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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.

EDDIE HERRERA,

Defendant and Appellant.

B249216

(Los Angeles County  
Super. Ct. Nos. KA094787,  
KA098966)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Lopez, Judge. Affirmed.

Kenneth J. Sargoy, 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, Steven D. Matthews, Supervising Deputy Attorney General, and J. Michael Lehman, Deputy Attorney General, for Plaintiff and Respondent.

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After a bench trial, the trial court found Eddie Herrera guilty of a probation violation as a result of a misdemeanor vandalism charge. Herrera admitted to a prior strike. The trial court denied a *Romero*<sup>1</sup> motion request to strike the strike for sentencing purposes. The trial court sentenced Herrera to 48 months. Herrera timely appealed, and we affirm.

### **BACKGROUND**

An information filed July 6, 2011 charged Herrera with felony possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). The information also alleged that Herrera had a prior strike under Penal Code<sup>2</sup> sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), a 1994 conviction for forcible rape in violation of section 261, subdivision (a)(2). Herrera also had two felony convictions under section 1203, subdivision (e)(4).

On July 28, 2011, Herrera pleaded no contest and admitted the prior strike and section 1203, subdivision (e)(4) allegations in exchange for one year of probation under Proposition 36 (§ 1210 et seq.) and suspension of the imposition of sentence.

On September 27, 2011, Herrera failed to appear in court for a Proposition 36 progress report. Herrera's probation and his participation in the Proposition 36 program were terminated and a bench warrant was issued.

An information filed September 11, 2012 charged Herrera with felony possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). The information also alleged that Herrera had a prior strike under sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d) and had three felony convictions under section 1203, subdivision (e)(4). That same day, as part of a plea agreement, Herrera pleaded no contest to the felony possession charge and admitted the July 6, 2011 felony possession charge. Pursuant to the agreement, imposition of

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

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

sentence was suspended, Herrera was granted a second Proposition 36 probation, and Herrera was also ordered to enroll in a Level II drug treatment program for both cases.

On May 3, 2013, Herrera was charged with misdemeanor vandalism. A probation violation hearing was set for May, 23, 2013. On the date of the hearing, the trial court offered Herrera a term of 48 months in state prison. Herrera rejected the offer, and the hearing proceeded.

The prosecution presented evidence that on March 15, 2013 Herrera had scratched up a car belonging to Kathy Montes. Montes testified that her aunt had been Herrera's girlfriend. Montes had been waiting in her car for her aunt at an address on Francisquito Avenue in the City of Valinda when Herrera approached the vehicle, twisted off the windshield wiper, and used it to scratch up the car. Montes called the police after Herrera left. Herrera acknowledged that he had been at the Francisquito Avenue address that night, but testified that he had never approached Montes's car.

The court found the vandalism charge true by a preponderance of the evidence, and found Herrera to be in violation of the terms of his probation. As a result, Herrera's probation was revoked and his participation in the Proposition 36 program was terminated. The trial court sentenced Herrera to 16 months for violating his first felony drug possession parole. The trial court imposed a consecutive term of one-third the midterm, or eight months, for Herrera's violation of his second felony drug possession parole. Due to his prior strike, Herrera received an enhanced sentence and was ineligible for further probation. Both sentences were doubled pursuant to sections 667, subdivisions (b)–(i), and 1170.12, subdivisions (a)–(d), for a total of four years (32 months plus 16 consecutive). Herrera was ordered to pay fees, fines, and restitution.

Herrera's counsel requested a *Romero* motion to strike the prior strike for sentencing purposes. The trial court did not strike the prior conviction allegation. Following sentencing, the prosecution dismissed the misdemeanor complaint.

On May 29, 2013, Herrera filed a notice of appeal. The sole issue on appeal is the trial court's denial of the *Romero* motion.

## DISCUSSION

Under section 1385, subdivision (a), a judge may order an action to be dismissed “in furtherance of justice.” The California Supreme Court has held that section 1385, subdivision (a) permits a trial court acting on its own motion to strike prior felony convictions in cases brought under the “Three Strikes” law. (*Romero, supra*, 13 Cal.4th at p. 529.) “The Three Strikes law, itself, expressly approves the striking of prior felony conviction allegations (§ 667[, subd.] (f)(2)), presumably for the purpose of affecting sentencing, since the striking of such allegations has no other purpose.” (*Id.* at p. 524, fn. 11.)

“[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.) There is a strong presumption that any sentence that conforms to the sentencing norms established by the Three Strikes law is appropriate. (*Id.* at p. 378.) “Where the record is silent [citation], or ‘[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance’ [citation].” (*Ibid.*) Failing to strike a prior felony conviction will only abuse a trial court’s discretion in limited circumstances where the “decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) “[T]he party attacking the sentence [has the burden of] clearly show[ing] that the sentencing decision was irrational or arbitrary.” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

Herrera argues that the trial court believed it lacked discretion to strike a prior felony conviction. If true, this would amount to an abuse of discretion. (See *People v. Carmony, supra*, 33 Cal.4th at p. 378 “[A]n abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss”.) After the trial court found him in violation of probation, Herrera’s counsel made an oral *Romero* motion, asking the court to consider striking the strike in light of Herrera’s progress in drug rehabilitation, the

minor nature of the vandalism charge, Herrera's willingness to pay restitution, and the fact that the prior is "kind of old." The court responded that the strike was a conviction under section 261, subdivision (a)(2), and stated: "[T]he court will not entertain a *Romero* motion. I will not at this time entertain a reduction or entertain a motion to strike the strike, that is not available to you at this time." Herrera argues that the plain meaning of the trial court's assertion that it would not "entertain" a *Romero* motion and that a *Romero* motion was "not available to [him] at th[at] time" indicates that the trial court was not aware of its discretion or authority to strike the strikes.

The record indicates that the trial court understood that it had the discretion to strike the prior conviction. At the probation revocation hearing, prior to calling witnesses, the trial court stated: "I'm not willing to offer you probation. The only way I can get to probation is strike your strikes and I'm not willing to do so." Respondent argues that by explicitly identifying the ability to "strike [the] strikes" the trial court indicated its awareness of its discretion under section 1385. We agree. Further, by expressing its unwillingness to strike the prior conviction, the trial court exercised its discretion. Although a trial court may exercise its discretion to strike a strike "'before, during or after trial'" (*Romero, supra*, 13 Cal.4th at p. 524, fn. 11), when the trial court stated it would not "entertain" a *Romero* motion after the hearing, it was simply declining to revisit the earlier motion it had already denied.

The trial court's statements must be considered in context. Herrera's counsel sought clarification, stating: "You said you didn't want to entertain the *Romero*, but you did entertain it, you just denied it." The trial court responded: "*Romero* motion request is noted and denied." The minute order twice states, "Defendant's *Romero* motion is denied."

Herrera carries the burden of clearly showing that the sentencing decision was arbitrary. The record indicates that the trial court was aware of its authority to strike a strike, as indicated by its prehearing comments. In the absence of an unambiguous showing that the trial court believed it lacked the discretion to strike prior conviction

allegations, Herrera has failed to meet his burden to affirmatively show error, and we resolve any ambiguity in the record against him. (*People v. Clifton* (1969) 270 Cal.App.2d 860, 862.)

Herrera also argues that the trial court abused its discretion by violating due process when it failed to consider mitigating factors. The trial court acknowledged the age of the prior serious or violent felony conviction and sentenced Herrera to the low term of 16 months rather than the midterm of two years. Herrera's contention that *Romero* motions require the trial court to consider any relevant mitigating factors on the record is a misinterpretation of the law. If the trial court chooses to exercise its discretion to dismiss or vacate a prior conviction allegation, then the trial court must consider the particulars of the defendant's background, character, and prospects. (*Romero, supra*, 13 Cal.4th at p. 531.) In contrast, "no similar requirement applies when a court declines to strike a prior. [Citation.] 'The absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law.' [Citation.]" (*In re Large* (2007) 41 Cal.4th 538, 550.)

Herrera cites to multiple cases where courts have dismissed prior strikes when a defendant has a lengthy criminal history. However, despite the existence of similarly situated defendants, declining to strike a strike is not an abuse of discretion. (See, e.g., *People v. Jefferson* (2007) 154 Cal.App.4th 1381, 1388 [declining to strike 22-year-old strike].)

Even if we were to conclude that the trial court had been unaware of its discretion to strike a strike, remand would be inappropriate in this case. "[R]emand is not required where the trial court's comments indicate that even if it had authority to strike a prior felony conviction allegation, it would decline to do so." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944; see, e.g., *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [denying remand where the trial court imposed a greater sentence than it believed to be required by the Three Strikes law].) Here the trial court clearly indicated that it was

unwilling to strike a strike to impose a lesser sentence, and remand is not required or appropriate.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.