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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RODNEY LOUIS GAINES, Defendant and Appellant.	B192177 (Los Angeles County Super. Ct. No. MA032254)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed in part; Reversed in part with directions.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon, Kathy S. Pomerantz and Colleen Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Rodney Louis Gaines appeals from a judgment of conviction entered after a jury convicted him of possession of cocaine base and possession of a smoking device. Appellant claims that the trial court erroneously denied his *Pitchess* motion, that the trial court erred in instructing the jury on simple possession as a lesser included offense of sale or transportation of cocaine base, that there was insufficient evidence to support the conviction of possession, and that the court abused its discretion in denying his motion for a continuance to allow him to review the presentence report. He further contends the court committed *Cunningham* error in selecting the upper term for the possession count, and abused its discretion in selecting the upper term and in denying his request to strike his prior felony convictions. Finally, appellant contends his sentence constituted cruel and/or unusual punishment under either the California or United States Constitutions. We find the trial court erred in denying appellant's *Pitchess* motion and will remand for a limited hearing on that issue. In all other respects the judgment is affirmed.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney charged appellant in an amended information with one count of sale, transportation, or offer to sell a controlled substance (Health & Saf. Code, § 11352, subd. (a), count 1);[1] and one count of possession of a smoking device (§ 11364, subd. (a), count 2), a misdemeanor. It was further alleged as to count 1 that appellant had suffered one prior conviction for a serious or violent felony within the meaning of Penal Code sections 1170.12,

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[1] All undesignated section references are to the Health and Safety Code.

subdivisions (a) through (d), and 667, subdivisions (b) through (i), and that he had served five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

Appellant elected to represent himself, and pleaded not guilty to the charges. Trial was by jury. The jury found appellant not guilty of violating section 11352, subdivision (a). However, it found him guilty of possession of a controlled substance (§ 11350), and of possession of a smoking device (§ 11364, subd. (a)). The trial court had instructed the jury that it could find appellant guilty of possession for sale of cocaine base, a lesser included offense of count 1, or it could find him guilty of possession of cocaine base, "a lesser offense to count 1, and a lesser offense to possession for sale of [a] controlled substance."[2]

Appellant admitted his prior strike conviction and five prior prison terms.

The trial court denied probation and sentenced appellant to 11 years in state prison, consisting of the upper term of three years as to count 1, doubled to six years because of the prior strike conviction, plus five years for the Penal Code section 667.5, subdivision (b) prior prison terms, which the court ordered to run consecutive to the sentence on count 1. The court sentenced appellant to 180 days in Los Angeles County jail as to count 2, and awarded him credit for 180 days of actual custody, the sentence to run concurrently.

This timely appeal followed.

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[2] With regard to the charge of possession for sale of cocaine *base*, we note that the verdict form made erroneous reference to section 11351, rather than the correct statute, section 11351.5. (See *People v. Howell* (1990) 226 Cal.App.3d 254, 257-258.)

FACTUAL BACKGROUND

Prosecution Evidence

On June 11, 2005, Los Angeles County Deputy Sheriff Roger Izzo was conducting undercover surveillance of a home in Lancaster where he believed narcotics were being sold. He saw some people leave the house and get into a maroon minivan. He followed the minivan to a liquor store, about half a mile away. As Deputy Izzo parked in the liquor store parking lot, he saw two occupants of the minivan go into the store. He contacted Deputies Steven Lehrman and Christopher McMaster, and told them to stop the minivan after the two people returned to the minivan and drove away. As Deputy Izzo waited, appellant, who had been standing in front of the liquor store, approached him and asked if he "smoked the white." Appellant offered to sell him whatever he needed, saying he "had it all." Deputy Izzo declined. Appellant then spit into his hand a small, black plastic "bindle," and offered it to Deputy Izzo. After Deputy Izzo said he was just waiting for someone and was not interested in buying drugs, appellant walked away.

Deputy Izzo contacted the other two deputies and told them to detain appellant because he had just offered to sell him drugs. While Deputy Izzo was talking to the other deputies, appellant approached him again and handed him a glass pipe used for smoking cocaine and a small piece of cocaine. Appellant said, "This one [is] on me. . . . You'll like it." Appellant walked back to the front of the liquor store.

Deputies Lehrman and McMaster then drove into the parking lot in their patrol car. After appellant saw them, he turned away from them and began walking away quickly, and as he did so he put his right hand to his mouth. The deputies ordered appellant to stop several times. When he failed to comply, Deputy McMaster grabbed the back of his shirt and ordered him to get down on the

ground. Deputy Lehrman said that appellant's mouth was clenched closed; he appeared to be chewing for a moment, and then he swallowed. Deputy Lehrman ordered appellant to open his mouth and when he finally did, the deputy saw white residue in his mouth. Appellant denied swallowing anything.

Deputy Izzo gave the other deputies the glass pipe and the small piece of cocaine. Deputy McMaster later booked these items into evidence. Deputy Lehrman testified at trial that the piece of cocaine was of a usable quantity. A criminalist with the Los Angeles County Sheriff's crime lab testified that the solid white substance weighed .03 grams and contained cocaine in a base form.

Defense Evidence

Appellant testified that on June 11, 2005, he went to the liquor store to panhandle. He was a cocaine addict, and wanted to get enough money to buy himself some drugs. When he got to the liquor store, another man was panhandling. Appellant described the man as an older black male, with salt and pepper hair. The two spoke briefly, and then both panhandled for 10 to 15 minutes. The older man then went over to a car in the parking lot and talked to its occupant. The older man came back over to appellant and asked if appellant had a pipe. Appellant said he did, and the man offered to give him a piece of cocaine in exchange for use of his pipe. Appellant handed him the pipe. The older man warned appellant not to keep the pipe in his possession because sheriffs had been frequenting the area and frisking people. The older man took appellant's pipe, and told appellant he would hide it in the slats on the side of the large trash receptacle behind the liquor store. About ten minutes later, appellant saw the older man walking away from the liquor store. Appellant called out to the man, who said he was leaving and indicated that he had left appellant's pipe on the side of the large trash receptacle. Appellant panhandled for a few more minutes, until he saw the

liquor store clerk come outside and look at him. Thinking the clerk was going to tell him to leave, appellant went back into the alley to retrieve his pipe and a crate he had left there with some of his belongings in it. He put the pipe in his sock, and went back out to the parking lot to see if the clerk was still standing outside. Deputy Izzo was sitting in a parked car and called appellant over. He asked if appellant had any "rock" for sale. Appellant replied, "I don't sell rock," "I just use."

The clerk apparently had gone back inside the store, so appellant went to the door to look in and see where the clerk was, and to panhandle as people came out of the store. As he did, Deputy McMaster suddenly grabbed the back of his shirt and pulled him to the ground. Appellant denied looking at Deputies McMaster and Lehrman, and denied that they called out to him before grabbing him. Deputy McMaster searched him, and found the glass pipe in his left sock. He checked appellant's mouth with a flashlight, then told him to remove his shoes and socks, and turn his socks inside out. As appellant removed his left sock, a "little white speck hit the ground." Deputy McMaster said it looked like rock cocaine. Appellant thought the older man must have left it in the pipe for him. Appellant denied offering to sell Deputy Izzo any drugs, denied spitting a bag of drugs into his hand, and denied giving Deputy Izzo a pipe and cocaine.

DISCUSSION

I. Denial of Appellant's *Pitchess* Motion

Appellant contends that the trial court erred in denying his motion to discover the three deputies' personnel records without conducting an in camera hearing. He argues that his motion sufficiently presented a plausible factual scenario contradicting the deputies' account to justify an in camera hearing. The

Attorney General responds that appellant's showing was insufficient. We find the showing was sufficient to warrant holding an in camera hearing.

We review the trial court's ruling on the *Pitchess* motion for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) "Evidence Code sections 1043 and 1045, which codified our decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, allow discovery of certain relevant information in peace officer personnel records on a showing of good cause. Discovery is a two-step process. First, defendant must file a motion supported by declarations showing good cause for discovery and materiality to the pending case. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 82 (*Santa Cruz*).) This court has held that the good cause requirement embodies a 'relatively low threshold' for discovery and the supporting declaration may include allegations based on 'information and belief.' (*Id.* at p. 94.) Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense. (Evid. Code, § 1045, subd. (b).)" (*People v. Samuels* (2005) 36 Cal.4th 96, 109.)

"To show good cause as required by section 1043, [appellant's] declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick*).) To show the required "'plausible' factual foundation" for such discovery, the defendant must show "a plausible scenario of officer misconduct . . . that might or could have occurred." (*Id.* at p. 1026.)

Appellant's showing satisfied the "'relatively low threshold for discovery.'" (*Warrick, supra*, 35 Cal.4th at p. 1019, quoting *Santa Cruz, supra*, 49 Cal.3d at p.

83.) Appellant alleged that Deputies McMaster and Lehrman did not have probable cause or reasonable suspicion to detain him, and that all three deputies wrote arrest reports that contained false and misleading information. Appellant alleged that Deputy Izzo did not call Deputies McMaster and Lehrman and tell them appellant had tried to sell him drugs. Therefore, McMaster and Lehrman approached appellant without probable cause or reasonable suspicion to detain him, and based only on a hunch. Appellant contended that he did not at any time place drugs in his mouth, or remove drugs from his mouth.

Accordingly, appellant sought to obtain personnel records relating to whether the deputies had previously falsified police records, planted evidence, or committed acts demonstrating dishonesty.[3]

The trial court found that appellant had not demonstrated good cause for an in camera review of the personnel records. The court found that his allegation of fabrication of phone calls was speculative because he would not be in a position to know whether calls were made. It further stated that appellant had merely alleged a general denial of putting drugs in his mouth, or removing drugs from his mouth, and he had not offered his version of the events of the night of his arrest.

In *Warrick*, the Supreme Court indicated that a general denial of the prosecution's version of events may sometimes constitute a sufficient showing of good cause. "[Appellant's] affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report." (*Warrick, supra*, 35 Cal.4th at pp. 1024-1025.) In this case,

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[3] Appellant also alleged in his declaration that the deputies used excessive force in arresting him, and sought records pertaining to previous incidents relevant to that claim. However, he has abandoned that issue on appeal.

appellant's denial of placing drugs in his mouth or removing drugs from his mouth contradicted the deputies' assertion that appellant tried to sell drugs to Deputy Izzo, which was the basis for the charge of sale or transportation of cocaine. Information that the deputies had previously falsified police reports or planted evidence would be relevant to support appellant's assertion that they had done so in his case. His assertion that the deputies falsified their reports when they indicated he had removed drugs from his mouth established "a plausible scenario of officer misconduct . . . that might or could have occurred." (*Id.* at p. 1026.)

Thus, we reverse the judgment and remand for the trial court to conduct a limited in camera review of the officers' personnel records. If the court finds no relevant discoverable information in the records, it should reinstate the judgment in its entirety. (*People v. Johnson* (2004) 118 Cal.App.4th 292, 296, 304-305; *People v. Hustead* (1999) 74 Cal.App.4th 410, 418-423.) If the court finds discoverable material, it "must order disclosure to [appellant], allow him an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed." (*People v. Johnson, supra,* 118 Cal.App.4th at p. 296; *People v. Memro* (1985) 38 Cal.3d 658, 684.) If appellant cannot demonstrate prejudice, the trial court should reinstate the judgment in its entirety.

II. Instruction on Simple Possession

Appellant contends that simple possession (§ 11350) is not a lesser included offense of sale, transportation, or offer to sell a controlled substance (§ 11352, subd. (a)), because the former requires actual or constructive possession, and the latter does not. Therefore, according to appellant, the trial court committed reversible error when it instructed the jury on simple possession because appellant

had not received notice of that charge. As we shall explain, we disagree because we conclude that appellant has forfeited the issue for purposes of appeal.

The Proceedings

After the defense rested, the trial court stated that based on the testimony it had heard, it was going to instruct on count 1, and also on possession for sale of a controlled substance, and on simple possession of a controlled substance. The court invited the parties to suggest additions to the instructions or to make objections.

Appellant objected to instructing the jury on the crime of possession for sale, but not to instruction on simple possession.

While the jury was deliberating, the trial court reviewed the verdict forms with the parties. The verdict forms included one for possession of a controlled substance. The parties were again invited to place objections on the record, but appellant did not object to inclusion of a verdict form for possession of a controlled substance.

Analysis

The Attorney General correctly concedes that simple possession is not a lesser included offense of the sale or transportation count, and therefore the trial court erred in instructing the jury on simple possession based on its erroneous conclusion in that regard. However, the Attorney General is also correct in asserting that appellant forfeited the issue of lack of notice for purposes of appeal by failing to object in the trial court to the instruction and verdict form regarding simple possession.

Appellant contends that he did not forfeit the issue because he did object to the court instructing the jury on possession for sale and, by doing so, "appellant

also objected to the trial court instructing the jury on any lesser included offense of possession for sale, including simple possession." We disagree.

Generally, a defendant may not be convicted of a crime that is neither charged nor necessarily included in a charged offense. (*People v. Daly* (1992) 8 Cal.App.4th 47, 58.) "A conviction for a nonincluded offense implicates a defendant's due process right to notice. . . . [¶] An accusatory pleading provides notice of the specific offense charged and also of offenses included within the charged offense [citations], but it does not provide notice of nonincluded offenses; consequently, '[a] person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense' [citation]." (*People v. Toro* (1989) 47 Cal.3d 966, 973 (*Toro*), disapproved on another ground by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

Two tests are applied "in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228, citing *People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) Accordingly, the determination whether an offense is necessarily included in a greater offense turns not on the evidence introduced at trial, but solely "upon the statutory definitions of both offenses and the language of the accusatory pleading. [Citations.]" (*People v. Ortega* (1998) 19 Cal.4th 686, 698.)

Applying the statutory elements test here, it is well-established that because possession is not a required element of the sale offense, possession of cocaine is not necessarily included in the offense of sale or transportation of cocaine. (*People v. Murphy* (2005) 134 Cal.App.4th 1504, 1508, disapproved of on another ground in *People v. Reed, supra*, 38 Cal.4th at p. 1228; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524.) As for the accusatory pleading test, its application here adds nothing because the prosecution merely couched the sale or transportation count in the general statutory language.

Although a defendant ordinarily may not be convicted of a crime that is neither charged nor necessarily included in a charged offense, the California Supreme Court in *Toro* recognized "an exception to this rule . . . in cases where a defendant expressly or impliedly consents to have the trier of fact consider a nonincluded offense: 'Since a defendant who requests or acquiesces in conviction of a lesser offense cannot legitimately claim lack of notice, the court has jurisdiction to convict him of that offense.'" (*Toro, supra,* 47 Cal.3d at p. 973.) A defendant is deemed to acquiesce to the jury's consideration of a lesser related offense when he or she fails to object to the jury instructions or verdict form relating to that offense. (*Id.* at pp. 976-977.) Specifically, the *Toro* court stated: "[I]t has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Id.* at p. 976, fn. omitted.)

We thus conclude that appellant has forfeited the argument that he did not receive adequate notice of the charge of simple possession, because he did not object to the instruction or verdict form in that regard. He provides no authority

for the assertion that his objection to the instruction on possession for sale of cocaine base also constituted an objection to all lesser included offenses thereof, and we have found no authority to support that proposition. Furthermore, appellant's apparent acquiescence to the instruction on simple possession was consistent with his theory of the case, that although rock cocaine was found in his sock, he did not intend to sell or offer to sell cocaine. Indeed, he admitted that he was panhandling in order to earn money to buy cocaine, though of course he also asserted that he did not know that the piece of cocaine was in his sock. Thus, the record indicates that appellant actually consented to the addition of the instruction on simple possession, and was merely objecting to the notion that he intended to *sell* cocaine.

Finally, we reject appellant's contention that "[he] was relieved from making any further objection because the trial court misinterpreted the law [by finding possession for sale and simple possession to be lesser included offenses to the charged offense,] making any further objection futile." Where the issue on appeal is forfeiture of an argument regarding lack of notice based on failure to object to a particular instruction, whether the trial court would have overruled the objection is entirely irrelevant.

III. Sufficiency of the Evidence

Appellant further contends that the evidence was insufficient to support his conviction for possession. Specifically, he argues that "by rejecting the prosecution's theory of guilt, the jury impliedly rejected any theory upon which appellant could have knowingly possessed cocaine." The prosecution presented evidence that appellant approached Deputy Izzo and attempted to sell him cocaine base, but the jury rejected this theory of guilt by finding appellant not guilty of violating section 11352. According to appellant, "[t]here was no other evidence

presented to prove beyond a reasonable doubt that appellant knowingly possessed the .03 grams of cocaine base." Appellant testified he was panhandling in order to buy drugs. He lent his pipe to another man who said in return he would give appellant a hit, but the man left without telling appellant if he fulfilled his promise. Appellant said he did not know the man had presumably put cocaine in the pipe until he was arrested. Appellant asserts that "[b]y rejecting the prosecution's theory of the case, the jury reasonably had to rely on the evidence presented by appellant about the events of that night." There was no evidence presented that appellant knew the rock cocaine was in the pipe.

When a conviction is challenged on sufficiency of the evidence grounds, we apply the substantial evidence standard of review: "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] '"[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66. See also *People v. Fulcher* (2006) 136 Cal.App.4th 41, 52; and *People v. Sumahit* (2005) 128 Cal.App.4th 347, 352.)

It is true that the jury apparently rejected the prosecution's evidence that appellant gave Deputy Izzo a piece of cocaine and tried to sell him drugs. However, the jury was not therefore required to adopt wholesale appellant's version of the events. It was free to disbelieve his testimony that he put the pipe in his sock without knowing the cocaine was there. The jury was shown the pipe and the piece of cocaine recovered from appellant's person, and based thereon could disbelieve appellant's testimony that he did not perceive that the pipe had cocaine

in it. Appellant admitted the cocaine fell out of his sock, and that he put the pipe in his sock after the other man said he would give appellant a hit for sharing the pipe. He further admitted he was addicted to cocaine and wanted to use some that night. This evidence was sufficient to support the conviction of possession, including the finding that he had knowledge of the presence of the cocaine.

IV. Denial of Continuance to Review Presentence Report

Appellant contends the court denied him his due process rights by denying his request for a continuance based on his receipt of the presentence investigation report on the day of sentencing. Because appellant has not demonstrated prejudice as a result of the untimely provision of the report, we find no error requiring reversal.

The Proceedings

On June 5, 2006, appellant informed the trial court that he had not received a copy of the presentence report. The trial court continued the sentencing hearing until June 27, 2006 to give appellant the opportunity to review the presentence report and file a new trial motion. However, appellant did not receive a copy of the report prior to the sentencing hearing. At the time of sentencing, appellant requested a continuance to allow him time to review the report. The court allowed appellant to briefly review the report, then proceeded with the hearing. Appellant provided the court with a copy of a report, apparently prepared by his parole officer, regarding his performance on parole; the trial court agreed to review it.

Analysis

"[I]f a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation

officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment. [¶] The probation officer shall immediately investigate and make a written report to the court of his or her findings and recommendations, including his or her recommendations as to the granting or denying of probation and the conditions of probation, if granted." (Pen. Code, § 1203, subd. (b)(1) & (2)(A).) "The report shall be made available to the court and the prosecuting and defense attorneys at least five days, or upon request of the defendant or prosecuting attorney nine days, prior to the time fixed by the court for the hearing and determination of the report, and shall be filed with the clerk of the court as a record in the case at the time of the hearing." (Pen. Code, § 1203, subd. (2)(E).)

"If a person is not eligible for probation, the judge shall refer the matter to the probation officer for an investigation of the facts relevant to determination of the amount of a restitution fine . . . . The judge, in his or her discretion, may direct the probation officer to investigate all facts relevant to the sentencing of the person. Upon that referral, the probation officer shall immediately investigate the circumstances surrounding the crime and the prior record and history of the person and make a written report to the court of his or her findings." (Pen. Code, § 1203, subd. (g).)

Here, appellant was statutorily ineligible for probation because he admitted to a prior strike felony. (Pen. Code, §§ 667, subd. (c)(2); 1170.12, subd. (a)(2).) Based on the plain language of section 1203, "case law has recognized that a probation report is not necessarily required if defendant is statutorily ineligible for probation, for example, because of a prior strike. (See, e.g., *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432; *People v. Llamas* (1998) 67 Cal.App.4th 35, 39-40.)" (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 180.) Here, the trial

court, in the exercise of its discretion, ordered a presentence investigation report to be prepared.

Penal Code section 1203 does not specifically extend the five-day notice requirement applicable to mandatory probation reports to discretionary presentence reports for defendants who are ineligible for probation. Nonetheless, once a presentence report is ordered, the trial court has discretion to grant a requested continuance when it is based on the untimely receipt of the report. However, in the event the judge refuses to continue the sentencing hearing, no error exists unless the defendant can establish prejudice. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 35, disapproved of on another ground in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.)

It is not reasonably probable that, given additional time to review the report, appellant would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The report indicated five circumstances in aggravation, including (1) the manner in which the crime was carried out indicated planning, sophistication or professionalism; (2) appellant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings were numerous or increasing in seriousness;[4] (3) appellant had served a prior prison term; (4) appellant was on probation or parole when the crime was committed; and (5) appellant's prior performance on probation or parole was unsatisfactory. The report did not list any circumstances in mitigation.

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[4] The probation report listed the following convictions: possession of a controlled substance, 1981; attempted robbery, 1983; throwing a substance at a vehicle with intent to cause great bodily injury, and assault with a deadly weapon, 1985; robbery, 1988; petty theft with a prior, 1992; possession of drug paraphernalia, 1994; possession of a controlled substance, 1995; possession of drug paraphernalia, 2003; and possession of a controlled substance, 2004. This list omits a 1988 felony conviction for assault with a deadly weapon.

At the sentencing hearing, appellant argued that the first factor regarding planning and sophistication did not apply to the present crime. He argued that his prior convictions were not numerous or of increasing seriousness: "On the contrary, [appellant's] criminal history here lately, in the past, 13, 14 years, [appellant] has basically ebbed from—or receded from a life of crime with the exception of possessions." Appellant conceded that he had served prior prison terms. He did not mention the fourth factor, and he had submitted a report from his probation officer as to the fifth factor. He stated, "[M]y position would be that the circumstances in mitigation outweigh those of aggravation."

The court reviewed the documents, noting the "indication that since his release from state prison, he appeared to be adjusting well to parole supervision." The court agreed with appellant's assertion that the manner in which the present crime was carried out did not indicate planning, sophistication or professionalism, and therefore ordered stricken the first factor in aggravation. The court declined to strike the other factors in aggravation.

Thus, appellant addressed those aggravating factors upon which argument could be made and, indeed, succeeded in convincing the court to strike one of them. While appellant claims on appeal that if granted a continuance he could have "prepared himself to address each of the aggravating factors, prepared and argued why his drug addiction should have been considered a mitigating factor, and otherwise challenged the recommendations provided in the presentence report," he does not specify what different arguments he could have presented. As to his drug addiction being a mitigating factor, the court in fact acknowledged that appellant suffered from drug addiction, but stated that it could not be considered a mitigating factor given that he had had opportunities to address it and had failed to

do so, for example during his prior prison terms. Thus, appellant has not demonstrated that a more favorable result was likely if he had been given additional time to review the report. We conclude there was no error in this regard that requires reversal.

V. *Cunningham* Issue

The trial court selected the upper term of three years (doubled to six years under the second strike law) for the possession offense, and also imposed five additional one-year terms for each of appellant's prior prison terms. Appellant contends that the court's selection of the upper term violated *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856, 166 L.Ed.2d 856 (*Cunningham*). We disagree.

In *Cunningham,* the Supreme Court noted that its prior decisions in, inter alia, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 "instruct [that] the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham, supra*, 127 S.Ct. at p. 860.) The High Court concluded that under California's Determinate Sentencing Law (DSL), the middle term is the statutory maximum sentence. Overruling *People v. Black* (2005) 35 Cal.4th 1238, 29 Cal.Rptr.3d 740, 113 P.3d 534 (*Black I*), the court held that "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra*, 127 S.Ct. at p. 871.)

On remand from the United States Supreme Court, the California Supreme Court considered the application of *Cunningham*. First, it held that defendants who were sentenced before the Supreme Court's decision in *Blakely v. Washington, supra*, 542 U.S. 296 did not forfeit their Sixth Amendment rights by failing to object to the sentencing procedure in the trial court. Because *Blakely* marked a significant change in the sentencing law, counsel were not required to anticipate its holding. (*People v. Black* (July 19, 2007, S126182) ___ Cal.4th ___ (*Black II*) [2007 WL 2050875].)

The Supreme Court further held in *Black II* that the upper term is appropriately imposed within the context of the Sixth Amendment as long as a single aggravating factor has been established by a jury finding, a fact admitted by the defendant, or a prior conviction. Once a single aggravating factor is constitutionally established, the trial court retains its traditional discretion to sentence within the statutory range, and in doing so, may take into account aggravating factors that were not found by the jury, admitted by the defendant, or based on prior convictions. "The court's factual findings regarding the existence of additional aggravating circumstances may increase the likelihood that it actually will impose the upper term sentence, but these findings do not themselves further raise the authorized sentence beyond the upper term. No matter how many additional aggravating facts are found by the court, the upper term remains the maximum that may be imposed. Accordingly, judicial fact finding on those additional aggravating circumstances is not unconstitutional." (*Id*. at p. ___.)

In imposing the upper term here, the trial court relied on appellant's prior convictions other than those admitted by appellant and used to impose the sentencing enhancements. This factor is one on which no jury trial was required. Further, although the court did not specify that it was also relying on factors in aggravation other than the additional prior convictions, the probation report also

listed the following factors, which the court declined to strike: (1) appellant was on probation or parole when the crime was committed; and (2) appellant's prior performance on probation or parole was unsatisfactory.[5] Both factors relate to appellant's recidivism, a traditional judicial sentencing consideration which need not be tried to the jury under the Sixth Amendment and which also justifies imposition of the upper term. In any event, the trial court retained its traditional discretion to sentence within the statutory range, and was constitutionally permitted to engage in judicial fact finding and take into account aggravating factors that were not found by the jury, admitted by the defendant, or based on prior convictions. Thus, there was no *Cunningham* error in the court's imposition of the upper term.

VI. Imposition of the Upper Term and Failure to Strike Priors

A. *Imposition of the Upper Term*

Appellant contends that the trial court abused its discretion in imposing the upper term for his conviction of possession of cocaine base because it determined that appellant's drug addiction could only be considered a factor in aggravation. We disagree with appellant's characterization of the court's statements in this regard, and thus find no abuse of discretion.

After pointing to appellant's prior convictions--other than those admitted by appellant and used to impose the sentencing enhancements--and noting that they were drug-related offenses, the court noted appellant's apparent failure to do anything to address his addiction. The court stated that under such circumstances,

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[5] The court noted, however, that the papers submitted by appellant included an "indication that since his release from state prison, he appeared to be adjusting well to parole supervision."

drug addiction "is certainly not a mitigating factor and has been held to be an aggravating factor." The court did not go on to find, however, that appellant's drug addiction was an aggravating factor. Instead, it was merely responding to, and rejecting, appellant's assertion that his drug addiction should be considered a mitigating factor.

The trial court was within the sound exercise of discretion in determining that there were no circumstances in mitigation. "The process of weighing the relative merits of aggravating and mitigating factors is for the trial court; we do not substitute our judgment on such matters." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) Absent a clear showing of abuse of discretion, we do not disturb the trial court's broad sentencing discretion. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) Here, no abuse of discretion appears in its decision to impose the upper term. (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637-1638.)

B. *Refusal to Strike Appellant's Priors*

Appellant contends the trial court abused its discretion when it refused to strike at least one of his prior convictions. We disagree.

"[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[, subdivision] (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 legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] 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.'"' [Citation.] 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." (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.)

The record demonstrates that the court listened to appellant's argument and reviewed all of the documentation before exercising its discretion not to strike a prior strike conviction. The trial court's decision was not irrational or arbitrary in view of the facts. As the trial court stated in denying the *Romero* motion, "given [appellant's] record, [and] given the consistency of [his] priors through the years," appellant is not someone who should be deemed outside the scheme's spirit such that any of his prior convictions should be stricken. Our review of the record indicates the trial court understood it had the discretion to strike priors, and its decision not to was neither irrational nor arbitrary.

VII. Cruel and/or Unusual Punishment

Appellant contends for the first time on appeal that his 11-year sentence for possession of a small amount of cocaine base constitutes cruel and/or unusual punishment under either the article I, section 17 of the California Constitution or the Eighth Amendment to the United States Constitution. Because he failed to assert this issue at the time of sentencing, he has forfeited the issue on appeal. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

In any event, appellant's claim that his sentence constitutes cruel and/or unusual punishment is without merit. A sentence may violate the state constitutional ban on cruel or unusual punishment if "'"'. . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" [Citations.] [¶] 'In order to determine whether a particular punishment is disproportionate to the offense for which it is imposed, we conduct a three-pronged analysis. [Citations.] First, we examine the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society. A look at the nature of the offense includes a look at the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of defendant's acts. A look at the nature of the offender includes an inquiry into whether "the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." [Citation.] Next, we compare the challenged punishment with the punishment prescribed for more serious crimes in the same jurisdiction. And finally, the challenged punishment is compared with punishment for the same offense in other jurisdictions.' [Citation.]" (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1432.)

Appellant's prior record and the present offense demonstrate that his sentence does not violate constitutional principles.[6] Based on the nature of his current crimes, his recidivist behavior, and his failure at rehabilitation, his sentence was proportionate to the nature of the offense and the offender. (Cf. *People v. Dillon* (1983) 34 Cal.3d 441, 477-489.)

The second prong of analysis "involves a comparison of the 'challenged punishment with the punishment prescribed for more serious crimes in the same jurisdiction.' [Citation.]" (*People v. Romero, supra,* 99 Cal.App.4th at p. 1433.) "'However . . . this step is inapposite to three strikes sentencing because it is a defendant's "recidivism in combination with current crimes that places him under the three strikes law. Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare [appellant's] punishment for his 'offense,' which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons." [Citation.]' [Citation.]" (*Ibid.*)

The third prong calls for comparison of the California punishment with punishment for the same crimes in other states. "'That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide." [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct.' [Citation.]" (*People v. Romero, supra*, 99

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[6] See footnote 4, *ante*, regarding appellant's prior convictions.

Cal.App.4th at p. 1433.) We conclude that appellant's sentence does not constitute cruel or unusual punishment under the California Constitution.

Further, contrary to appellant's claim, his sentence is not grossly disproportionate to his crimes and does not violate the Eighth Amendment of the federal Constitution. (U.S. Const., 8th Amend.; *Ewing v. California* (2003) 538 U.S. 11; *Lockyer v. Andrade* (2003) 538 U.S. 63; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820-828.)

DISPOSITION

The judgment is reversed in part with directions. On remand, the trial court must conduct an in camera inspection of the requested peace officer personnel records relating to previously falsified police records, planted evidence, or acts of dishonesty. In any other respect, the judgment is affirmed. If the trial court's inspection on remand reveals no relevant information, the trial court must reinstate the judgment of conviction and sentence, which shall stand affirmed. If the inspection reveals relevant information, the trial court must order disclosure, allow appellant an opportunity to demonstrate prejudice, and order a new trial if there is a

reasonable probability the outcome would have been different had the information been disclosed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.