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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMOND RUEL PERSON,

Defendant and Appellant.

B279520

(Los Angeles County  
Super. Ct. No. PA086212)

APPEAL from a judgment of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed and remanded with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Armond Ruel Person appeals from a judgment of conviction for possession for sale of a controlled substance and misdemeanor possession of a smoking device entered after a jury trial. His sole contention on appeal is that the trial court abused its discretion in refusing to strike his prior conviction for attempted robbery for purposes of sentencing under the three strikes law (Pen. Code, §§ 667, subds. (a)(1), (b)-(i), 1170.12).<sup>1</sup> We conclude the trial court did not abuse its discretion in denying Person's motion to strike his prior conviction, and affirm the conviction.

However, we remand for resentencing for the trial court to correct an unauthorized sentence by exercising its discretion to impose or strike the sentence enhancements under section 667.5, subdivision (b), for two prior convictions for which Person served prison terms, and to strike the sentence enhancement imposed by the trial court under Health and Safety Code section 11370.2, subdivision (a), in light of a legislative amendment to that code provision.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. *The Information***

Person was charged in an information with two counts of pandering by procuring (Pen. Code, § 266i, subd. (a)(1); counts 1 and 2), possession for sale of a controlled substance (Health & Saf. Code, § 11378; count 3), and misdemeanor possession of a smoking device (*id.*, § 11364; count 4). The information alleged

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

that Person suffered a prior conviction of a serious or violent felony, which constituted a strike within the meaning of the three strikes law (§§ 667, subds. (a)(1), (b)-(i), 1170.12), specifically, a 2009 conviction for attempted robbery (§§ 211, 664). It further alleged that Person had two prior convictions for which he served prison terms (§ 667.5, subd. (b)), including 2007 and 2011 convictions for possession of a controlled substance in violation of Health and Safety Code sections 11377 and 11350, respectively. The information also alleged that Person suffered one prior drug-related conviction within the meaning of Health and Safety Code section 11370.2, subdivision (a), a 2007 conviction for possession for sale of a controlled substance (Health & Saf. Code, § 11351).<sup>2</sup> Person pleaded not guilty and denied the special allegations.

B. *Evidence at Trial*

1. *The People's Case*

On April 26, 2016 Person was arrested as part of an undercover police operation targeting prostitution.<sup>3</sup> Person interacted with Los Angeles Police Department (LAPD) Officers Rosa Haro and Kristin Dimich, who were working undercover posing as prostitutes. Person told them he was a drug dealer.

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<sup>2</sup> The information also alleged that at the time of the offenses charged in counts 1, 2, and 3, he was released from custody on bail or his own recognizance within the meaning of Penal Code section 12022.1. However, at trial the People were not able to proceed on this enhancement, and the court dismissed the enhancement allegation pursuant to section 1385 in the interest of justice.

<sup>3</sup> Because Person was acquitted of both pandering charges, we do not discuss the testimony relating to those charges.

Based on her conversation with Person, Haro signaled to the other members of the undercover team that Person was engaged in criminal activity. Haro and Dimich then left the area.

LAPD Detective Martin Pinner was part of the undercover team that took Person into custody. During their search of Person, the officers recovered a wallet, identification, and a cell phone in Person's right front pants pocket, and drugs and a glass pipe in his left front pants pocket. The drugs appeared to be methamphetamine.

LAPD Officer Travis Coyle, who had worked 10 years in the narcotics field, testified that the recovered drugs were in a sandwich bag, which was one way that methamphetamine is packaged. Coyle reviewed text messages found on Person's phone, and testified that the conversations were indicative of conversations about the sale of methamphetamine. Coyle opined that the methamphetamine Person possessed on April 26, 2016 was in a usable amount, and was possessed for the purpose of sale. Coyle also opined that the glass pipe recovered from Person was the type of pipe that a person would use to ingest or smoke methamphetamine. Testing by an LAPD analyst confirmed that the baggie contained 2.22 grams of methamphetamine.

## *2. The Defense Case*

Person testified on his own behalf. He admitted to a 2004 conviction for attempted robbery, a 2006 felony conviction, and a 2011 conviction for a felony weapons charge. He admitted to speaking with Haro and Dimich, but stated he pulled over to talk with Dimich because she was attractive, not to do business with the undercover officers. Person admitted he sold drugs and on April 26, 2016 had drugs in his possession. However, he testified

he was a drug user, and intended to use the drugs in his possession for his own use, not to sell.

### 3. *The Verdict and Sentencing*

The jury found Person not guilty on the two pandering charges. It convicted him on count 3 for possession for sale of a controlled substance (Health & Saf. Code, § 11378) and count 4 for misdemeanor possession of a smoking device (*id.*, § 11364).

Person waived his right to a jury trial on the prior convictions. The trial court found the prior conviction allegations to be true. Defense counsel moved to dismiss Person's prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), on the basis that the conduct underlying the strike and the conviction occurred over 12 years earlier and the strike was for an attempted, not a completed robbery.

The trial court denied the motion, stating, "Mr. Person has a very long record. That attempt robbery—apparently he was granted probation in 2004, and then that was revoked and he went to state prison when he picked up his next conviction. That was the Van Nuys case in 2007. He got four years' state prison on that case, got four years' state prison concurrent on another case. Then in 2011 he got 16 months' state prison on [a violation of Health and Safety Code section] 11350. He did have that strike stricken for those purposes. That was concurrent to four years' state prison on his possession of a deadly weapon conviction listed in the probation report. And then he picked up a misdemeanor domestic violence charge in 2015 for [180] days' county jail.

“So I do believe that . . . Person is someone who falls within the scope and spirit of the three strikes law. He did get the benefit of having his strike stricken once in the past, but he’s picked up convictions since then, so I don’t think he deserves to have it stricken again.”

The trial court imposed the upper term of three years on count 3 for the possession for sale of a controlled substance, based on Person’s criminal history, doubled as a second strike. It imposed an additional three years for the prior drug-related conviction under Health and Safety Code section 11370.2, subdivision (a), for a total aggregate term of nine years in state prison. The court imposed a concurrent term of 180 days on count 4 for the misdemeanor conviction of possession of a smoking device, with credit for time served. The court imposed and stayed the one-year sentences on the prior prison term enhancements.<sup>4</sup>

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<sup>4</sup> The court stayed the sentences on the prior prison term enhancements in response to a concern raised by defense counsel that the prior convictions for which Person served prior prison terms were potentially subject to reduction to misdemeanors under Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (Pen. Code, § 1170.18). We do not reach the issue whether Proposition 47 would have affected imposition of the prior prison term enhancements. However, we conclude below that the trial court imposed an unauthorized sentence by staying imposition of the enhancements.

## DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying Person's Motion To Strike His 2004 Conviction for Attempted Robbery*

1. *Governing Law and Standard of Review*

A trial court has discretion under section 1385, subdivision (a), to dismiss a strike conviction allegation for purposes of sentencing “in furtherance of justice.” (*Romero*, *supra*, 13 Cal.4th at p. 530; *People v. Williams* (1998) 17 Cal.4th 148, 158.) “[A] court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*); accord, *People v. Leavel* (2012) 203 Cal.App.4th 823, 831; see also *People v. Solis* (2015) 232 Cal.App.4th 1108, 1124 [concluding trial court did not abuse its discretion in refusing to dismiss prior strike convictions for assault with a deadly weapon and first degree burglary].)

A trial court does not abuse its discretion unless its ruling “is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony*, *supra*, 33 Cal.4th at p. 377; accord, *People v. Mullins* (2018) 19 Cal.App.5th 594, 612 [trial court’s ruling denying motion to reduce felony conviction to a misdemeanor “was neither irrational nor arbitrary”]; *People v. Leavel*, *supra*, 203 Cal.App.4th at p. 830 [no abuse of discretion in refusing to dismiss strike conviction].) The party challenging the sentence has the burden to show the sentence was irrational or arbitrary. (*Carmony*, *supra*, at p. 376; *Mullins*, *supra*, at p. 612; *Leavel*, *supra*, at p. 830.)

““In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citations.] . . . [A] “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citation.]” (*Carmony, supra*, 33 Cal.4th at pp. 376-377; accord, *People v. Leonard* (2014) 228 Cal.App.4th 465, 502.)

In determining whether to strike a prior conviction, the trial court “must consider whether, in light of the nature and circumstances of his 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, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, 17 Cal.4th at p. 161; accord, *People v. Solis, supra*, 232 Cal.App.4th at p. 1124; *People v. Leonard, supra*, 228 Cal.App.4th at p. 502.)

Because the three strikes “law creates a strong presumption that any sentence that conforms to [the law’s] sentencing norms is both rational and proper,” there are very limited circumstances under which the appellate court will find an abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 378.) These circumstances include where the trial court is unaware of its discretion to strike a prior conviction, it considers impermissible factors, or, under the circumstances, imposition of a three strikes sentence would be irrational or arbitrary. (*Ibid.*;



*People v. Leavel*, *supra*, 203 Cal.App.4th at p. 837.) Only under “extraordinary” circumstances does the trial court’s failure to strike a prior conviction constitute an abuse of discretion. (*Carmony*, *supra*, at p. 378; accord, *People v. Finney* (2012) 204 Cal.App.4th 1034, 1040 [“Once a career criminal commits the requisite number of strikes, the circumstance must be ‘extraordinary’ before he can be deemed to fall outside the spirit of the three strikes law”].)

Even where a prior strike conviction is remote in time, a trial court does not abuse its discretion in refusing to strike the conviction where the defendant continues to reoffend. (*Carmony*, *supra*, 33 Cal.4th at pp. 378-379 [trial court did not abuse its discretion in refusing to strike three remote prior strike convictions, including 16-year old conviction, where the defendant was a ““revolving door” career criminal” and had not addressed his substance abuse problem]; see also *People v. Pearson* (2008) 165 Cal.App.4th 740, 749 [trial court did not abuse its discretion in refusing to strike three prior robbery convictions suffered up to 24 years before the current offense, noting that “the defendant has led a continuous life of crime”]; *People v. Philpot* (2004) 122 Cal.App.4th 893, 906 [trial court did not abuse its discretion in denying a motion to strike a remote prior strike conviction where the “defendant consistently committed criminal offenses for the past 20 years”]; *People v. Strong* (2001) 87 Cal.App.4th 328, 345 [reversing trial court’s grant of motion to dismiss strike conviction where the defendant had a 22-year criminal record and was “a career criminal with a long and continuous criminal history”].)

2. *The Trial Court Did Not Act in an “Irrational or Arbitrary” Manner in Refusing To Strike Person’s Prior Conviction*

Person contends the trial court abused its discretion because it failed to consider the circumstances surrounding the current offense, Person’s personal traits, and the danger Person presented to society. While Person is correct that the underlying conviction of possession for sale of methamphetamine was not a violent or serious felony, this was only one of the factors the trial court could consider in exercising its discretion whether to strike Person’s prior attempted robbery conviction. (See, e.g., *Carmony, supra*, 33 Cal.4th at pp. 376-377 [affirming trial court’s denial of motion to dismiss prior strike conviction where the underlying conviction was for failure to register as a sex offender]; *People v. Williams, supra*, 17 Cal.4th at pp. 162-163 [affirming denial of motion to dismiss prior strike conviction where the underlying conviction was for felony driving under the influence of a controlled substance]; *People v. Strong, supra*, 87 Cal.App.4th at pp. 331, 346 [reversing grant of motion to dismiss prior strike conviction where the underlying conviction was for the sale of a substance falsely represented to be cocaine].)

The trial court considered Person’s lengthy and continuous criminal record in concluding that he fell “within the scope and spirit of the three strikes law.” As the trial court noted, Person was granted probation for the attempted robbery charge in 2004, but then reoffended in 2007 with resulting convictions for possession of a controlled substance and possession for sale of a controlled substance. He was sentenced to four years in state prison on each offense, to run concurrent. Person was then convicted of possession of a controlled substance in 2011, for

which he was sentenced to 16 months in state prison. The trial court in that case granted his *Romero* motion, and dismissed his 2004 attempted robbery conviction allegation. Person later was convicted of possession of a deadly weapon, and was sentenced to four years in state prison. Finally, in 2015 he was convicted of misdemeanor domestic violence and was sentenced to 180 days in county jail.

Thus, while Person's 2004 conviction for attempted robbery was 12 years old, since that time Person continued to reoffend and serve state prison sentences, and was "an exemplar of the "revolving door" career criminal to whom the Three Strikes law is addressed.' [Citation.]" (*People v. Carmony, supra*, 33 Cal. 4th at p. 379; see also *People v. Pearson, supra*, 165 Cal.App.4th at p. 749 [remoteness of the prior conviction did not support motion to strike where "the defendant has led a continuous life of crime"].)

Moreover, while Person asserts on appeal that the trial court should have considered that he had a drug problem, Person did not make this argument before the trial court and failed to present any evidence of his "background, character, and prospects" that would potentially have supported the trial court granting his motion to strike the prior conviction. As our Supreme Court found in *Carmony*, the defendant there "had also done little to address his substance abuse problems." (*Carmony, supra*, 33 Cal.4th at pp. 377, 378; see also *People v. Leavel, supra*, 203 Cal.App.4th at p. 837 [the defendant failed to cite evidence showing "treatment for his mental health and substance abuse problems that he claims led to the crimes"].) Person failed to present any evidence that he had taken steps to address his drug problem. Moreover, Person's two most recent convictions were

not drug related, for the possession of a deadly weapon and domestic violence.

Accordingly, the trial court's denial of Person's motion to strike his prior attempted robbery conviction was not "irrational or arbitrary," and the trial court did not abuse its discretion in denying Person's motion. (*Carmony, supra*, 33 Cal.4th at p. 373; *People v. Leavel, supra*, 203 Cal.App.4th at p. 829.)

**B. *The Trial Court Imposed an Unauthorized Sentence***

The trial court imposed and stayed two one-year sentence enhancements for Person's conviction of offenses for which he served prior prison terms within the meaning of section 667.5, subdivision (b). However, "[o]nce 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; accord, *People v. Lua* (2017) 10 Cal.App.5th 1004, 1020 [concluding the trial court imposed an unauthorized sentence by imposing and staying the one-year sentence enhancement under § 667.5, subd. (b)].) Although neither party raised this issue, we remand for the trial court to exercise its discretion to impose or strike the prior prison term enhancements.<sup>5</sup>

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<sup>5</sup> We invited letter briefs addressing this sentencing error and the impact of Senate Bill No. 180. (Gov. Code, § 68081.) We received a supplemental letter brief from the People, in which they request that we remand for resentencing to allow the trial court to exercise its discretion to impose or strike the prior prison term enhancements. In their prior supplemental letter brief, the People acknowledged that the three-year sentencing

In addition, the trial court imposed a three-year enhancement under Health and Safety Code section 11370.2, subdivision (a), based on Person’s 2007 conviction for possession for sale of a controlled substance (Health & Saf. Code, § 11378). However, Senate Bill No. 180 amended Health and Safety Code section 11370.2, effective January 1, 2018, to remove Health and Safety Code section 11378 convictions from the list of prior convictions that qualify for a sentence enhancement under Health and Safety Code section 11370.2. (Stats. 2017, ch. 677, § 1.) Instead, only the crime of using a minor in the commission of offenses involving specified controlled substances is now subject to the enhancement. (Health & Saf. Code, § 11370.2.)

Because the judgment in this case is not yet final and the legislative change would lessen the punishment, under *In re Estrada* (1965) 63 Cal.2d 740, the amendment to Health and Safety Code section 11370.2 applies retroactively to the sentence imposed in this case. (*People v. Millan* (2018) 20 Cal.App.5th 450, 455, fn. omitted [“We agree with the parties that *Estrada* applies in this case and that the recent amendment to [Health & Saf. Code, §] 11370.2[, subd.] (c) requires the reversal of [the defendant’s] sentence”]; *People v. Zabala* (2018) 19 Cal.App.5th 335, 344 [“In light of amendments to [Health & Saf. Code, §] 11370.2[, subd.] (c), effective January 1, 2018, we vacate the three-year enhancement for a prior narcotics conviction under . . . [§] 11370.2, former [subd.] (c) . . .”].)<sup>6</sup> On remand, the trial court

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enhancement under Health and Safety Code section 11370.2 should be stricken.

<sup>6</sup> Although the sentences in both *Millan* and *Zabala* were imposed under Health and Safety Code section 11370.2, subdivision (c) (for possession for sale of a controlled substance

is directed to strike the Health and Safety Code section 11370.2, subdivision (a), enhancement.

### **DISPOSITION**

The judgment of conviction is affirmed. The sentence is vacated. We remand for resentencing for the trial court to exercise its discretion to impose or strike the sentence enhancements for Person's prior convictions for which he served prison terms within the meaning of section 667.5, subdivision (b), and to strike the sentence enhancement imposed by the trial court under Health and Safety Code section 11370.12, subdivision (a).

FEUER, J.\*

We concur:

PERLUSS, P. J.

ZELON, J.

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under Health & Saf. Code, § 11378), the same reasoning applies to imposition of an enhancement under Health and Safety Code section 11370.2, subdivision (a), for a conviction of possession for sale of a controlled substance in violation of Health and Safety Code section 11351.

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.