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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS JORGE FLORES, JR.,

Defendant and Appellant.

B281912

(Los Angeles County
Super. Ct. No. BA451965)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed as modified with directions.

Mark S. Devore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Luis Jorge Flores, Jr. was convicted by a jury of attempted carjacking, a felony. (Pen. Code,¹ §§ 215, subd. (a), 664.) The jury further found defendant personally used a deadly weapon, a knife, in the commission of the offense. (§ 12022, subd. (b)(1).) Defendant admitted a prior serious felony conviction allegation for purposes of section 667, subdivision (a)(1), and the Three Strikes law as set forth in sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (e). He also admitted a section 667.5, subdivision (b) prior separate prison term allegation. The trial court imposed a 12-year state prison sentence.

On appeal, defendant argues the trial court's denial of his *Romero*² motion to dismiss his prior strike conviction was an abuse of discretion. We find no abuse of discretion. Defendant further asserts, the Attorney General concedes, and we agree that a local crime prevention programs fine was improperly imposed and, with respect to the weapon use enhancement, the abstract of judgment cites the wrong statute. We modify the judgment to omit the fine and otherwise affirm it. We direct that the abstract of judgment be amended to omit the fine and to reflect an enhancement under section 12022, subdivision (b)(1) rather than section 12022.5, subdivision (b)(1).

¹ Further statutory references are to the Penal Code.

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

II. DISCUSSION

A. *The Trial Court did not Abuse its Discretion When it Refused to Dismiss the Prior Strike Conviction Allegation*

1. Applicable law

Under section 1385, subdivision (a), and in furtherance of justice, a trial court may vacate an allegation under the Three Strikes law that a defendant has previously been convicted of a serious or violent felony. (*People v. Romero, supra*, 13 Cal.4th at pp. 529-530.) In doing so, “the court . . . must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) The court must also state its reasons for dismissing a strike conviction allegation orally and, in some circumstances, in the court minutes (§ 1385, subd. (a)), but is not required to “explain its decision *not* to exercise its power to dismiss’ [Citation.]” (*People v. Carmony, supra*, 33 Cal.4th at p. 376, italics added.)

Our review is for an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 375.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) It is defendant’s burden to establish that the trial court’s decision was irrational or arbitrary. (*Id.* at p. 376.) That reasonable

minds might differ is not enough. (*Id.* at pp. 375, 378.) Absent a showing the trial court’s decision was irrational or arbitrary, we presume the trial court acted to achieve lawful sentencing objectives. (*Id.* at pp. 376-377) “[W]here 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’ [Citation.]” (*Id.* at p. 378.)

2. Facts pertaining to defendant

Defendant committed multiple offenses as a juvenile, between the ages of 12 and 17. The longest period of time between transgressions was 19 months. Defendant’s juvenile adjudications were for battery, exhibiting a deadly weapon, vandalism, alcohol possession, marijuana possession, giving false identification to police, and lewd and lascivious acts. Defendant spent time at home on probation and in Camp Community Placement. In January 2001, defendant was committed to the California Youth Authority (now the Division of Juvenile Justice) for eight years.

As an adult, defendant continued to repeatedly violate the law. He was discharged from the California Youth Authority on March 3, 2004. Seventeen days later, on March 20, 2004, defendant committed the prior strike offense, a robbery. He approached a woman waiting at a bus stop, simulated a handgun and demanded money. Fearing for her safety, the victim gave defendant \$100. The victim told a passing police officer that defendant had robbed her. Defendant was arrested and the \$100 was returned to the victim. Defendant told a probation officer:

he was under the influence of medication and alcohol and had no memory of committing the robbery; he had been consuming alcohol for three years but had never attended a drug or alcohol counseling program; he had been raised by his mother since the age of nine when his parents separated; and his father was in prison. Defendant was convicted of robbery and, on April 22, 2004, was sentenced to two years in state prison.

After serving his state prison sentence for robbery, defendant did not remain crime free for any period of time longer than two years. Defendant was paroled from state prison on December 4, 2005. One year and three months later, on March 7, 2007, he was arrested for driving under the influence of alcohol or drugs and for marijuana possession. On June 29, 2007, he was convicted of driving while under the influence of alcohol, a misdemeanor, and sentenced to three years' summary probation. Six months later, on December 31, 2007, and while defendant was on probation, he was arrested for grand theft, a felony. He was convicted of that offense on May 21, 2008, and sentenced to state prison for five years. He was paroled on February 25, 2012. Less than eight months later, on October 14, 2013, defendant was arrested for receiving stolen property and petty theft. On December 18, 2013, defendant was convicted of petty theft, a misdemeanor, and placed on probation for one year. One month later, on January 11, 2014, while on probation, defendant was arrested for possession of a controlled substance in a prison or jail. On August 12, 2014, defendant was convicted of that offense, a felony, and sentenced to one year in state prison. Five months later, on January 27, 2014, defendant was arrested for failing to register as a sex offender. On August 7, 2014, he was convicted of the felony offense and sentenced to two years in state

prison. On September 2, 2014, defendant was imprisoned on a parole violation following an arrest for receiving stolen property, controlled substance possession and escaping from jail.

Defendant was paroled on October 12, 2015.

Defendant committed the present offense on June 23, 2016, eight months after he was paroled. He was unemployed and transient at the time. The victim, Ivan Hernandez, was in line at a McDonald's drive-through when defendant approached Hernandez's truck and told him to get out. When Hernandez refused, defendant said, "Are you really going to do this?" Defendant brandished a five- to six-inch knife. Hernandez pushed defendant away, placed his truck in reverse, and drove off.

In 2016, defendant's parole agent described defendant as a gang member, a methamphetamine user, and an alcohol abuser. The parole agent told a probation officer: "The defendant had the opportunity to change but chose otherwise. The defendant was provided a place to live, but decided to remain on the streets to continue drinking alcohol and partake in methamphetamine. A drug treatment program was offered, but he refused. Defendant found it very difficult to support himself and could not handle society pressures, which made it difficult to find a suitable placement for him. Defendant had [a] very difficult time adjusting and could not function in the community."

3. Proceedings in the trial court

In support of his motion in the trial court, defendant argued 13 years had passed since he committed the 2004 offense leading to the prior strike conviction, he was only 21 years old

then, he did not use a weapon, and his subsequent offenses were nonviolent. With respect to his history of methamphetamine and alcohol abuse, and the absence of any prior participation in a drug treatment program, defendant asserted: “[Defendant’s] refusal to partake in a drug treatment program offered by parole is a symptom of the fact that prison has done little to prepare [defendant] for life in the community.” Defendant also attempted to minimize the present offense’s seriousness calling it a crime of opportunity lacking sophistication and planning. Defendant noted the victim “was never removed from the car,” there was no indication defendant attempted to assault the victim with the knife, the victim suffered only “a small laceration on his hand,” there was no damage to the car, and defendant did not chase the victim when the victim drove away.

The trial court denied the motion. At the hearing on the motion, the trial court noted defendant began his criminal career when he was just 12 years old, he had repeatedly served time in juvenile and adult custody, his criminal history was constant and continuous—he did not remain free of criminal conduct for more than two years at any time—and the current offense was aggravated. The court observed: “The history shows consistency. He’s released, he commits a crime. He’s released, he commits a crime. He is released, he commits a crime. [¶] He doesn’t get it.” The minute order states: “[T]he defendant’s crimes and convictions have been consistent, he has not remained free of any crime for 2 years, he started his criminal activity at age 12 and the crimes get more aggravated.”

4. The trial court did not abuse its discretion

There was no abuse of discretion. Defendant has an extensive criminal history. His criminal record spans 21 years, from 1995 to 2016. He committed his first offense when he was 12 years old. During the 21 ensuing years, defendant did not remain crime free for any significant period of time. He was on parole when he committed the present attempted carjacking. Defendant brandished a knife during the attempted carjacking thereby endangering the victim's life. And although given the opportunity, he had failed to address his substance abuse problems. His prospects for the future were poor. At the time of his most recent arrest, defendant was on parole, unemployed and transient, had declined housing and had refused substance abuse programming. The trial court balanced these factors and concluded defendant did not fall outside the spirit of the Three Strikes law. The trial court's decision not to dismiss the prior strike conviction allegation was neither irrational nor arbitrary and does not constitute an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at pp. 378-379; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

Defendant contends the trial court's decision improperly focused solely on his criminal history and failed to consider the "entire picture" including the nonviolent nature of his post-strike crimes and the remoteness of his prior strike conviction. That the two misdemeanor and three felony convictions defendant sustained, between his 2004 robbery and this conviction, were for nonviolent crimes, does not place him outside the spirit of the Three Strikes law. Moreover, the age of defendant's 2004 strike conviction was not a mitigating factor because "[h]e did not

refrain from criminal activity during [the ensuing years], and he did not add maturity to age.” (*People v. Williams* (1998) 17 Cal.4th 148, 163.) Finally, “the fact that the [trial] court focused its explanatory comments on [defendant’s criminal history] does not mean that it considered only that factor.” (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.)

B. It was Error to Impose a Local Crime Prevention Programs Fine

Subject to a defendant’s ability to pay, a \$10 local crime prevention programs fine must be imposed in any case in which the defendant is convicted of any of the offenses enumerated in section 1202.5, subdivision (a). The trial court imposed the fine in this case. Carjacking in violation of section 215 is one of the enumerated offenses. *Attempted* carjacking is not. Therefore, it was error to impose the fine. (*People v. Jefferson* (2016) 248 Cal.App.4th 660, 663.) The judgment must be modified and the abstract of judgment amended to omit the \$10 fine together with the \$2 surcharge assessed on the fine under section 1465.7.

C. The Abstract of Judgment Must be Amended to Correctly Reflect the Enhancement Imposed

As noted above, the jury found defendant personally used a deadly weapon, a knife, in the commission of the attempted carjacking in violation of section 12022, subdivision (b)(1). The abstract of judgment erroneously reflects an enhancement under section 12022.5, subdivision (b)(1). We must correct the error. (*People v. Jones* (2012) 54 Cal.4th 1, 89.) We will direct the trial

court to amend the abstract of judgment to cite the correct statute.

III. DISPOSITION

The judgment is modified to omit the \$10 local crime prevention programs fine imposed under Penal Code section 1202.5, subdivision (a). The judgment is affirmed in all other respects. On remand, the abstract of judgment must be corrected to (1) omit the \$10 local crime prevention programs fine together with the \$2 surcharge assessed under Penal Code section 1465.7 and (2) reflect a one-year enhancement under Penal Code section 12022, subdivision (b)(1), rather than Penal Code section *12022.5*, subdivision (b)(1). The trial court is to deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.