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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.

RAY EDWARD DULANY,

Defendant and Appellant.

2d Crim. No. B285056  
(Super. Ct. No. 16F-08399)  
(San Luis Obispo County)

Ray Edward Dulany, a three strikes offender, appeals his 30-year-to-life state prison sentence, imposed after a jury convicted him of first degree residential burglary. (Pen. Code, § 459.)<sup>1</sup> In a bifurcated proceeding, the trial court found that appellant had suffered two prior strike convictions for first degree

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated. The trial court sentenced appellant to 25 years to life on the burglary count, plus five years on the prior serious felony conviction (§ 667, subd. (a)(1)). The prior prison term enhancement was stayed.

residential burglary (§§ 667, subds. (d) & (e), 1170.12, subds. (b) & (c)), a prior serious felony conviction (§ 667, subd. (a)(1)), and a prior prison term (§ 667.5, subd. (b)). Appellant contends that the trial court abused its discretion in denying his *Romero* motion (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) to strike a prior strike conviction. We affirm.

### *Facts*

On August 30, 2016, appellant burglarized Stephen and Cherie Clark's house while they were gone. Appellant wore sunglasses, a gray sweater, and had a pair of socks on his hands. A surveillance camera filmed the burglary. Detective Chad Guiton of the San Luis Obispo County Sheriff's Department recognized appellant in the surveillance video and determined that a Harley Davidson belt buckle was taken from the house. Appellant sold the belt buckle to a pawn shop a few hours after the burglary and signed a receipt. The pawn shop owner, Elaine Evans, identified appellant in a six-pack photo lineup.

On September 2, 2016, Sheriff's Deputy James Wyett responded to a family disturbance call at appellant's house and detained appellant as he was getting into his car. Inside the car was property taken in the burglary, a shuriken (martial arts throwing star), and a pair of sunglasses and gray sweater that matched the burglar's apparel in the surveillance video.

### *Romero Motion*

Before sentencing, appellant brought a *Romero* motion to strike his prior strike convictions. (§ 1385.) Denying the motion, the trial court found appellant was a threat to public safety and "has shown repeatedly criminal sophistication and opportunism. [¶] And, I don't, quite honestly, have any reason to believe if he were to receive a sentence less than a three strikes

sentence that he wouldn't continue to engage in that pattern of behavior.”

On review, there is a strong presumption that the trial court properly exercised its discretion in denying the motion to strike. (*In re Large* (2007) 41 Cal.4th 538, 551.) “[T]he Three Strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm . . . .” (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) In ruling on a motion to strike, the trial court considers the defendant’s past and present felonies, background, character, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

Appellant contends that the trial court failed to consider and weigh all the *Williams* factors. The trial court carefully reviewed the motion, supporting documents, and opposition papers “because this is a serious case and [appellant] has quite a bit at stake.” Appellant had an extensive criminal history. In 2007, shortly after appellant turned 18, appellant was arrested for prowling outside a residence. Appellant and his cohort had black face masks and 17 iPods and iPads in a backpack. In a *Miranda* interview (*Miranda v. Arizona* (1966) 384 U.S. 436), appellant admitted committing four residential burglaries and said that he had committed nearly 50 similar burglaries using the same modus operandi. Appellant would knock on the house door and if no one answered, enter through a window or door. Appellant was charged with four counts of residential burglary, entered a plea to two counts of first degree residential burglary, and was granted probation with 365 days jail.

In 2008 appellant, dressed in all black, smashed a restaurant window, burglarized the restaurant, and led the police on a foot chase wearing a pair of socks on his hands. Appellant pled no contest to second degree burglary, admitted a strike prior, and was sentenced to six years state prison.

Following appellant's release from prison appellant was convicted of two counts of possession of a controlled substance (Health & Saf. Code, §§ 11375, subd. (b)(2), 11377, subd.(a)). In 2016, less than four months before the Clark burglary, appellant was convicted of unlawful possession of personal identifying information (§ 530.5, subd. (c)(1)) and use of a controlled substance. (Health & Saf. Code, § 11550, subd. (a).)

Appellant argues that he had a difficult childhood, was homeless, and committed the burglary to support his drug addiction. Although substance abuse may, in some cases, be a factor in mitigation, the trial court reasonably concluded that appellant's failure to address his substance abuse problem was a negative indication of appellant's background, character and prospects. (*Williams, supra*, 17 Cal.4th at p. 163.) The trial court found that it "cannot, by any stretch, simply presume that this criminal behavior that [appellant] has engaged in, fairly unremittingly, since he was 18 years old has solely been attributed to his substance abuse addiction. In fact, it appears that in all of his offenses [appellant] exhibited a certain amount of criminal sophistication that quite honestly makes me wonder whether he was, in fact, suffering from addiction at the time he committed some of these offenses."

Appellant contends that the non-violent nature of the burglary is a mitigating factor and warrants a more lenient sentence. Rejecting the argument, the trial court found that

appellant is a danger to public safety. “[Appellant] is going into people’s homes, violating their personal space and their safety, and stealing from their residences. [Residential burglary] is a crime that can either be a serious or violent offense depending on whether the home is occupied, which, thank goodness, in this case it was not at the time he committed the offense.”

Appellant argues that he has matured and notes that the probation officer recommended a 14 year prison sentence if the trial court was inclined to grant the *Romero* motion.<sup>2</sup> Despite his promise to reform, appellant carried out a sophisticated burglary that was highly dangerous and similar to the prior burglaries. Appellant not only had two prior strikes but, in 2007,

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<sup>2</sup> Appellant, in his reply brief, claims that the trial court abused its discretion in not considering the mitigating factors tied to appellant’s youth. (See *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*); *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*); *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*); *People v. Caballero* (2012) 55 Cal.4th 262; *People v. Franklin* (2016) 63 Cal.4th. 261.) Appellant was 18 years old when he committed the two prior strikes, and 20 years old when he was sentenced to prison for commercial burglary. Our Supreme Court and the California Courts of Appeal have rejected attempts to extend the rationale of *Roper*, *Graham*, and *Miller* to adult offenders. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1381-1382; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 [defendant who committed murder when he was 18 years 5 months old not entitled to the same sentencing considerations as juveniles convicted of crimes when they are less than 18 years old].) “[T]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood’ [citation], and that is the line the [United States Supreme Court] has drawn in its Eighth Amendment jurisprudence.” (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1380.)

admitted committing 50 other residential burglaries. In 2008, appellant was convicted of commercial burglary that could have well resulted in a Three Strikes sentence. As an act of grace, appellant was sentenced to six years state prison and squandered the opportunity to reform. Following his release from prison, appellant was convicted of three drug offenses and unlawful possession of personal identifying information, all a few months before the Clark burglary.

The trial court found that appellant's drug addiction and childhood problems did not outweigh appellant's persistent inability to conform his conduct to the requirements of the law. On review, we are precluded from reweighing the sentencing factors set forth in *Williams* and *Romero*. (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 373-374.) Once a career criminal commits the requisite number of strikes, the circumstances must be extraordinary before the defendant can be deemed to fall outside the spirit of the Three Strikes law. (*Id.* at p. 378; *People v. Philpot* (2004) 122 Cal.App.4th 893, 907.) This is not an extraordinary case. The trial court was well within its discretion in finding that appellant's unabated recidivism placed appellant squarely within the spirit of the Three Strikes law. (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.) Viewing appellant's criminal history, the prior convictions which are numerous and of increasing seriousness, and his failed attempts at probation, we cannot say that the sentence is irrational or arbitrary. (*People v. Carmony*, *supra*, at pp. 376-377.)

*Disposition*

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

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