

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

KERRY SHANE ABELA,

Defendant and Appellant.

H042550

(Santa Cruz County

Super. Ct. No. F22003)

Defendant Kerry Shane Abela pleaded guilty to receiving stolen property, and he pleaded no contest to two counts of burglary. He admitted a prior strike conviction and three prior prison terms. He moved under *Romero*<sup>1</sup> and Penal Code section 1385<sup>2</sup> to strike the prior strike conviction, but the trial court denied the motion and sentenced Abela to a total term of 17 years 4 months.

Abela appeals from the trial court's denial of his *Romero* motion. We conclude the trial court's denial of the motion was not an abuse of discretion. Finding no error, we will affirm the judgment.

---

<sup>1</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

<sup>2</sup> Subsequent undesignated statutory references are to the Penal Code.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. *Facts of the Offenses*<sup>3</sup>

On July 2, 2011, the Santa Cruz Police Department received a report of a residential burglary. When the police arrived to investigate, the victim told them he had found his stolen property—an electric guitar and two microphones—at a local music store. An employee at the store told police he bought the items from a man with a paper copy of a driver’s license in the name of “Robin Abela.”

Also on July 2, 2011, another victim told police two speakers had been stolen from his van. The victim found the speakers at the same music store where the guitar and microphones were found. The music store employee showed the victim video footage from a surveillance camera next door. The victim recognized a man known as “Karey” or “Carey” who had been causing problems and stealing items at the victim’s apartment complex. The music store employee later identified Abela in a photographic lineup.

Abela subsequently stated he had received the stolen property from someone named “Stanley,” but he denied committing either of the burglaries.

### B. *Procedural Background*

The information charged Abela with three counts: Count One—Residential burglary (§ 459); Count Two—Burglary of a vehicle (§ 459); and Count Three—Receiving stolen property (§ 496, subd. (a)). As to Count One, the information alleged Abela had suffered two prior serious felony convictions: Resisting arrest in 2005 (§ 148.10), and assault with a deadly weapon in 1994 (§ 245). As to all three counts, the information also alleged the two prior convictions constituted strike priors. (§ 667, subds. (b)-(i).) The information further alleged Abela had served six prior prison terms. (§ 667.5, subd. (b).)

---

<sup>3</sup> Our statement of the facts is based on those set forth in the probation report.

In June 2013, Abela pleaded guilty to Count Three, and he pleaded no contest under *Alford*<sup>4</sup> to Counts One and Two. Abela admitted he had previously been convicted of a strike and a serious felony for assault with a deadly weapon in 1994. The parties stipulated to dismissal of the remaining strike allegation—the conviction for resisting arrest in 2005—because it did not constitute a strike. Abela also admitted three of the prior prison term allegations. The remaining prior prison term allegations were stricken.

The trial court agreed to release Abela to the Salvation Army residential drug treatment program pending sentencing. Defense counsel informed the court of her intention to move to strike the prior strike conviction under *Romero*, and she requested a period of several months before sentencing. The court set a sentencing date four months later to allow for the Salvation Army to report on Abela’s progress. The court admonished Abela that “part of your bargain is if you do not successfully participate in the program, if you abscond, if you violate any more laws, it’s highly unlikely that I will be lenient at time of sentencing. That will have demonstrated to me that I’m not willing to risk community safety any longer. It would be highly unlikely that I would be able to strike the strike in your *Romero* motion<sup>5</sup> because there would be more criminal activity and, of course, I would have to look at how you’re doing, but also highly unlikely that I would give you probation because you would have demonstrated to me that you can’t be successful on probation.”

While Abela was awaiting sentencing, he relapsed and failed to remain in the Salvation Army program. The trial court revoked his OR status and issued an arrest warrant, but Abela failed to appear at the next court hearing for his *Romero* motion. After multiple continuances, the court held a sentencing hearing at which Abela appeared in May 2015. Abela moved for another continuance, but the court denied it on the

---

<sup>4</sup> *North Carolina v. Alford* (1970) 400 U.S. 25.

<sup>5</sup> The *Romero* motion was subsequently denied by a different judge.

ground, among others, that the hearing had already been substantially delayed due to Abela's failure to appear.

The court then conducted a hearing, at the conclusion of which it denied the *Romero* motion. As grounds for the denial, the court cited Abela's history and his failure to complete the Salvation Army rehabilitation program. As to his criminal history, the court found Abela had suffered 13 felony convictions and eight misdemeanor convictions. The court noted the seriousness of the burglary convictions and underscored the need to protect members of the public from having their homes burglarized. The court acknowledged Abela's family tragedies, his psychological difficulties, and letters of support from the community, but the court found these factors outweighed by society's interest in safety and security.

The court imposed a total term of 17 years 4 months, composed of eight years for Count One (the midterm of four years, doubled by the strike), 16 months for Count Two (one-third the midterm of two years, doubled by the strike), five years for the prior serious felony, and three years for the prior prison terms, all consecutive. The court also reduced the conviction on Count Three to a misdemeanor and imposed a term of 30 days in county jail.

## **II. DISCUSSION**

Abela contends the trial court abused its discretion in denying his *Romero* motion because the court misunderstood the nature of the offense constituting the prior strike conviction. He also argues that the court failed to consider various mitigating factors, including efforts he made towards rehabilitation and his psychological issues. The Attorney General contends the trial court's denial was not an abuse of discretion, and that any error in misidentifying the prior strike did not affect the decision to deny the motion. We conclude the trial court did not abuse its discretion in denying Abela's *Romero* motion.

### A. *Legal Principles*

A trial court has discretion under the Three Strikes law to dismiss or strike prior conviction allegations in the furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

“[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*)). “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.” (*Id.* at pp. 376-377.)

B. *Denial of the Romero Motion Was Not an Abuse of Discretion*

Abela's primary argument is that the trial court misunderstood the nature of the offense that constituted the strike. He cites to a statement the court made in explaining its sentencing calculations.

After the court denied the *Romero* motion and set forth grounds for the denial, the court then pronounced sentence. As set forth above, the prosecution had initially alleged two prior strike convictions. The parties stipulated to dismissal of the prior conviction for resisting arrest (§ 148.10), and Abela admitted the prior conviction for assault with a deadly weapon (§ 245), leaving the latter conviction as the sole basis for the strike. In stating its sentencing calculations, however, the court erroneously referenced section 148.10 instead of section 245.

In setting forth the grounds for denying the *Romero* motion, the court made no reference to the applicable Penal Code section or the substantive nature of the offense constituting the strike. The court stated it was denying the motion based largely on Abela's failure to complete the rehabilitation program and his extensive criminal history, which included multiple burglaries. The court stated it had considered Abela's personal circumstances and various mitigating factors, but the court found them outweighed by the needs of public safety. Nothing in the court's pronouncements indicated it had relied on a mistaken understanding of the substance or facts of the prior strike conviction. Nor was the court's decision "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at pp. 376-377.) Accordingly, we perceive no abuse of discretion in this ruling.

Even assuming the court had the wrong offense in mind when it denied the *Romero* motion, the record clearly shows it would have made no difference if the court had been corrected. "In general, '[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known

that some of its reasons were improper.’ ” (*People v. Leonard* (2014) 228 Cal.App.4th 465, 503, quoting *People v. Price* (1991) 1 Cal.4th 324, 492.) Here, the court’s reliance on other events in Abela’s criminal history—including 13 felonies and 8 misdemeanors—strongly suggests the nature of the strike was not “ ‘critical to its decision’ because other considerations—sufficient in themselves—supported the court’s refusal to dismiss [the defendant’s] prior conviction allegation.” (*People v. Leonard, supra*, 228 Cal.App.4th at p. 503.) Furthermore, the offense that actually formed the basis for the strike—assault with a deadly weapon—is a more serious offense than resisting arrest. (See § 1192.7, subd. (c) [making assault with a deadly weapon a serious offense].) Abela contends the assault conviction was more remote in time—occurring in 1994, whereas the resisting arrest conviction occurred in 2005—but the 1994 conviction was not so old it compelled granting a *Romero* motion. (See, e.g., *People v. Solis* (2015) 232 Cal.App.4th 1108, 1124 [no abuse of discretion in denial of motion to dismiss 30-year-old strike].) We conclude it is not reasonably probable the court would have reached a different decision regardless of which offense it considered as the basis for the strike.

Abela contends the trial court failed to consider positive steps he had taken towards rehabilitation. He cites to various certificates of completion and letters from rehabilitation programs, employers, and other sources contained in the probation report. But the record shows the court did consider his rehabilitative efforts. The court stated, “I read the report. Every single page and all the letters. Everything you’ve done.” Moreover, the court was not required to state whether or how it considered Abela’s rehabilitative efforts. “While a court must explain its reasons for striking a prior [citations], no similar requirement applies when a court declines to strike a prior [citation].” (*In re Large* (2007) 41 Cal.4th 538, 550.)

Finally, Abela contends the trial court denied him “the opportunity to investigate the relationship between his drug addiction and underlying psychological issues.” At the

start of the hearing, Abela's counsel moved for a three-week continuance. She argued that Abela had given her "substantial information about his background and information as to his conduct in the past" suggesting some unspecified "psychological component" to his conduct. She stated she wanted to consult with a psychologist to determine whether an assessment was needed, and she added that "if an assessment is needed, then I certainly would come to the Court before that time to indicate what might be necessary." The court noted that it had already granted multiple continuances, such that nearly two years had passed since entry of plea. The court also noted that Abela's failure to appear had unnecessarily delayed the proceedings. The court concluded counsel had already been given abundant time to obtain a psychological assessment. Accordingly, the court denied the motion for a continuance.

Abela does not argue on appeal that the court erred in denying the continuance. In any event, the court did not err in doing so. A continuance in a criminal case may be granted only for good cause. (Pen. Code, § 1050, subd. (e).) "The determination of whether a continuance should be granted rests within the sound discretion of the trial court, although that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare." (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) Under this standard, the court's denial of the motion to continue was not an abuse of discretion. And the court was not required to consider evidence that was not before it as a result of a party's own failure to present that evidence.

Furthermore, the record shows the court did consider whatever evidence of psychological harm Abela presented. The court stated, "I know about the tragedies in your family. And, yeah, I agree. You have been hurt and damaged. And the PTSD I'm sure is there." But the court found these factors outweighed by the need to protect society. Abela complains that the court gave insufficient consideration to mitigating factors, but the weight given to such facts lies within the court's discretion.

For the reasons above, we conclude the trial court's denial of Abela's *Romero* motion was not an abuse of discretion.

**III. DISPOSITION**

The judgment is affirmed.

---

WALSH, J.\*

WE CONCUR:

---

RUSHING, P.J.

---

GROVER, J.

---

\*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.