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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

RODOLPHO RUDY MIRAMONTES,

Defendant and Appellant.

H024323

(Santa Clara County

Super. Ct. No. CC089585)

An information filed by the Santa Clara County District Attorney charged Rodolpho Miramontes with possession of a controlled substance (methamphetamine) (Health & Saf. Code, § 11377, subd. (a); count one) and being under the influence of a controlled substance (methamphetamine) (Health & Saf. Code, § 11550, subd. (a); count two). Further, it was alleged that Mr. Miramontes had three prior convictions within the meaning of Penal Code section 667, subdivisions (b)-(i) and section 1170.2; and that he had served three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Mr. Miramontes entered a plea of not guilty.

Following a jury trial, Mr. Miramontes was found guilty as charged. In addition, the jury found true the prior conviction and prior prison term allegations.

Prior to sentencing, the court exercised its discretion and granted Mr. Miramontes's motion to strike two of the prior convictions. Probation was denied and Mr. Miramontes was sentenced to serve nine years in state prison.

Mr. Miramontes filed a timely notice of appeal. In addition, the People filed a notice of appeal requesting appellate review of Mr. Miramontes's sentence.

Facts and Proceedings Below

On October 27, 2000, San Jose Police Officers Jonathan Shaheen and David Wilson drove into the parking lot of the Whitehouse Inn. There they saw Mr. Miramontes standing in the middle of the driveway.

According to Officer Shaheen, he parked the patrol car to the side of the driveway and got out. As Officer Shaheen walked towards Mr. Miramontes, Mr. Miramontes walked towards him. Officer Shaheen noticed that Mr. Miramontes was under the influence of a stimulant. He had fluttering eyelids, non-reactive dilated pupils, "a white cakey substance" around his tongue, a rapid pulse and rapid speech.

Officer Shaheen placed Mr. Miramontes under arrest. He searched him and found several bags containing "off white powdery rocks." Officer Shaheen took Mr. Miramontes to the police station to be booked. At the station, Officer Shaheen told Mr. Miramontes that he needed to give a blood sample, to which Mr. Miramontes replied: "You know that it's going to come back dirty." Mr. Miramontes refused to let the technician draw any blood.

Grais Ko from the Santa Clara County Crime Laboratory conducted an analysis of the three bags found in Mr. Miramontes's pocket. The first bag contained 2.58 grams of methamphetamine; the second bag contained 0.09 grams of methamphetamine; and the third bag contained 0.25 grams of methamphetamine. Each bag had a "usable" quantity of methamphetamine.

Before trial, Mr. Miramontes filed a *Pitchess* motion for discovery of Officer Shaheen's and Officer Wilson's personnel records containing prior citizen complaints. Specifically, he sought complaints of alleged "false arrest, illegal searches or seizures, fabrication of evidence, dishonest acts, false testimony, false information in police reports, or use of coercive interrogation methods."

Mr. Miramontes's discovery motion was accompanied by a declaration of defense counsel. The declaration stated that Mr. Miramontes disputed the "truthfulness of the allegations as set forth in the police report." Specifically, that the "contact was not consensual, that he was walking away from the officers and stopped only after the officers identified themselves to him as San Jose Police and ordered him to stop"; that Mr. Miramontes "was not under the influence of a controlled substance at the time the officers contacted him"; that he "was not in possession of a controlled substance"; and that, in fact, "the evidence was fabricated."

In addition, defense counsel filed a copy of the police report in which Officer Shaheen detailed that he was on routine patrol with Officer Wilson; that they "were driving through the Whitehouse Inn" when they "made a consensual contact with [Mr.] Miramontes"; that Mr. Miramontes "was standing in the middle of the parking lot" when they contacted him; that as they began to talk to him they "observed the following symptoms of someone under the influence of a controlled substance: fluttering eyelids, non-reactive dilated pupils, dry mouth, pulse 130 BPM, and rapid speech." The report went on to note that Officer Shaheen "located two small white baggies containing an off white powdery substance in his right front jeans coin pocket." In addition, he "found another small baggy containing two off white powdery rocks in the coin pocket."

The trial court denied the discovery motion stating that defense counsel's declaration was insufficient to go to an in camera hearing.

Mr. Miramontes contends that his judgment of conviction must be reversed because the trial court erroneously denied his discovery motion in violation of his right to due process and a fair trial. Additionally, he contends that the trial court erred in questioning a prosecution witness, erroneously introducing irrelevant evidence, and later advising the jury not to consider the evidence in violation of his right to due process; his conviction for being under the influence of a controlled substance must be reversed because the jury instruction provided by the trial court misstated the law; there was

cumulative prejudicial error; and the court "erroneously instructed the jury with a conclusive presumption that [he] was the person who suffered the prior convictions alleged in violation of [his] right to a jury trial and due process."

Additionally, pursuant to California Rules of Court, rule 16(b)(1), in respondent's brief, the People appeal the trial court's decision to strike two of Mr. Miramontes's prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. We will affirm.

In an accompanying petition for writ of habeas corpus, which this court ordered considered with the appeal, Mr. Miramontes raises several issues. We have disposed of the petition by separate order filed this day. (Cal. Rules of Court, rule 24(b)(4).)

Discussion

Pitchess Motion

" 'A motion for discovery of peace officer personnel records is "addressed solely to the sound discretion of the trial court." [Citation.] A review of the lower court's ruling is subject to an abuse of discretion standard.' [Citations.]" (*City of San Jose v. Superior Court (Eti)* (1998) 67 Cal.App.4th 1135, 1145.)

Under Evidence Code section 1043, subdivision (b)(3), a party moving for discovery of peace officer personnel records must include "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation"

At the hearing on the discovery motion, the City of San Jose attorney, relying on this court's decision in *City of San Jose v. Superior Court (Eti)*, *supra*, 67 Cal.App.4th 1135, opposed the motion on the ground that Mr. Miramontes had not demonstrated a "specific factual scenario" establishing a likelihood of police misconduct.

During the hearing on the discovery motion, the court addressed defense counsel as follows: "You have to be factual. You can't be conclusive. Did the officer go in the police car, pick up some controlled substances, and pretend that he pulled them out of

Mr. Miramontes' pocket? Did they just handcuff him and throw him in jail? Did they just plant these things without searching him at all? [¶] What happened? How did they get to the conclusion that they have physical evidence that they say came from Mr. Miramontes."

Mr. Miramontes argues that the trial court erred "in imposing a higher burden on [him] to show good cause for the discovery than required under *Pitress* as reaffirmed in recent California Supreme Court decisions."

The "specific factual scenario" language upon which the trial court impliedly relied is found in this court's opinion in *City of San Jose v. Superior Court (Eti)*, *supra*, 67 Cal.App.4th 1135. In turn, this court found the "specific factual scenario" language in the California Supreme Court decision in *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85. In that case, the defendant was charged with resisting arrest (Pen. Code, § 148) and exhibiting a knife (Pen. Code, § 417). He moved for discovery of complaints regarding the arresting officers' use of excessive force in effecting arrests. His motion was supported by police reports and the declaration of defense counsel. The police reports indicated that the defendant resisted arrest and that in order to make the arrest, one of the officers struck the defendant with his fist and wrestled him to the ground. The declaration alleged that the officers handcuffed the defendant, threw him to the ground, and stepped on his head, thereby using excessive force and rendering the arrest illegal. The declaration stated that complaints of similar behavior by the officers would show the officers' propensity to use excessive force in making arrests. (*Id.* at p. 79.)

The court in *City of Santa Cruz* concluded that the defendant had made a showing of good cause for discovery of such records: "The police reports make clear that considerable force was used to effect the arrest. Counsel's declaration asserts that the officers used excessive force 'so as to make said arrest illegal and otherwise improper.' The declaration sets forth, on the basis of information and belief, *a specific factual*

scenario to support that assertion. Counsel avers that she seeks the information relating to prior complaints of excessive force against the arresting officers to 'show a tendency or propensity on the part of the arresting officers[s] herein to engage in the use of unlawful and excessive force in the execution of the arrests.' [¶] Viewed in conjunction with the police reports, counsel's averments establish a *plausible factual foundation* for an allegation of excessive force, put the court on notice that the officers' alleged use of excessive force will likely be an issue at trial, and articulate a valid theory as to how the information sought might be admissible. [Citations.]" (*City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at pp. 85-86, italics added.)

Mr. Miramontes argues that the language "specific factual scenario," "cannot be read to have held that such a heightened showing is necessary to 'establish some cause' for discovery." He asserts that "[b]ecause this court elevated what the California Supreme Court considered ample factual support for the defendant's motion in *City of Santa Cruz* to a necessary element of a sufficient pleading in *City of San Jose*, its reasoning is erroneous" Thus, he urges this court to reconsider its ruling in *City of San Jose (Eti), supra*, 67 Cal.App.4th 1135.

We decline to reconsider our ruling in *City of San Jose (Eti)* because we do not believe that a defendant is required to make a "heightened" showing. General allegations are too broad to allow the trial court to properly determine whether " 'the discovery or disclosure sought' would be material to 'the subject matter involved in the pending litigation.'" (Evid. Code, § 1043, subd. (b)(3).)" (*City of San Jose (Eti), supra*, 67 Cal.App.4th at p. 1150.)

Here, defense counsel alleged that Mr. Miramontes's contact with the officers was not consensual, without explaining how the stop was illegal; that Mr. Miramontes was not under the influence of methamphetamine, without explaining how the officers' conclusions that he was were incorrect; and that he did not possess methamphetamine, without explaining how the officers fabricated the evidence.

Thus, defense counsel's description of the events leading up to Mr. Miramontes's arrest reached several conclusions without supplying the court with the facts on which those conclusions rested.

Accordingly, we conclude that the trial court did not abuse its discretion by finding that Mr. Miramontes had not presented "enough to go to an in camera proceeding."

Brady Motion

Mr. Miramontes asserts that although it was neglected in the hearing on his *Pitchess* motion, the motion he filed included a request for the same information under *Brady v. Maryland* (1963) 373 U.S. 83 (hereinafter *Brady*). Thus, he argues that the trial court's implied denial of his *Brady* motion was erroneous.

Mr. Miramontes's argument is as follows: The prosecution is obligated to disclose evidence favorable to the accused that is material to the issue of guilt. During cross-examination a party may inquire into matters that impeach the witness either directly through eliciting testimony contrary to that provided on direct examination, or indirectly through showing inconsistencies between the witness's testimony and prior statements. Thus, it follows that information relevant to the impeachment of the prosecution's only eyewitness is "clearly 'favorable' under *Brady*." Accordingly, the information sought in the *Pitchess/Brady* motion, that is "evidence of false statements and fabrication of evidence -- was directly linked to the officers' credibility. Therefore, it was material under [United States v.] *Bagley* [(1985) 473 U. S. 667, 682]¹ and the prosecution had a duty to disclose it for in camera review regardless of whether appellant had requested it."

¹ In *United States v. Bagley*, *supra*, 473 U.S. 667 the Supreme Court extended *Brady* to impose a duty on prosecutors to volunteer exculpatory material to the defense even without a request for such material.

"A prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. [Citations.] The prosecution must disclose evidence that is actually or constructively in its possession or accessible to it. [Citation.]" (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358.)

"The obligation to disclose favorable evidence under *Brady* includes evidence that serves to impeach the testimony of a prosecution witness. [Citations.] Evidence is material under *Brady* 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' [Citation.]" (*Id.* at p. 359.)

However, "[t]he Pitchess procedure is the sole means by which citizen complaints may be obtained. [Citations.] In order to obtain discovery of citizen complaints, the People, as well as the defendant, must comply with the statutory requirements for disclosure of citizen complaints. (*Alford v. Superior Court* [(2003)] 29 Cal.4th [1033] at p. 1046 [prosecutor does not have a right to be heard in *Pitchess* proceedings or to receive material ordered disclosed after a successful motion]; *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 407 . . .)" (*People v. Jordan, supra*, 108 Cal.App.4th at p. 360 (*Jordan*).)

"Notwithstanding the prosecutor's duty to disclose material evidence to the defense, ' "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* [*v. Maryland* [, *supra*,] 373 U.S. 83 . . .] did not create one" ' (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1135 . . . , quoting *Weatherford v. Bursey* (1977) 429 U.S. 545, 559 . . .) Thus, 'the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.' [Citation.]" (*Jordan, supra*, 108 Cal.App.4th at p. 361.)

Mr. Miramontes presents no evidence that the prosecution suppressed evidence. Instead, he impliedly asserts that the prosecution should be required to bring a *Pitchess* motion to discover peace officer records every time a peace officer is called as a prosecution witness. We decline to enforce such a rule. To decide otherwise would require the People to go on "a fishing expedition" into peace officer personnel records every time they called a peace officer as a witness.²

Accordingly, we reject Mr. Miramontes's claim that his conviction should be reversed because the trial court erroneously denied his discovery motion.

Questioning By the Trial Court

During cross-examination of Officer Shaheen, defense counsel asked several questions concerning the chain of custody of the three bags of methamphetamine found in Mr. Miramontes's pocket. The following exchange took place.

"[DEFENSE COUNSEL] The next time you remember touching this exhibit is when you took it out for court; is that right?"

"[OFFICER SHAHEEN] Yes.

"[DEFENSE COUNSEL] How many times would that be?"

"[OFFICER SHAHEEN] I believe once for court without looking at the paper -- once for court --"

After defense counsel showed the exhibit to Officer Shaheen, he continued: "Once for court and once last week when I took it to the crime lab."

At the conclusion of the officer's testimony, the trial court noted that he had referred to prior court proceedings. The court asked the officer to describe those court

² That is not to say that if a prosecutor has information that a police officer's credibility is questionable it should not be part of *Brady* discovery. "It is undisputed that materials that 'may be used to impeach a witness' fall within the class of information subject to *Brady* because impeachment information affects the fairness of trial. [Citations.]" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1,16.)

proceedings. Officer Shaheen explained that the proceedings were a motion to suppress evidence and a preliminary hearing.

Subsequently, a juror sent a note to the court regarding other court proceedings. The court addressed the jury as follows:

"[THE COURT] Let me just explain to you, there was mention about a preliminary examination. In virtually every felony case that is filed, there is a preliminary examination. It is before a judge only, not before a jury. It is very, very, common process. And it is what we call a show cause kind of hearing where some evidence is presented, enough to determine that the case should proceed on to the next level. This is the next level.

"All right. So that's what a preliminary examination is.

"The same note went on to ask further questions about other procedures which I'm . . . not going to comment on. And you're not to really speculate about things that may or may not have happened in this case. There will be no evidence as to any other proceedings. So I'll just admonish you not to speculate as to any other proceedings that may have occurred in this case."

Defense counsel did not object to the court's explanation.

Mr. Miramontes argues that his judgment of conviction must be reversed because "through its own questioning of the prosecution witness, [the court] erroneously introduced irrelevant evidence, and later advised the jury not to consider the evidence in violation of [his] right to due process."

Mr. Miramontes concedes that the alleged evidentiary error has been forfeited by trial counsel's failure to object. However, he argues that it is not "the erroneous admission of the evidence that constitutes the prejudicial error here. It is the trial court's subsequent denial that the evidence was introduced and its refusal to instruct the jury regarding it, in response to its question, that prejudiced [him]."

Relying on *People v. Martin* (1954) 128 Cal.App.2d 724 (*Martin*), Mr. Miramontes argues that the trial court left the jury to speculate on the character and significance of the suppression motion.³

In *Martin* the defendant was charged with driving under the influence. The defense established that the defendant suffered from a sinus condition and had been taking medication for that condition. Defense counsel read the label of the medicine bottle to the jury. During closing argument, defense counsel referred to the label. The court interrupted counsel's argument to ask about the evidence. Ultimately, the court ruled the evidence was hearsay that should not have been admitted. (*Id.* at pp. 725-728.) The court concluded: "That is the ruling of the court, that what is on that label is stricken out of the record now and the jury are instructed to disregard it." (*Id.* at p.729.) The Second District Court of Appeal held that the ruling and action of the judge was prejudicial. (*Id.* at pp. 729-730.) The Court of Appeal noted: "Judges are not justified by the law in admitting evidence before the jury under objection and exception, and then, after the case has been argued by counsel, instruct the jury that such evidence should not

³ In addition, Mr. Miramontes relies on *People v. Armstead* (2002) 102 Cal.App.4th 784. In *Armstead*, in responding to a juror's question for clarification of CALJIC No. 2.90, the trial court "in effect changed the scope or basis of admissibility of the evidence, essentially redefining it as 'other crimes' evidence on the issues of identity, motive and intent, without having had that evidence properly admitted for such purposes during the trial. In the usual course of considering the admissibility of 'other crimes' evidence, the court follows well-established rules of evidence and law after hearing argument from counsel on the matter; this requires the court to carefully review each count in light of the alleged 'other crimes' evidence to determine its probativeness to prove a material fact other than criminal disposition and then to weigh its probative value against its prejudicial effect before it is admitted." (*Id.* at pp.793-794.) The Fourth District Court of Appeal held that failure to so do was reversible error noting: "The substantial change in the scope of the evidence before the jury as a result of the court's response to its question after the case was submitted for deliberation . . . deprived Armstead of the opportunity to meaningfully challenge the evidence in its new character." (*Id.* at p. 794.) We find *Armstead* distinguishable. The court did not admit evidence and then change its character after argument for a purpose other than that for which it was admitted.

be considered by them in making up their verdict. Such course, if practiced, certainly would be out of the ordinary, and not just to a defendant. [Citation.]" (*Id.* at p. 729.)

We find Mr. Miramontes's reliance on *Martin* misplaced. In Mr. Miramontes's case, the trial court did not admit evidence then strike it from the jury's consideration. In response to a juror's question, the trial court explained the nature of a preliminary hearing. Then, the court admonished the jurors "not to speculate as to any other proceedings that may have occurred" Jurors are presumed able to understand the court's admonishment and follow it. (*People v. Williams* (1995) 40 Cal.App.4th 446, 456.)

Accordingly, we find no error on this record.

CALJIC No. 16.060

The trial court instructed the jury pursuant to CALJIC No. 16.060 as follows: "Defendant is accused in Count 2 of having violated Section 11550(A) of the Health and Safety Code, a misdemeanor. [¶] Every person who willfully and unlawfully uses or is under the influence of any controlled substance, namely methamphetamine, is guilty of a violation of Health and Safety Code section 11550(A), a misdemeanor. [¶] A person is under the influence of a controlled substance if after using it the substance has appreciably affected the nervous system, brain, muscles or other parts of the person's body or is creating in him any perceptible abnormal or physical condition. [¶] In order to prove this crime, the following elements must be proved: [¶] 1. A person willfully and unlawfully used a controlled substance, namely methamphetamine or a person was under the influence of a controlled substance, namely methamphetamine."

Mr. Miramontes argues that the final paragraph of the instruction misstates the law and permits a finding of guilt without proof of willful use. Alternatively, he argues that the instruction deprived him of due process and a fair trial, because the only evidence that his ingestion of methamphetamine may have been willful was his possession of a supply on his person.

Defense counsel did not object to the jury instruction as given or ask that it be clarified, amplified or explained.

Health and Safety Code section 11550 states in pertinent part: "(a) No person shall use, or be under the influence of any controlled substance which is . . . specified in paragraph . . . (2) of subdivision (d) . . . of Section 11055." In turn paragraph (2) of subdivision (d) of Health and Safety Code section 11055 states: "Methamphetamine, its salts, isomers, and salts of its isomers." The only exception to this is if the methamphetamine was "administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances." (Health & Saf. Code, § 11550, subd. (a).) Furthermore, "[i]t shall be the burden of the defense to show that it comes within the exception." (*Ibid.*)

Thus, Health and Safety Code section 11550 does not require "willfully" being under the influence. Accordingly, we find no error here.

Cumulative Prejudicial Error

Mr. Miramontes argues that even if no single error was prejudicial enough to warrant reversal, the cumulative prejudice arising from the multiple errors "clearly deprived [him] of a fair trial, and, taken together cannot be found harmless beyond a reasonable doubt."

Since we have found no harmful errors, we reject Mr. Miramontes's claim of prejudice resulting from cumulative error.

The Prior Convictions

Mr. Miramontes concedes that the California statutory right to a jury trial, regarding the truth of the allegations that a defendant has suffered a prior conviction, does not include the right to a jury trial regarding the identity of the person who suffered

the prior convictions.⁴ Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), he argues, however, that he has a federal constitutional right to a jury finding regarding each fact relevant to a determination that he suffered prior convictions.

"The right, if any, to a jury trial of prior convictions allegations derives from [Penal Code] sections 1025 and 1158, not from the state or federal Constitution. [Citations.]" (*People v. Epps* (2001) 25 Cal.4th 19, 23.) Mr. Miramontes has no right to jury trial on "the fact" that he is the person whose name appears on the documents admitted to establish the convictions. (*Id.* at pp. 26-27.)

Accordingly, we reject Mr. Miramontes's argument that he has a federal constitutional right to a jury finding that he was the person who suffered the prior convictions.

The Romero Motion

At the sentencing hearing, the trial court struck two of Mr. Miramontes's prior convictions. The People contend that the trial court abused its discretion in striking the prior convictions.

Mr. Miramontes is correct in noting that the People failed to object in the trial court. Prior to imposing sentence, the trial court expressed its intention to strike two 1982 robberies and impose a nine-year prison term. Then, the court continued: "Are there any comments . . . Mr. Pitsker?" The prosecutor replied: "No."

In *People v. Scott* (1994) 9 Cal.4th 331, the court held that the waiver doctrine should apply to claims involving the trial court's failure to properly make its discretionary

⁴ Penal Code section 1025, subdivision (b) states in pertinent part: "the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty [¶] (c) Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury."

Accordingly, the jury in Mr. Miramontes's case was instructed with CALJIC No. 17.26 as follows: "You are instructed that the defendant is the person whose name appears on the documents admitted to establish the convictions."

sentencing choices. (*Id.* at p. 353.) The court explained that "In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims, reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim. [Citations.] These principles are invoked as a matter of policy to ensure the fair and orderly administration of justice." (*Id.* at p. 351.)

Under this authority, we conclude that the People have waived their right to challenge the trial court's reasons for striking two of Mr. Miramontes's prior convictions.

However, even if not waived, we would find no abuse of discretion. In *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, the Supreme Court provided guidance for the exercise of a sentencing court's discretion under section 1385 to dismiss a strike allegation. A court abuses its discretion if it strikes a sentencing allegation merely for judicial convenience, to relieve court congestion, or because a defendant pleads guilty. (*Id.* at p. 531.) An abuse of discretion may also occur if the dismissal is " 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*Ibid.*)

In *People v. Williams* (1998) 17 Cal.4th 148, the court elaborated on these guidelines. In deciding whether to strike a serious felony allegation, 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." (*Id.* at p. 161.)

"The Supreme Court has thus made clear that a decision to strike a prior is to be an individualized one based on the particular aspects of the current offenses for which the

defendant has been convicted and on the defendant's own history and personal circumstances. This approach allows the court to perform its obligation to tailor a given sentence to suit the individual defendant. But the court must also be mindful of the sentencing scheme within which it exercises its authority. In deciding to strike a prior, a sentencing court is concluding 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." (*People v. McGlothlin* (1998) 67 Cal.App.4th 468, 474.) When we review such a decision, we remember that the abuse-of-discretion standard is deferential, but "not empty." (*People v. Williams, supra*, 17 Cal.4th at p. 162; see also *People v. Garcia* (1999) 20 Cal.4th 490, 503.)

The People argue that this case is like others where appellate courts have found that trial courts abused their discretion in striking strikes. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320-322 (*Gaston*); *People v. Strong* (2001) 87 Cal.App.4th 328 (*Strong*)). In *Gaston*, the appellate court determined that the defendant was "one of the clearest examples of a revolving-door criminal we have seen." (*Gaston, supra*, 74 Cal.App.4th at p. 312.) The appellate court stated, "As is apparent from the trial court's thoughtful statements from the bench and in its sentencing memorandum, the decision in this case was deliberate and not capricious." (*Id.* at p. 320.) Nevertheless, "Our review of Gaston's background, character and prospects leads to a conclusion directly contrary to that of the trial court." (*Id.* at p. 322.) In *Strong*, the trial court was reversed for striking the defendant's only strike. The appellate court's premise was that "extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record." (*Strong, supra*, 87 Cal.App.4th at p. 338.) The appellate court criticized each of the five reasons cited by the trial court for striking the strike. (*Id.* at pp. 343-346.) In each case the ultimate question for the trial judge was

what sentence was appropriate for the individual defendant before the court after considering "the particulars of his background, character, and prospects," including past and current crimes. (*Id.* at p. 339.)

People v. Myers (1999) 69 Cal.App.4th 305 affirmed a trial court's decision not to strike two of three strikes. The court explained, "We shall continue to review rulings on motions to strike prior convictions when the issue is raised under the deferential abuse of discretion standard. Under that standard an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*Id.* at pp. 309-310; cf. *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1249-1250.)

Myers applies appellate rules to a decision about striking a strike. As stated in another context by *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968: "On appeal, two additional precepts operate: 'The 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.] Concomitantly, '[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.]'" (*Id.* at pp. 977-978.) An appellate court is not authorized to substitute its judgment of the relative weights of aggravating and mitigating factors properly considered by the trial court. (*People v. Hetherington* (1984) 154 Cal.App.3d 1132, 1140-1141; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87.)

In this case, the trial court articulated several reasons for the dismissal: Mr. Miramontes's age (40); the present case involved a small amount of drugs, 2.29 grams of methamphetamine; there was no violence in the present case; Mr. Miramontes admitted that he was under the influence to the officer and cooperated with him; he had no convictions since 1988 (although a great deal of time since then had been spent in prison); the strikes were old (1982) and Mr. Miramontes was only 18 at the time he committed the two robberies; and Mr. Miramontes had been addicted to drugs since he was 12 or 13 years old.

There is no question that Mr. Miramontes has repeatedly failed to conform his conduct to the law and the conditions of his parole. However, "[w]hile a defendant's recidivist status is undeniably relevant, it is not singularly dispositive." (*People v. Garcia* (1999) 20 Cal.4th 490, 501, quoting *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th 968, 973.)

The question before us is not whether this court would have reached a different conclusion on the facts, but whether the People have shown that the trial court's conclusion was clearly arbitrary or irrational. We find that the People have not carried their burden. "It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.) There was no abuse of discretion.

Disposition

The judgment is affirmed.

Elia, Acting P. J.

WE CONCUR:

Wunderlich, J.

Mihara, J.