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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAUL RODRIGUEZ, Defendant and Appellant.	B238121 (Los Angeles County Super. Ct. No. KA094529)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan C. Dominguez, Judge. Affirmed.

Sunne L. Daniels, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Raul Rodriguez appeals from the judgment entered following a jury trial which resulted in his conviction of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and the trial court's findings that, in 2000 he had been convicted of the unauthorized possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)); in 2004 he had been convicted of assault with a firearm (Pen. Code, § 245, subd. (a)(2)) pursuant to the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); and in 2009 he had been convicted of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). With regard to all three prior convictions, the trial court determined Rodriguez had served prison terms within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced Rodriguez to five years in prison (see Pen. Code, § 1170, subd. (h)(3)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The prosecution's case*.

Los Angeles County Deputy Sheriff Steve Busch was assigned to the Temple Station and had qualified as an expert in the area of narcotics investigation. At approximately 4:14 in the afternoon on June 8, 2011, the deputy, who was accompanied by Deputy Mario Garcia, was on patrol in an unmarked car near 1225 Esteban Torres Drive in the City of South El Monte. There, he and Garcia observed a parked gray Honda with an expired registration sticker on the license plate. Busch and Garcia decided to go back to the vehicle and contact its occupants.

When they arrived at the Honda, Busch noted that appellant, Rodriguez, was just "getting into the rear passenger seat." He had crossed the street in front of the deputies, but it was unclear where he had come from. After the deputies had driven back toward the Honda and pulled up next to it, Busch got out of their car and approached the driver and, because he had noticed something unusual about Rodriguez when he was still outside the car, Garcia contacted him as he was sitting in the back passenger seat.

There were three other occupants in the Honda and after Busch and Garcia had detained the individuals, they called for assistance from back-up units. When the deputies had first approached the Honda, the vehicle had rolled forward "as if it [were]

going to take off and leave the scene." Busch was able to stop it, but he could not see one of the passengers in rear. He could not see her hands. A short time later, several patrol cars arrived at the scene.

Busch, who had initially approached the driver, eventually had all of the occupants get out of the car. As he watched three individuals, Garcia searched Rodriguez at the rear of the vehicle. Garcia, who was also a trained narcotics officer, asked Rodriguez to place his hands behind his back and Garcia patted him down for weapons. In Rodriguez's right front pant pocket, Garcia found a glass pipe. The pipe was approximately three inches long and had a bulb at the end. There was white residue and some burnt methamphetamine still on the pipe. Garcia believed there was enough methamphetamine in the pipe to "get high." There was still white powder within the pipe which could be lit and smoked.

Once he recovered the pipe, Garcia placed it in the glove box of his car, then locked the car. He later gave the pipe to Deputy Busch, who took it to the station and booked it and the substance from inside it into evidence.

After Garcia handed to Busch the three- to four-inch glass pipe with a bulb at one end, Busch noted that much of the bulb was "burnt" and "in the shaft of the pipe there was a white substance that resembled methamphetamine." Busch opened up a paper clip and used the straightened end to scrape the residue from the bowl and the rest of the pipe. He then emptied the residue from the pipe into a bag. He put the pipe itself into another bag and booked the two bags into evidence. The container in which the crystallized substance had been placed contained a net weight of .07 grams of powder containing methamphetamine.[1]

Criminalist Michael Best works for the Los Angeles County Sheriff's Department Laboratory. He was assigned to the West Covina Regional Laboratory. As a criminalist, Best analyzes substances ranging from narcotics to blood samples and has had

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[1] According to Busch, the Drug Enforcement Agency has indicated that .02 grams is a usable amount of methamphetamine. A "usable amount" is the amount it takes "someone to get high or be under the influence."

experience analyzing methamphetamine. He uses "infrared spectroscopy, . . . color test, micro crystal tests, . . . gas chromatography, [and] mass catastrophe to identify . . . different types of samples as they are presented in the laboratory." Using these techniques, he tries to make the best identifications "with the limited amount of material that may be presented."

Best analyzed the substance obtained by officers Busch and Garcia in this case. Using color tests and spectroscopy, he "identified .07 grams of powder containing methamphetamine." Moreover, the tests indicated that it was a "pure compound or almost a pure compound."

2. *Defense evidence*.

Raul Rodriguez, Sr. lives at 1222 Esteban Torres Drive in South El Monte. The appellant, Raul Rodriguez, Jr., is his son and he, too, lives at the house at 1222 Esteban Torres Drive.

On June 8, 2011, Rodriguez, Sr. saw his son leave the house. Rodriguez went out the back door toward the garage. He was going to borrow Rodriguez, Sr.'s truck and Rodriguez, Sr. had some items he wanted to take out. However, when they got outside, Rodriguez changed his mind. He did not go to the truck. He decided to go out the front and across the street to where a small, older car was parked. As Rodriguez was approaching the car, a Pontiac came driving down the street "as fast as it [could], slam[med] on the brakes, open[ed] the door[s], and guns were drawn like there was no tomorrow."

Rodriguez, Sr. indicated that it "was scary to see that happening to [his] son. The language they used was language that [he didn't] use in [his] vocabulary, and they had [his] son on the ground telling him [to] get on his knees[,] [a] gun pointed right at his head from a distance." There were two deputies and the one pointing his weapon at Rodriguez was Deputy Garcia. The other deputy was holding his weapon on the three individuals still in the car. They were all holding their hands up in the air.

After several minutes, a number of "squad cars" pulled up. Rodriguez was made to get down on the ground, he was hand-cuffed then picked up and moved approximately four houses down the street to a parked squad car.

Rodriguez, Sr. had never given his son a methamphetamine pipe and he had not examined his son's pockets before he left the house. Rodriguez, Sr. had no idea what Rodriguez had in his pockets that day. In addition, Rodriguez, Sr. did not see any deputies give to Rodriguez any methamphetamine, "but that [didn't] doubt in [his] mind that they couldn't have planted it in his pocket as well. [¶] . . . [Rodriguez, Sr.] didn't see that. But it sure [came] into his mind."

Rodriguez, Sr. did not see the deputies go into Rodriguez['s] pockets. He "didn't see them search [Rodriguez] at all." Rodriguez, Sr. did use a camera or phone to take some pictures that day. However, "once [he] knew, they had everything under control, [he] left, because [he] was so scared that there might have been gunfire." Although his son did not have a gun, "the law enforcement sure did."

3. *Procedural history*.

Following a preliminary hearing, an amended information was filed on October 4, 2011 in which Rodriguez was charged with one count of possession of a controlled substance, methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a), a felony. It was further alleged that Rodriguez previously had been convicted of second degree burglary (Pen. Code, § 459) and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) within the meaning of Penal Code section 1203, subdivision (e)(4), had suffered a conviction for assault with a firearm (Pen. Code, § 245, subd. (a)(2)) within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)), and had been convicted of and served prison terms within the meaning of Penal Code section 667.5, subdivision (b) for two convictions of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and one conviction of assault with a firearm (Pen. Code, § 245, subd. (a)(2)). Finally, it was alleged that, as to count 1, "an executed sentence for a felony pursuant to [that] subdivision [would] be served in state prison pursuant to Penal Code section

1170[,] [subdivision] (h)(3)" in that Rodriguez previously had suffered a conviction for assault with a firearm (Pen. Code, § 245, subd. (a)(2)), a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(8).

Before the jury trial on the substantive offense began, Rodriguez moved to have the trial bifurcated. He wished to have the trial court take a waiver as to his right to have a jury trial on his priors and to instead have the trial court sit as the trier of fact. The following colloquy then occurred: The Court: "You understand that you have the right to have the issue [of your prior convictions] decided by a jury? You understand that? [¶] [Rodriguez]: Yes, I do. [¶] The Court: You are giving up that right and will allow the court to be the trier of the fact? The court will listen to the evidence and decide whether these are your priors or not? [¶] [Rodriguez]: Yes. [¶] The Court: You agree to that? [¶] [Rodriguez]: Yes."

After the presentation of evidence, defense counsel made a motion for entry of a judgment of acquittal pursuant to Penal Code section 1118.1. He argued that, although it was clear Rodriguez possessed a controlled substance, there was no evidence to indicate he "knew of the nature and character of the controlled substance." Counsel continued: "Now, what I am talking about is where is any evidence that Mr. Rodriguez has ever smoked a pipe? Does it follow circumstantially from the fact that [one has] a pipe that [one] ever smoked methamphetamine in a pipe? No. It doesn't follow. . . . [L]et's go backwards in time to the first time he ever picked up a pipe. What knowledge and experience [about methamphetamine] does that person have the first time he ever pick[s] up a pipe . . . ? None." "Number 3 is he knew of the character of the controlled substance. Well, there again, Rodriguez had a pipe. . . . How do we know that someone [didn't give] Mr. Rodriguez the pipe to walk across the street and give it to somebody else and he doesn't even know what it is[.] . . . I am just saying what do we know from the mere fact that someone has something? What other fact can [we] logically get to? We really can't get to anything."

The trial court responded: "[The prosecutor's] case consists of police officers [patting] down the defendant and removing a pipe containing [what we now] know to be methamphetamine. He can argue to the jury that [Rodriguez] knew [what it was]. You can argue to the jury that he didn't."

After the prosecutor presented a statement regarding the matter, the trial court denied Rodriguez's Penal Code section 1118.1 motion.

Defense counsel next argued that the charge, which is a "wobbler," should be reduced to a misdemeanor. Defense counsel asserted that Rodriguez should not go to state prison for a mere .07 grams of methamphetamine. The trial court disagreed. The court stated: "[I]t's not only the instant offense, but also the history of a defendant. . . . The defendant has been to state prison. He was just released in 2009. He . . . suffered a strike in 2004 . . . . So the motion to reduce to a misdemeanor is denied."

After counsel presented their arguments and the trial court gave its final instructions, the jury began its deliberations on December 6, 2011. The following morning, on December 7, 2011, the foreperson indicated that the jury had reached a verdict. The court clerk read the verdict form which indicated: "[W]e the jury in the [above] entitled action find the defendant Raul Rodriguez guilty of possession of [a] controlled substance, to wit, methamphetamine, in violation of Health and Safety Code section 11377[,] [subdivision] (a), a felony . . . ."

The matter was then continued to December 21, 2011 for trial on the alleged prior convictions and prison terms and for sentencing. At those proceedings, Los Angeles County Sheriff's Department Forensic Identification Specialist Jeff Farris testified that he had made well over 100,000 fingerprint comparisons and was a Board certified examiner. That day, he had examined Rodriguez's fingerprints and compared them with those contained in a series of documents from the Department of Corrections and Rehabilitation known as a 969(b) packet. Farris indicated that he "made three comparisons to three separate fingerprint cards" and that "all three of the fingerprint cards matched [Rodriguez's] prints."

After reviewing the documents contained in the packet, including the abstracts of judgment, the trial court found beyond a reasonable doubt that the convictions were Rodriguez's. The court stated "that he in fact suffered a conviction for 11377[,] [subdivision] (a) [on] April 19, 2000, in [case No.] KA048176; and [on] December 13, 2004, under case [No.] KA068260 [he was convicted of] a 24[5,] [subdivision] (a)(2) and finally[,] on or about August 11, 2009, in [case No.] KA087682 [he suffered a conviction] for a violation of [section] 11377[,] [subdivision] (a) of the Health and Safety Code."

Rodriguez requested that sentence be imposed at a later time because he wanted to stay in the county jail longer. "[H]e ha[d] a friend that[] . . . in the near future [would likely] be sentenced to . . . life in prison, and he want[ed] to spend some time with that friend before" his sentence was imposed. Defense counsel, the prosecutor and the trial court all agreed that that was not "good cause" for postponing sentencing and the trial court denied Rodriguez's request.

Rodriguez's counsel made a motion to strike his prior Three Strikes conviction for assault with a firearm. Counsel argued, among other points, that Rodriguez had never sold drugs. He had never tried to "push drugs on anybody else. [He] is a user of methamphetamine." Counsel asserted that Rodriguez needed treatment, not state prison. In addition, he noted that there was so little methamphetamine in the pipe that the deputies had to scrape it out with a paper clip. It was a "[t]iny little bit that was burnt inside the pipe." Counsel indicated that the trial court should look at the "minor nature of the current offense."

In response, the prosecutor argued that Rodriguez fell outside the provisions of the *Romero*[2] case because, among other factors, his prior strike had been fairly recent. He had suffered the conviction in 2004 and served five years in prison for it. In addition, since having been released from prison for that offense, Rodriguez had committed other offenses, including a 2009 conviction for possession of methamphetamine for which he

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

served four years in prison. The prosecutor indicated that the factors the trial court should consider in a Three Strikes matter, the defendant's character and background, did not "seem to indicate that [Rodriguez fell] outside of the career criminal statute. In fact he [fell] directly within [it]."

The trial court agreed with the prosecutor and sentenced Rodriguez to two years in state prison, then doubled the term pursuant to Penal Code sections 667, subdivisions (b) to (i) and 1170.12, subdivisions (a) to (d), the Three Strikes law. The trial court then imposed a one year term for Rodriquez's 2004 conviction and service of a prison term (Pen. Code, § 667.5, subd. (b)) for assault with a firearm in violation of Penal Code section 245, subdivision (a)(2). The court struck the remaining two Penal Code section 667.5, subdivision (b) allegations and, in total, imposed a term of five years in prison.

The trial court awarded Rodriguez presentence custody credit for 197 days of actual custody and 98 days of good time/work time, for a total of 295 days. Rodriguez was ordered to pay a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)) and a stayed $200 parole revocation restitution fine (Pen. Code, § 1202.45). He filed a timely notice of appeal on the day of sentencing, December 21, 2011.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed July 13, 2012, the clerk of this court advised Rodriguez to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. On August 15, 2012, Rodriguez filed a letter brief in which he asserted the trial court, by denying his *Romero* motion and sentencing him to prison, abused its discretion and denied him the ability to obtain the treatment he needs as a drug addict. He urged the sentence amounted to cruel and unusual punishment and stated: "So here I am again, NO program, NO treatment, NO rehabilitation, when the court possessed the power to implement a treatment [program]. Clearly the court is not addressing the issue at hand, even when [it] recognize[s] it. Treatment is what is needed for an addict. Not jail time."

Here, the trial court was required to impose jail time, in part because Rodriguez had suffered a Three Strikes conviction. In *People v. Superior Court (Romero), supra*, 13 Cal.4th at pages 530 to 531, the court emphasized that "[a] court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. . . . [¶] . . . [¶] 'From the case law, several general principles emerge. Paramount among them is the rule "that the language of [section 1385], 'in furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" [Citations.] At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." [Citations.]' [Citation.] 'Courts have recognized that society, represented by the People, has a legitimate interest in "the fair prosecution of crimes properly alleged." [Citation.] " '[A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion.' [Citations.]" ' [Citation.]" (Italics in original.)

"From these general principles it follows that a court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.' [Citation.] A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the [T]hree [S]trikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 531.)

Here, had the trial court chosen to strike Rodriguez's conviction for assault with a firearm so that it could place him, not in state prison, but in a drug-rehabilitation facility, the court would have been acting in part out of its "antipathy for the [T]hree [S]trikes law." More importantly, it would have been ignoring Rodriguez's lengthy criminal record. Although Rodriguez is clearly an addict, he has a substantial criminal record which includes crimes other than narcotics offenses. His probation report indicates that

Rodriguez has taken a vehicle without the owner's consent, uttered fictitious instruments, committed burglary, twice battered an ex-spouse or person in a dating relationship and committed assault with a firearm. In addition to those offenses, Rodriguez has suffered three convictions for possession of a controlled substance.

It is unclear why, on a previous occasion, Rodriguez did not opt for drug treatment. However, at this stage of his criminal career, the trial court properly chose to impose a prison term pursuant to the Three Strikes law. Considering his background and the nature of his present offense, the trial court properly determined it would be an abuse of discretion to grant Rodriguez's *Romero* motion, to reduce the offense to a misdemeanor or to place Rodriguez in a drug-treatment program. As the trial court stated: "[I]n this particular case there has been . . . criminal activity . . . and his convictions have not stopped. [He] [h]as continued unabated and when he's placed on probation, he's not complied with the terms and conditions of probation. When he's been placed on parole, [he] has not complied with the terms and conditions of parole, almost on a yearly basis, other than the time period that he's . . . in actual custody in state prison." Under these circumstances, the trial court properly determined that Rodriguez was "statutorily ineligible for probation pursuant to [Penal Code section] 1170.12[,] [subdivision] (a)(2)" and was required to "serve time in state prison pursuant to [section] 1170[,] [subdivision] (a)(3) of the Penal Code due to the fact that he has a conviction for [a] prior serious or violent felony." The trial court appropriately sentenced Rodriguez to five years in state prison.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.