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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD JOSEPH ROBINSON,

Defendant and Appellant.

C084177

(Super. Ct. No. 16FE007978)

A jury found defendant Edward Joseph Robinson guilty of assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (c)),<sup>1</sup> driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer (Veh. Code, § 2800.2, subd. (a)), and possession of a firearm by a felon (§ 29800, subd. (a)(1)). In a bifurcated proceeding, the trial court found true the allegation he had a prior serious felony conviction (§ 667, subd. (a)) for robbery (§ 211) that qualified as a strike

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<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

under the three strikes law (§§ 667, subds. (b)-(i), 1170.12). After denying defendant's *Romero*<sup>2</sup> motion to strike the prior robbery conviction, the trial court sentenced him to an aggregate prison term of 14 years four months.

On appeal, defendant contends that the trial court erred in denying his *Romero* motion. In supplemental briefing, he argues that his case should be remanded to allow the trial court to exercise its discretion to strike his section 667, subdivision (a) serious felony enhancement pursuant to Senate Bill No. 1393 (S.B. 1393)

We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Defendant fled from a police officer after the officer attempted to conduct a traffic stop for expired registration. During the pursuit, defendant drove at high rates of speed through a shopping center parking lot and on surface streets. He also threw a loaded handgun out his window that had a red lace attached to it. At one point, defendant stopped his car. After the officer pulled behind him, defendant put his car in reverse and rammed into the patrol car. He then drove off. The pursuit continued until defendant struck a parked car and fled on foot. He was apprehended about 25 minutes later after a perimeter was established and additional officers arrived on scene.

Following a jury trial, defendant was found guilty of assault with a deadly weapon upon a peace officer (§ 245, subd. (c)), driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer (Veh. Code, § 2800.2, subd. (a)), and possession of a firearm by a felon (§ 29800, subd. (a)(1)). In a bifurcated proceeding, the trial court found true the allegation that he had a prior serious felony conviction (§ 667, subd. (a)) for robbery (§ 211) that qualified as a strike under the three strikes law (§§ 667, subds. (b)-(i), 1170.12).

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

The probation report identified no circumstances in mitigation and four circumstances in aggravation: the crime involved great violence and other acts disclosing a high degree of cruelty viciousness or callousness (Cal. Rules of Court, rule 4.421(a)(1)),<sup>3</sup> defendant had engaged in violent conduct indicating he is a serious danger to society (rule 4.421(b)(1)), defendant had served a prior prison term (rule 4.421(b)(3)), and defendant was on parole supervision when the crimes were committed (rule 4.421(b)(4)). The probation report also noted that defendant had two prior felony convictions, including a conviction for robbery with a firearm enhancement.

The facts of the prior robbery conviction were summarized in the probation report as follows: “[D]efendant robbed three (3) victims while pointing a handgun at them. Later that evening, he robbed a female victim while armed with a gun. Upon contact with officers, the defendant was found with a gun hidden in his pants.” As for the other prior conviction, the probation report stated that defendant was convicted of possessing a weapon (§ 4502) while incarcerated for the robbery offense.

When interviewed by the probation officer, defendant reported that “he suffers from a mild intellectual disability, ADHD, PTSD and psycho-effective disorder” but does not take medication. Defendant also reported that he developed a drug addiction to heroin while incarcerated and used the drug on a daily basis when available and continued to use the drug after he was released from custody. Defendant admitted that what he did was wrong and apologized. He acknowledged that he has a violent background and that his violent behavior worsened when he was incarcerated. However, he maintained that he is not a bad person and was hopeful for a second chance. He noted that he had been locked up since he was 16 years old and has not had much of an opportunity to be successful in life. He explained that he wanted to live a normal life and

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<sup>3</sup> Further rule references are to the California Rules of Court.

did not want prison to be all that he knows. He said he had spoken to at-risk youth about growing up in foster homes and prison on a few occasions and began “to see what could be out there for [him]” until he “messed up” again.

Prior to sentencing, defendant filed a *Romero* motion requesting the trial court exercise its discretion to strike his strike prior for armed robbery.<sup>4</sup> In support of his motion, he pointed to a variety of factors, including his age at the time of the robbery offense (16 years old), his mental disorder (ADHD) and developmental disabilities, his troubled childhood, the assertedly less severe nature of the current offense as compared to the strike prior, and the passage of Proposition 57. He noted that Proposition 57 was not available to him when he suffered the robbery conviction and claimed he was not allowed to participate in rehabilitation programs while incarcerated because he was treated as an adult offender. He asserted that Proposition 57 was a “wakeup call” regarding the criminal process that juveniles should be afforded, and that “it is not too late to do something to help” him.

At the hearing on the motion, defense counsel reiterated many of the same points he made in his motion. He highlighted the fact that defendant had developmental delays, and that the robbery occurred when defendant was 16 years old. He also noted that defendant was treated as an adult for the robbery offense, and that, because Proposition 57 was not in effect at the time, there was no determination as to whether he was more suitable for treatment as a juvenile at the time. Counsel argued that, as a consequence of being treated as an adult for the robbery offense, defendant was not afforded an opportunity for rehabilitation. Instead, he was sent to prison, which “made him significantly worse.” Counsel admitted that defendant had joined a gang and got into fights, but asserted he did so to protect himself in prison. As for whether there was any

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<sup>4</sup> As part of his motion, defendant submitted social records from Alta California Regional Center.

chance for rehabilitation, counsel stated that, while defendant had one parole violation for absconding during the year or so he was on parole, he had not engaged in any acts of violence and was participating in an educational program, which involved speaking to at-risk youths. Counsel argued that the failure to treat defendant differently when he was a minor “mitigates this case to the point . . . where it brings it outside of the traditional California Three Strikes Law.”

The prosecutor argued that striking the strike prior was not appropriate because defendant robbed multiple individuals with a firearm, and his actions in this case do not support the conclusion that he was “looking to go on the right path.” The prosecutor stated it was his understanding that defendant had been hanging out with gang members at the time he committed the robbery offense, and that he continued to hang out with the same gang members after he was released from prison. The prosecutor noted that the handgun defendant had thrown out the window of his car had a red lace attached to it, which was consistent with firearms carried by gang members in the community. The prosecutor acknowledged that defendant did stay out of trouble for about a year after he was released from prison but argued that such conduct was not enough to justify striking the strike prior.

In ruling on the motion, the trial court considered various factors, including the circumstances of the robbery, defendant’s age at the time he committed the robbery (16 years old), his age at the time of sentencing (27 years old), his troubled childhood, his diagnosed mental disorders, his developmental disabilities, his conviction for possessing a weapon while incarcerated, the period of time he was free from convictions, his conduct in this case and the fact that he was on parole.<sup>5</sup>

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<sup>5</sup> Regarding defendant’s argument about not having had the benefit of Proposition 57, the trial court stated it had served in the Juvenile Court and had been assigned the fitness hearings for three years. It noted that the juvenile charge sheet indicated defendant had

Specifically, the court reasoned: “When I look at the aggravating factors in this particular case, he was convicted at a very young age of a 211. There was an arming enhancement in that offense. He was subsequently convicted of a violation of [s]ection 4502 . . . in 2011 for having a weapon up at Pelican Bay. He was given two years [s]tate prison consecutive to the eight years that he received here in Sacramento County. [¶] . . . [¶] [T]he offense conduct here is important. . . Here, while he was on parole, he had a firearm, which is a very serious offense. . . [H]e led the officer on a high-speed chase through a parking lot with a whole pile of cars and pedestrians walking through it and then down a street, and then the firearm was tossed out . . . And then shortly, thereafter, the Defendant rams the police officer in the police officer’s car with the vehicle that he was driving, which is one of the counts that he was convicted of here. [¶] So that’s *very significant conduct demonstrating a huge lack of potential rehabilitation. That’s a huge, huge, huge, minus factor in the equation.* (Italics added.)

The court went on to note: “He doesn’t have a significant period of time where he is free from convictions. He was in prison. He picked up another felony in prison; and then after he was released on parole, he picks up these offenses in a relatively short period of time.” The court noted that there was no evidence defendant acquired “any valuable skills . . . that would benefit him in the outside world” and that he had not graduated high school.

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been charged with four armed robberies and that he had been personally armed with a .357 revolver at the time. The court noted “that picture of the [d]efendant fits quite neatly in the heartland of cases where a [d]efendant would be found frequently to be fit and tried as an adult.” The court continued: “The bottom line is, the allegations at that time were very serious and he had mitigating factors that are not in everybody’s case. So the bottom line is, maybe he would have been treated as an adult and maybe he would have been treated as a juvenile. I can’t really tell. If he was treated as a juvenile and adjudicated, he clearly would have been sent to . . . At that time, I think it might have still been CYA, but if not, it was the successor to that because of the nature of the offense with the firearms.” The court acknowledged that had he been sent to CYA, “greater services” would have been made available to defendant than in state prison.

The court continued: “So to summarize the factors in this case, he has . . . diagnosed disorders which clearly have had an effect upon him. He had a rough upbringing. And on the flip side, *he has a tremendous criminal history, and the offense conduct is very serious.*” (Italics added.) The court acknowledged there may have been a correlation between defendant’s ADHD and his behavior as a youth, but also noted “there is a lot of people with ADHD who don’t engage in four . . . counts of armed robbery and those types of things.” The court stated: “When I apply all of those factors taken together, I do find that he falls within the heartland of those cases which are designed to fall within the scope of the Three Strikes Law.” ¶ One of the facts of life are, *I look at [defendant] as he is now* and look at all those factors in his history, both positive and negative, maybe if when he was 16 if other things had happened, some of the things between then and now would not have happened, but they did. And the question is: What are we going to do going forward? And does he fall within the heartland or does he not fall within the heartland? And for the reasons I just said, I do find that he falls within the heartland; and for that reason the *Romero* motion is denied.” (Italics added.)

After denying the *Romero* motion, the trial court sentenced defendant to an aggregate prison term of 14 years four months.

## **DISCUSSION**

### **I. Denial of Romero Motion**

Defendant contends the trial court erred in denying his *Romero* motion. We disagree.

Section 1385 gives the trial court authority, on its own motion or upon application of the prosecution, “and in furtherance of justice,” to order allegations be stricken or dismissed. (§ 1385, subd. (a).) In *Romero*, our Supreme Court held that a trial court may utilize section 1385 to strike or dismiss a prior strike for purposes of sentencing under the three strikes law. (*Romero, supra*, 13 Cal.4th at p. 504.) A trial court’s ruling denying a request to strike or dismiss a prior strike allegation “is subject to review under the

deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).)

“In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘ “[t]he burden is on the party attacking the sentence 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 on review.” ’ [Citations.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

In deciding whether to dismiss a prior strike allegation, a trial court “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.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, the trial court considered these factors, and acted well within its discretion in denying defendant’s *Romero* motion.

## **II. Senate Bill No. 1393**

Included in the aggregate term of defendant’s 14-year four months sentence is a five-year prior serious felony enhancement. (§ 667, subd. (a)). At the time defendant was sentenced, the court had no discretion to strike the enhancement.

S.B. 1393 (2017-2018 Reg. Sess.) went into effect on January 1, 2019 and amended sections 667, subdivision (a) and 1385, subdivision (b) to give a trial court the



authority to strike or dismiss a prior serious felony allegation in the furtherance of justice under section 1385. Because defendant's appeal was pending when S.B. 1393 went into effect, it applies to defendant retroactively. (*People v. Franks* (2019) 35 Cal.App.5th 883, 892 (*Franks*); *People v. Jones* (2019) 32 Cal.App.5th 267, 272-273 (*Jones*).)

Defendant asks us to remand this matter to allow the trial court to exercise its discretion as to whether to strike or dismiss the section 667, subdivision (a) enhancement under section 1385. The People argue that given the various factors the court considered in ruling on the *Romero* motion and its reasons for denying that motion, remand would be futile. We agree.

We are not required to remand when “ ‘the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] ... enhancement’ even if it had the discretion.” (*Jones, supra*, 32 Cal.App.5th at pp. 272-273, quoting *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; accord, *Franks, supra*, 35 Cal.App.5th 883, 892.) “The trial court need not have specifically stated at sentencing it would not strike the enhancement if it had the discretion to do so. Rather, we review the trial court’s statements and sentencing decisions to infer what its intent would have been.” (*Jones*, at p. 273, citing *People v. McVey* (2018) 24 Cal.App.5th 405, 419.)

Here, the record clearly indicates the trial court would not have stricken or dismissed the section 667, subdivision (a) five-year enhancement. We recognize the trial court sentenced defendant to the midterm for the assault on a police officer charge, thereby showing some leniency. But in denying the *Romero* motion, the trial court considered the same section 1385 furtherance of justice factors it would be required to consider on remand to consider whether to strike or dismiss the section 667, subdivision (a) enhancement in the furtherance of justice under section 1385 -- the nature and circumstances of the current offense, the nature and circumstances of prior conviction offense, the particulars of defendant’s background, character, and prospects for the



Duarte, J., Dissenting.

I respectfully dissent from the majority's decision to decline to remand this case to allow the trial court to consider its newly conferred discretion to strike defendant's Penal Code section 667, subdivision (a) serious felony enhancement pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.).

As a general rule, remand is *required*; the exception to that rule is where the record shows the trial court clearly indicated at the original sentencing that it would not strike the enhancement, even if it had the discretion to do so. (*People v. Franks* (2019) 35 Cal.App.5th 883, 892; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Although the majority concludes the trial court already considered the relevant factors in its analysis of defendant's motion to dismiss his prior strike, and thus the court has already indicated how it would rule such that remand is unwarranted, I disagree.

As the majority correctly points out, under the analysis in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, in deciding whether to dismiss a prior strike allegation, a trial court must determine whether defendant should properly be deemed outside the spirit of the three strikes law. (Maj. opn., pp. 7-8; see *People v. Williams* (1998) 17 Cal.4th 148, 161.) In the application of the discretion conferred by Senate Bill No. 1393, in contrast, the role of the trial court is to "evaluate[] all relevant circumstances to ensure the punishment fits the offense and the offender." (*People v. Shaw* (2020) 56 Cal.App.5th 582, 587.) These are very different analyses with different considerations. In the context of deciding a *Romero* motion, the trial court need not consider the underlying offense or offenses and the appropriate sentence therefor; the analysis concerns only the *offender*, and whether they fall within the spirit of the three strikes law, which is a tool for punishing those offenders with recidivist tendencies more harshly than non-recidivist offenders. Thus, I do not agree that the trial court's decision below to deny the *Romero* motion was, as the majority suggests, the equivalent of a decision to decline to reduce defendant's sentence by four years. (See maj. opn., p. 10.) The decision to decline to find defendant outside the heartland of recidivist offenders is

not a decision about the propriety of the sentence he or she will face as a consequence of inclusion in or removal from that heartland.

Accordingly, I disagree that the *Romero* motion's denial, even when considered with the trial court's findings in support of that decision, was necessarily a signal of that court's unspoken conclusion that the ultimate sentence was "the aggregate sentence [the court] felt was needed for defendant to achieve a level of rehabilitation and at the same time protect the community." (Maj. opn., p. 10.) I do not see that the decision to deny the motion was necessarily an endorsement of the resulting sentence as a sentence that would ensure the punishment fits the offense and the offender. (See *People v. Shaw*, *supra*, 56 Cal.App.5th at p. 588.) This case is readily distinguished from the cases cited by the majority in support of its refusal to remand, including *People v. Franks*, *supra*, 35 Cal.App.5th at page 893, where the trial court announced it would not dismiss the prior *even if* it had discretion to do so, and *People v. Jones* (2019) 32 Cal.App.5th 267 at page 274, where the trial court had made numerous comments about its intention to impose the longest possible sentence, including announcing: " "This gives me obviously, as you know, great satisfaction in imposing the very lengthy sentence here today.' " No such definitive statements, which would conclusively indicate the futility of remand for exercise of discretion, were made in this case.

Finally, the passage of Senate Bill No. 1393 signaled a willingness by the Legislature to confer new discretion on trial courts. "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*In re Estrada* (1965) 63 Cal. 2d 740, 745.) The trial court could not have considered this willingness here, because it was not yet evidenced by the passage of the bill, and the subject did not come up at sentencing.

