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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWRENCE WILLIAM STOKES,

Defendant and Appellant.

B192558

(Los Angeles County
Super. Ct. No. VA093940)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michael A. Cowell, Judge. Affirmed as modified.

Jeffrey Lewis, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C.
Johnson and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and
Respondent.

Lawrence Stokes appeals from judgment entered following a jury trial in which he was convicted of second degree commercial burglary, count 1 (Pen. Code, § 459), and uttering a forged prescription, count 2 (Health & Saf. Code, § 11368). He admitted he suffered a prior conviction of a serious or violent felony within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d))¹ and served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b). He was sentenced to prison, in count 1, to the upper term of three years, doubled as a consequence of his admission of the strike prior, for a total of six years. Imposition of sentence on count 2 and the prior prison term enhancement was stayed. He contends the trial court’s denial of his *Romero*² motion was an abuse of discretion, and the trial court’s selection of an upper term sentence violated his Sixth Amendment right to a trial by jury and proof beyond a reasonable doubt.³ For reasons explained in the opinion, we strike the one-year enhancement and in all other respects affirm the judgment.

¹ In 1980, in case number A355446, appellant was convicted of voluntary manslaughter. (Pen. Code, § 192, subd. (a).)

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

³ While not raised, we observe that the trial court appeared to have sentenced appellant to an unauthorized sentence by ordering the one-year enhancement pursuant to Penal Code section 667.5 stayed. Penal Code section 667.5, subdivision (b) “provides for an enhancement of the prison term for a new offense of one year for each ‘prior separate prison term served for any felony,’ with an exception not applicable here involving a prior five-year commitment ‘washout’ period of freedom from custody and further felony offenses. Once the prior prison term is found true within the meaning of [Penal Code] section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken. [Citations.]” (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241.) As it is clear the trial court intended appellant not serve the additional year, we will order the one-year enhancement stricken.

FACTUAL AND PROCEDURAL SUMMARY

On February 15, 2006, appellant and codefendant Yul Lubrien walked into a Target store in Pico Rivera, and each dropped off a prescription for Oxycontin to be filled. The two prescriptions were consecutively numbered, from the same doctor's office, and signed by two different doctors. The pharmacist became suspicious because although different doctors had signed each prescription, the handwriting on the two prescriptions appeared to be the same. After learning the prescriptions were not valid, the pharmacist notified her asset protection team, and they called the police. Appellant and his co-defendant were thereafter arrested.

DISCUSSION

I

Appellant contends the trial court abused its discretion when it denied his *Romero* motion to strike his prior conviction for voluntary manslaughter. At sentencing, appellant argued that the prior conviction was remote, occurring in 1980. It had been a "neighbor disturbance," appellant had pled guilty and he had not gone to state prison. The prosecution opposed the motion based on appellant's criminal history and the fact that appellant had violated parole on five separate occasions.

In ruling on the motion, the court stated it was aware that appellant's strike prior was very old and that the current offense was a nonviolent one, but concluded that in light of appellant's lengthy and extensive criminal record, there was no basis to grant such a motion.⁴

⁴ The probation report reflects appellant's criminal record commenced in 1979. Over the years, he had felony convictions for voluntary manslaughter, multiple counts

“[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, 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.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A court’s failure or refusal to dismiss or strike a prior conviction allegation under Penal Code section 1385 is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) “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 the 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

of possession of controlled substances, possession for sale of a controlled substance, grand theft of a vehicle and the unlawful driving or taking of a vehicle. His misdemeanor convictions were for receiving stolen property, being under the influence of controlled substances, vehicle tampering, and carrying a concealed weapon in a vehicle.

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.” (*Id.* at pp. 376-377.) Our review of the record indicates the trial court understood it had the discretion to strike priors, and its decision was neither irrational nor arbitrary.

II

In imposing the upper term of three years for count 1, the court stated the “extensiveness of [appellant’s] record alone[–]that sole factor is more than enough to justify the imposition of high term.”

Appellant contends imposition of an upper term sentence violated his federal constitutional rights to a jury trial and proof beyond a reasonable doubt under the Sixth Amendment and *Blakely v. Washington* (2004) 542 U.S. 296. He acknowledged *People v. Black* (2005) 35 Cal.4th 1238 but argued it may not be the final word on the issue based on *Cunningham v. California* (2006) ___ U.S. ___ [126 S.Ct. 1329]. Indeed *People v. Black* was not the final word. (*Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856___].)⁵ In *Cunningham*, decided January 22, 2007, the Supreme Court concluded California’s determinate sentencing law, authorizing a judge to find the facts permitting an upper term sentence and to permit the finding based on a preponderance of the evidence, violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, and the Sixth Amendment. The Court reiterated, however, that the fact of a prior conviction need not be submitted to a jury. (See *Cunningham v. California, supra*, 549 U.S. ___; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239-247.) Here the record of appellant’s prior

⁵ We asked the parties to file supplemental briefs addressing the sentencing issue in light of *Cunningham*, which they did.

convictions was the sole factor used to sentence him to the upper term; accordingly, there was no violation of his right to a trial by jury as provided by the Sixth Amendment.

DISPOSITION

The one-year enhancement imposed pursuant to Penal Code section 667.5, subdivision (b) is ordered stricken, and in all other respects the judgment is affirmed. The trial court is directed to prepare a new abstract of judgment incorporating the modification and to send a certified copy to the Department of Corrections and Rehabilitation.

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MANELLA, J.

We concur:

WILLHITE, Acting P.J.

SUZUKAWA, J.