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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KARL JOHN MCMILLIN,

Defendant and Appellant.

2d Crim. No. B270599
(Super. Ct. No. 2013000747)
(Ventura County)

Karl John McMillin appeals the judgment entered after he pled guilty to petty theft with prior theft convictions (Pen.¹ Code, § 666, subds. (a)-(b)) and robbery (§ 211). He also admitted suffering two prior strike convictions (§§ 667, subds. (b)-(i), 1170.22, subds. (a)-(d)) and served two prior prison terms (§ 667.5, subd. (b)). As to the robbery charge, appellant further admitted that he personally inflicted great bodily injury (§ 12022.7, subd. (a)) and had two prior serious felony convictions (§ 667, subd. (a)(1)). The trial court sentenced him to a state prison term of 25 years to life plus 13 years. Appellant contends

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

the court abused its discretion in denying his motion to dismiss his prior strike convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We affirm.

FACTS AND PROCEDURAL HISTORY

Because appellant pled guilty, the relevant facts are derived from the preliminary hearing transcript. In March 2012, appellant stole Steven Richter's credit card from Richter's bag at a golf course. Richter witnessed the incident and confronted appellant, who denied the theft. Richter retrieved his credit card from a pocket in appellant's bag and appellant ran away.

In December 2012, appellant stole a wallet from a golf bag at a different golf course. The victim, Craig Colton, searched his bag after seeing appellant near it and discovered his wallet was missing. Colton, his son Matthew, and another golfer ran after appellant, who got in his car and started driving away. Appellant hit Matthew, causing him to fly over the top of the car. Appellant did not stop or slow down after hitting Matthew and it appeared to both Colton and Matthew that appellant had intentionally hit him. Matthew spent five days in the hospital for injuries that included a collapsed lung, rib, elbow, and dental fractures, a chin laceration, and multiple abrasions. His left arm required surgery and is no longer fully functional. He also has ongoing breathing difficulties due to scar tissue that formed on his lung after it was reinflated.

Appellant was charged with two counts of petty theft with prior theft convictions, robbery, leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), and reckless driving resulting in injury (*id.* § 23105, subd. (a)). It was alleged as to all counts that appellant had served prior prison terms and had two

prior strike convictions, i.e., a 1993 federal bank robbery conviction (18 U.S.C. § 2113), and a 2003 conviction of first degree burglary (§ 459). The robbery count included additional allegations that appellant personally inflicted great bodily injury and had been previously convicted of two serious felonies.

Pursuant to a negotiated disposition, appellant pled guilty to one of the section 666 counts and the robbery count and admitted the attendant allegations. The remaining counts were dismissed. Appellant filed a *Romero* motion, which was heard in conjunction with the sentencing hearing. In support of his motion, appellant filed a report summarizing the results of a “brief forensic process addiction (compulsive gambling) evaluation” conducted by an investigator who purportedly offers “forensic drug and alcohol services.” The investigator concluded that appellant was a compulsive gambling addict and that inpatient treatment for his addiction “will do much more to protect the community than lengthy incarceration.” Appellant argued that he fell outside the spirit of the Three Strikes law because his crimes were motivated by his gambling addiction and his prior strike convictions were remote and did not involve actual violence.

In opposing appellant’s *Romero* motion, the prosecution asserted that the nature of appellant’s new offenses, the nature of his prior strikes, and his background, character, and prospects demonstrate that he did not fall outside the spirit of the Three Strikes law. In the 1993 robbery, appellant entered a bank near closing time, announced that he was committing a robbery, and ordered the tellers to place cash on the counters. As he was leaving with the money, he announced that a friend with a gun was waiting outside. Appellant was apprehended within

minutes. He later confessed that he committed the crime and said he had done so to cover a recent gambling loss at the horse track. Appellant was also suspected of committing five other bank robberies but was never charged with those crimes. When asked about the other robberies, appellant said he wanted an attorney.

The victim of appellant's 2003 burglary was a 79-year-old man he met at the horse track in Santa Paula. Appellant fraudulently induced the victim to give him more than \$50,000, which represented most of the victim's life savings. Appellant pled no contest to burglary, elder theft (§ 368, subd. (d)), grand theft (§ 487, subd. (a)), forgery (§ 470, subd. (d)), and issuing a check without sufficient funds (§ 476a). He also admitted that he took over \$50,000 in committing the thefts (former § 12022.6, subd. (a)) and that his 1993 bank robbery conviction was a serious felony. In exchange for his plea, eight other counts and an allegation that the 1993 bank robbery conviction constituted a prior strike. Appellant apparently paid full restitution to the victim at the time of sentencing, but restitution ordered as to other unnamed victims had yet to be paid as of his sentencing in the current case. The court imposed and stayed execution of a 10-year prison sentence and placed appellant on 5 years of probation with terms and conditions including that he serve a year in county jail and participate in treatment for his gambling addiction. While serving his one-year jail sentence on electronic monitoring, appellant was arrested and charged with committing a theft at a supermarket. The court recalled the previously imposed 10-year sentence and imposed a 7-year prison term. Appellant was released on parole in October 2010.

At the combined section 1385 hearing and sentencing hearing, the prosecution presented victim impact statements from Colton and Matthew along with a letter from the former domestic partner of the 2003 burglary victim. The prosecution also presented evidence that appellant had committed another crime while out on bail in the instant matter. In February 2014, Richter informed the prosecutor that he had seen appellant acting suspiciously in the parking lot of yet another golf course. The Ventura County Sheriff's Department began conducting surveillance of appellant. On June 4, 2014, deputies followed appellant to a golf course in Orange County and saw him touch several golf bags and reach inside one of them. The deputies arrested appellant and found three wads of cash on his person totaling more than \$1,000. One of the wads matched the amount reported missing from the bag appellant had reached inside. Other golfers at the course reported thefts that same day. In September 2014, appellant was convicted of petty theft with a prior conviction and was sentenced to four years in state prison.

Appellant presented statements from one of his sons and two friends and also spoke on his own behalf. At the conclusion of the hearing, the court denied appellant's *Romero* motion. The court found that appellant was "a danger to the public" and added, "I don't have any question in my mind that if you were to be shown any leniency that you would be right back here where you are right now."

DISCUSSION

Appellant contends the court abused its discretion in denying his *Romero* motion. We are not persuaded.

The trial court has the authority under section 1385 to strike a prior conviction allegation brought under the Three

Strikes law “in furtherance of justice.” (§ 1385; *Romero, supra*, 13 Cal.4th at pp. 529-530.) In making that determination, the court is required to consider the defendant’s constitutional rights and society’s interest in a fair prosecution. (*Romero*, at pp. 530-531.) “[P]reponderant weight must be accorded to factors intrinsic to the scheme, such as 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. [Citation.]” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Circumstances must be extraordinary to deem a career criminal as falling outside the spirit of the Three Strikes law. (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*).)

We review the denial of a *Romero* motion for an abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 375.) The party attacking the denial has the burden to show that the decision was irrational or arbitrary. (*Id.* at pp. 376-377.) Absent that showing, the trial court is presumed to have achieved legitimate sentencing objectives, and its discretionary determination will be upheld. (*Ibid.*) In light of that presumption, an abuse of discretion will be found only in limited circumstances. An abuse of discretion occurs where the trial court is unaware of its discretion to dismiss, where it considers impermissible factors in declining to dismiss, or where the resulting sentence produces an arbitrary, capricious or patently absurd result under the particular facts of a specific case. (*Id.* at p. 378.)

There was no abuse of discretion here. In arguing otherwise, appellant characterizes his strike priors as “very old” and notes that neither crime involved actual violence. He also

offers that his other prior felony convictions are for petty thefts, which are now treated as misdemeanors, and claims “[t]he instant case would also have solely been misdemeanor thefts but for the accidental collision with the son of the victim of the theft . . .” He further offers that “his crimes stemmed from his gambling addiction” and claims he “successfully completed his most recent parole supervision and was discharged after only two years.”

Even putting aside that the evidence does not establish appellant’s collision with Matthew was “accidental” and that he committed one of his current offenses while on parole, his assertions at most indicate that the court would not have abused its discretion had it granted the motion. But that is not the relevant inquiry. (See *Carmony, supra*, 33 Cal.4th at p. 376 [in filing a *Romero* motion, “[i]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations”].) Notwithstanding the age of appellant’s strike priors and the fact that his crimes appear to have been motivated by his addiction, the relevant factors support the court’s conclusion that appellant falls within the class of recidivists that the Three Strikes law is intended to protect society against. Although appellant’s strike priors did not involve violence, the court properly concluded that he nevertheless presents a “danger to the public.” Moreover, he was given ample opportunities to treat his addiction yet continued to reoffend even after the current charges were brought against him. Given the nature and circumstances of appellant’s current and prior crimes and the particulars of his background, character, and prospects, this is not the “extraordinary” case in

which “no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme” (*Ibid.*)

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Gilbert A. Romero, Judge
Superior Court County of Ventura

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