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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR GOMEZ RAMIREZ,

Defendant and Appellant.

2d Crim. No. B269964  
(Super. Ct. No. 2014030324)  
(Ventura County)

The trial court found Edgar Gomez Ramirez guilty of felony resisting an executive officer (Pen. Code, § 69)<sup>1</sup> and misdemeanor giving false information to a peace officer (§ 148.9, subd. (a)). The trial court also found Ramirez suffered one prior strike conviction within the meaning of the three strikes law. (§§ 667, subds. (b)-(i), 1170.2, subds. (a)-(d).)

The trial court sentenced Ramirez to 16 months on the resisting count, doubled to 32 months for his prior strike. The court sentenced Ramirez to a concurrent 180 days on the false information count.

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<sup>1</sup> All statutory references are to the Penal Code.

## FACTS

California Highway Patrol Officers Adam Woods and Jeffrey Clements saw a Dodge Stratus being driven by Ramirez's brother. There was a passenger in the front seat and Ramirez was in the back seat. The passenger and Ramirez were not wearing seat belts. The officers followed the Dodge into a nearby parking lot. When the officers arrived, the Dodge was already parked and the three men were walking toward a bar.

The officers ordered the three men back into their car. Two of the men complied. Ramirez did not. He walked toward the officers until they ordered him to stop several times.

Officer Woods asked Ramirez for his identification. Ramirez said he did not have any and that his name was Hector. Ramirez then ran away. Both officers gave chase. Officer Clements tackled Ramirez to the ground. Ramirez was pushing and kicking, trying to get away. Woods was assisting Clements when he noticed that the other two men had left their car. The men were extremely agitated and charged toward the officers. Woods drew his service weapon and directed the men back toward their car.

In the meantime, Ramirez was able to stand up. He punched Officer Clements in the head several times. As Ramirez was climbing over a wall, Officer Woods shot his taser at him. Although Woods hit Ramirez with taser darts, Ramirez was able to escape over the wall.

The officers went to the local sheriff's office and were able to identify Ramirez.

## *Search*

On June 19, 2014, sheriff's deputies executed a search warrant at the home of one of Ramirez's brothers in an unrelated matter. They found a cell phone with a cracked screen. They

opened the phone to determine to whom it belonged. The phone contained a picture of Ramirez holding taser darts. By coincidence, one of the deputies involved in executing the search warrant had helped the Highway Patrol officers identify Ramirez. The deputy recognized the significance of the photograph.

### *Defense*

Ramirez elected to stand on the People's evidence and produced no evidence in his defense.

## DISCUSSION

### I

Ramirez contends the record does not reflect a valid waiver of his right to a jury trial.

But the record exists. Ramirez simply did not provide it for this appeal. Ramirez, as appellant, has the burden of providing an adequate record. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 628, p. 704.) We do not presume error from an inadequate record. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

In any event, the People have provided the record of the hearing at which Ramirez personally waived his right to a jury trial. It shows Ramirez made a knowing and intelligent waiver.

Ramirez argues that due to the lack of a record, we cannot know whether he was offered any benefit that rendered his waiver of a jury trial involuntary. But the record shows no such inducement was offered. In fact, at sentencing, the trial court stated, "We did discuss disposition, and I might have said I would do what Judge Wright did. I know the defendant declined and then waived jury." Ramirez declined any offer that might have been made prior to waiving his right to a jury trial.

## II

Ramirez contends the trial court erred in admitting into evidence photographs from his cell phone.

On June 19, 2014, officers executed a search warrant on the home of Ramirez's brother, Cesar. The search warrant was for evidence unrelated to the instant case. The warrant included cell phones belonging to Cesar. Ramirez was present at his brother's home during the search. All those present, including Ramirez, were detained outside the home.

During the search, Officer Adam Garnier found a cell phone in the house. None of those detained admitted it was their cell phone. Garnier opened the cell phone to determine to whom it belonged. He saw a picture of Ramirez holding taser darts. At the time of the cell phone search, Ramirez had been arrested and was in the back of a police car.

Ramirez made a motion to suppress the evidence on the ground that Officer Garnier failed to obtain a search warrant prior to opening the cell phone. The trial court denied the motion.

Ramirez relies on *Riley v. California* (2014) 573 U.S. \_\_ [189 L.Ed.2d 430] for the proposition that a warrant is required for the search of a cell phone. But *Riley* was decided on June 25, 2014, six days after the search occurred here. At the time of the search, there was binding precedent allowing police officers to lawfully search a suspect's cell phone incident to an arrest without a warrant. (*People v. Diaz* (2011) 51 Cal.4th 84.) Where an officer acts in compliance with binding precedent, his behavior is not wrongful and the exclusionary rule does not apply. (*Davis v. United States* (2011) 564 U.S. 229, 240-241.)

### III

Ramirez contends the trial court denied his right to confront and cross-examine witnesses in violation of the Sixth Amendment.

The record does not support Ramirez's contention. Ramirez claims the trial court prevented his counsel from inquiring as to the ownership of the cell phone. But the record shows the trial court sustained the prosecutor's objection because the question had been asked and answered. The court sustained other objections because the questions misstated the witness's testimony. Finally, Ramirez was unable to elicit the information he wanted on cross-examination, not because of any ruling by the trial court, but because the witness testified he could not remember. The court did not prevent Ramirez from confronting and properly cross-examining witnesses.

### IV

Ramirez contends the trial court abused its discretion in denying his motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Ramirez suffered a prior conviction for assault with a deadly weapon, a knife, by means likely to produce great bodily injury, with an enhancement for personally inflicting great bodily injury. (§§ 245, subd. (a)(1), 12022.7, subd. (a).) The conviction constitutes a strike within the meaning of the three strikes law.

In *Romero*, our Supreme Court held that the trial court retains the inherent power to strike a prior conviction in the interest of justice in spite of language to the contrary in the three strikes law.

In support of his motion, Ramirez argued that he lives in poverty and has no way out of poverty because of his undocumented status; that his current offense would have been

charged as a misdemeanor but for his prior conviction; and that the court should show compassion because he has a serious kidney disease.

In opposition, the People argued that Ramirez’s prior strike was a gang case; he has not changed his life of criminality; and it is not in the interest of society to strike his prior conviction.

In ruling on a *Romero* motion, the trial court must consider whether in light of the defendant’s prior and current serious or violent felony convictions, and the particulars of his background, character and prospects, the defendant may be deemed outside the three strikes scheme’s spirit. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court stated it gave Ramirez’s motion “a good deal of thought.” The court stated Ramirez has been in the criminal justice system consistently since he was 11 years old as a juvenile and adult; the facts of the prior conviction are “pretty awful”; and in the present case, he shows no remorse, indicating there is not a likelihood of changing his life and becoming a productive citizen. The trial court denied the motion.

Here the trial court thoughtfully considered the necessary factors. The court did not abuse its discretion.

The judgment is affirmed.

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GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Nancy Ayers, Judge  
Superior Court County of Ventura

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Jennifer Zide, under appointment by the Court of  
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