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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SANTOS IGNACIO LOPEZ, Defendant and Appellant.	C061177 (Super. Ct. No. 06F03232)

A jury found defendant Santos Ignacio Lopez guilty of bringing heroin into a state prison and possession of heroin while in a state prison. The trial court dismissed one of defendant's three prior strike allegations and, after a court trial, found the two remaining strike allegations true. The court denied defendant's request to dismiss the remaining two strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and sentenced him to 25 years to life in state prison.

On appeal, defendant contends the court's denial of his *Romero* motion was an abuse of discretion, and that his 25-years-to-life sentence constituted cruel and unusual punishment. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2006, defendant, an inmate at the California State Prison in Sacramento, was visited by his father and sister in the prison's visiting area. Correctional Officer Pamela Montez was working in the visiting room control booth that day, surveying the room by video monitor. Montez noticed that defendant was watching the officer's desk and not interacting much with his visitors. Montez saw defendant place something in his mouth and then gulp his drink down without chewing. She also thought she saw him place something into his rectum. Montez relayed the information to Correctional Officer Steven Williamson, who was working the visiting room desk.

Williamson summoned defendant to the search area. However, defendant turned and walked away from Williamson, taking things from his pockets and throwing them on the ground as he walked. When defendant refused to heed Williamson's repeated commands to stop and get down, Williamson took defendant down to the ground and restrained him. Williamson directed another officer, William Brown, to the location of a balloon thrown by defendant. Brown collected the balloon which was later found to contain heroin. Brown also collected all of the items from the table

where defendant and his visitors had been sitting and searched each item. Inside a warm ham and cheese sandwich, he found a latex glove containing four small balloons, each of which contained heroin.

Defendant was taken to the "stripout" room and searched, then placed on contraband watch. Officers eventually collected five balloons from defendant's feces, each of which contained heroin. The heroin from all of the balloons recovered had a combined weight of 41.16 grams.

Defendant was charged by amended information with bringing heroin into a state prison (Pen. Code, § 4573--count one)[1] and possession of heroin in a state prison (§ 4573.6--count two). The amended information alleged defendant had three prior strike convictions within the meaning of sections 667.5, subdivisions (b) through (i), and 1170.12.[2]

A jury found defendant guilty of both counts. Defendant waived his right to a jury trial on the alleged priors. In a bifurcated proceeding, the court found defendant's priors true. Following a hearing, the court denied defendant's *Romero* motion, and sentenced him to 25 years to life in state prison on count one, and 25 years to life on count two, stayed pursuant to

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[1] Hereafter, unless otherwise specified, undesignated statutory references are to the Penal Code.

[2] On the People's motion, the court dismissed one of defendant's three prior strike allegations for insufficient evidence.

section 654. Defendant was awarded 345 days of credit for time served.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Defendant contends the trial court abused its discretion in failing to strike one or both of his prior strikes because the record "in its totality, viewed against the backdrop of [defendant's] background and social history," did not justify the imposition of the third strike. We disagree.

The three strikes law "'establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme."' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) In making this determination, the court should consider "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." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to

review for abuse of discretion." (*Carmony, supra*, 33 Cal.4th at p. 375.) In the context of sentencing decisions, "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.) Reversal for abuse of discretion is justified where the trial court was unaware of its discretion to strike a prior strike, or refused to do so at least in part for impermissible reasons. (*Id.* at p. 378.) But where the court, aware of its discretion, "'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 trial court was well aware of its discretion to strike defendant's prior strikes, and did not abuse that discretion in refusing to do so. The court stated that it "spent a fair amount of time" reviewing the documentation regarding defendant's prior strike offenses. The first strike, a conviction for voluntary manslaughter, arose out of an incident that occurred in June 1997, when defendant was 17 years old. Defendant, the driver of a car, struck a rival gang member on a bicycle. Defendant pulled up alongside the individual he hit. Defendant laughed and his passenger stared at the individual. The individual then pulled a gun from his pocket and fired

several shots into defendant's vehicle, injuring defendant and killing his passenger.

Defendant's second strike, assault with a deadly weapon, arose out of an incident that occurred in November 1997. Passengers fired several shots from a vehicle driven by defendant, sending pedestrians running for safety. Defendant then led police officers on a high-speed chase, striking several vehicles and placing numerous people in danger in the process.

The trial court found both incidents to be "strike conduct," the November 1997 incident being "far more heinous in nature." Taking that into consideration, along with defendant's age, the court noted that it could not "find anything that actually would provide for [defendant] to be outside the spirit of the Three Strikes law."

The court noted that, in addition to the current offense involving conduct while in prison, defendant "has had a new number of write-ups while in prison." Those incidents include participating in a riot in January 1999, possession of manufactured alcohol in November 1999, possession of a falsified document in February 2000, mutual combat in May 2000, participating in a riot in October 2003, possession of manufactured alcohol in September 2004, refusing to stand for count twice in March 2005, refusing a direct order in January 2006, and possession of escape paraphernalia (i.e., a cell phone) in January 2008.

With respect to the current offense, the court remarked that it involved a substantial amount of contraband, noting that defendant's family assisted him in smuggling the heroin into the prison. While not eager to sentence defendant to 25 years to life in prison, the court explained that it could not find anything to persuade it that defendant was outside the spirit of the three strikes law.

Defendant argues that his current offense is a "non-violent narcotics offense not involving any weapon and apparently was at the behest of others in prison." However, even his trial counsel conceded that the amount of heroin involved was "substantial," making this more than a minor felony.

Defendant also argues, as he did in the trial court, that his prior strike convictions did not involve the use of a gun by defendant, and that the bulk of his disciplinary actions in prison were "minor in nature" and did not involve conduct initiated by him. The fact that defendant may not have fired the gun in either of the prior strike offenses does not aid him. He initiated the June 1997 incident by using his vehicle to strike another individual on a bicycle and then drove alongside the individual, which led to the victim shooting in response and ultimately injuring defendant and killing his passenger. Some five months later, in the second incident in November 1997, after shots rang out from defendant's car, he led police on a

dangerous car chase ramming other vehicles and placing police and innocent bystanders in great peril.

As for defendant's prison conduct, his record demonstrates that he was consistently involved in misconduct over a period of seven years prior to the current offense, and once again two years thereafter.

Finally, defendant argues that the particulars of his background, character, and prospects compel the conclusion that he falls outside the spirit of the three strikes law because not only is his criminal record "limited and remote in comparison to his age," but he has "support on the outside and offers of employment upon his release," and he is "ready to take steps toward becoming a productive member of society."

Defendant fails to note, however, that his prior criminal history is limited due to the fact that his 1997 crimes were serious enough to result in an 11-year prison sentence, thus accounting for the fact that defendant committed no other crimes in the interim. Moreover, defendant committed a steady stream of violations during his period of incarceration culminating in the current crime. All of this behavior belies defendant's claim that he has been or is now ready to take steps to become a productive member of society. He does not fall outside the spirit of the three strikes law.

The trial court properly exercised its discretion in denying defendant's *Romero* motion.

II

As in the trial court, defendant contends on appeal that his sentence of 25 years to life in prison constitutes cruel and unusual punishment under both the California and United States Constitutions. Conceding that the United States Supreme Court "has concluded the mandatory indeterminate sentences of the Three Strikes law do not constitute cruel and unusual punishment in the abstract," defendant urges that the particular facts of his case require a different result. We are not persuaded.

Under the proscription of "cruel and unusual punishment" in the Eighth Amendment to the United States Constitution (applicable to the states via the Fourteenth Amendment), a "'narrow proportionality principle' . . . 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 117] (*Ewing*), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 [115 L.Ed.2d 836, 865-866] (*Harmelin*).) This constitutional principle "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*Ewing, supra*, at p. 23 [155 L.Ed.2d at p. 119], quoting *Harmelin, supra*, at p. 1001 [115 L.Ed.2d at p. 869].)

Objective factors guiding the proportionality analysis include "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Solem v.*

Helm (1983) 463 U.S. 277, 292 [77 L.Ed.2d 637, 650].) But only in the rare case where the first factor is satisfied does a reviewing court consider the other two factors. (*Harmelin, supra*, 501 U.S. at p. 1005 [115 L.Ed.2d at pp. 871-872 (conc. opn. of Kennedy, J.).)

The United States Supreme Court rejected an Eighth Amendment challenge to a 25-years-to-life three strikes sentence in *Ewing, supra*, 538 U.S. 11 [155 L.Ed.2d 108], noting that recidivism has traditionally been recognized as a proper ground for increased punishment. (*Id.* at p. 25 [155 L.Ed.2d at p. 120].) Given the defendant's long criminal history, the court held that the defendant's punishment was not disproportionate despite the relatively minor character of his current felony. (*Id.* at p. 29 [155 L.Ed.2d at p. 122].)

Here, defendant's criminality began in 1997 when he was 17 years old. Within a brief six-month period, defendant was twice involved in gang-related conduct resulting first in a voluntary manslaughter conviction and next in an assault with a deadly weapon conviction. For those crimes, he was sentenced to 11 years in state prison. While in prison, defendant committed a steady stream of violations, some minor and others more serious. That misconduct in prison culminated in the current offense which, although nonviolent, involved a substantial amount of heroin smuggled into the institution. Defendant's punishment under the three strikes sentencing scheme was not

grossly disproportionate in light of his criminal record. (See *People v. Poslof* (2005) 126 Cal.App.4th 92, 109; *People v. Meeks* (2004) 123 Cal.App.4th 695, 706-710.)

Similarly, article I, section 17 of the California Constitution proscribes "cruel or unusual punishment." Although this language is construed separately from the federal constitutional ban on "cruel and unusual punishment" (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085), the method of analysis is similar: the reviewing court considers "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society"; the comparison of "the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses*"; and the comparison of "the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* . . . ." (*In re Lynch* (1972) 8 Cal.3d 410, 425-427.) The purpose of this analysis is to determine whether the punishment is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Id.* at p. 424, fn. omitted.)

This is not one of those rare cases where the sentence is so disproportionately harsh as to shock the conscience or to offend fundamental notions of human dignity. (See *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.) We have previously discussed in this opinion defendant's record reflecting a

general lack of both concern for the safety of others and willingness to abide by the law. His violations in prison, consistent with his behavior in society, continue to demonstrate his disregard for rules--prison rules. Smuggling heroin into the prison reflects his continuing disregard for the law and, assuming the significant amount of smuggled heroin had made its way into the prison, a potential for more lawless behavior by defendant and other inmates. Defendant's punishment is not disproportionate to that imposed on other recidivists under the three strikes law, including those whose present offense, like defendant's, is not a "serious" or "violent" felony under that law. (See, e.g., *People v. Poslof, supra*, 126 Cal.App.4th at p. 109; *People v. Meeks, supra*, 123 Cal.App.4th at pp. 706-710.)

Defendant places great significance on the fact that he was not the "actual shooter" and "did not use any weapon" in either of his two prior strike incidents. His arguments are meritless given the circumstances of his two prior strike incidents. The fact that defendant's priors may be "old relative to his age" is of little consequence considering that he has been in prison since committing those crimes and has demonstrated a consistent pattern of misconduct while incarcerated.

In support of his argument that the penalty in this case is disproportionate when compared to the penalty prescribed in other California cases where the offense was more serious, defendant cites *In re Oluwa* (1989) 207 Cal.App.3d 439, 444-447

(*Oluwa*)), a case in which the defendant, a nonrecidivist, was convicted of second degree murder, child endangering and cruel or inhuman corporal punishment of a child and sentenced to 15 years to life in state prison. (*Id.* at p. 442.) However, as defendant properly concedes, California appellate courts have held that cases such as *Oluwa* cannot be compared to cases in which the defendant is a recidivist. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510-1512; *People v. Cooper* (1996) 43 Cal.App.4th 815, 826; *People v. Karsai* (1982) 131 Cal.App.3d 224, 242-243, overruled on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.)

Defendant cites numerous cases in support of his argument that the penalty here is disproportionate to "recidivist punishments" in other jurisdictions. The People cite cases to the contrary. The interjurisdictional test, however, does not require proof that California's sentencing scheme as to recidivists is less harsh than others. (*People v. Martinez, supra,* 71 Cal.App.4th at p. 1516.)

Defendant has not shown that his punishment was "cruel and unusual" under the federal Constitution, or "cruel or unusual" under the California Constitution.

III

Pursuant to this court's Miscellaneous Order No. 2010-002, filed March 16, 2010, we deem defendant to have raised an issue (without additional briefing) of whether amendments to section

4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence conduct credits. We conclude that the amendments do apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant is not final"; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to amendment allowing award of custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying *Estrada* to amendment involving conduct credits].) However, as defendant was previously convicted of serious felonies within the meaning of section 1192.7, subdivision (c), the recent amendments to section 4019 do not operate to modify his entitlement to credit. (§ 4019, subds. (b)(2), (c)(2); Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.