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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALDO TOLEDO TOCA,

Defendant and Appellant.

B230396

(Los Angeles County
Super. Ct. No. KA089833)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Bruce F. Marrs, Judge. Reversed in part and affirmed in part.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Geraldo Toledo Toca (Toca) was convicted of failing to register as a sex offender as required by Penal Code section 290.015, subdivision (a)¹ (count 1); failing to update sex offender registration annually in violation of section 290.012, subdivision (a) (count 2); and giving false information to a police officer in violation of section 148.9, subdivision (a) (count 3). He was sentenced pursuant to the Three Strikes Law. Toca challenges his conviction on count 1 based on insufficiency of the evidence and ineffective assistance of counsel. In addition, he claims that the trial court erred by not striking at least one prior conviction allegation. We reverse the conviction under section 290.015, subdivision (a). In all other respects, we affirm.

FACTS

Background

In 1981, Toca was convicted in Nevada of committing rape and robbery while using a deadly weapon. He was sentenced to Nevada state prison and was not released until 2000 or 2001.² In 2003, he was convicted of carrying a concealed dagger in violation of section 12020, subdivision (a)(4) and possession of controlled substance paraphernalia in violation of Health and Safety Code section 11364. He was placed on probation for two years and sentenced to four days in county jail. In the same year, he was convicted of taking a vehicle without consent in violation of Vehicle Code section 10851, subdivision (a), sentenced to 365 days in county jail and placed on probation for three years. In 2005, he was convicted of possession of controlled substance paraphernalia and sentenced to 60 days in county jail. On multiple occasions, his probation was revoked on the 2003 conviction for taking a vehicle without consent and sent to country jail or prison.

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

² There is no direct evidence of how long Toca was incarcerated. The probation officer's report states that the length of incarceration is unknown. But at the sentencing hearing, the prosecutor stated: "He got 20 years for what he did to that young lady back in Vegas. So if you take that 20 years, that drops him right into 2000, 2001." We have no cause to doubt the prosecutor's statements. On appeal, Toca does not suggest that he served less than 20 years.

Pursuant to section 290, Toca registered as a sex offender in the City of Pomona (Pomona) on October 6, 2005, December 21, 2005, March 29, 2006, and October 11, 2006. But after October 11, 2006, he did not register in Pomona or anywhere else in California.

In September 2007, Toca was convicted of receiving stolen property in violation of section 496, subdivision (a), possession of burglary tools in violation of section 466 and giving false information to a police officer in violation of section 148.9. He was sentenced to 30 days in county jail.

Effective October 2007, the Legislature enacted section 290.015. Section 290.015, subdivision (a) provides: “A person who is subject to the [Sex Offender Registration Act] shall register, or reregister if he or she has previously registered, upon release from incarceration, placement, commitment, or release on probation pursuant to subdivision (b) of Section 290.”

Toward the end of 2007, Toca was convicted of a failure to register in violation of section 290. He was sentenced to 32 months in state prison. On January 19, 2010, he was released on parole.

Toca did not reregister as a sex offender upon his release.

On June 3, 2010, Pomona police officers entered a condemned house near a high school and encountered seven people, including Toca. The officers questioned Toca and he provided a false name and date of birth. He was arrested for providing false information to a police officer.

The information

The Los Angeles District Attorney charged Toca with two counts of failing to register as a sex offender and one count of providing a police officer with false information. As to count 1, it was alleged that Toca violated section 290.015, subdivision (a) by failing to provide true registration information.³ Regarding sentencing

³ It is clear on its face that the information filed by the Los Angeles District Attorney did not allege the elements of section 290.015, subdivision (a). On appeal, the People do not defend this allegation.

enhancements, it was alleged that Toca's convictions for rape and robbery in Nevada qualify as prior convictions within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through d), and that the prison terms he served in connection with his 2003 conviction for taking a vehicle without consent and his 2007 conviction for failure to register as a sex offender qualify as prior prison terms within the meaning of section 667.5, subdivision (b).

Confusion regarding count 1

In a pretrial discussion, defense counsel questioned "the choice of the language that [the prosecutor] used, his office used, in [c]ount 1[,] which is the failure to provide true registration information." Defense counsel stated: "[A]s I try to read the code and figure this thing out, it almost sounded like it's willfully giving false information to the police." The trial court replied: "It certainly seems fairly close to that. Yes." According to defense counsel, the false information issue "comes up again in [c]ount 3." He added: "So I'm not sure, I was never sure exactly what they're driving at in [c]ount 1."

The prosecutor weighed in, stating, "I can clarify. If when you look at [section] 290.015, it actually goes to, as the judge just alluded to, . . . there's two ways [you can] violate under [CALCRIM No.] 1170 [If] you don't update your residence status, whether new house or transient or anything of that nature, within 5 business days of moving within a city, moving between counties, moving between states. And that's the sum and substance of [c]ount 1."

The trial court agreed. The prosecutor added: "Our system prints out this definition, but basically that's the People's theory, is that he did not properly update his residence status and location."

Defense counsel continued, stating, "But the language that they used, that the computer used at least, is failure to provide true information. It almost sounds like okay, you gave us information, but it wasn't true. So the flip side of that is you actually gave us false information. [¶] In other words, it seems like the crime here that they're targeting, at least in the language, is not that he failed to go down and register . . . , but when he gave any information at all, it was false information to avoid the registration

process. [¶] Because they use the word failure to provide true information like he gave information but it was untrue.”

When defense counsel said that he was still confused, the trial court said, “Well, [defense counsel], you’re in good company. I’m regularly in that position.”

The stipulation

The parties stipulated that Toca “was previously convicted of an offense which required him to register pursuant to Penal Code section 290.”

Trial on the charged offenses

In his opening statement, the prosecutor stated: “The People expect the evidence to show that [Toca] had a duty to register as a sex registrant. Pursuant to that duty, he was to register on his birthday or 5 days after his birthday, as well as any time he changed his residences or became transient. That the defendant was so advised of these obligations and the defendant did not comply with these obligations. [¶] And that on June 3rd, after not registering for his birthday and his change of residence, he was located in the City of Pomona, and he gave a false name to an officer, which was later determined to be false. [¶] And the People expect these are the facts, this is evidence you’ll hear, and at the end of trial that those will be the facts and evidence you’ll have to consider on whether or not he’s guilty.”⁴

Officer Ronald Ramirez of the Pomona Police Department was called to the witness stand first. He testified regarding the events that transpired on June 3, 2010, when Toca was arrested. Next, the prosecution called Annette Flores (Flores) to testify. At the time, she was assigned to the Detective Bureau in the Pomona Police Department, and her official title was Administrative Assistant to the Sex Crimes Division. She testified that she handles sex registration in Pomona. Flores explained that a sex offender must register annually on his birthday if there is no change in residence. If there is a

⁴ Except for a short preamble, this was the prosecution’s entire opening statement. Significantly, the prosecutor did not state that the evidence would show that Toca was incarcerated, that he was released on probation on January 19, 2010, and that he failed to register within 5 days of his release.

change in residence, or if the sex offender becomes transient, he must update his registration. In each instance, registration must be within five days. Flores was familiar with Toca because she dealt with his previous registrations. According to Flores, Toca had last registered in Pomona in March 2006.⁵

The People rested. The defense made a motion to dismiss under section 1118.1 and the motion was denied.

The defense did not call any witnesses.

As to count 1, the trial court instructed the jury pursuant to a modified version of CALCRIM No. 1170 and stated that Toca is “charged . . . with failing to register as a sex offender, in violation of . . . section 290[, subdivision] (b) and [section] 290.015[, subdivision] (a). [¶] To prove [Toca] is guilty of this crime, the People must prove 1, [Toca] was previously convicted of a registerable offense; 2, [Toca] resided in California; 3, [Toca] actually knew he had a duty to register as a sex offender under . . . section 290 within 5 working days of his birthday . . . ; 4, [Toca] willfully failed to register as a sex offender with the police chief of that city within 5 working days of coming into or changing his residence within that city.”

In the prosecutor’s closing argument, he argued that Toca willfully failed to register as required by section 290 when he changed his residence to the condemned house; he willfully failed to register annually; and he willfully provided false information to the police. The prosecutor did not argue that Toca failed to register after being released from prison.

The jury convicted Toca on all counts.

Trial on the priors; the motion to strike

The trial court found true the allegations that Toca suffered prior convictions for rape and robbery in Nevada and that he served prior prison terms after being convicted of taking a vehicle without consent and failing to register as a sex offender. Defense

⁵ Flores was only asked about annual registration, change of address registration and transient registration. She was never asked about registration after a sex offender is released from incarceration or released on probation.

counsel moved to strike at least one the conviction priors pursuant to the trial court's discretion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The trial court denied the motion, stating: "I would note that after the sentence in 1981, [Toca] spent a very substantial period of time in Nevada State Prison, turned around in [2003] and picked up a California prison sentence. On that he was violated in [2007], violated again in [2009]. [¶] He may not specifically have been told at the time of the Nevada prosecution that he was going to have to register in California or some other state if he moved. But rape and robbery are clearly very serious violent crimes. He may not have been told specifically, but common sense would tell you that there would be consequences to those kinds of convictions. [¶] But the most important thing in this particular case and the thing I'm focusing on, he's already been to prison once on a [section] 290 violation, and he was on parole and probation at the time of the commission of this particular offense. And I can't get around that. And those facts by themselves put him right square in the [three] strikes legislation. [¶] Yes, he's approaching the upper age range that [three] strikes was aimed at. But he either cannot or will not conform his behavior to the requirements of the law. Therefore, [the] *Romero* [motion] will be denied as to both strikes."

The sentence

On count 1, Toca was sentenced to 25 years to life pursuant to the Three Strikes Law, and he was given two years for the prior prison term findings. On count 2, he received a sentence of 25 years to life. And as to count 3, he received a six-month misdemeanor jail sentence. The sentences on these last two counts were ordered to run concurrently with the sentence on count 1.

This timely appeal followed.

DISCUSSION

I. Count 1 was not supported by sufficient evidence.

According to Toca, the People failed to prove that he violated section 290.015, subdivision (a). We agree.

The prosecution had the burden of proving every element of count 1. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) “To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the ‘substantial evidence’ test. Under this standard, the court ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.]” (*Id.* at pp. 260–261.)

Section 290.015, subdivision (a) provides that a sex offender must register pursuant to section 290, subdivision (b) upon release from incarceration or release on probation. Section 290, subdivision (b) requires a sex offender to register within five working days of entering into or changing his residence within a city. Thus, for the prosecution to prevail, it was required to prove that Toca was incarcerated after he last registered in 2006 and then failed to reregister within five working days after his release on probation on January 19, 2010. A review of the record establishes that the prosecution offered no evidence at trial to support these elements. Thus, the conviction was not supported by sufficient evidence.

The People contend that the evidentiary gap is filled by the stipulation. We disagree. The parties merely stipulated to the existence of a prior conviction that required Toca to register as a sex offender. But they did not stipulate as to when he was convicted. Per that stipulation, that conviction could have been long before Toca last registered in 2006. In fact, as the record shows, the conviction was in 1981. The parties also did not stipulate that Toca had been released from prison after he last registered, or that he had a duty to register by a specific date after his release. Moreover, Toca could not be convicted absent evidence that he willfully violated section 290.015, subdivision (a). (§ 290.018, subd. (b).) There was no evidence that Toca had been informed of his duty to register under section 290.015.

A few more observations are pertinent. The prosecutor and trial court proceeded as though Toca had been charged with violating section 290, subdivision (b). When the

prosecutor was explaining count 1 to defense counsel, he cited CALCRIM No. 1170 as the controlling jury instruction. That instruction pertains to violations of section 290, subdivision (b) rather than violations of section 290.015, subdivision (a). When the trial court instructed the jury on the substantive law pertaining to count 1, the trial court used CALCRIM No. 1170. In his opening and closing statements, the prosecutor never mentioned Toca's incarceration and subsequent release on January 19, 2010. Thus, not only was the jury deprived of evidence regarding section 290.015, it was also deprived of argument and a jury instruction.

Count 1 must be reversed.

In light of our conclusion, we need not consider Toca's argument that he received ineffective assistance of counsel.

II. The trial court did not abuse its discretion when it denied Toca's *Romero* motion to strike at least one prior conviction.

Toca argues that one of the prior conviction allegations should have been stricken because they both arose out of the same incident in 1981 and are arguably remote; his subsequent crimes were nonviolent; his failure to reregister in 2007 was a regulatory offense that posed no direct or immediate threat to society; he is outside the spirit of the Three Strikes Law; and if he was sentenced based on a second strike, he would likely receive a sentence of eight years six months and he would not be released from prison until he was 60 and no longer a threat to society.

This argument lacks merit.

In the furtherance of justice, a trial court may strike a prior serious and/or violent felony conviction allegation pursuant to section 1385, subdivision (a). (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*)). When deciding whether to strike a prior conviction, "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.” (*Id.* at p. 161.) As stated in *People v. Garcia* (1999) 20 Cal.4th 490, 500, a “defendant’s sentence is also a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior convictions allegations is the avoidance of unjust sentences. [Citation.]” Last but not least, when a trial rules on a *Romero* motion, it must remain mindful that the purpose of the Three Strikes Law is to provide greater punishment for recidivists. (*People v. Acosta* (2002) 29 Cal.4th 105, 127; *People v. Stone* (1999) 75 Cal.App.4th 707, 717; § 667, subd. (b) [it is the intent of the Legislature in enacting section 667 to “ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses”].)

A trial court’s denial of a motion to strike prior felony conviction allegation is reviewed for abuse of discretion. (*Romero, supra*, 13 Cal.4th at p. 530.) An appellate court will presume that the trial court “considered all relevant factors in the absence of an affirmative record to the contrary. [Citation.]” (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) It is not enough for an appellant “to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where 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.*) The burden is on the appellant “to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside[.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.)

Generally, the failure to strike a prior conviction allegation is an abuse of discretion only if: (1) a trial court is not aware of its discretionary power, (2) it considers impermissible factors, or (3) the sentencing norms established by the Three Strikes Law

produce an arbitrary, capricious or patently absurd result in a particular case. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Below, the trial court expressly considered the nature of the 1981 rape and robbery, calling them very serious violent crimes. The trial court also considered that Toca was convicted of failing to register after he had already been convicted of failing to register in 2007 and served time in prison. Regarding his character, the trial court noted that Toca cannot or will not conform his behavior to the requirements of the law. As for Toca's background and prospects, the trial court presumably found that Toca has nefarious character and poor prospects based on his past convictions, probation violations, and prison sentences, and based on him being transient and living in a condemned house next to a high school. The trial court quite properly determined that Toca falls within the spirit of the Three Strikes Law because he has repeatedly failed to register as a sex offender. Last, the trial court presumably considered whether Toca's sentence was just.

The record establishes that the trial court balanced the relevant facts and reached an impartial decision in conformity with the controlling case law. In other words, the trial court did not consider improper criteria. Nor is this case one in which application of the Three Strikes Law is arbitrary, capricious or patently absurd. Toca fits within the spirit of the Three Strikes Law because he is a recidivist who has never stopped committing crimes, going to prison, or violating probation and parole since 1981. As a result, we perceive no abuse of discretion.

We easily reject Toca's suggestion that his Nevada convictions are too remote for purposes of the Three Strikes Law. If a defendant lives a continuous life of crime, as here, a prior conviction will not be deemed remote. (*People v. Pearson* (2008) 165 Cal.App.4th 740, 749.)

It is true, as Toca points out, that he has not committed a violent felony since 1981 and failure to register as a sex offender is a regulatory offense. But the third strike under the Three Strikes Law does not have to be a violent crime. And, in any event, we reject Toca's attempt to minimize the severity of his offense. The purpose of section 290.012 is

to ensure that persons convicted of the enumerated crimes shall be readily available for police surveillance because they have been deemed likely to commit similar offenses in the future. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1196; *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527 [“Plainly, the Legislature perceives that sex offenders pose a ‘continuing threat to society’ [citation] and require constant vigilance”].) The trial court impliedly inferred that Toca evaded surveillance by failing to register while he was on parole for the same offense, defeated the purpose of the statute and thereby increased the possibility that would commit another sex crime. To make matters worse, he gave police officers false information in 2010. By his noncompliant behavior, Toca demonstrated that he was a continuing threat to society.

Though Toca contends that he falls outside the spirit of the Three Strikes Law, this contention is belied by the fact that he has never stopped committing crimes, violating probation and parole, and serving time in prison. Toca suggests that he would be sent to prison for eight years six months if a prior conviction allegation was stricken and this would be sufficient to punish him and protect the public from any threat that he poses. But based on his background, failure to register, decision to live in a condemned house near a high school (and therefore in proximity to vulnerable children), and willingness to lie to police, a longer sentence is appropriate because he has demonstrated that he will not conform his behavior to the law.

In his reply brief, Toca contends that reversal is dictated by *People v. Cluff* (2001) 87 Cal.App.4th 991 (*Cluff*). This contention lacks merit.

The defendant in *Cluff* was sentenced to 25 years to life for failing to register within five days of his birthday. The Court of Appeal reversed the denial of his *Romero* motion. It stated: “This record strongly suggests that Cluff committed a ‘technical’ violation of section 290, without intent to deceive or evade law enforcement. Though he failed to annually update his registration in San Mateo, Cluff consistently registered in the jurisdictions where he resided. The annual updating requirement was added to the Penal Code five years after Cluff left prison, the new requirement was omitted from the only document he was allowed to keep in 1995 when he registered in San Mateo, and the

updating requirement was itself amended in 1996. When the police looked for Cluff, he was living at his registered address. After the police contacted Cluff, he immediately telephoned them and promptly came to the station. [¶] Thus, Cluff's *Romero* motion did not lack substantial grounds on which the trial court might have exercised its discretion to strike one or more strikes. Cluff's failure to confirm his address, by itself, posed no danger to society. Cluff was exactly where he said he would be when he registered in 1995, and the police were able to quickly find him. The purpose of the registration statute was not undermined by his failure to annually update his registration. There was no indication he had reoffended since he left prison in 1990, and [the testifying doctor] believed that 'with probation supervision and participation in a treatment program' Cluff would not reoffend." (*Cluff, supra*, 87 Cal.App.4th at pp. 1001–1002, fn. omitted.) Despite these facts, the trial court found that Cluff intentionally tried to obfuscate where he was actually living. According to the *Cluff* court, the trial court's finding was not supported by substantial evidence. (*Id.* at p. 1004.)

The court did not reach Cluff's argument that a 25 years to life sentence violated the Eighth Amendment. But the court stated: "[F]or the guidance of the trial court on remand, we note that the severe penalty imposed on Cluff appears disproportionate by any measure. The nature of Cluff's current offense did not demonstrate recidivist tendencies toward child molestation. While there is no requirement that a third strike be a serious or violent felony, neither the Legislature nor the voters intended the Three Strikes law to be used as a nuisance statute to rid society forever of persons who fail to meet technical requirements to confirm an accurate registration. [¶] . . . [¶] On this record, there are strong arguments that Cluff should be treated as though he fell outside the Three Strikes scheme. In addition to the factors discussed above, we note that none of the circumstances in aggravation listed in the California Rules of Court appear to apply here . . . , while some circumstances in mitigation may apply. . . ." (*Cluff, supra*, 87 Cal.App.4th at p. 1004, fn. omitted.)

Cluff is easily distinguished. While Cluff had a stable residence, was regularly employed and complied with the requirement that he register upon changing his residence

(*Cluff, supra*, 87 Cal.App.4th at pp. 994–1004), Toca did not reregister after 2006 and being convicted of failing to register. Thus, there was evidence that Toca intentionally avoided registering as a sex offender so that the police could not find him. For that reason, his violation of section 290.012 was not a technical transgression on par with Cluff’s transgression.

DISPOSITION

Count 1 is reversed. We affirm the conviction on count 2 and the sentence for 25 years to life. We also affirm the conviction on count 3 and the concurrent jail sentence of six months.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ