. According to the probation report, each teller approached by defendant in committing the present offenses was told by defendant that he had a gun or believed that defendant had a gun based upon the circumstances. The crimes involved at least an implicit threat of violence.

Courts recognize that a perpetrator's threat against a robbery victim may provoke resistance and increase the possibility of actual physical injury. (See *People v. Ramos, supra*, 30 Cal.3d at p. 589.) Under section 667.5, subdivision (c), "[a]ny robbery" qualifies as a "violent felony." (§ 667.5, subd. (c)(9).)

We conclude that the trial court did not mischaracterize the recent robberies as violent or potentially violent. We have no reason to believe that the court misunderstood the nature of the present offenses, which the probation report had summarized. The record does not affirmatively demonstrate that the court mistakenly believed that defendant had physically harmed anyone.

B. Defendant's Major Depression and Drug Dependence

Defendant argues that the trial court's failure to duly consider his long standing depression and drug addiction and his lack of treatment for these problems in deciding whether *Romero* relief was warranted was an abuse of discretion. The sole case cited in support of this argument is no longer good law. (See *People v. Smith*, review granted May 9, 2012, S201186.)

The trial court was not required to state every consideration for its *Romero* ruling denying relief. (See § 1385, subd. (a).) But the court did state, at the beginning of the sentencing hearing, that it had read all the materials presented. The appellate record does not affirmatively establish that the court ignored or failed to give "due consideration" to the psychological report, which provided comprehensive personal and family history and reported that defendant suffered from a recurrent major depressive disorder, for which he had not been treated, and drug and alcohol dependence, which had not been addressed.

"On appeal, we presume that a judgment or order of the trial court is correct, '[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 564 . . .)" (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) Consequently, we reject defendant's suggestion that the trial court abused its discretion by failing to "give due consideration" to his problems of "depression and drug dependence."

C. Court's Awareness of Its Discretion and Available Sentencing Choices

Although his memorandum set forth four of the possible sentencing options, defendant now asserts that "it does not appear that the trial court was fully aware of the complete panoply of sentencing options available to it under *Romero*." He states that "nothing suggests that the trial court appreciated that it could treat each of the three charged offenses individually" and that the court understood it had the authority, for example, to dismiss none of the strike allegations as to one count and dismiss two or all three of the strike allegations as to the remaining counts.

As we have indicated, the California Supreme Court in *People v. Garcia, supra*, 20 Cal.4th 490 concluded that a court may exercise its discretion under section 1385, subdivision (a), by dismissing a strike allegation with respect to one count but not another. (*Id.* at pp. 492-493, 503-504.) The court explained: "A trial judge, applying the factors we enumerated in *Romero* and *Williams*, may find adequate justification for striking one or more prior conviction allegations, but may deem appropriate the sentence that results from striking the prior conviction allegations as to only some counts. When a proper basis exists for a court to strike prior conviction allegations as to at least one current conviction, the law does not require the court to treat other current convictions with perfect symmetry if symmetrical treatment would result in an unjust sentence." (*Id.* at p. 500.)

The general rule is " 'that a trial court is presumed to have been aware of and followed the applicable law. [Citations.]' [Citations.]" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) "This rule derives in part from the presumption of Evidence Code section 664 'that official duty has been regularly performed.' " (*Ibid.*) The "general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues. [Citations]" (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497.) Accordingly, we must presume, in the absence of affirmative evidence to the contrary,

that the court was fully aware of the scope of its discretion, including the discretion recognized in *Garcia*, in granting *Romero* relief and sentencing defendant.

D. Judicial Remark Regarding Public Perception

Defendant contends that the trial court impermissibly considered the public's perception in reaching its *Romero* ruling. In discussing its decision, the court commented, "The other thing that I constantly cannot help but think about in cases such as this is a public perception." The court then proceeded to discuss whether there were two systems of justice, one for persons with privileged backgrounds and another for those from poor backgrounds. The court indicated that a defendant from a privileged background might be able to argue that he or she had a strong support system and, therefore, had favorable prospects for not offending again but a defendant with a poor background with the same criminal history might not have that argument. The court ultimately indicated that it would not treat defendant Alexander any differently or any worse because he had a better upbringing and more advantages than others in the criminal justice system.

The court's remark about public perception, while perhaps ill-advised, must be understood in context of its more extensive comments. The record does not demonstrate that the court gave any weight to public perception, a factor extrinsic to the Three Strikes scheme, in denying *Romero* relief.

E. No Abuse of Discretion

Defendant argues that the trial court abused its discretion, pointing to his foregoing contentions of error, which we have rejected, and the factors favoring *Romero* relief. He states that he has "led a productive life for extended periods of time, in fact for the vast majority of his life, which unfortunately has been marred by the occasional, although sometimes intense periods of criminality generally spaced over a decade apart." He asserts that "[h]e has marketable skills in both construction and music which he has put to good use for extended periods of time, most of his adult working life, to provide

for himself and others." He notes his "very large and supportive family." He claims that during pretrial incarceration "he has come to grips with his drug and alcohol abuse and how it affects his life and his behavior."

It was up to the trial court, not this court, to make the discretionary determination "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, supra*, 17 Cal.4th at p. 161.) Although defendant Alexander cooperated with police and his crimes appear related to drug addiction similar to the defendant in *Garcia*, defendant Alexander's prior strike convictions did not arise "from a single period of aberrant behavior for which he served a single prison term." (*People v. Garcia, supra*, 20 Cal.4th at p. 503, see *id.* at p. 494.)

Defendant Alexander's criminal history was extensive and serious. He committed armed robbery in 1979 and was convicted and sentenced to a three year prison term. He apparently committed a spate of bank robberies in the mid-1980's. In 1986, he was convicted of two of them and sentenced to a six-year term in federal prison. In 1997, he was convicted of forgery and sentenced to 32 months in prison. In 2010, defendant committed 10 bank robberies, the three bank robberies to which he pleaded no contest in this case and seven others to which he confessed.

Most significantly, the trial court in *Garcia* exercised its discretion to grant, not deny, *Romero* relief. In this case, defendant faces the formidable hurdle of showing that all reasonable minds agree that one or more of the strike allegations should be dismissed as to one or more counts.

Defendant's criminal record suggests that he knew that his "criminal conduct was unacceptable—but had failed or refused to learn his lesson." (*People v. Gallego* (1990) 52 Cal.3d 115, 209, fn. 1, quoted in *People v. Williams, supra*, 17 Cal.4th at p. 163.) At

the time of the probation report, defendant was enrolled in an in-custody drug program, which is commendable. Nevertheless, the court could reasonably view defendant's criminal history and his return to drug and alcohol use upon each release from prison and his repeated failures to address his underlying substance abuse problems and depression despite criminal punishment as circumstances indicating defendant had poor prospects for avoiding recidivism and defendant came within three strikes law.

We cannot say that the court below abused its discretion in declining to strike any of the prior robbery conviction allegations under three strikes law. This court has no authority to substitute its judgment for the judgment of the trial court. (See *People v. Carmony, supra*, 33 Cal.4th at p. 377.)

DISPOSITION

The judgment is affirmed.

ELIA, Acting P. J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MÁRQUEZ, J.