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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR HERRERA,

Defendant and Appellant.

B233069

(Los Angeles County
Super. Ct. No. LA066102)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Elizabeth Lippitt, Judge. Affirmed as modified with directions.

James Koester, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey,
Supervising Deputy Attorney General, and Blythe J. Leszkay, Deputy Attorney General,
for Plaintiff and Respondent.

Salvador Herrera was convicted of 13 counts of first degree residential burglary and forgery, and received a sentence of 79 years to life. Herrera appeals, arguing that the trial court abused its discretion in not dismissing prior strikes, his sentence was cruel or unusual, and other sentencing errors occurred. We modify the abstract of judgment in several respects, remand for the trial court to impose or strike prior prison term enhancements, and otherwise affirm the judgment.

BACKGROUND

An information filed November 30, 2010, charged Herrera with nine counts of first degree residential burglary occurring between August 9 and September 20, 2010, each of a different dwelling, in violation of Penal Code section 459.¹ The information also charged Herrera with six counts of forgery in violation of section 470, subdivision (d). Further, the information alleged that Herrera had suffered 15 prior strike convictions as to all counts pursuant to sections 1170.12, subdivision (a), and 667, subdivisions (b) through (i); had two prior felony convictions within the meaning of section 1203, subdivision (e)(4); and had two prior prison terms pursuant to section 667.5, subdivision (b).

Herrera filed a pretrial motion to dismiss his prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), which the court denied. At trial, the prosecution presented evidence that Herrera stole electronics from the residences and also stole and cashed several checks, forging the signatures of the account holders. Herrera admitted the truth of the prior conviction allegations and prior prison terms allegations. Counts 3 (burglary) and 4 (forgery) were dismissed, and the jury convicted Herrera of the remaining 13 counts, finding true allegations that the burglaries were of inhabited dwellings within the meaning of section 462, subdivision (a).

After the verdict, Herrera filed a *Romero* motion and a sentencing memorandum, asking that the trial court dismiss his prior strikes and treat the case as a first or second strike. The court denied probation and struck the Three Strikes allegations as to some

¹ All further statutory references are to the Penal Code.

counts, but sentenced Herrera to 25 years to life on two counts (counts 1 and 5). After the court corrected its sentencing calculation, Herrera received a sentence of 79 years to life, detailed as follows: on counts 1 and 5, he received consecutive 25-years-to-life sentences under the Three Strikes Law, and consecutive five-year sentences on both counts under section 667, subdivision (a); count 8 was the base term for the determinate sentence, all but one prior strike was dismissed on that count, and he received a low term of two years, doubled to four years as a second strike, plus five years under section 667, subdivision (a); on the remaining burglary counts, counts 9, 10, 12, 14, and 15, all the strikes were dismissed, and he received a one year and four months sentence (one-third the midterm) on each count, to be served consecutively; and on the forgery counts (2, 6, 7, 11, 13) he received 8 months (one-third the midterm) consecutive on each.

Herrera filed a timely notice of appeal.

DISCUSSION

I. The trial court did not abuse its discretion in failing to strike all the prior strike allegations.

Herrera filed a posttrial motion requesting that the trial court dismiss prior strike allegations in the interest of justice under section 1385 and *Romero, supra*, 13 Cal 4th 497, arguing that the court should exercise its discretion to do so because Herrera's current convictions did not involve weapons, gangs, violence, or injuries, and noting that his prior strike convictions (15 counts of residential burglary) all occurred in a single case from 2004. At a hearing, the trial court pointed out that Herrera's 15 prior strike convictions resulted from his guilty plea to 15 residential burglaries of hotel rooms in a case in which 35 charges were filed. Herrera was informed "that if he were to pick up another felony that he would be looking at 25 to life. . . . [¶] So the problem is with residential burglary. Although it's not a serious and violent felony under the Penal Code, it is a serious felony. And the potential for violence and physical harm to people is very great. [¶] In this particular case, he didn't have any weapons. . . . And he did help the police in solving a lot of the burglaries in this particular series of incidents." As

described in detail above, the trial court did not dismiss any strikes on the burglary convictions on counts 1 and 5, but dismissed all but one strike on the burglary conviction in count 8, and dismissed all strikes on the remaining 10 counts. Herrera argues that the court abused its discretion in failing to dismiss the remaining strikes.

The trial court has discretion under the Three Strikes law to dismiss prior conviction allegations in the furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529–530.) In exercising its discretion, the court must take into account the particulars of the defendant’s background, character, and prospects; his constitutional rights; the nature and circumstances of the current and prior offenses; and the interests of society, to decide whether the defendant may be deemed outside the anti-recidivist “spirit” of the Three Strikes law, in whole or in part. (*Romero*, at pp. 530–531; *People v. Williams* (1998) 17 Cal.4th 148, 161.) The court may also consider the sentence a defendant receives on one of the current counts, with respect to the remaining counts, and (as occurred in this case) may dismiss a strike allegation with respect to some of the current offenses, leaving the finding in effect with respect to others. (*People v. Garcia* (1999) 20 Cal.4th 490, 500.) We give deference to the court’s exercise of its discretion, and will not reverse the court’s denial of a *Romero* motion “unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) 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. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction in limited circumstances.” (*Id.* at p. 378.) If the record shows that the trial court has considered the relevant facts and reached its decision impartially and in the spirit of the law, we affirm ““even if we might have ruled differently in the first instance,”” and reverse only when the circumstances are “extraordinary.” (*Ibid.*)

No extraordinary circumstances appear in this case. The trial court properly weighed Herrera's criminal history and the absence of a weapon in this case. Although no statement of reasons is required when the court does not dismiss a prior conviction finding (*In re Large* (2007) 41 Cal.4th 538, 550), the trial court in this case noted that Herrera's prior convictions were also for residential burglary, which even without a weapon is a serious felony under the Three Strikes law and in any event presents the potential for violence and physical harm. The court also considered Herrera's cooperation with the police. Herrera does not argue that the court was not impartial, and we see no indication of partiality on the record. Herrera was a recidivist felon who committed multiple residential burglaries, and the court's refusal to dismiss all the prior convictions was not a decision with which all reasonable people would disagree.

We also reject Herrera's argument that some of his prior strike convictions should have been dismissed because they were the result of a single adjudication. As he acknowledges, a criminal defendant may accrue multiple strikes in a single adjudication. (*People v. Benson* (1998) 18 Cal.4th 24, 26–27.)

The trial court did not abuse its discretion.

II. The sentence is not cruel or unusual under the California constitution.

Herrera's *Romero* motion also urged that the imposition of the Three Strikes law "is both cruel and unusual under the 8th Amendment to the [U.S.] constitution and disproportionate to the offenses at hand." At the hearing, Herrera's counsel brought up the Eighth Amendment issue. On appeal, Herrera concedes that his sentence "is likely not violative of the Eighth Amendment's prohibition against cruel and unusual punishment." He argues, however, that his "virtual life without parole" sentence shocks the conscience and is grossly disproportionate to his culpability, so as to violate the California Constitution's ban on cruel *or* unusual punishment. (Cal. Const., art. 1, § 17.)

Herrera did not raise a California constitutional argument in the trial court, and therefore has forfeited this issue. (*In re Coley* (Aug. 30, 2012, S185303) ___ Cal.4th ___ [2012 Cal. Lexis 8296, p. 24, fn. 8]), *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

We nevertheless address it briefly. A prison sentence violates article 1, section 17, if it is “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) In examining whether a sentence is grossly disproportionate, we examine the “nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.” (*Id.* at p. 425.) The “[d]efendant must overcome a ‘considerable burden’ to show the sentence is disproportionate to his level of culpability. [Citation.] Therefore, ‘[f]indings of disproportionality have occurred with exquisite rarity in the case law.’” (*People v. Em* (2009) 171 Cal.App.4th 964, 972.)

Herrera admits that his sentence is not disproportionate under the federal constitution, and he is being punished under a California statute that expressly mandates more severe punishment for recidivists. (See *People v. Cooper* (1996) 43 Cal.App.4th 815, 826–827; *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 559–560 & fn. 8.) Although his parole date may be beyond his life expectancy, this does not implicate the state or federal constitution. (See, e.g., *People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 593–595.) Herrera’s sentence is not so grossly disproportionate as to offend common notions of decency and shock the conscience. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [111 S.Ct. 2680, 115 L.Ed.2d 836]; *In re Lynch*, *supra*, 8 Cal.3d at p. 424; *People v. Dillon* (1983) 34 Cal.3d 441, 479.)

III. The trial court may have erroneously believed Herrera would serve 80 percent of his entire sentence.

Herrera argues that the trial court likely misunderstood when Herrera would be eligible for parole if he received early release credits postconviction, so that the court imposed the sentence believing that Herrera was reasonably likely to be eligible for parole during his lifetime. Herrera quotes the court’s statement during the first sentencing hearing (“[t]hat is at 80 percent that he will be doing.”) to argue that the court

believed he would serve 80 percent of his entire sentence. He points out that he would be ineligible for such credits under *In re Cervera* (2001) 24 Cal.4th 1073, 1078–1079, 1081, and contends that remand is necessary for the trial court to reexamine his sentence with the understanding that he would not be eligible for parole during his lifetime.

That ambiguous statement by the trial court raises the possibility that the court erroneously believed Herrera would be eligible for parole after he had served 80 percent of his entire sentence. In *In re Cervera*, our Supreme Court held that a defendant sentenced to an indeterminate life term under the Three Strikes law is not entitled to postconviction prison conduct credits for use against his or her mandatory indeterminate term of life imprisonment, or the 25 year minimum. (24 Cal.4th at pp. 1076, 1080.) We therefore direct the trial court to resentence Herrera in the light of his ineligibility for postconviction credits.

IV. Herrera is entitled to additional presentence actual and conduct credits, and only one crime prevention fine should have been imposed.

At the second sentencing hearing, the trial court awarded Herrera 266 days of custody credit (the same number of days that Herrera was in actual custody), plus 53 days good time/work time, calculated at 20 percent, for a total of 319 days. This was a miscalculation.

We agree with Herrera that he is entitled to one additional day of actual custody credit. Herrera was arrested on September 20, 2010 and sentenced on June 13, 2011. Under section 4019, he was entitled to credits for all days in custody, including the first and last days. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735.) He should have received credits for 267 days in custody.

Respondent concedes that Herrera was entitled to additional presentence conduct credit. Under the former version of section 4019 in effect at the time Herrera committed the crimes in this case, he was entitled to 132 days, not 53 days, of presentence conduct credit. (See Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28X, § 50, eff. Jan. 25, 2010.) We

may correct the error in the credit calculation where, as in this case, that is not the sole issue on appeal. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 351, fn. 1.)

Respondent also concedes that the trial court should have imposed only one crime prevention fine. The court imposed “a crime prevention fine of \$10 *per count*” (italics added). Section 1202.5, subdivision (a), states: “In any case in which a defendant is convicted of any of the offenses enumerated in Section[s] . . . 459, 470 . . . , the court shall order the defendant to pay a fine of ten dollars (\$10) in addition to any other penalty or fine imposed.” “[T]he crime prevention fine can be imposed only once ‘[i]n any case.’ [Citation.] Although defendant was accused and convicted of committing multiple offenses, this was still a single case. [Citation.] Thus, only one \$10 fee could be imposed.” (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.)

V. The trial court failed to impose or strike the prior prison term enhancements.

Herrera admitted that he had suffered two separate prior prison terms pursuant to section 667.5, subdivision (b), in case no. GA064013 and case no. GA055772. The trial court did not mention the section 667.5, subdivision (b) prior prison term enhancements during the sentencing hearings, and no disposition of the prior prison terms appears in the abstract of judgment.

“Once the prior prison term is found true within the meaning of section 667.5[, subdivision] (b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) “The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal. [Citations.]” (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.)

On remand, the trial court must strike or impose the prior prison term enhancement under section 667.5, subdivision (b), for case No. GA064013 only. (See *People v. Bradley, supra*, 64 Cal.App.4th at p. 392.) No enhancement under section 667.5, subdivision (b) may be imposed related to case no. GA055772, as Herrera has

already received a five-year term for a prior prison term under section 667, subdivision (a), for that case. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150–1152.)

DISPOSITION

The trial court is directed to resentence Herrera in light of *In re Cervera*, *supra*, 24 Cal.4th at pp. 1078–1081, to strike the prior prison term enhancement related to case no. GA055772, and either impose or strike the prior prison term enhancement related to case no. GA064013, in compliance with California law. The clerk of the superior court is then to prepare an amended abstract of judgment reflecting the court’s resentencing, awarding custody credits of 267 days, and 132 days of presentence conduct credits, for total credits of 399 days; striking all but one of the \$10 crime prevention fines; and reflecting the disposition of the trial court in connection with the imposition or striking of the prior prison term enhancement related to case no. GA064013. The court is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitations. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.