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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. DONALD GENE CAMPBELL, Defendant and Appellant.	B231575 (Los Angeles County Super. Ct. No. PA063050)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harvey Giss, Judge. Affirmed.

Johanna R. Pirko, 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, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Donald Gene Campbell appeals from the judgment entered upon his convictions by jury of transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a), count 1) and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a), count 2) as a lesser included offense of possession for sale of a controlled substance (Health & Saf. Code, § 11378). Appellant admitted a prior felony strike within the meaning of Penal Code sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d).[1] After denial of appellant's *Romero*[2] motion, the trial court sentenced him to an aggregate state prison term of six years, calculated as the middle term of three years on count 1, doubled as a second strike. Appellant contends that (1) the trial court abused its discretion in denying him probation under Proposition 36,[3] (2) the trial court abused its discretion by denying appellant's *Romero* motion, and (3) the abstract of judgment should be modified to reflect the correct offense of which appellant was convicted in count 2.

We affirm.

FACTUAL BACKGROUND

Near midnight on October 8, 2008, Los Angeles Police Officer Armando Magana stopped appellant for having an expired license on the Nissan truck he was driving. The officer asked appellant for his driver's license, registration and proof of insurance. Appellant had a California identification card but no driver's license or insurance.

At some point, Officer Magana conducted an inventory search of the truck. Inside, he found two large baggies of a crystal-like substance, resembling methamphetamine. In searching appellant, the officer confiscated $777 cash from

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

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

3 Proposition 36 was passed by the electorate as the Substance Abuse and Crime Prevention Act of 2000. The Proposition is codified in Penal Code sections 1210, 1210.1, 3063.1, and Health and Safety Code section 11999.4 et seq. It will be referred to herein as "Prop. 36."

appellant's wallet, some of which was in small denominations. He did not find drug paraphernalia or other evidence that appellant used or sold methamphetamine.

After uncovering the narcotics, Officer Magana arrested appellant and drove him to the police station. During the drive, appellant spontaneously said that he was out of work, being evicted from his residence, needed money and was just picking up the methamphetamine for a friend. At the station, he wrote a statement, stating that he did not sell drugs, was just picking them up for a friend, that this was the third or fourth time that he purchased drugs from this particular dealer and that he always purchased one to two ounces from him.

Forensic analysis determined that the two baggies confiscated from appellant's truck each contained approximately one ounce of methamphetamine. Officer Chris McKinney, a police drug expert, opined that the methamphetamine was possessed for sale based upon the large quantity of the drug, appellant's handwritten statement, this being the third or fourth purchase of the same quantity of methamphetamine from the same dealer, appellant having no drug paraphernalia that could be used for personal use, and the significant amount of cash found on him. Two ounces of methamphetamine could supply about 500 doses, though a heavier user might only get 100 doses from that quantity, which could last only a month if used three times a day. The expert recalled only one case out of the 400 or 500 cases that he investigated where a person possessed an ounce of methamphetamine for personal use.

Appellant testified in his own defense. He had been using methamphetamine since 1984 and was a 50-year-old methamphetamine addict. He was employed full time as a boat salesman since 1991 and earned $64,000 in 2008. At work, he would hide in the bathroom of one of the boats and smoke methamphetamine three or four times a day.

Appellant's tolerance to the drug and the quantity he used increased over time. The quantity he used depended on the strength of the drug, which depended on the dealer from whom he obtained it and varied even from the same dealer from batch to batch. Appellant claimed to have bought the methamphetamine for personal use from "Simon"

for $900. When he was arrested, he had not yet used any of this batch and therefore did not know its strength, except as reputed.

Appellant had purchased methamphetamine from Simon three or four previous times. Simon was his last choice from whom he wanted to purchase methamphetamine because Simon's methamphetamine was of a lower strength than that purchased from other dealers. On each previous occasion, appellant purchased two ounces from Simon. Appellant bought the large quantity because Simon would not sell him less than two ounces and because the drug was difficult to obtain at that time, and appellant did not want to run out.

Appellant claimed that the $777 confiscated from him when he was arrested was from his paycheck, which he had just cashed. He said that right next to the cash in his wallet was his paycheck stub. In his written statement, because he wanted to make himself appear innocent and Simon appear to be the bad guy, appellant did not say he purchased the methamphetamine for personal use but rather that he purchased it for someone else. He did not realize that by saying he purchased the methamphetamine for someone else, he was setting himself up for the transportation charge. Appellant claimed to be telling the truth at trial because after his arrest he became a Christian.

Defense expert, Dr. John Treuting, a toxicologist, testified that methamphetamine is a very potent central nervous system stimulant and one of the most addictive drugs. As the user builds up a tolerance to the drug, he or she must use more and more to attain the same high. Dr. Treuting opined that it was possible for someone to possess two ounces of the drug for personal use. That quantity might be purchased for personal use to avoid the possibility that it might not be available when needed, because it cost less if purchased in greater quantities, higher quality can sometimes be obtained if purchased in larger amounts, and higher quantity reduces the risk of being caught by the police because fewer purchases are necessary. Dr. Treuting did not test, and therefore did not know, the potency of the methamphetamine recovered from appellant by the police.

DISCUSSION

I. Denial of Prop. 36 probation

A. Background

The prosecution sought to prove that the large quantity of methamphetamine purchased by appellant was a major factor in proving that its purchase and transport were not for personal use. To show that the large quantity was for personal use, appellant sought to introduce testimony of his toxicology expert that drug potency is relevant to show that more methamphetamine is required of a less potent batch of the drug in order to achieve the same high.

During cross-examination of the People's expert criminalist, defense counsel asked whether any of the tests performed on the confiscated methamphetamine determined its concentration. After the witness testified that they did not, the prosecutor objected that it was irrelevant, which objection was sustained. The trial court subsequently struck the answer.

A sidebar discussion ensued. The trial court noted that defense counsel wanted to present evidence regarding the potency of the methamphetamine, but the trial court did not "see how potency is going to be relevant unless it's based on speculation. You could draw a lot of conclusions for strong or weak potency of the meth. So I am going to preclude [defense counsel] from going into that issue." Defense counsel argued that his expert was "prepared to testify that in part of the determination as to whether or not something is for personal use or for sale, potency is relevant because an amount of drug that is less potent one has to use more of it to get the same effect."

During a sidebar discussion later in the trial, the trial court modified its preclusion of potency evidence, stating: " . . . I know you're getting ready to call an expert on the subject matter of . . . the purity or the potency of, of the drug and the case law that says it's not relevant. I have no objection if you want to put your client on the stand and have him testify why he had two bags. And he's liable to say something regarding that aspect, then its admissible. But until then, it's not relevant and material because we have to know that it even relates to his state of mind as to what he was doing and why. So just to

have somebody testify that the purity and the potency might be significant is speculative and conjectural. We have to first hear from the defendant that that's why he had two bags and there was something to do with the potency. . . . The moment you put your client on and he states he relies on that, then we can go into that subject matter."

During appellant's testimony, he explained that the amount of methamphetamine that he had to use to achieve the same high depended on the strength of the batch he was using. The potency of methamphetamine differed among drug dealers. How long an ounce lasted depended on its quality. He had purchased methamphetamine from Simon three or four previous times, and Simon's methamphetamine was "subpar."

Dr. Treuting corroborated appellant's testimony, testifying that it was possible to possess two ounces of methamphetamine for personal use and that the strength of methamphetamine could be a factor in a user's determination of how much to purchase for personal use. A heavy user might possess a larger amount because he knew he had purchased a weak batch.

In closing argument, defense counsel argued that appellant testified that the methamphetamine appellant had previously purchased from Simon was not as strong as methamphetamine he had purchased from other drug dealers and argued that appellant knew to buy a larger quantity from Simon to achieve the same high.

The jury found appellant guilty of transportation of methamphetamine and possession of methamphetamine as a lesser included offense of possession of methamphetamine for sale. At the sentencing hearing, defense counsel argued that the jury's verdict reflected that it found that appellant transported the drugs for personal use, requiring that the trial court impose a probationary sentence under section 1210 et. seq.

The trial court disagreed, finding that appellant's handwritten admission that he was the middleman in the methamphetamine transaction and the quantity that he purchased was substantial evidence that appellant possessed the drugs for sale. It therefore denied probation and imposed a prison sentence.

B. Contention

Appellant contends that the trial court abused its discretion in denying him probation under section 1210 et. seq. (Prop. 36). He argues that the trial court erroneously excluded evidence regarding the potency of the methamphetamine he transported, which evidence was relevant in assessing whether he possessed it for personal use. By excluding that evidence, the trial court deprived him of his federal constitutional right to present a complete defense and provided the trial court with an incomplete record on which to make its finding that he was ineligible for Prop. 36. This contention lacks merit.[4]

C. Prop. 36

After enactment of Prop. 36, a defendant who is convicted of a "'nonviolent drug possession offense'" must receive probation and diversion into a drug treatment program, and may not be sentenced to incarceration as an additional term of probation. (*People v. Canty* (2004) 32 Cal.4th 1266, 1272–1273; *People v. Davis* (2003) 104 Cal.App.4th 1443, 1446; § 1210.1, subd. (a).) A "'nonviolent drug possession offense'" is the "unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance" that is identified in that section. (§ 1210.)

Under Prop. 36, persons convicted of nonviolent drug possession offenses are entitled to probation under section 1210.1, subdivision (a), *unless* they meet one of the express statutory disqualifications specified in subdivision (b). (See *People v. Esparza* (2003) 107 Cal.App.4th 691, 699 ["When a defendant is eligible for Proposition 36 treatment, it is mandatory unless he is disqualified by other statutory factors"].) One exclusion from Prop. 36 probation under subdivision (b) is when the defendant "in addition to one or more nonviolent drug possession offenses, has been convicted in the

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4 Appellant does not challenge the propriety of the trial court, rather than the jury, making the finding that the methamphetamine was transported for sale, rather than for personal use.

same proceeding of a misdemeanor not related to the use of drugs or any felony." (§ 1210.1, subd. (b)(2).)

Here, appellant was convicted of possession of methamphetamine, a nonviolent drug possession offense under the statute, which mandates probation unless one of the statutory exceptions provided in section 1210.1, subdivision (b) is applicable. Because subdivision (b)(2) of section 1201.1 provides that probation is not required if the defendant is convicted in the same action of a felony other than nonviolent drug possession offenses, the critical question is whether the charge against appellant for transportation of a controlled substance is a nonviolent drug possession offense i.e., for personal use, or a felony that is not, thereby invoking the subdivision (b)(2) exception.

As a result, the key issue before us is whether the trial court abused its discretion in concluding that appellant's transportation conviction was not for personal use. Appellant concedes that "the evidence presented at trial might have otherwise supported the court's conclusion that appellant was ineligible for probation." He argues, however, that the trial court abused its discretion "under the circumstances here," because it failed to admit evidence of the potency of the methamphetamine, which he claims is germane to the quantity of the drug required. The trial court therefore did not have the necessary evidence before it to properly exercise its discretion.

D. Admissibility of evidence of potency

1. Standard of review

We review the trial court's rulings on the admission and exclusion of testimony for abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230; *People v. Kipp* (2001) 26 Cal.4th 1100, 1123 [relevance objection]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 352 [Evid. Code, § 352 objection].) The trial court's discretion is as "'broad as necessary.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.) "'[I]n most instances the appellate courts will uphold its exercise whether the [evidence] is admitted or excluded.'" (*Ibid.*) "'A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice.'" (*Id.* at p. 1533.) "'[W]hen the question on appeal is whether the

trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion.'" (*Ibid*.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) We find no abuse here.

2. Relevant evidence

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Evidence Code section 352 provides an exception to the rule that all relevant evidence is admissible, stating: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

We conclude that the trial court was correct in determining that there was insufficient evidence of the relationship between the potency of the methamphetamine appellant purchased and the quantity he purchased to make evidence of potency relevant. In any event, any error in the trial court's ruling was harmless, as substantial evidence of potency was admitted.

3. Lack of foundation to make potency evidence relevant

Evidence Code section 403, subdivision (a)(1) provides that the proponent of evidence has the burden of producing evidence of a preliminary fact when the "relevance of the proffered evidence depends on the existence of the preliminary fact." On the issue of whether the inordinately large quantity of methamphetamine was for personal use, evidence of its potency, by itself, had little "tendency in reason to prove or disprove" that fact. (Evid. Code, § 210.) As the trial court observed, "you could draw a lot of conclusions for strong or weak potency of the meth." Weak methamphetamine, that is, methamphetamine mixed with a greater amount of another substance might yield more product to sell and therefore bring in greater profit. Alternatively, weak

methamphetamine might cost less to purchase, thereby potentially increasing profit if it were resold. Hence, weak potency might establish an intent to sell, as much as it might bear on personal use.

In order to establish that the potency of the methamphetamine was relevant to appellant's intention to use it himself, it must first be established that appellant was aware of its potency and that he made the decision to purchase the quantity he purchased because of that potency. Evidence of neither fact was established by appellant here. There was no foundation laid as to the precise strength of the methamphetamine; that is how weak it was. When asked why he purchased such a large quantity of methamphetamine if it was only for personal use, appellant said only that Simon required that he purchase two ounces and that because of the difficulty in obtaining methamphetamine at that time, he did not want to run out. He never testified that he made the large purchase because the methamphetamine was not very potent.

While appellant did testify that the methamphetamine he obtained from Simon in the past was "subpar," there was no quantitative evidence of what that meant. He also testified, however, that he had not tried any of that methamphetamine before his arrest and that the strength of methamphetamine varied from batch to batch, *even when purchased from the same drug dealer*. Thus, the fact that his prior purchases from Simon were of "subpar" methamphetamine did not prove that the two ounces with which he is charged with purchasing here was also subpar.

We therefore conclude that the trial court's ruling to exclude evidence of the potency of the methamphetamine without the proof of the foundational facts was proper and that no adequate foundation was laid.

Appellant cites *People v. Tolhurst* (1982) 139 Cal.App.3d 1, 8, *People v. O'Hearn* (1983) 142 Cal.App.3d 566, 570 and *People v. Arguello* (1966) 244 Cal.App.2d 413, 420 for the proposition that the quantity and quality of contraband seized "is always relevant to the issue of whether narcotics are held for sale or personal use." (*People v. Tolhurst, supra,* at p. 8.) While those cases did include statements to that effect, none of those cases involved the issue of the admissibility of evidence of the potency of drugs on

whether they were possessed for sale or personal use. *Tolhurst* and *O'Hearn* involved the question of the destruction of narcotics before the defense had the opportunity to test them, and *Arguello* involved whether an expert's testimony on whether narcotics were possessed for sale was proper expert testimony.

4. Harmless error

Even if the trial court erred in ruling that evidence of potency was to be excluded, it is not reasonably likely that had it been admitted a different result would have ensued. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317 [adopting *Watson*[5] harmless error standard where trial court ruling did not preclude a defense but merely rejected certain evidence concerning the defense].)

First, as the People argue, despite the trial court's statement and rulings that the potency of the methamphetamine appellant possessed was irrelevant, at least some evidence on that subject was admitted. Appellant testified that the quantity of methamphetamine he used depended on the strength of the drug, which in turn depended on the drug dealer from whom he purchased it. He had previously purchased the drug from Simon, and Simon's methamphetamine was "subpar," that is of lower strength. Through this testimony, appellant was able to, and did, argue to the jury that he obtained the large quantity of the drug because its quality was poor, requiring a greater quantity to achieve the same effect when ingested. Dr. Treuting, the defense toxicologist, testified that one could possess two ounces of methamphetamine for personal use and that a person might possess a larger quantity because the person knew that the strength of what he had purchased was weak. Thus, despite its rulings, the trial court had before it evidence that potency of methamphetamine can affect the amount that a person purchases.

Second, evidence that appellant purchased the methamphetamine for other than personal use was strong. He was caught with and admitted having two ounces of methamphetamine in his car, an inordinately large amount to purchase just for personal

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5 *People v. Watson* (1956) 46 Cal.2d 818.

use. The People's drug expert testified that out of the hundreds of cases that he investigated where the person possessed an ounce of methamphetamine, only in one case was it possessed for personal use. Appellant provided the police with a written statement in which he said that he purchased the drugs for someone else as the middleman in the drug transaction. At trial, he recanted that statement, saying that he purchased the methamphetamine for personal use. But he also testified that he was then aware that his written admission of acting as a middleman was tantamount to admitting that he transported the methamphetamine for other than personal use. This recognition by appellant provided him with an incentive to lie at trial. Appellant told police that he was in poor financial condition and needed money, providing a motive for him to sell the methamphetamine rather than use it. No drug paraphernalia was found, and appellant had a large amount of cash on him.

5. Right to present a defense

We further reject defendant's claim that he was deprived of his constitutional right to present a defense by virtue of the excluded evidence. "'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level . . . .'" (*People v. Boyette* (2002) 29 Cal.4th 381, 427–428; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103.)

As discussed in part ID4, *ante*, appellant was not precluded from presenting all evidence on the subject of the potency of the methamphetamine and its significance on whether it was possessed for use or sale. Hence, he was not denied his right to present a defense.

II. *Romero* motion

A. Background

Appellant filed a *Romero* motion seeking to have the trial court dismiss his 1984 first degree burglary felony-strike conviction on the grounds that (1) it was temporally remote, (2) he had not suffered any violent or serious felony convictions since incurring

the strike, (3) his criminal past was the result of his life-long drug addiction, (4) his current offense was nonviolent, and (5) his age (50 years old) and strong family ties were mitigating factors.

The prosecutor argued that although appellant's strike prior was old, he "has an extensive criminal record which dated back from 1978 all the way to the present time. I don't think there is any break in time which shows that he has been a law abiding citizen in the community. It's clear that he is a career criminal . . . and therefore the court should not strike the strike prior."

Appellant's criminal record included the following convictions: (1) November 1978 conviction of burglary (§ 459) for which he received 36 months formal probation, (2) January 1980 conviction of possession of controlled substance (Health & Saf. Code, § 11350) for which he received a two-year diversion, (3) March 1984 conviction of first degree burglary for which he received 36 months probation and 90 days jail, (4) September 1990 conviction of inflicting corporal injury on a spouse (§ 273.5) for which he received probation, which was later violated and he received two years state prison, (5) June 2000 convictions of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (b)) and possession of controlled substance paraphernalia (Health & Saf. Code, § 11364) for which he received 36 months probation and 150 days in jail, (6) July 2000 conviction of driving with suspended license (Veh. Code, § 23152, subd. (a)) for which he received 36 months probation, (7) November 2001 conviction of driving on a suspended license for which he received 36 months probation and 30 days in jail, (8) September 2003 conviction of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a) for which he received 36 months probation and 365 days in jail, and (9) March 2006 conviction of driving without a license for which he received 12 months probation.

The trial court denied the motion, finding appellant within the spirit of the three strikes law. He had a long and continuous criminal history, which did not need to consist entirely or extensively of violent or serious felonies. It found his drug addiction and failure to do anything about it over his lifetime as an aggravating factor.

B. Contention

Appellant contends that the trial court abused its discretion in refusing to dismiss his prior felony strike. He argues that his background, character, prospects and the circumstances of his present and prior convictions placed him outside the spirit of the three strikes law. This contention is without merit.

C. Standard of review

We review the trial court's *Romero* ruling for abuse of discretion. (*People v Williams* (1998) 17 Cal.4th 148, 158; *Romero, supra,* 13 Cal.4th at p. 504.) Where the record indicates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the three strikes law, we will affirm the trial court's ruling, even if we might have ruled differently in the first instance. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers).*) "'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."'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977–978.) The trial court "is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*Myers, supra,* at p. 310.)

D. Dismissal of felony strike

Section 1385 provides in part: "The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) *Romero* held that trial courts have authority to strike a prior conviction pursuant to section 1385. In deciding whether to do so, the trial court must take into account the defendant's background, the nature of his current offense and other individualized considerations. (*Romero, supra,* 13 Cal.4th at p. 531.)

Determining what constitutes "'in furtherance of justice'" entails consideration "'"both of the constitutional rights of the defendant, and *the interests of society represented by the People, . . .*" . . . At the very least, the reason for dismissal must be "that which would motivate a reasonable judge."'" (*Romero, supra,* 13 Cal.4th at

pp. 530–531.) Thus, in deciding whether to strike a prior conviction, "the court in question 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 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.)

"'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . 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.'" (*People v. Superior Court* (*Alvarez*), *supra*, 14 Cal.4th at pp. 977–978.)

The trial court here was clearly aware of its discretion to dismiss a felony strike. It stated that it had reviewed appellant's motion and the probation report and cited numerous pertinent authorities on the subject. The court's comments in denying the motion reflect a thorough, thoughtful consideration of the relevant factors. Where the record indicates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the three strikes law, we will affirm the trial court's ruling, even if we might have ruled differently in the first instance. (*Myers*, *supra,* 69 Cal.App.4th at p. 310.) We "presume[] [that the trial court] considered all of the relevant factors in the absence of an affirmative record to the contrary." (*Ibid*.)

The trial court properly considered appellant's criminal record in reaching its decision. (See *People v. Cole* (2001) 88 Cal.App.4th 850, 874.) While that record is not the most serious that unfortunately comes before us, appellant nonetheless has a lengthy criminal history over more than three decades, including several violent offenses. The trial court reviewed that record and found him to be "a career criminal, who is a recidivist."

The trial court also carefully considered the impact of appellant's longstanding drug addiction on its decision. It pointed out that in some cases addiction might be a

mitigating factor supporting the striking of a prior felony strike, but that there are also cases, such as this one, where it could be an aggravating factor. Appellant's attempt to mitigate his criminal record by attributing it to a long-standing and serious drug problem is unavailing. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 ["However, drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment"].) Over more than three decades of drug addiction, appellant failed to deal with his problem for any significant period of time. His addiction and long-term failure to address it make appellant's future prospects dim, at best, as well as making it extremely unlikely that he would be able to adhere to the conditions of probation, if probation were granted. He had in the past violated probation.

Appellant's current offense, while not violent, is quite serious. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 315 [nature of current offense is factor to consider].) He was apprehended possessing a very large quantity of methamphetamine, one of the most addictive narcotics. Moreover, appellant lied in connection with this arrest, either in his statement to police, where he claimed he simply obtained the drug for someone else, or at trial where he claimed that he purchased it for personal use only. His failure to honestly acknowledge what he had done can also be considered by the trial court in assessing whether appellant is likely to change his ways. Here, the trial court believed that appellant possessed the methamphetamine for sale, a more serious offense than the one for which he was convicted by the jury.

Finally, this is not a case in which the granting of the *Romero* motion is appropriate because of the unusually harsh sentence appellant might receive if the motion were not granted. (See *People v. Gaston, supra,* 74 Cal.App.4th at p. 315 [defendant's sentence is an "'overarching consideration'" because the underlying purpose of striking a prior conviction is to avoid an unjust sentence].) The six-year sentence appellant received is not disproportionate to his crime, particularly considering his lengthy history of drug-related offenses. Appellant can significantly shorten that sentence if he receives all of the conduct credits that are available to him.

Appellant argues that the record suggests the court was *predisposed* to deny this [*Romero*] motion based on its personal antipathy towards appellant, who the court considered part of a "network for distributing methamphetamine . . . the present modern day version of the plague." Appellant bases this assertion on the facts that when defense counsel asked for a short continuance to bring a *Romero* motion, the trial court initially, without allowing for any argument, stated: "Okay, Your *Romero* motion would be denied." While the trial court ultimately granted a continuance, appellant argues that the court's "initial reaction casts doubt on its ability to neutrally evaluate the merit of the motion." Finally, appellant claims that the trial court placed undue emphasis on his recidivist history and made several errors in describing that history.

We do not consider the trial court's erroneous characterization of one of appellant's priors as undermining the conclusion it reached with respect to his recidivist history. Moreover, the fact that the trial court chose to comment on that history and discuss it in detail, in no way suggests that that was the only factor it considered or that it gave undue consideration to it. Nothing in the record indicates that the trial court failed to consider all of the relevant factors. (*Myers, supra*, 69 Cal.App.4th at p. 310 [we "presume [that the trial court] considered all of the relevant factors in the absence of an affirmative record to the contrary"].) The trial court's negative comments about appellant's offense merely reflected its justifiable conclusion that appellant's offense was a serious one. Its initial reluctance to grant a continuance for a *Romero* motion was not an indication that it could not neutrally decide such a motion, but rather that it felt that the request was untimely, having been made at the scheduled sentencing hearing. Further, the trial court's statement that it would deny the motion, simply reflected that it was familiar enough with the relevant factors in that case that it was inclined to deny the motion.

III. Correction of abstract of judgment

A. Background

Appellant was convicted of transporting a controlled substance and possession of a controlled substance. The abstract of judgment, however, states that appellant was convicted of possession of a controlled substance for sale, of which charge he was acquitted.

B. Contention

Appellant contends that the abstract of judgment must be corrected to reflect that he was only convicted of possession of a controlled substance, not possession for sale. The People agree with appellant, as do we.

C. Oral pronouncement of judgment controls over abstract of judgment

Rendition of judgment is an oral pronouncement. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Entry of judgment in the minutes is a clerical function. (*Ibid.*; § 1207.) An abstract of judgment is not the judgment of conviction and cannot add to or modify the judgment it purports to summarize. (*People v. Mesa, supra,* at p. 471.) The oral pronouncement of judgment controls over the abstract of judgment. (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1416.) If a minute order or abstract of judgment fails to reflect the judgment pronounced by the trial court, the error is clerical and the record can be corrected at any time to make it reflect the true facts. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa*, *supra,* at p. 471; see also *People v. Williams* (1992) 10 Cal.App.4th 827, 830, fn. 3; *People v. Jack* (1989) 213 Cal.App.3d 913, 915–916.)

Consequently, the abstract of judgment should be modified to correct the above mentioned inconsistency with the trial court's oral pronouncement of judgment.

DISPOSITION

The judgment is affirmed. On remand the trial court is directed to correct the abstract of judgment to reflect that appellant was convicted of possession of a controlled substance, not possession for sale.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ