Filed 11/29/18 P. v. Moore CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH CHRISTOPHER MOORE, Defendant and Appellant.	B284290, B287347 (Los Angeles County Super. Ct. No. BA442110)

APPEAL from a judgment of the Superior Court of Los Angeles County. William N. Sterling, Judge. Affirmed.

Cynthia L. Barnes, 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, Senior Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph Christopher Moore (defendant), while pretending to be a police officer with a gun, confronted three different women while they were alone and proceeded to grope them. A jury convicted him of assault with intent to commit rape, false imprisonment by violence and other crimes, and the trial court sentenced him to prison for 115 years to life. In an appeal and related petition for a writ of habeas corpus, defendant argues that (1) the trial court erred (a) in denying his motion to suppress evidence found in his residence and car, (b) in denying his motion for discovery of law enforcement personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), (c) in admitting evidence of his prior conviction for assault with intent to commit rape, (d) in denying his motion to dismiss both of his prior "strike" convictions; (2) the matter should be remanded for the trial court to consider whether to strike the 20 years' worth of firearm enhancements included in his sentence; and (3) his trial counsel was constitutionally ineffective. Because each of these arguments lacks merit, we affirm his convictions and sentence and deny his petition for habeas relief.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Incidents*

1. *First incident*

In late October 2015, defendant walked into a perfume store owned by Yeny G., a woman in her late 30s, just a few minutes before the store was to close. He said he was a police detective and "very quickly" flashed a badge that looked real but was, in fact, a movie prop. He demanded to talk to the store's owner, told Yeny that the money she had at the store was "fake," and insisted that he needed to search the store. Defendant

ordered her to close the store's front door, to retreat to the store's backroom with the cash box, and to disable the store's surveillance system. He then ordered her to stand facing the store's refrigerator and proceeded to pat her down, touching her shoulder, waist and legs. He next ordered her to enter the store's restroom and to strip down to her bra and panties. When she hesitated, he opened his jacket to flash the gun holstered on his hip. She undressed and, at defendant's insistence, turned to the left and then to the right so he could see her profile.

Before anything else could happen, Yeny's cell phone began to ring and someone began pounding on the store's front door. Yeny explained it was her ex-husband, and defendant told her to answer her phone and tell him to leave. She did as instructed, but the ex-husband remained at the front door of the store. Defendant gathered up approximately $1,200 in cash, six bottles of perfume worth $40-$50 each, and the store's surveillance camera that was worth approximately $300, and walked out the store's front door.

2. *Second incident*

Just shy of four weeks later, defendant approached Ani B., a then-24-year-old UCLA student, as she was digging for her keys in her belongings on the unlit porch of her Hollywood apartment complex just after midnight. Defendant told her that he was an undercover cop, "very quickly" flashed a badge, and accused her of having drugs. When Ani walked to a better lit bench to show defendant the contents of her bags, defendant beckoned her back to the unlit doorway, asked her if she lived alone, and asked her what was in an even darker alcove behind a nearby gate. Defendant then ordered her to stand facing a wall, and proceeded to grope her hips, her buttocks, and the sides of

her breasts. When Ani asked defendant what he was doing, he "got very angry," pulled a gun from his pocket, aimed the barrel at her, and told her that he would shoot if she screamed. Ani nevertheless rang the doorbell and her roommate came to the door. Defendant left.

Within hours of the incident and over the next few days, defendant used his cell phone to search for "sexual assault in Los Angeles," "breaking news in Los Angeles," and "UCLA student sexually assaulted." He also searched for and watched videos on "rape videos," "raped at gunpoint," and "raping abducted girl."

3. *Third incident*

On November 28, 2015, defendant used his cell phone to search for "how to get away with rape," "how to rape a woman and get away with it," "how to scientifically get away with rape," "ten ways to get away with rape," "top ten ways to get away with rape."

Two days later, defendant pulled up alongside then 24-year-old Ursula S. while driving a car with heavily tinted windows as she was stopped at a light around midnight. Defendant followed Ursula to the carport of her apartment and approached her car from behind. He pressed a badge to her window and, when she rolled down her window, told her that her tags were invalid. As he put away his badge, Ursula saw a gun holstered on his hip. Defendant asked if she had any drugs in her car and demanded that she open her trunk so he could search it, but then only "briefly glanced" in the opened trunk. Defendant then announced that he needed to search *her* and proceeded to grab her buttocks twice and grope along her inner and outer thighs. Defendant then accidentally bumped up against the

adjacent car and set off the alarm; he admonished her to "get [her] tags fixed" and walked away.

Within a few days after the incident, defendant used his cell phone to access articles regarding a man impersonating a police officer fondling two women in the Hollywood area.

B. *Items recovered from storage locker, defendant's home and defendant's car*

In a storage locker used by defendant's former girlfriend, police recovered defendant's birth certificate, an old FBI style raid jacket, a pair of handcuffs, and a wallet containing several different Los Angeles Police Department and California Department of Justice badges and identity cards.

In December 2015, police searched defendant's residence in Anaheim, California, as well as his car. From defendant's residence, police recovered zip ties, an empty gun case and cleaning kit, a magazine loaded with bullets, replica license plates for an "exempt" government vehicle, and a fake police badge that was stamped "movie prop" on the back. From defendant's car, police recovered a flashlight/taser, duct tape, and a police scanner.

II. Procedural Background

A. *Charges*

In the operative, first Amended Information, the People charged defendant with ten crimes. With respect to the first incident involving Yeny G., the People charged defendant with (1) second degree commercial burglary (Pen. Code, § 459)[1] (count 7); (2) false imprisonment by violence (§ 236) (count 8), (3) unlawful use of a badge, a misdemeanor (§ 538d, subd. (b)(2)) (count 9),

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

and (4) grand theft of personal property (§ 487, subd. (a)) (count 10). With respect to the second incident involving Ani B., the People charged defendant with (1) assault with intent to commit rape (§ 220, subd. (a)(1)) (count 1), (2) criminal threats (§ 422, subd. (a)) (count 2), and (3) unlawful use of a badge, a misdemeanor (§ 538d, subd. (b)(2)) (count 5). With respect to the third incident involving Ursula S., the People charged defendant with (1) false imprisonment by violence (§ 236) (count 3), (2) sexual battery, a misdemeanor (§ 243.4, subd. (e)(1)) (count 4), and (3) unlawful use of a badge, a misdemeanor (§ 538d, subd. (b)(2)) (count 6).

The People alleged that defendant "personally used" a firearm (§ 12022.53, subd. (b)) in the commission of the two felonies involving Ani B.; that defendant "personally used" a firearm (§ 12022.5, subd. (a)) in the commission of the false imprisonment count involving Yeny G.; and was "armed with a firearm" (§ 12022, subd. (a)(1)) in the commission of the burglary and grand theft offense involving Yeny G. The People further alleged that defendant's 1994 conviction for robbery (§ 211) and his 1996 conviction for assault with intent to commit rape (§ 220) constituted "strikes" within the meaning of our Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(j)) as well as prior "serious" felonies (§ 667, subd. (a)).

B. *Verdicts and Admissions*

The jury found defendant guilty of all charged offenses and firearm enhancements. Defendant admitted his prior convictions.

C. *Sentencing*

The trial court sentenced defendant to prison for 115 years to life. The court imposed 45 years to life for the assault with

intent to commit rape against Ani B., comprised of a third strike sentence of 25 years to life, plus 10 years for personal use of a firearm, plus five years for each prior serious felony. The court imposed an identical 45-year sentence for the false imprisonment by violence count against Yeny G. The court imposed 25 years to life for the false imprisonment by violence count against Ursula S. The court ordered these sentences to run consecutively. The court imposed sentences of 25 years to life on the remaining felonies but stayed them pursuant to section 654. The court imposed terms in the county jail for the three misdemeanor counts, but also stayed them pursuant to section 654.

D. *Appeal*

Defendant filed a timely notice of appeal.

E. *Petition for a Writ of Habeas Corpus*

Defendant also filed a petition for a writ of habeas corpus. We subsequently issued an order by which we would consider the petition concurrently with defendant's appeal.

DISCUSSION

Direct Appeal

I. Denial of Motion to Suppress

A. *Pertinent facts*

Because all three incidents occurred in Los Angeles, the Los Angeles Police Department (LAPD) investigated them. When the LAPD identified defendant as the perpetrator and sought to search his residence in Anaheim (which is in Orange County), the lead investigator presented her search warrant application to an Orange County judge. The judge signed the warrant, and LAPD officers executed it. No Orange County-based peace officers were involved.

Prior to trial, defendant—while representing himself—filed a motion to suppress the evidence seized from his home and his car. He argued that the Orange County judge did not have the authority to issue a warrant to peace officers from a different county for a crime that occurred in that different county.

After considering the People's opposition and holding a hearing at which the LAPD's investigating officer testified, the court ruled that (1) the warrant was "improper[ly]" issued, but that (2) suppression was not warranted because the LAPD was "acting in good faith" within the meaning of *United States v. Leon* (1984) 468 U.S. 897 (*Leon*).

B. *Analysis*

Defendant argues that the trial court erred in denying his motion to suppress. We independently review both the application of the law to undisputed facts (*People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 284), and the applicability of *Leon*'s good faith exception (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 767).

We independently agree with the trial court's conclusion that the magistrate erred in issuing a warrant in this case. By statute, a magistrate "must issue a search warrant . . . to a peace officer in his or her county . . ." (§ 1528, subd. (a); *People v. Emanuel* (1978) 87 Cal.App.3d 205, 211-212.) What is more, as long as the crime being investigated occurred in the magistrate's county, the magistrate may issue a search warrant to officers in his or her county for a location anywhere within the State of California. (*People v. Fleming* (1981) 29 Cal.3d 698, 703-704 (*Fleming*); §§ 1524, subd. (b) [noting that "[t]he property" listed in a search warrant "may be taken on the warrant from any place"], 830.1, subd. (a) [noting that a peace officer's "authority" "extends

to any place in the state" if a "public offense has been committed" in the officer's jurisdiction].) But is a magistrate authorized to issue a warrant to peace officers from a *different* county for a crime that occurred in that different county? The answer is no because the magistrate is not issuing the warrant to a "peace officer in his or her county." (§ 1528, subd. (a); accord, *People v. Galvan* (1992) 5 Cal.App.4th 866, 869-870 (*Galvan*) [a magistrate may not issue a search warrant to officers from a different county even if the location to be searched and the underlying crime occurred in the magistrate's county].)

We nevertheless independently agree with the trial court's conclusion that the error in this case falls squarely within *Leon*'s "good faith exception." *Leon* held that the Fourth Amendment's exclusionary rule generally does not require the suppression of evidence if law enforcement "act[s] in objectively reasonable reliance on a search warrant that is issued by a detached and neutral magistrate but is later found to be invalid . . ." (*People v. Willis* (2002) 28 Cal.4th 22, 30.) "[R]eliance on [such a] warrant . . . is reasonable per se" except in four circumstances enumerated in *Leon* itself: (1) when the affiant knowingly or recklessly included or omitted material information in the affidavit supporting the search warrant; (2) when the magistrate "wholly abandoned his judicial role"; (3) when the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable' [citation]"; or (4) when the warrant is "so facially deficient" for "failing to particularize the place to be searched or the things to be seized [] that the executing officers cannot reasonably presume it to be valid." (*People v. Dantzler* (1988) 206 Cal.App.3d 289, 294; *Leon*, *supra*, 468 U.S. at p. 923; cf. *People v. Gotfried* (2003) 107 Cal.App.4th

254, 264-265 [warrant "so lacking" in probable cause]; *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1508 [same].) Here, the officers relied upon a warrant that does not fit within any of *Leon*'s exceptions. As one would therefore expect, the California courts—including our Supreme Court—have repeatedly noted that the failure to comply with the inter-county territorial rules, without more, constitutes a "technical" error that falls within *Leon*'s "good faith exception." (*People v. Ruiz* (1990) 217 Cal.App.3d 574, 586-587; *Galvan*, *supra*, 5 Cal.App.4th at pp. 870, 872; *Fleming*, *supra*, 29 Cal.3d at pp. 703-704.)

Defendant cites several cases for the proposition that *Leon*'s good faith exception should not apply, but each of those cases involved a *warrantless* search and thus did not involve the application of *Leon*'s warrant-friendly rule. (*People v. Ivey* (1991) 228 Cal.App.3d 1423, 1426; *People v. Ingham* (1992) 5 Cal.App.4th 326, 333-334; *Miranda v. Superior Court* (1993) 13 Cal.App.4th 1628, 1629-1630.)

II. Denial of *Pitchess* Motion

1. *Pertinent facts*

Prior to trial, defendant—again, while representing himself—filed a motion (1) seeking the personnel records of 19 named officers and "et al." pertaining to any "form of misconduct," including "writing false reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports, or any other evidence of misconduct amounting to moral turpitude," and (2) demanding "an investigation . . . on which police agency fired the shot into defendant's home" through his front door. (In actuality, the LAPD did not fire any "shots" into defendant's home; they fired two bean bags at defendant's front door to get his attention. At the hearing on defendant's

motion, defendant elaborated that the police engaged in misconduct by (1) unlawfully detaining him, (2) unlawfully searching his residence outside of their jurisdiction, and (3) shooting at his front door. The trial court denied defendant's motion for disclosure of personnel records finding that there was no "police misconduct in this particular case."

B. *Analysis*

Defendant argues that the trial court erred in denying his *Pitchess* motion for the disclosure of personnel records. (He does not appeal the refusal to order an investigation.) We review the denial of *Pitchess* motion for an abuse of discretion. (*People v. Breaux* (1991) 1 Cal.4th 281, 311-312.)

The "personnel records" of "peace" and "custodial officers," as well as "complaints by members of the public," are conditionally privileged under California law. (§§ 832.5, 832.7, 832.8.) This conditional privilege is overcome only if the party seeking them follows the procedures first articulated in *Pitchess*, *supra*, 11 Cal.3d 531, and later codified in Evidence Code section 1043 through 1047. Under these procedures, a court must find "good cause for the discovery or disclosure"—that is, a showing that the agency from which the records and complaints are sought possesses them and, more relevant here, a showing that the records and complaints are "material[] . . . to the subject matter involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3).) To establish materiality, the requesting party must (1) set forth a "specific" and "plausible" "factual scenario of officer misconduct," and (2) must establish both how the information sought is "similar" to the misconduct alleged in the pending action and how the information would support a defense or negate the People's case. (*Warrick v. Superior Court* (2005) 35

Cal.4th 1011, 1021, 1025-1027; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1021.)

The trial court did not abuse its discretion in concluding that the personnel records defendant sought were not "material." Before the trial court, defendant articulated three possible ways in which the records might support a defense or negate the People's case. First, he stated that the personnel records on the 19 named officers might support his position that the LAPD unlawfully detained him, but arrests in public are valid as long as they are supported by probable cause (*United States v. Watson* (1976) 423 U.S. 411, 418) and defendant never disputed the probable cause underlying his arrest. Even if we assume that defendant was implicitly suggesting that all 19 officers involved in the investigation and his arrest conspired to "fabricate virtually all the events preceding and following [his] arrest," that suggestion is not a "plausible" "factual scenario" in the absence of some suggestion as to *why* they would single him out. (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1317-1319.) Second, defendant stated that the personnel records would support his position that his search warrant was issued by the wrong magistrate. This issue, as defendant conceded before the trial court, turned on undisputed facts to which the personnel records would add nothing. Lastly, defendant stated that the personnel records would support his claim that the officers used excessive force by firing at his front door. But none of the charges against defendant has anything to do with that use of force; that issue is accordingly irrelevant to any charge or defense.

On appeal, defendant simply states that he "met the requirements" of Evidence Code section 1043. This statement is conclusory, and by itself does not demonstrate why the trial court

abused its discretion. Defendant goes on to articulate two further issues to which he asserts the personnel records are material: (1) to show the character of the arresting officers for violence, which is admissible as a character trait of a victim under Evidence Code section 1103; and (2) to undermine the officers' credibility. The first issue is not material because the officers are not victims of any crime charged in this case. And the second issue is not material for the reasons explained above—chiefly, that the issues to which the officers' credibility might be relevant rest on facts that are otherwise undisputed or irrelevant to the charges in this case.

III. Admission of 1996 Assault With Intent To Commit Rape Charge

A. *Pertinent facts*

In 1996, defendant was convicted of assault with intent to commit rape (§ 220).

The People sought to admit this conviction to show the defendant's propensity to commit the charged sex offenses pursuant to Evidence Code section 1108. Defendant objected. The trial court overruled the objection. In so ruling, the court found that the admissibility of the 1996 conviction under Evidence Code section 1108 turned on whether it was appropriate to admit the conviction under Evidence Code section 352. On one side of the balance, the court found the "probative value" of the 1996 conviction of assault to commit rape to be "sufficient" because it was relevant to prove whether he assaulted Ani B. with the intent to rape (or, instead, with some other intent). On the other side, the court found that this probative value was not "substantially outweighed" by "the possibility of prejudice" or by an "undue consumption of time"; the 1996 conviction was not "stale" because defendant had been in "custody . . . a significant

amount of time since then" and proving the conviction would not take up much time because it could be "introduce[d] . . . by way of court records."

The People subsequently introduced the conviction through court records, and the trial court instructed the jury—at that time and again at the conclusion of trial—on the proper use of the conviction as propensity evidence.

B. *Analysis*

Defendant argues that the trial court erred in admitting his 1996 conviction under Evidence Code section 1108. We review this evidentiary ruling for an abuse of discretion. (*People v. Powell* (2018) 5 Cal.5th 921, 961.)

Although evidence that a criminal defendant has the propensity or disposition to engage in certain conduct is "generally inadmissible to prove" that he did so "on a specified occasion" (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159; Evid. Code, § 1101, subd. (a)), Evidence Code section 1108 is an exception to this general rule because it allows "evidence of [a] defendant's commission of another sexual offense or offenses" to prove his disposition to commit a charged "sexual offense" (Evid. Code, § 1108, subd. (a)). Before admitting evidence of another sexual offense, however, the trial court must decide under Evidence Code section 352 whether the probative value of the other sexual offense is "substantially outweighed" by a "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" or may "necessitate undue consumption of time." (Evid. Code, §§ 352 & 1108, subd. (a)).

In this case, the trial court did not abuse its discretion in admitting defendant's 1996 assault with intent to commit rape conviction under Evidence Code section 1108 as evidence of

defendant's propensity to commit the charged offense of intent to commit rape against Ani B. The prior conviction is a "sexual offense" within the meaning of Evidence Code section 1108. (Evid. Code, § 1108, subd. (d)(1)(B).) The trial court also did not abuse its discretion in balancing the pertinent factors under Evidence Code section 352. The prior conviction was substantially probative of a central issue in this case—namely, whether defendant intended to rape Ani B. or instead, as he testified, he just intended to rob her. (See *People v. Thompson* (1980) 27 Cal.3d 303, 318 [evidence of uncharged acts must have "substantial" probative value].) This probative value was not outweighed by the countervailing considerations. Although defendant incurred the conviction in 1996, he was in prison until 2005, on parole until 2008, back in prison until 2010 for failing to register as a sex offender, and on parole again until 2012. Consequently, the age of the 1996 conviction does not render it less egregious by virtue of its remoteness because he "had been incarcerated during the vast majority of" the intervening 19 years. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 317.) Nor did the introduction of the "prison packet" containing the pertinent conviction documents take up much time, let alone "undue . . . time."

Defendant makes three arguments in response. First, he paradoxically asserts that his prior conviction was both "cumulative" and so harmful as to be "unduly prejudicial." Although there was other evidence of defendant's intent to rape (such as his web searches on how to get away with rape as well as his reported groping of Ani B. and the other victims), his prior conviction of assault with intent to commit rape constituted independent further evidence of that intent and of defendant's

predisposition. It was certainty prejudicial (because its probative value undermined his defense) but was not unduly prejudicial (because it did not elicit an emotional reaction from the jury (*People v. Thornton* (2007) 41 Cal.4th 391, 427)). Second, defendant contends that the trial court gave "insufficient weigh[t]" to the conviction's prejudicial effect versus its probative value. But this contention effectively asks us to reweigh the pertinent factors under Evidence Code section 352, a task we may not undertake when reviewing for an abuse of discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*).) Lastly, defendant asserts that admission of his prior conviction violated due process. Where, as here, admission of evidence complies with a rule of evidence affirmed as constitutional by our Supreme Court, it also complies with due process. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

IV. Denial of Motion to Dismiss Prior "Strike" Convictions

A. *Pertinent facts*

Just prior to trial and after defendant had relinquished his right to self-representation and requested the assistance of counsel, defendant filed a motion to dismiss the allegations that his 1994 robbery conviction and 1996 assault with intent to rape conviction constitutes "strikes" within the meaning of our Three Strikes Law.

After defendant was convicted by the jury and admitted the two prior "strike" convictions, the trial court denied defendant's motion to strike at the beginning of defendant's sentencing hearing. The court observed that the current charges involved a "sophisticated scheme" by which defendant obtained police paraphernalia, "stalked his victims . . . into isolated areas where they were particularly vulnerable," and then displayed or

brandished "a gun and threatened" them in order to grope or rob them. Based on this conduct, the court found that defendant was "a predator" and a "danger to society" because he repeatedly "put[] people in dangerous situations." The court further observed that defendant's prior convictions were for similar, predatory behavior—namely, assault with intent to commit rape and a robbery that occurred in the midst of a carjacking. All in all, the court found, defendant was "exactly the kind of person that the Three Strikes Law was enacted for, to protect society from someone who preys on other people."

B. *Analysis*

Defendant argues that the trial court erred in denying his motion to dismiss. We review such denials for an abuse of discretion. (*Carmony*, *supra*, 33 Cal.4th at pp. 373-374.)

A trial court has the discretion to grant a motion to dismiss a strike allegation. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 161-162.) In deciding whether to exercise that discretion, the court is to "'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, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*Carmony*, *supra*, 33 Cal.4th at p. 377.)

The trial court did not abuse its discretion in denying defendant's motion to strike. The court thoroughly explained why, in its view, defendant was the proverbial "poster child" for why the Three Strikes Law exists.

Defendant raises three arguments in response. First, he argues that the court erred by focusing solely on his prior convictions, a factor that cannot by itself defeat a motion to dismiss prior convictions because any such movant by definition has such priors. (Accord, *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250-1251.) This argument ignores that the trial court focused chiefly on the nature of the *current* crimes, their similarity to his prior convictions, and how that similarity bespoke of a person who was a lifelong predator of the type the Three Strikes Law was meant to reach; thus, the court relied on far more than defendant's prior convictions. Second, defendant contends his prior convictions are stale. This argument is unconvincing for the reasons explained above. Third, defendant asserts that the factors relevant to whether to dismiss a prior conviction balance in his favor, including his age (41 at the time of sentencing). Defendant is effectively asking us to reweigh these factors and to come to a different conclusion than the trial court. This we cannot do. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310 ["It is not enough to show that reasonable people might disagree about whether to strike one or more of [a defendant's] prior convictions."].)

V. Remand To Consider Whether To Dismiss Firearm Enhancements

In his final argument on appeal, defendant contends that he is entitled to a remand for the trial court to consider whether to strike the 10-year firearm enhancements imposed pursuant to sections 12022.53 and 12022.5 because our Legislature in January 2018 for the first time granted trial courts the discretion to dismiss those enhancements. (§§ 12022.53. subd. (h), 12022.5, subd. (c).) Defendant is correct that the statutory amendments conferring this discretion apply retroactively to him because his

convictions are not yet final. (E.g., *People v. Chavez* (2018) 22 Cal.App.5th 663, 712.) However, it is well settled that a remand for a trial court to exercise that discretion is not necessary where "the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*Id.* at p. 713, quoting *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. McVey* (2018) 24 Cal.App.5th 405, 418-419.) The trial court gave just such a clear indication in this case when it stated: "[M]y inclination is to sentence [defendant] . . . to the maximum . . . he did 15 searches on how to get away with rape . . . this makes him just supremely dangerous besides being evil. I can't see any reason to give him anything less than the most I can give him."

Petition for Writ of Habeas Corpus

In his separately filed petition for a writ of habeas corpus, defendant argues that his trial counsel was constitutionally ineffective because he (1) did not renew defendant's motion to suppress during the trial, (2) did not give an opening statement during trial, and (3) did not "perform basic duties outlined by court that competent attorneys must perform," such as (a) "fail[ing] to adequately investigate possible diminished capacity or insanity defense[s]," (b) "fail[ing] to subpoena key witness that could have testified as to relevant evidence that was exculpatory and could have affected the jury's opinion as to particular evidence," and (c) "fail[ing] to file a motion for new trial."

"To establish that counsel was constitutionally ineffective, a criminal defendant must show that (1) counsel's performance was 'deficient' because it '"'"'fell below an objective standard of reasonableness . . . under prevailing professional norms.'"'"'; and

(2) but for that deficient performance, there is a 'reasonable probability . . . the outcome of the proceeding would have been different' (*People v. Mickel* (2016) 2 Cal.5th 181, 198, citing *Strickland v. Washington* (1984) 466 U.S. 688, 687-692.)" (*People v. Washington* (2017) 15 Cal.App.5th 19, 25.)

Defendant has not established that his trial counsel was constitutionally ineffective. Trial counsel was not ineffective for failing to renew defendant's motion to suppress because renewals are statutorily barred unless there is some previously unavailable ground on which to do so (§ 1538.5, subd. (h)), and defendant has neither alleged nor established as much. Absent that showing, any renewed motion would have been meritless, and an attorney's failure to make a meritless motion does not constitute ineffectiveness. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.) Trial counsel was also not ineffective in deciding to reserve his opening statement until the close of the People's case rather than giving it at the beginning of the trial because "[t]he decision whether to reserve opening statement is a matter of trial tactics and strategy that a reviewing court generally cannot second guess." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1237, abrogated on other grounds in *People v. Griffin*, (2004) 33 Cal.4th 536, 555, fn. 5) (defendant is incorrect to the extent he suggests defense counsel gave no opening statement at all.) And defendant's final claims of ineffectiveness are purely conclusory and lack any factual basis. As our Supreme Court has said time and again, "conclusory allegations without specific factual allegations do not warrant [habeas] relief." (*In re Reno* (2012) 55 Cal.4th 428, 493.)

DISPOSITION

The judgment is affirmed, and the petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ