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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DAVID GARZA, Defendant and Appellant.	2d Crim. No. B286680 (Super. Ct. No. 2015025680) (Ventura County)

David Garza was convicted by jury of possessing a controlled substance in jail. (Pen. Code, § 4573.6.)[1] He admitted a 1998 felony "strike" for first degree burglary. He admitted prior prison terms for the burglary; taking a vehicle; receiving stolen property; and possession of a controlled substance.

The trial court denied appellant's request to dismiss his burglary conviction. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.) It did, however, erroneously grant his unopposed request to be sentenced to a "split" five year term –

[1] Unlabeled statutory references are to the Penal Code.

three years in county jail and two years in a residential program. (§ 1170, subd. (h)(3).) The court later corrected the order because the law requires that appellant serve his sentence in state prison. We conclude that the court was aware of its discretion under *Romero*, did not abuse its discretion by refusing to dismiss appellant's burglary conviction, and did not need to revisit the *Romero* issue when it corrected the unauthorized sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant's Current Conviction

On August 12, 2015, appellant was arrested in Ventura. The arresting officer warned him to declare any contraband before entering jail, because crimes that are misdemeanors on the street are usually felonies in a custodial facility. Appellant declared nothing, and walked past signs posted outside the jail warning that it is a felony to bring drugs into the facility.

During processing at county jail, arrestees undergo a strip search to uncover contraband that might be smuggled into the facility. When appellant was searched, a deputy saw "a blatantly obvious white plastic bag secreted between the buttocks." Appellant handed over the bag, saying "I just didn't want to get caught with it" or "I just didn't want to get in trouble." The crystalline substance in the bag was methamphetamine.

Appellant was read his *Miranda*[2] rights. He waived them. He said the drugs belonged to a friend who was with him when he was arrested. Not wanting the man to get in trouble, appellant took the bag and intended to get rid of it upstairs at the jail. While awaiting processing, he sat in a cell for three hours; during that time, before he was strip searched, he could have

[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

disposed of the drugs by flushing them down the toilet or leaving them in the cell. Instead, he kept them.

Appellant told the deputy that the confiscated bag was a "nickel," i.e., $5 of methamphetamine. However, the bag was 2.2 grams, about 22 doses. Two grams of methamphetamine is worth $80 on the street. In jail, the value is closer to $300 because drugs can be bartered by inmates to obtain food, money or phone cards.

Appellant's Criminal History

The court considered appellant's probation report before sentencing. It details decades of unremitting misconduct that explains appellant's gang moniker, "Lil Criminal." In 1993, at age 16, he was found during a traffic stop to be sitting on a loaded semi-automatic pistol, with ammunition clips in his pocket and alcohol and drugs on the back seat. He admitted to associating with a street gang. Two months later, he and an accomplice robbed a store while armed with a butcher knife. Appellant was declared a ward of the juvenile court. In 1994, police found stolen stereo equipment appellant was hiding in a nearby trash bin. He violated his probation by failing to report to court; leaving the county; violating curfew; and testing positive for methamphetamine, cocaine and codeine.

As an adult, appellant was convicted in 1998 of residential burglary, taking tools worth $1,100. He violated probation three times, refused to enter drug treatment, and was sent to prison. In 1998, appellant was present at a gang shoot out in which a rival gang member was killed. Appellant was not charged with any crime. In 2000, appellant was convicted of taking a vehicle without the owner's consent.

Appellant received jail time in Missouri after burglarizing a residence in 2005, and taking a cell phone and $90. In 2007, he was arrested in a stolen car; a search revealed a glass pipe, syringes and ignition keys shaved to fit the vehicle. He was sentenced to four years in prison and paroled in 2011. In 2012, officers found stolen access cards in appellant's wallet. No charges were filed. One month later, officers found appellant holding a pipe used to smoke drugs; he tested positive for methamphetamine. One month later, he was again found to be under the influence and admitted using drugs. A search uncovered methamphetamine and a glass pipe. He was tried concurrently on drug charges arising in Kings County in April 2013 and sentenced to prison. In August 2013, police found appellant, who falsely identified himself, in possession of two syringes and a glass pipe. Charges were dismissed on statute of limitations grounds.

Appellant's Sentence

At sentencing in August 2016, appellant asked the court to strike the burglary conviction because it is old, dissimilar to the current drug charge, and he deserved a shorter sentence for his crime. The prosecutor replied that although the conviction is not recent, appellant's theft crimes are interwoven with his substance abuse. He violated probation three times; violated parole five times; refused drug treatment three times; absconded; associated with gang members; and refused to attend sobriety meetings.

The court did not dismiss appellant's burglary conviction, but struck three prison priors. It sentenced him "to state prison for the low term of two years doubled pursuant to Penal Code section 667(e)(1) to four years. The Court is imposing an

additional one year to that sentence previously announced pursuant to Penal Code section 667.5 (b)," the prison prior. At appellant's request, the court ordered that he "serve three years in state prison and . . . the remaining two years in a drug treatment facility."

In February 2017, appellant was resentenced. The court said, "[t]he [d]efense oral motion to strike the strike is denied." His sentence of five years was unchanged, except that "three years [are] to be served [in] felony jail, [and] remaining two years [are] to be served in a residential treatment program." Appellant also pled guilty to a charge of possessing drug paraphernalia, and the court sentenced him to serve 30 days in jail, concurrent with the time he was already serving. In March 2017, the court denied appellant's request for early release.

In April 2017, appellant filed a written request asking the court to correct the "unlawful" and "unauthorized" split sentence. Counsel informed the court that appellant is "ineligible for county jail" due to his felony strike and asked that appellant be transferred to state prison. On May 17, 2017, his request was heard by a judge other than the original sentencing judge who had retired. Judge Young righted the meandering course of appellant's sentence. He recounted its tortured history, noted the errors that had been made, and concluded that the only proper sentence was the one first announced at the original sentencing prior to appellant's request for the "split sentence." Accordingly, he ordered the record amended and remanded appellant to custody to serve the balance of his time in prison. There was no objection.

DISCUSSION

Appellant challenges the court's refusal to dismiss his burglary conviction. The courts may dismiss prior convictions "in furtherance of justice," subject to review for an abuse of discretion. (*Romero*, *supra*, 13 Cal.4th at p. 504; §§ 667, 1385.)

In considering whether to dismiss a prior conviction, "preponderant weight must be accorded to factors intrinsic to the scheme, such as the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The court decides, in light of these factors and particulars, if "the defendant may be deemed outside the spirit of the [Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Ibid*.)

If the trial court does not state reasons, we presume that it acted to achieve legitimate sentencing objectives. We do not substitute our judgment for that of the trial court. On appeal, appellant must show that the decision "is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Appellant cannot show that the court's refusal to dismiss his burglary conviction is irrational or arbitrary. He has a long history of criminality, beginning as a juvenile, and repeatedly refused drug treatment. Since the burglary, he has had repeated incarcerations. When released, he promptly reoffends. In this case, appellant was warned to declare contraband because bringing drugs into jail is a felony. He did not declare the drugs, passed signs warning him not to enter jail with drugs, and did

not dispose of the drugs during his three-hour wait to be searched. He showed awareness of guilt when the drugs were found between his buttocks, saying "I just didn't want to get caught with it." Once caught, he lied about the amount of drugs he possessed, telling the deputy it was one dose when it was, in fact, 22 doses. It is clear that he hoped to sell or use the drugs in jail. His probation report indicates a "high risk to reoffend in the community."

Given his decades-long criminal history, his effort in this case to hide drugs for sale or use in jail, and the high risk he will reoffend, appellant falls squarely within the spirit of the Three Strikes law. Appellant "has led a continuous life of crime" that militates against dismissing the prior conviction. (*People v. Pearson* (2008) 165 Cal.App.4th 740, 749; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [20-year-old conviction is not remote given defendant's recidivism].) Appellant "is the kind of revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320.)

At two hearings, the trial court explicitly denied appellant's request to dismiss the prior serious felony, demonstrating awareness of its discretion. The record "reflect[s] recognition on the part of the trial court" that it had sentencing discretion. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348.) "If the record demonstrates on its face that the sentencing court was aware of its statutory authority . . . it may be presumed that the court did exercise its discretion . . . ." (*Id.,* fn. 8.) Defense counsel argued, "[i]f the Court is not inclined to strike the strike, I'd ask the Court in the interest of justice to consider a split sentence of those five years . . . ." The court then issued a split sentence. Its

acquiescence in appellant's request does not mean that it misunderstood its discretion under *Romero*.

Months after judgment, appellant advised the court that his sentence was "unlawful" and "unauthorized." He did not seek a new ruling on his request to dismiss the prior under *Romero*, and "[u]nder well-established case law, a court may exercise its dismissal power under section 1385 at any time before judgment is pronounced—but not after judgment is final." (*People v. Chavez* (2018) 4 Cal.5th 771, 777.) In any event, by failing to raise the *Romero* issue at the May 2017 hearing, appellant forfeited the right to raise it on appeal. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 375-376.) Counsel was not ineffective in failing to raise the *Romero* issue a third time, given the two prior denials of his motion to strike. No circumstances changed, least of all appellant's criminal history.

Appellant correctly told the court that its sentence was unauthorized. The sentence for a defendant with a prior serious felony strike "shall be served in the state prison." (§ 1170, subd. (h)(3).) A split sentence outside prison was not authorized by law after the court denied appellant's *Romero* motion. The court violated mandatory provisions governing appellant's confinement. (*People v. Scott* (1994) 9 Cal.4th 331, 354 [sentence is unauthorized if it cannot be lawfully be imposed under any circumstance].) An unauthorized sentence "may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.)

A defendant's presence is not required when the court corrects an unauthorized sentence, unless the result is "more onerous." (*People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1417.) Here, the court did not increase the length of appellant's

sentence. Instead, it changed the location of his confinement. Appellant could not have been surprised, because prison is what he requested in his "Motion to Correct Sentence." His absence at the hearing, where he was represented by appointed counsel, did not affect the outcome. The issue presented to the court was purely a legal one, so that appellant's absence (or presence) did not affect the fairness of the proceeding. (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 109.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Rebecca S. Riley, Judge

Superior Court County of Ventura

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

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