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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.

HEYWARD CLARK,

Defendant and Appellant.

B230944

(Los Angeles County
Super. Ct. No. SA068729)

APPEAL from a judgment of the Superior Court of Los Angeles County. Antonio Barreto, Jr., Judge. Affirmed.

Trisha Newman, 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, Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Heyward Clark appeals from the judgment entered after a jury convicted him of making criminal threats and personally using a deadly and dangerous weapon during commission of the crime. Clark contends the judgment should be reversed and the matter remanded for resentencing because the trial court did not understand the scope of its discretion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to dismiss his prior serious felony conviction so that he could avoid sentencing under the “Three Strikes” law. We disagree and thus affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An information, dated September 26, 2008, charged Clark with one count of making criminal threats (Pen. Code, § 422, subd. (a)),¹ and specially alleged that he had personally used a deadly and dangerous weapon in committing the offense (§ 12022, subd. (b)(1)). The information also specially alleged that Clark had a prior serious felony conviction for making criminal threats that qualified as a strike under the Three Strikes law and subjected him to a five-year enhancement pursuant to section 667, subdivision (a)(1), and that Clark had served two prior prison terms within the meaning of section 667.5, subdivision (b). Clark pleaded not guilty and denied the special allegations.

According to the evidence at trial, on August 25, 2008, a custodian of the Westwood branch of the Los Angeles Public Library encountered Clark at the trash disposal area. Clark, who was homeless and frequented the area, warned the custodian not to touch his bicycle. Clark threatened to cut the custodian in the stomach and pulled out a blade from his backpack. The custodian’s coworker called the police, who arrested Clark near the scene. Clark testified in his defense, acknowledging that he had warned the custodian not to touch his bicycle but denying that he had threatened the custodian or pulled out a blade from his backpack.

A jury convicted Clark of making criminal threats and personally using a deadly and dangerous weapon during commission of the crime. After Clark waived a jury trial

¹ Statutory references are to the Penal Code.

on the alleged prior conviction and prison terms, the trial court found that Clark had a prior serious felony conviction for making criminal threats that qualified as a strike under the Three Strikes law and subjected him to a section 667, subdivision (a), enhancement and that he had served one prior prison term within the meaning of section 667.5, subdivision (b).

Before sentencing, the trial court denied Clark's motion under section 1385 and *Romero* to dismiss his prior serious felony conviction. It sentenced Clark to 7 years 8 months in state prison, consisting of the low term of 16 months for making criminal threats, doubled pursuant to the Three Strikes law, plus 5 years under section 667, subdivision (a)(1).

DISCUSSION

Section 1385, subdivision (a), authorizes a trial court to exercise its discretion to dismiss a defendant's prior serious or violent felony conviction. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) The court's discretion, however, is limited. (*Id.* at p. 530.) "[T]he court in question must consider whether, in light of 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, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part" (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Absent an affirmative disclosure on the record to the contrary, we presume a court considered all pertinent factors in determining whether to dismiss a prior serious or violent felony conviction. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The totality of the court's statements determines whether it properly understood its discretionary authority to dismiss a prior serious or violent felony conviction. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 993.)

Clark argues that the trial court misunderstood the scope of its discretion to dismiss his prior serious felony conviction for making criminal threats. According to Clark, the court erroneously restricted its analysis to his criminal record and failed to consider his mental health issues. Clark maintains that his mental health issues mitigated his culpability because it affects his ability to be productive in society.

(See Cal. Rules of Court, rule 4.423(b)(2) [mental condition is a mitigating factor in sentencing if it “significantly reduced culpability for the crime”].)

Contrary to Clark’s contention, the trial court did consider his mental illness, acknowledging that Clark has “mental and emotional issues that interfere with his ability to operate in a rational way in a civilized society.” The court then recognized that “the rule for the *Romero* discretion is whether looking at all the different factors that go into it, the circumstances of the offense and of the offender, of his prior history and/or lack thereof, everything involved, does the defendant fall outside the spirit of the Three-Strikes law?” Based on those factors, the court considered Clark’s present crime, the fact that he was on parole when he committed the crime, his prior misdemeanor and felony convictions and his background to determine whether Clark’s mental health issues rendered him outside the spirit of the Three Strikes law. The court concluded they did not.² This record does not show, as Clark contends, that the court misunderstood the scope of its *Romero* discretion.

Clark maintains that the trial court’s remarks about his mental health issues demonstrate that the court wanted to dismiss his prior serious felony conviction, but mistakenly believed it did not have the authority to do so. Clark bases his contention on the court’s statement that if Clark’s mental health issues were the only relevant factor in determining whether to dismiss the prior serious felony conviction, it would, but considering that factor alone would be improper under *Romero*. The court’s statement merely was an expression that no legal basis warranted dismissing Clark’s prior serious felony conviction because Clark’s mental health issues did not sufficiently outweigh his criminal history to warrant sentencing outside the Three Strikes law. The statement did

² Clark has an extensive criminal record that spans more than 30 years. He has numerous convictions, including robbery, battery, possession of a dangerous weapon, stalking and criminal threats. In 2004 Clark suffered two felony convictions for making criminal threats and stalking, for which he served two years in state prison. Clark was on parole for those crimes when he committed the instant offense, a second felony conviction for making criminal threats.

not express a mistaken belief about the scope of discretion.³ (*People v. Carrasco, supra*, 163 Cal.App.4th at p. 994 [trial court’s express consideration of defendant’s background and character when defendant argues that his mental illness is grounds to dismiss a prior strike conviction demonstrates proper understanding of *Romero* discretion and court need not place greater weight on mental illness than on other relevant criteria].)

DISPOSITION

The judgment is affirmed.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

³ Although the court did not dismiss Clark’s prior serious felony conviction, it did rely on his mental health issues to impose the low term of 16 months for making criminal threats, despite the People’s request for a mid-term sentence. The court also directed the Department of Corrections and Rehabilitation to conduct a mental health examination to determine where Clark should be housed. And the court using its discretion under section 1385 did not impose punishment on Clark for the weapon enhancement or the prior-prison-term enhancement.