Filed 10/31/18 P. v. Hollis CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DARRELL LYN HOLLIS, Defendant and Appellant.	B281885 Los Angeles County Super. Ct. No. BA440698

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed in part, sentence vacated, and remanded with directions.

Marta I. Stanton, 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, Victoria B. Wilson, Stephanie C. Brenan and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Darrell Lyn Hollis received a third-strike sentence of 80 years to life after robbing two fast food franchises at gunpoint. He contends that a prosecution witness's reference to his parole status in violation of the court's pretrial order was prejudicial, that the court abused its discretion in declining to strike one of his strike priors, and that he is entitled to resentencing so the court may exercise its discretion to strike the firearm enhancements. We agree with defendant that the court must be given the opportunity to strike the firearm enhancements. Accordingly, we vacate defendant's sentence and remand for resentencing.[1] In all other respects, we affirm.

PROCEDURAL BACKGROUND

By second amended information filed May 27, 2016, defendant was charged with four counts of second-degree robbery (Pen. Code,[2] § 212.5, subd. (c); counts 1–2, 4–5) involving the

---

[1] After this matter was taken under submission, defendant filed a supplemental brief in which he argued that he is also entitled to the benefit of new legislation that grants courts discretion to strike five-year serious-felony priors. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.), Stats. 2018, § 1 [amending Pen. Code, § 667, subd. (a)(1)], § 2 [amending Pen. Code, § 1385, subd. (b)].) As the changes do not take effect until January 1, 2019, the People contend this claim is not ripe. They concede, however, that after that date, S.B. 1393 will apply retroactively to all nonfinal judgments. We note that in resentencing defendant, the court may, of course, exercise the full range of its sentencing discretion, including its discretion under S.B. 1393.

[2] All undesignated statutory references are to the Penal Code.

personal use of a firearm (§ 12022.53, subd. (b)).[3] The information also alleged defendant had been convicted of robbery (§ 211) in 1998 and 2000—and that those crimes constituted strike priors (§ 667, subd. (d); § 1170.12, subd. (b)), serious-felony priors (§ 667, subd. (a)(1)), and prison priors (§ 667.5, subd. (b)). Finally, the information alleged six additional prison priors (§ 667.5, subd. (b)).

Defendant pled not guilty and denied the allegations. His motion to suppress the fruits of a warrantless search was denied. After a trial at which he did not testify, a jury convicted defendant of all counts and found the firearm allegations true. Defendant admitted the prior-conviction allegations.

The court denied defendant's motion to strike one or more of his prior strikes under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, and sentenced him to an aggregate third-strike term of 80 years to life.[4] For count 1, the court imposed 45 years to life—a third-strike term of 25 years to life (§ 1170.12, subds. (a)–(d); § 667, subds. (b)–(i)) plus 10 years for the personal-use enhancement (§ 12022.53, subd. (b)) and 10 years for the serious-felony priors (§ 667, subd. (a)(1)).

---

[3] The original information, filed March 10, 2016, also charged defendant with one count of possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3). That count was later dismissed as a charging error.

[4] Defendant received an aggregate determinate term of 30 years followed by an indeterminate life sentence with a minimum parole eligible date of 50 years. For the sake of our discussion, we combine the determinate term with the minimum indeterminate term. (See generally *People v. Francis* (2017) 16 Cal.App.5th 876, 886, fn. 10.)

The court imposed 35 years to life for count 2—a third-strike term of 25 years to life plus 10 years for the personal-use enhancement—to run consecutively, and imposed and stayed 10 years for the serious-felony priors. The court imposed the same sentence of 35 years to life for counts 4 and 5, but exercised its discretion under *People v. Deloza* (1998) 18 Cal.4th 585 to run those counts concurrently. The court struck the prison priors (§ 667.5, subd. (b)).[5]

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

This case involves robberies of two fast food franchises in Baldwin Hills over the course of one week in 2015.

1. Subway Robbery

On August 26, 2015, at about 9:45 p.m., defendant entered a Subway restaurant located at 3627 South La Brea Avenue in Los Angeles. Three employees and two customers were in the

---

[5] We note that four of the prison priors—including all three crimes defendant committed after his strike offenses—were for drug offenses. Two of those convictions were for crimes that have since been reduced to misdemeanors under Proposition 47 (Health & Saf. Code, § 11350 [possession of a controlled substance]) and Proposition 64 (Health & Saf. Code, § 11360 [transportation of cannabis]). The record on appeal does not reveal whether defendant has ever moved to reclassify those convictions, however. (See § 1170.18, subds. (f)–(h) [Prop. 47 reclassification procedure]; Health & Saf. Code, § 11361.8, subds. (e)–(g) [Prop. 64 reclassification procedure]; *People v. Call* (2017) 9 Cal.App.5th 856 [reclassification of prior convictions under Prop. 47 precluded use of the priors as enhancements even though they were felonies when defendant was convicted].) Because the court chose to strike the prison priors, this issue is not before us.

store at the time. Defendant pointed a gun at one of the employees and told her to empty the cash register. The employee was scared; she had never seen a gun before. Eventually, another employee opened the register, and defendant took the money out of the drawer. Defendant left, and the workers called the police. A police officer viewed surveillance footage and took the witnesses' statements. Surveillance footage of the robbery was played for the jury.

2. Baskin-Robbins Robbery

On September 1, 2015, at about 9:20 p.m., defendant entered a Baskin-Robbins ice cream store located at 4066 Victoria Avenue in Los Angeles. Two employees were working that night. Defendant pointed a gun at the workers and demanded money from the cash register. They opened the register, and defendant took about $60 out of the drawer. Surveillance footage of the robbery was played for the jury.

3. Investigation

Los Angeles Police Department Detective Jose Velasco investigated the Subway robbery. On August 27, 2015, he watched the surveillance video of the incident. On September 10, 2015, he watched the surveillance video of the Baskin-Robbins robbery, and noticed that the two robbers appeared to be the same man. According to Velasco, the robbers were wearing the same watch and had used similar semi-automatic weapons.

On October 9, 2015, Velasco happened to see defendant at a mini-mart about a block away from the Baskin-Robbins. Defendant was wearing the chrome watch Velasco had noticed in the videos. Velasco detained defendant to obtain his contact

information, then created a six-pack photo lineup. A surveillance video from the mini-mart was played for the jury.

On October 9, 2015, one of the Baskin-Robbins employees identified defendant and another man in the six-pack as resembling the robber.[6] On October 13, 2015, one of the Subway employees identified defendant as the man who had robbed the restaurant.[7]

On October 15, 2015, LAPD Sergeant Rodney Peacock went to the Sober Clarity residential treatment facility, where defendant lived. Peacock met with the house manager and showed him the surveillance video of the Baskin-Robbins robbery. The house manager immediately identified defendant as the robber in the video. The manager also gave Peacock items of clothing belonging to defendant.

When the manager next spoke to defendant, he told defendant about the video identification. Defendant replied that the video was of something that had happened "before."

4. Defense Evidence

Defendant presented a defense of mistaken identity. In support of this defense, he called two LAPD fingerprint experts. Both experts testified that fingerprints lifted from Subway and Baskin-Robbins did not match defendant's prints.

---

[6] That employee was unable to identify defendant at trial. The other Baskin-Robbins employee did not identify defendant either in the photo lineup or at trial.

[7] That employee also identified defendant in court. The other Subway employee did not identify defendant either in a photo lineup or at trial.

DISCUSSION

Defendant contends that Peacock's reference to his parole status—in violation of the court's pretrial order—was prejudicial, that the court abused its discretion in declining to strike one or more of his strike priors, and that the court must be allowed to exercise its new discretion to strike his firearm enhancements.

1. Peacock's testimony does not require reversal.

1.1. Proceedings Below

Before trial, the court ruled that there would be no mention of the fact that defendant was on Post-Release Community Supervision when he committed the offenses in this case. But during the prosecution's case, when Peacock was asked whether he gave the clothing he recovered from defendant's room to Velasco, Peacock responded, "No. He had done a parole search of the residence and then we all went back to the station and I gave it back to him there." Defense counsel did not object. Velasco testified next. Then, the prosecution rested.

After the court excused the jury for the day, defense counsel addressed Peacock's statement:

> Your Honor, while we're here, there's one thing I wanted to know for the record, which is Sergeant Peacock mentioned that one of the searches of Mr. Hollis's residence was conducted pursuant to parole search. … I know we talked about that and I have confidence that [the prosecutor] instructed him not to say that, but since it had been said, I'm concerned at this time that it may be prejudicial to the jury.

Counsel explained she was "concerned about the jury knowing at this point that [defendant] has been in trouble before and that he is on some kind of post-prison supervision." Therefore, she concluded, "at this point I would ask for a mistrial if the court considers the prejudice to be great enough." The prosecutor suggested that rather than declare a mistrial, the court could admonish the jury not to consider the statement. The court took the matter under submission.

The following day, the court denied the defense motion on two grounds. First, the court held that the motion was untimely because counsel waited until the end of the day to request the mistrial. Second, the court did "not believe that the testimony is so prejudicial in light of the other evidence that has been presented during the trial." The court offered, however, to "strongly consider" any defense request that it instruct the jury not to consider the statement.

1.2. Defendant forfeited the issue.

The rules of evidence are not self-executing. We may not reverse a judgment or verdict based on "the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).) This rule exists to give the trial court a concrete legal proposition to pass on, to allow the proponent of the evidence an opportunity to cure the defect, and to prevent abuse. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) Defendant contends he preserved his evidentiary claims because counsel's "objection … fairly apprised the trial court of the issue presented." We disagree.

Defendant did not object to Peacock's testimony, did not ask the court to strike the testimony, and did not avail himself of the court's offer of a limiting instruction. While defendant did move for a mistrial at the end of the day, he does not argue that the court erred in denying that motion. Even if defendant's motion for a mistrial could be construed as an objection, however, the objection was not timely.

Accordingly, we conclude defendant has forfeited these claims.

1.3. Trial counsel did not provide ineffective assistance.

"The Sixth Amendment secures to a defendant facing incarceration the right to counsel at all 'critical stages' of the criminal process. [Citations.]" (*Iowa v. Tovar* (2004) 541 U.S. 77, 87; see *People v. Doolin* (2009) 45 Cal.4th 390, 417 ["A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution."].) Defendant appears to argue that if the issue has been forfeited, his attorney provided constitutionally ineffective assistance by failing to object.[8] We find no constitutional violation.

---

[8] Defendant's ineffective assistance claim comprises a single sentence. We remind counsel that matters that are not properly raised or that are lacking in adequate legal discussion will be deemed forfeited. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182 [claim presented without "adequate" supporting legal argument was "not properly raised"]; *People v. Mayfield* (1993) 5 Cal.4th 142, 196 ["Defendant's constitutional claims largely are asserted perfunctorily and without argument in support. Therefore we do not consider them."].) Nevertheless, we exercise our discretion to address ineffective

1.3.1. Legal Principles

Under either the federal or state Constitution, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).) To establish ineffective assistance, defendant must satisfy two requirements. (*Id.* at pp. 690–692.)

First, he must show his attorney's conduct was unreasonable "under prevailing professional norms"—that is, that it fell "outside the wide range of professionally competent assistance." (*Strickland*, *supra*, 466 U.S. at pp. 688, 690.) This requires him to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Id.* at p. 687.) " 'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny …' and must 'view and assess the reasonableness of counsel's acts or omissions … under the circumstances as they stood at the time that counsel acted or failed to act.' [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Next, the defendant must demonstrate that the deficient performance was prejudicial—i.e., there is a reasonable probability that but for counsel's failings, the result of the

---

assistance of trial counsel to foreclose a later claim of ineffective assistance of appellate counsel.

proceeding would have been different. (*Strickland*, *supra*, 466 U.S. at pp. 687 [defendant must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"], 694.) "It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.)

Claims of ineffectiveness must usually be "raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform" the inquiry. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) "There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." (*Massaro v. United States* (2003) 538 U.S. 500, 508.) But those cases are rare.

Usually, if "the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation. [Citations.]" (*People v. Scott*, *supra*, 15 Cal.4th at p. 1212.) These arguments should instead be raised on collateral review. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

1.3.2. Counsel had sound tactical reasons not to object.

One reason claims of ineffective assistance are typically limited to collateral review is that failure to object is not necessarily evidence of incompetence. Often, "competent counsel may often choose to forgo even a valid objection. '[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1197, alteration in *Riel*.) The decision not to object to Peacock's testimony "comes within this broad range of trial tactics that we may not second-guess. [Citation.]" (*Ibid*.)

Plainly, counsel saved her mistrial motion until the jury had been excused because she did not want to emphasize Peacock's fleeting reference to a parole search. Counsel likely declined to request a limiting instruction for the same reason. Indeed, both the court and the prosecutor acknowledged that a limiting instruction would probably draw the jury's attention to the statement. Counsel could reasonably have concluded, therefore, that objecting in front of the jury or requesting a limiting instruction would only have served to highlight the damaging evidence.

Accordingly, counsel's performance was not deficient.

2. The court did not abuse its discretion by denying defendant's *Romero* motion.

Defendant contends the court abused its discretion by declining to strike one or more of his strike priors for one or more counts. We disagree.

2.1. Standard of Review

When a prior felony conviction is proven under the Three Strikes law, a trial court has discretion to strike it for sentencing purposes under section 1385. (*Romero*, *supra*, 13 Cal.4th at pp. 529–530.) The court may also choose to strike a prior conviction as to one count but not as to another count. (*People v. Garcia* (1999) 20 Cal.4th 490, 503–504 (*Garcia*).)

The court's discretion is limited, however. (*Romero*, *supra*, 13 Cal.4th p. 530.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, 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* (1998) 17 Cal.4th 148, 161.)

We review the trial court's decision not to strike a prior serious or violent felony for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) A court abuses its *Romero*/*Garcia* discretion only "in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*Id.* at p. 378.) It is " 'not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation]." (*Ibid.*) Instead, if

" 'the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid*.)

2.2. Proceedings Below

After the jury's verdicts were recorded, defendant admitted suffering two prior convictions for robbery (§ 211), a strike offense. Defense counsel subsequently filed a sentencing memorandum in which she asked the court to exercise its discretion under *Romero* and *Garcia* to strike one or both of the strike priors. (*Romero*, *supra*, 13 Cal.4th p. 530; *Garcia*, *supra*, 20 Cal.4th at pp. 503–504.) The motion emphasized that defendant was 58 years old, that the strike priors had occurred 17 and 19 years earlier, and that if the court struck one of them, defendant would still spend decades in prison. The prosecutor also filed a sentencing memorandum. She asked the court to impose the maximum term of 204 years to life.

At the sentencing hearing, the court noted it had reviewed both sentencing memos and had "seriously considered" striking one of the prior strikes. Ultimately, however, it declined to do. The court explained:

> The prior strikes are both Penal Code 211 violations and the crimes in the present case are also robberies.
>
> The court does not know the extent of the force or fear utilized in the prior strikes. But in the case before this court, defendant was found to have

> used a handgun. At a minimum, this cannot be construed to be a lesser degree of force or fear.
>
> The prior strikes involved convictions in 1998 and 2000. The defendant's criminal record since the strike convictions involve non-violent offenses without any allegations that the court is aware of [involving] the use of a weapon.
>
> However, during the intervening 15 years since the 2000 conviction, the defendant appears to have been incarcerated for the vast majority of the time. Thus, one cannot successfully argue that the defendant has led a crime-free life for the last 15 years due to the incarceration and due to the narcotic convictions in 2009, 2012, and 2014.
>
> Even assuming that no such convictions existed, the court would still find the prior strikes are not so remote as to be stricken, particularly in light of the defendant's incarceration period during the interim.

Finally, the court observed that "although drugs or alcohol addiction may have contributed to the present offenses," defense counsel had not presented any evidence that would have allowed "the court to properly assess the effects [of that addiction] on the present offense for purposes of striking the strike." Nor had counsel provided evidence of "defendant's willingness to be in any type of rehabilitation program or his prospects." Though defendant's age (58) weighed in favor of striking one of the priors, on balance, the court declined to do so.

2.3. The court did not abuse its discretion.

Defendant argues that he does not fall within the spirit of the Three Strikes law because his strike priors were remote—17 and 19 years old—and he had been convicted of only drug crimes since then. He also contends his age, struggles with addiction, and mental illness all weighed against multiple third-strike sentences, and notes that if the court had chosen to strike one of the priors, he would have received a still-substantial determinate term of 35 years in prison. Yet the court explicitly weighed each of these factors and reached a different conclusion.

In exercising its discretion, the court considered defendant's criminal history,[9] the circumstances and seriousness of his current offenses, and the fact that his current convictions were for the same conduct as his strike priors. The court emphasized that though the prior strikes were nearly 20 years old, defendant had been incarcerated for most of the intervening time. Under these circumstances, the court acted within its discretion when it concluded defendant fell within the spirit of the Three Strikes law.

3. S.B. 620

When defendant was sentenced in 2016, the trial court lacked discretion to strike the firearm enhancements found true under section 12022.53, subdivision (b). (Former § 12022.53, subd. (c), Stats. 2010, ch. 711, § 5; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) Effective January 1, 2018, however, the Legislature amended the statute to give trial courts authority to strike firearm enhancements in the interest of

---

[9] We note that defendant's rap sheet is 20 pages long.

justice. (§ 12022.53, subd. (h); Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, §§ 1, 2, hereafter S.B. 620.) Defendant contends he is entitled to the benefit of that provision. The People properly concede the point, and we agree.

Under *In re Estrada*, we presume that, absent contrary evidence, an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 [judgment is final when time for petitioning for certiorari has expired].) The *Estrada* rule applies to substantive crimes and penalty enhancements alike. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) Accordingly, S.B. 620 applies to all cases that were not yet final on the amendment's operative date—including this one. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091.)

" ' "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless 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." ' (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)" (*People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

The record before us does not clearly indicate that the trial court would have declined to strike the firearm enhancements if

it had the discretion to do so. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428 [remand proper where "the court imposed a substantial sentence" but "expressed no intent to impose the maximum sentence"].) Accordingly, we vacate defendant's sentence and remand this matter to allow the trial court to exercise its discretion, under amended section 12022.53, to strike the firearm enhancements. We emphasize that in resentencing defendant, the court may exercise the full range of its sentencing discretion, including its discretion under newly-enacted S.B. 1393 to strike one or more of the five-year serious-felony priors. We offer no opinion on how the court should exercise that discretion.

DISPOSITION

Defendant's sentence is vacated and the matter is remanded for resentencing. In all other respects, we affirm.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.