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

THE PEOPLE,

Plaintiff and Respondent,

v.

AUGUSTUS STEVEN MOSLEY,

Defendant and Appellant.

H037310

(Santa Clara County

Super. Ct. No. C1100236)

Defendant Augustus Steven Mosley entered a plea of guilty to first degree residential burglary and admitted that there was a person in the dwelling who was not an accomplice when the offense was committed. He also admitted allegations that he had been convicted previously of six violent or serious felonies (or “strikes”), one serious felony conviction, and three felonies for which he had served prison terms. Defendant thereafter brought a motion requesting that the court exercise its discretion to dismiss the prior strike allegations in accordance with *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), which was opposed by the People. The court denied the *Romero* motion, struck two of the prior prison offense enhancements and stayed the third enhancement, and sentenced defendant to a term of 25 years to life in prison, consecutive to a five-year prison term.

Defendant argues on appeal that the denial of his *Romero* motion constituted an abuse of discretion because the court failed to give adequate consideration to his

background, experience, and prospects. He argues further that the court erred in imposing a \$10,000 restitution fine pursuant to Penal Code section 1202.4, subdivision (b),¹ because (1) it was unaware that it had the discretion to reduce the amount of the fee based upon, among other things, defendant's inability to pay it; (2) there was insufficient evidence to support its imposition based upon the court's failure to consider all relevant factors, including defendant's inability to pay; and (3) the fine was an unconstitutionally excessive fine.

We conclude that the court did not abuse its discretion in denying the *Romero* motion. But we hold that the court failed to properly exercise its discretion in imposing a restitution fine under section 1202.4. We will therefore reverse the judgment, and we will remand the case to the trial court for the limited purpose of determining the amount of the restitution fine to impose in the trial court's discretion under section 1202.4, if any, and the corresponding parole revocation restitution fine under section 1202.45.

FACTS²

On February 11, 2011, at approximately 3:41 a.m., San Jose Police Officer S. Cary observed defendant riding a bicycle eastbound on San Antonio Street near 28th Street, and that he failed to stop at the intersection which contained a posted stop sign. The officer made contact with defendant; he admitted that he was on active parole, a fact that Officer Cary confirmed through dispatch. The officer conducted a pat search for weapons, found a "distinctive bulge" in one of the jacket pockets, and asked defendant about it. Defendant responded that the bulge was caused by "[his] 'walkie talkies.'" From a search of defendant's person, Officer Cary obtained two walkie talkies and a charging unit for them, an iPod touch, a 4G iPhone, a 3G iPhone, an iPhone charger, a number of gift cards, cash, a credit card in the name of Kristie Kuechler, black gloves, a

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

² Our summary of the facts is taken from the police reports.

flashlight, and a black mask. The officer also found a long flathead screwdriver on defendant's bicycle, an item the officer recognized as "a common tool for burglars." Defendant told the police that all of the property belonged to him. He told Officer Cary that 20 minutes before he was stopped, he bought the two iPhone cellular phones and the iPad "from a 'Mexican guy' on Keyes Avenue."

Through the name on the credit card, another responding officer was able to make contact with Kuechler. After checking the downstairs area of her home and searching her belongings, including her purse, she confirmed to the police that items found upon searching defendant, including her iPhone 3, a credit card in her name, a number of gift cards, and \$415 in cash, had been taken. Kuechler's husband, Chris Reid, confirmed that he was missing an iPhone 4 and an iPod touch. Based upon interviews with the victims, who last saw the electronic items in the laundry room late in the evening on February 10, 2011, the police determined that a burglary had taken place at the victims' residence sometime between 11:00 p.m. on February 10, 2011, and 3:41 a.m. on February 11, 2011. From the interview with Reid, the police determined that it was probable that the suspect had entered through a rear laundry room door which may have been unlocked.

THE PRIOR STRIKES³

Defendant was convicted previously of six violent or serious felonies. Except for the third strike, these strike priors are briefly described below.

The first strike: On August 11, 2007, defendant entered a Los Altos home while the occupant of the home was sleeping and stole two wallets, \$140 cash, and four credit cards. Defendant entered through a garage door which had been left open and a door leading from the garage to the home which the owner had left unlocked.

³ Our summary of the strike priors is taken from the probation report.

The second strike: On October 6, 2007, defendant entered a Los Altos home while an occupant, his wife, and son were sleeping; he entered by prying open a side garage door. Defendant stole a purse, a wallet, \$600 cash, and a cellular phone.

The third strike: The probation officer indicated in her report that there was no information available concerning the conviction alleged as the third strike prior.

The fourth strike: On December 7, 2007, defendant entered a Los Altos home while an occupant and her family were sleeping; he entered through an unlocked door on the side of the house. Defendant stole a purse, a wallet, \$210 cash, numerous credit cards, and a cellular phone.

The fifth strike: On November 19, 2007, defendant entered the unlocked garage of a Los Altos home, shattered the window of the victim's BMW automobile, and took a purse, two new laptop computers, and numerous credit cards. (The total loss was estimated to be \$3,200.) There was no evidence that defendant entered the residence itself, where an occupant, his wife, their infant son, and their nanny were sleeping.

The sixth strike: On April 26, 2007, defendant entered a home located in Santa Clara County. Defendant took a laptop computer, a purse, and two wallets containing cash and a number of credit cards. Defendant entered from an unlocked side garage door and through an unlocked door leading from the garage into the kitchen.

In a single proceeding (Superior Court of California, County of Santa Clara, case no. BB731095), defendant was convicted of six counts of first degree burglary (§§ 459-460, subd. (a)), each of which constituted a violent or serious felony (strike) within the meaning of sections 667.5, subdivision (a) and 1192.7, subdivision (c).

PROCEDURAL BACKGROUND

Defendant was charged by a first amended complaint filed on February 23, 2011, with first degree burglary of a dwelling, a felony (§§ 459-460, subd. (a)). It was alleged that there was a person present in the residence who was not an accomplice when the offense was committed and the offense was therefore a “ ‘violent felony’ ” strike offense

within the meaning of section 667.5, subdivision (c)(21). Defendant was alleged further to have been convicted previously of (1) six violent or serious felonies, i.e., strikes (§§ 667, subds. (b) – (i); 1170.12), namely, six first degree burglary offenses; (2) one serious felony offense (§ 667, subd. (a)); and (3) three felonies for which he had served prison terms, and had not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years after having served those terms (§ 667, subd. (b)).

On June 16, 2011, defendant entered a plea of guilty to the first degree burglary count and admitted all of the allegations in the complaint. The plea was entered with the understanding that defendant would be filing a *Romero* motion to strike the strike allegations. Before accepting the plea, the court apprised defendant fully of the rights he was giving up as a result of his guilty plea and concerning the consequences of that plea. Counsel stipulated that there was a factual basis for the plea.

Defendant thereafter filed a motion to have the court exercise its discretion to strike all of the prior strike allegations, in accordance with *Romero, supra*, 13 Cal.4th 497, which was opposed orally by the People. After hearing argument on August 26, 2011, the court denied defendant's motion. It imposed a prison sentence of 25 years to life for the burglary conviction and a consecutive five-year prison term for the Proposition 8 prior serious felony conviction (§ 667, subd. (a)). The court also exercised its discretion under section 1385 by striking two of the prior prison offense enhancements, and it stayed any additional punishment for any other enhancements. Defendant filed a timely notice of appeal based upon the sentence or other matters occurring after the plea not affecting the validity of the plea.

DISCUSSION

I. *Denial of Romero Motion*

of unjust sentences. [Citation.]” (*People v. Garcia* (1999) 20 Cal.4th 490, 500.) If the court strikes or dismisses one or more prior conviction allegations, its reasons for doing so must be stated in an order entered on the minutes. (*Ibid.*) Conversely, the trial court has no obligation to set forth its reasons for deciding not to strike or dismiss prior strikes. (*In re Large* (2007) 41 Cal.4th 538, 546, fn. 6.)

The granting of a *Romero* motion is “subject to review for abuse of discretion. This standard is deferential. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question ‘falls outside the bounds of reason’ under the applicable law and the relevant facts. [Citations.]” (*Williams, supra*, 17 Cal.4th at p. 162; see also *People v. Garcia, supra*, 20 Cal.4th at p. 503.) And this abuse of discretion standard also applies to appellate review of the denial of *Romero* motions. (*People v. Carmony* (2004) 33 Cal.4th 367, 374-376 (*Carmony*); see also *id.* at p. 375: “ ‘Discretion is the power to make the decision, one way or the other.’ ”) It is the defendant’s burden as the party attacking the sentencing decision to show that it was arbitrary or irrational, and, absent such showing, there is a presumption that the court “ ‘ ‘acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ ” [Citations.]” (*Id.* at p. 377.)

Placing in context the circumstances under which a court properly exercises its discretion in granting a *Romero* motion, as the Supreme Court has explained: “[T]he [T]hree [S]trikes 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. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances.” (*Carmony, supra*, 33 Cal.4th at p. 378.) Therefore, “[b]ecause 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.*)

B. *Defendant's Romero Motion*

In his written *Romero* motion, defense counsel argued that the court should exercise its discretion to strike the six strike priors. He argued that, upon consideration of “the nature of the present offense, [defendant's] background and character, and any other individualized considerations with the end result being fair consideration of the interests of [defendant], as well as the interests of society,” the court should strike defendant's prior strikes. He asserted that “the facts of this case, as well as [defendant's] surrounding circumstances and prior record, fall outside of the spirit of the [Three] Strike[s] law,” thereby warranting the striking of the strike convictions.⁴

In the motion, counsel provided significant detail about defendant's troubled childhood, including that defendant's father (Bo) had beaten defendant's mother (Virginia) when defendant was very young; Virginia had left Bo and had taken defendant and his half-sister (Tony) from California to Florida when defendant was two or three; after a year in Florida and after Bo had threatened to kill Virginia if she did not return the children, defendant and Tony were returned to California. Defendant was raised by Bo, and he witnessed Bo's beating of his live-in girlfriend. Defendant grew up in poverty, was frequently beaten by Bo, and witnessed Bo's drug and alcohol abuse. Defendant

⁴ Defendant also argued below that the imposition of a sentence pursuant to the Three Strikes law in this particular instance would constitute cruel and unusual punishment prohibited by the United States and California Constitutions. Defendant does not renew this contention here and has therefore abandoned the argument on appeal. (*People v. Combs* (2004) 34 Cal.4th 821, 845.)

received no emotional support from Bo while growing up. Defendant graduated from high school in San Jose and attended De Anza Junior College, where he majored in accounting but excelled as a football player. While in school, defendant worked with severely emotionally disturbed and autistic children. In his early 20s, defendant worked as a teacher's assistant at a special education school and later as a child advocate. He later worked for his cousin repairing restaurant equipment and as a part-time clerk at Safeway. But by the time defendant was 21, he was abusing drugs (marijuana and methamphetamine) and alcohol.

Defendant detailed his history of criminal convictions, acknowledging that in addition to his prior strike convictions, he had six prior felony convictions. He explained that he had sustained "only one [misdemeanor] conviction involving any sort of violence, from 17 years ago." He indicated that "the majority of his convictions [were] drug[-] related offenses."

Defendant indicated that after his release from prison, he actively looked for work. He became involved with a woman who became pregnant with his child, but she miscarried. Shortly afterward, defendant "went into a deep depression" and relapsed. He participated in various substance abuse programs over the years, but "it [was] not until recently that he has been able to seriously address his addiction by identifying his triggers to use drugs . . . [which] arise from his childhood." Since his incarceration for the current offense, defendant became engaged to a woman whom he had met while "taking his DUI classes in 2007."⁵

In conclusion, defendant argued that the court should exercise its discretion to strike the strike priors because (1) the current burglary offense concerned only a limited

⁵ Defendant also submitted a three-page letter he wrote seeking leniency from the court, as well as letters from five relatives, two former employers, and his fiancée, in support of his *Romero* motion.

entry into the laundry room, as opposed to a more “invasive ransacking of the entire residence”; (2) each of the six prior strikes occurred over a short time period in 2007 and were placed on the same docket; (3) “his difficult childhood and his efforts to work as a productive member of society” constituted mitigating circumstances; (4) there was a “lack of significant violence in his criminal record”; and (5) he offered an “[e]arly admission of guilt.” (Emphasis omitted.)

At the hearing on the *Romero* motion, defense counsel reiterated these five themes in support of his request that the court strike the prior strikes. Defense counsel also presented one of the victims of the current crime, Reid, who indicated that he was opposed to the Three Strikes law generally except in the case of “violent criminals and sex offenders,” and urged that a 25-years-to-life sentence for the current crime was, in his view, unduly harsh.

The People argued in their oral opposition that “the Three Strikes law was designed for someone” who had committed far fewer crimes and had suffered far fewer strike convictions than defendant. The prosecutor noted that the current offense was committed only a short time after defendant was paroled. The People also emphasized the dangerous nature of the current offense and the prior strike convictions—burglaries in the middle of the night of occupied homes.

The court denied defendant’s *Romero* motion. After explaining that it had spent considerable time reviewing all of the papers relevant to the motion, the court concluded that defendant “falls squarely within [the Three Strikes law].”

C. *Discussion Regarding Denial of Romero Motion*

Defendant argues that the court abused its discretion in denying his *Romero* motion, contending that it “failed to give any consideration to appellant’s non-criminal background, his prospects for reform, and age. Instead, it focused exclusively on his criminal history, but failed to give adequate consideration to the lack of violence in it.” He asserts further that “[a]lthough appellant fit the profile of a Third Strike offender, he

was deserving of a lesser punishment,” urging that the court should have stricken five of the prior strikes and then sentenced defendant to a 17-year prison term as a two-strike offender. Defendant therefore argues that “[h]ad the court given adequate consideration to appellant’s background, character, and prospects, and not merely to his criminal history, it would have had to conclude that the purposes of the Three Strikes law . . . [would be] adequately served by imprisoning appellant for 17 years under a second strike sentence.” Defendant’s contentions are without merit.

At the outset, we observe that defendant’s argument misstates the standard governing a trial court’s ruling on a *Romero* motion. That standard is not whether “the purposes of the Three Strikes law . . . [would be] adequately served” by striking one or more strike allegations and then sentencing the defendant accordingly. Rather, the court must determine from a review of the relevant factors whether there are “ ‘extraordinary’ ” circumstances such that the defendant, a “ ‘career criminal[,] can be deemed to fall outside the spirit of’ ” the Three Strikes law. (*Carmony, supra*, 33 Cal.4th at p. 378.)

The court, in considering the *Romero* motion, was obliged to consider the factors identified by the high court in *Williams*, namely, “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” (*Williams, supra*, 17 Cal.4th at p. 161.) We are confident from a review of the record that the court did consider each factor in concluding that this case did not present extraordinary circumstances warranting the court’s exercising its discretion to strike the prior strikes.

Concerning the first factor (current offense), the court noted that it was “an extremely dangerous offense . . . Any time you’re going into a home at nighttime with families sleeping present, . . . horrible things can happen and that’s why you have . . . hot prowl allegations[.] . . . [T]he law says it’s much more serious when someone is in the residence during the commission of the offense. . . .[¶]. . . Because when confronted, it can become a violent situation both for the perpetrator and the family.” The court also

observed that defendant lied to the police concerning how he came into possession of the victims' property; it "found somewhat disturbing" the fact that defendant blamed persons of another ethnic group in his explanation to the police. And the court noted that defendant committed the current offense only a short time—less than four months—after he had been paroled in October 2010.

On appeal, defense counsel, while acknowledging that people were present when defendant committed the current burglary offense, argues that no one was harmed and there was no evidence that defendant was armed. The fact remains, however, that the current offense constituted a " 'violent felony' " within the meaning of the Three Strikes law. (§ 667.5, subd. (c)(21); cf. *People v. Strong* (2001) 87 Cal.App.4th 328, 344 [reversing order granting *Romero* motion which was based in part on nonviolent nature of current offense, holding "the nonviolent or nonthreatening nature of the felony cannot alone take the crime outside the spirit of the law"]; *People v. Poslof* (2005) 126 Cal.App.4th 92, 108 [denial of *Romero* motion not an abuse of discretion, even though current crime, failing to register as a sex offender, was nonviolent].)

The court below, in addressing the second *Williams* factor—the prior strike offenses—noted that, like the current offense, most or all of the six strike priors involved the "same type of dangerous activity." In so finding, the court detailed each of the prior strikes for the record.

In addressing the third factor enunciated in *Williams*—"the particulars of [defendant's] background, character, and prospects" (*Williams, supra*, 17 Cal.4th at p. 161)—the court emphasized defendant's extensive criminal history. The court noted that this history included, in addition to the six prior strikes, a 2005 felony conviction of buying or receiving stolen property (§ 496, subd. (a)), which the court observed had been "reduced from a first degree burglary [charge,]" for which defendant received a 16-months' prison sentence; a 2002 felony conviction of importing, selling, distributing or transporting controlled substances (Health & Saf. Code, § 11379, subd. (a)), for which

defendant received a two-year prison sentence;⁶ and 1994 misdemeanor convictions for battery (§§ 242/243, subd. (a)) and infliction of corporal injury upon a spouse or cohabitant (§ 273.5, subd. (a)), for which he received suspended sentences and grants of probation upon conditions that he serve county jail terms.⁷ The court concluded that the commission of the strike priors in 2007 and the current offense in 2011, as compared with the seriousness of his earlier offenses, demonstrated defendant’s “escalating criminal behavior.”⁸

In addition to defendant’s criminal history, it is clear that the court had before it and considered other aspects of defendant’s background. It specifically referenced the letters attached to defendant’s motion, which addressed defendant’s “bad upbringing,” and it commended defense counsel for that presentation. Defendant argues, however, that the court failed to “give[] adequate consideration to [his] background, character, and prospects . . .” In effect, he is contending that, because the court did not articulate on the record all of the specific aspects of his background, character and life experience it considered in connection with defendant’s motion, the court necessarily failed to “give[] adequate consideration” to those factors. But the law does not require the trial court to

⁶ The court, apparently erroneously, identified the conviction as one of possession of methamphetamine for sale (Health & Saf. Code, § 11378, subd. (a)). This apparent error is of no consequence to our analysis of the claim that the court abused its discretion in denying the *Romero* motion.

⁷ The court did not detail the remainder of defendant’s criminal history between 1989 and 2008 that it considered in ruling on the *Romero* motion. That record before the court, in summary, consisted of seven felony convictions (other than the six strike offenses, the drug trafficking offense, and the receiving stolen property offense mentioned by the court), and over 40 misdemeanor convictions.

⁸ The court also properly rejected defendant’s claim, renewed here, that defendant’s criminal history lacked an element of violence. The court observed that two of defendant’s convictions from 1994—corporal infliction of injury on a spouse or girlfriend, and battery—involved violence.

specify the reasons for denying a *Romero* motion to strike prior strikes. (*In re Large*, *supra*, 41 Cal.4th at p. 546, fn. 6.) And we will not infer that the court failed to consider the third *Williams* prong—“the particulars of [defendant’s] background, character, and prospects . . .” (*Williams*, *supra*, 17 Cal.4th at p. 161)—where there is no showing of such failure in the exercise of the court’s discretion.

Defendant also emphasizes that he was 40 years old (at the time he committed the current offense) and that this fact, along with the “well[-]known [fact] that recidivism declines with age,” should have been considered in reaching the conclusion that he should have received only a two-strikes sentence of 17 years. The court, in fact, considered defendant’s age in deciding whether to grant the motion, observing that defendant’s level of criminal behavior had escalated since his late 20s, and “there is no reason to believe if he [were] let out in five, ten or 15 [years,] that he wouldn’t continue the criminal behavior because all the reasons for that criminal behavior are still in place and have been in place apparently for 15 or more years of his life.” The fact that defendant is no longer young is not a sufficient reason for striking any of the strike priors. “[M]iddle age, considered alone, does not remove a defendant from the spirit of the Three Strikes law. Otherwise, those criminals with the longest criminal records over the longest period of time would have a built-in argument that the very factor that takes them within the spirit of the Three Strikes law—a lengthy criminal career—has the inevitable consequence—middle age—that takes them outside the law’s spirit.” (*People v. Strong*, *supra*, 87 Cal.App.4th at p. 345.)

Defendant’s reliance on *People v. Bishop* (1997) 56 Cal.App.4th 1245 (*Bishop*) is misplaced. There, the defendant was charged with petty theft with a prior theft-related conviction that had resulted in his incarceration (§ 666); the information alleged, *inter alia*, that he had sustained three prior strike convictions. (*Bishop*, *supra*, at pp. 1247-1248.) The trial court granted the defendant’s motion to strike two of three prior strikes alleged in the information which it deemed “remote (17 to 20 years old)” (*id.* at p. 1248)

and thereafter sentenced the defendant to a 12-year prison term. (*Id.* at pp. 1248-1249.) The appellate court rejected the People’s claim that the court erred because it placed undue weight on mitigating factors and did not properly weigh factors in aggravation that supported the imposition of a three-strikes sentence. (*Id.* at p. 1250.) It observed that the People’s analysis was flawed because it “fail[ed] to accord the trial court the breadth of discretion that it has traditionally possessed under section 1385.” (*Ibid.*) The appellate court found no abuse of discretion, explaining that while the trial court must consider that a defendant’s qualification as a three-strikes offender is a factor in aggravation, “the nature and timing of a defendant’s crimes may also operate as mitigation, such as in this case where the present crime is a petty theft and the prior violent offenses are remote.” (*Id.* at p. 1251.)

Bishop is obviously distinguishable, both procedurally and factually. The court there was concerned with whether the granting of a *Romero* motion constituted an abuse of discretion. Here, we consider whether the court abused its discretion in denying defendant’s motion, thereby concluding that this case did *not* present “ ‘extraordinary’ ” circumstances under which defendant, as “a career criminal[, should] 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 . . .” (*Carmony, supra*, 33 Cal.4th at p. 378.) We conclude that the court did not abuse its discretion in reaching this conclusion. Furthermore, here, unlike in *Bishop*, the prior strike offenses were not remote—the convictions occurred less than three years before the current offense. And the current offense, unlike the petty theft offense in *Bishop*, was a very serious one that was a “ ‘violent felony.’ ” (§ 667.5, subd. (c)(21).) *Bishop* provides no assistance to defendant here.

Defendant’s criminal career has spanned 22 years in which he has accumulated 17 felony convictions, including six strikes (exclusive of the current strike offense), and over 40 misdemeanor convictions. The current offense and at least most of the strikes, as

the court observed, involved the very significant crime of first degree residential burglary while a person other than an accomplice was present at the time, an “elevate[d]” first degree burglary (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1336) that is a “ ‘violent felony’ ” under the Three Strikes law. (§ 667.5, subd. (c)(21).) And as the court noted further, defendant committed the current offense while on parole, and he reoffended less than four months after being released from prison.

The court properly considered defendant’s history and the severity of the strikes and current offense in concluding that defendant’s prospects were poor and that he fell “squarely within” the Three Strikes law. (See *People v. Philpot* (2004) 122 Cal.App.4th 893, 906-907 [court properly considered the defendant’s history of continuously committing crimes for 20 years, his underlying drug addiction, and the prior and current offense as indicative of his poor future prospects and that, as “a flagrant recidivist,” he was not outside the spirit of the Three Strikes law].) The circumstances here are not “ ‘extraordinary’ ” (see *Carmony, supra*, 33 Cal.4th at p. 378), and the court, after giving due consideration to defendant’s prospects, the specifics of the current offenses, the nature of the prior strike offenses, and the evidence of defendant’s extensive criminal record, properly concluded that defendant did not fall outside of the letter and spirit of the Three Strikes sentencing scheme. Its ruling did not “ ‘fall[] outside the bounds of reason’ under the applicable law and the relevant facts. [Citation.]” (*Williams, supra*, 17 Cal.4th at p. 162.) Therefore, we find that the court did not abuse its discretion in denying defendant’s *Romero* motion.

II. *The Restitution Fine*

A. *Background*

The court at the time of sentencing imposed a restitution fine of \$10,000 pursuant to section 1202.4, subdivision (b),⁹ and a suspended parole revocation restitution fine of \$10,000 under section 1202.45.¹⁰ The court indicated it was imposing the restitution fine “under [the] Penal Code section 1202.4[subdivision] (b) formula.” Immediately after imposing the restitution fine, the court indicated: “I’m not going to impose any court security fee, criminal conviction fees or criminal justice administration fee or attorney fees and there is no ability to pay[,] clearly.”

In contending that the imposition of the \$10,000 restitution fine was error,¹¹ defendant makes several arguments. First, he contends that the court was unaware when

⁹ Former section 1202.4, subdivision (b)(1) in effect at the time of the commission of the current offense (see *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248) provided in relevant part: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony, . . . [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” (Former § 1202.4, subd. (b); see Stats. 2010, ch. 351, § 9.) Because, the only substantive changes to subdivision (b) implemented by the 2011 amendment to section 1202.4 concerned increases in the minimum fees for felony and misdemeanor convictions (see stats. 2011, ch. 358, § 1), we will, for convenience, refer to the statute hereafter without designating it as “former.”

¹⁰ “In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine . . . shall be suspended unless the person's parole is revoked. . . .” (§ 1202.45.)

¹¹ Because section 1202.45 requires the trial court to impose an additional parole revocation restitution fine in the same amount as the restitution fine when a person is convicted of a crime and his or her sentence includes a period of parole, defendant also challenges the fine imposed by the court under section 1202.45.

it imposed the fine that it had the discretion to reduce the amount of the fine based upon defendant's inability to pay it. He argues in the alternative that there was insufficient evidence to support the restitution fine because the court must consider all relevant factors, including the defendant's inability to pay, the defendant's economic gain from the crime, the victim's economic losses, and the defendant's future earning capacity. He argues that none of these factors were considered by the court in imposing the restitution fine. He asserts further that the fine here violated both the United States and California Constitutions which prohibit excessive fines. And he contends that these challenges were not forfeited even though they were not raised below. Lastly, he argues that to the extent his claims are forfeited, they should nonetheless be considered because trial counsel's failure to object constituted prejudicially ineffective assistance of counsel.

B. *Discussion of Claim of Error*

Under section 1202.4 applicable at the time defendant was sentenced, the court was required to impose, unless "it finds compelling and extraordinary reasons for not doing so" (§ 1202.4, subds. (b), (c)), a restitution fine of between \$200 and \$10,000 where a person was convicted of a felony. (§ 1202.4, subd. (b)(1).) The statute specifically states that the defendant's inability to pay is not in and of itself "a compelling and extraordinary reason" warranting the court's determination that no restitution fine should be ordered. (§ 1202.4, subd. (c).) And it provides that the amount of the fine shall be fixed at the discretion of the court and shall be "commensurate with the seriousness of the offense." (§ 1202.4, subd. (b)(1).)

In imposing the restitution fine, subdivision (b) of the statute provides the court with two alternative approaches. It may use a specified formula provided in subdivision (b)(2), under which the fine is determined by multiplying \$200 "by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." Alternatively, the court may exercise its discretion to set the restitution fine without reference to the statutory

formula. (§ 1202.4, subd. (b)(1).) Regardless of whether the formula under subdivision (b)(2) is utilized, in setting the fine at more than \$200, the court “shall consider any relevant factors, including, but not limited to, the defendant’s inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant’s ability to pay may include his or her future earning capacity.” (§ 1202.4, subd. (d).)

It is the defendant’s burden to show his or her inability to pay (§ 1202.4, subd. (d)), and “[t]he statute thus impliedly presumes a defendant has the ability to pay.” (*People v. Romero* (1996) 43 Cal.App.4th 440, 449.) The court is not required to make specific findings or conduct a separate hearing concerning the amount of the fine to be imposed under section 1202.4. (§ 1202.4, subd. (d); *People v. Avila* (2009) 46 Cal.4th 680, 729.) Thus, a trial court is not required in its imposition of a restitution fine to make express findings concerning the defendant’s ability to pay the fine. (*People v. Gamache* (2010) 48 Cal.4th 347, 409.)

The Attorney General argues that defendant forfeited his challenges to the restitution fine because he failed to assert them below. Were defendant’s claim here simply one based upon sufficiency of the evidence supporting the fine, we would agree that the claim was forfeited. (See *People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Gamache, supra*, 48 Cal.4th at p. 409.) But one of defendant’s contentions is that the court misapprehended the nature of the discretion with which it was vested in determining whether to impose a restitution fine, and if so, in determining the amount of such fine.

Here, the court purportedly set the restitution fine based upon the “formula” of section 1202.4, subdivision (b)(2), without reference to any factors specified in

subdivision (d). Notwithstanding that it apparently miscalculated the amount of the fine in an attempt to apply the statutory formula,¹² the court nonetheless purported to use the formula under subdivision (b)(2), rather than exercising its discretion to fix the amount of the fine at between \$200 and \$10,000 under subdivision (b)(1). The court's statement immediately afterward in the hearing that it would not impose nominal¹³ court security, criminal conviction, criminal justice administration, and attorney fees due to defendant's "clearly" having an inability to pay the fees was indicative of the court's belief that it was required to impose a restitution fine by using the statutory formula of subdivision (b)(2) of section 1202.4.

The trial court must act with an understanding of its sentencing discretion. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944 [discretion to strike prior conviction allegations]; *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 (*Belmontes*) [discretion to impose full term consecutive sentencing under § 667.6 (c)].) A criminal defendant is "entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (*Belmontes*, at p. 348, fn. 8; see also *People v. Fuhrman*, at p. 948.) In an instance in which the court "is unaware of the scope of its discretionary powers[, it] 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." (*Belmontes*, at p. 348, fn. 5.)

¹² In following the recommendation of the probation officer in fixing the restitution fine at \$10,000, the court did not adhere to the formula of subdivision (b)(2). Under that formula, since defendant was convicted of one felony and received an aggregate sentence of 30 years to life, the fine under the formula would have been \$6,000.

¹³ For instance, the statutory court security fee would have been \$40 (see § 1465.8), and the criminal conviction fee would have been \$30 (see Gov. Code, § 70373).

Although discretionary sentencing decisions are subject to deferential review on appeal (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978), “[a] trial court’s failure to exercise discretion is itself an abuse of discretion, and we review such action in accordance with that standard of review.” (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515, citing *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.) Thus, where the court’s ruling on a discretionary matter would otherwise be affirmed as within its discretionary power, it “ ‘will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]’ [Citation.] . . .Where . . . a sentencing choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination. [Citations.]” (*People v. Downey* (2000) 82 Cal.App.4th 899, 912, quoting *People v. Penoli* (1996) 46 Cal.App.4th 298, 302.) For example, where it appears from a review of the record that the court was under the misimpression that it was required to impose restitution in a set amount and was without discretion to impose a lower amount of restitution, remand is appropriate. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229.)

Here, it is apparent from the record that the court believed it was *required* to impose a restitution fine pursuant to the specific, *discretionary* formula of subdivision (b)(2) of section 1202.4. In light of this apparent misapprehension concerning the court’s discretionary powers, and the court’s indication that defendant “clearly” had no ability to pay statutory fines—and notwithstanding that the court was not otherwise required to make specific findings (§ 1202.4, subd. (d); *People v. Avila, supra*, 46 Cal.4th at p. 729)—we conclude that the court was unaware that in setting the amount of the restitution fine in excess of \$200, it was required to “consider any relevant factors,” including defendant’s inability to pay, his future earning capacity, and other factors

expressly noted in subdivision (d) of section 1202.4.¹⁴ Accordingly, we will reverse the judgment and remand the matter to the trial court for the limited purpose of having the court exercise its discretion to determine whether to impose a restitution fine, and if so, whether that fine should exceed the minimum statutory amount of \$200 after consideration of all relevant factors.

DISPOSITION

The judgment is reversed. The case is remanded to the trial court for the limited purpose of having the court exercise its discretion to determine whether to impose a restitution fine, and if so, the amount of such fine after considering all relevant factors, including those specified in section 1202.4. If the court exercises its discretion to impose a restitution fine under section 1202.4, subdivision (b), it shall also impose a

¹⁴ The Attorney General argues that the record shows the court was aware that it could set a restitution fine of between \$200 and \$10,000, citing to the reporter's transcript of the change of plea hearing occurring over two months before defendant was sentenced. In light of what transpired at the sentencing hearing, we reject the Attorney General's argument.

parole revocation restitution fine pursuant to section 1202.45 in the amount of the restitution fine, and shall suspend such parole revocation restitution fine.

Márquez, J.

WE CONCUR:

Premo, Acting P.J.

Mihara, J.