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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA,)
) No. B123456
Plaintiff and Respondent,)
) (Sup.Ct.No. CR12345)
)
v.)
)
JOHN DOE,)
)
Defendant and Appellant.)
_____)

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF VENTURA COUNTY
THE HONORABLE KEVIN MCGEE, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page(s)</u>
APPELLANT'S REPLY BRIEF	1
INTRODUCTION	1
ARGUMENT	2
THE COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT APPELLANT’S <i>ROMERO</i> MOTION AND STRIKE THE “STRIKE” PRIOR	2
A. The Error is Appealable	2
B. The Trial Court Abused Its Discretion in Refusing to Strike the Prior.	4
CONCLUSION	8

TABLE OF AUTHORITIES

Page(s)

STATE CASES

In re Cortez (1971)
6 Cal.3d 78 6

People v. Benevides (1998)
64 Cal.App.4th 728 2, 3

People v. Gillispie (1997)
60 Cal.App.4th 429 2, 4

People v. Myers (1999)
69 Cal.App.4th 305 2, 4, 5

People v. Sipe (1995)
36 Cal.App.4th 468 6

People v. Superior Court (Alvarez)
(1997) 14 Cal.4th 968 5

People v. Williams,
supra, 17 Cal.4th at 161 5, 7

In re Saldana (1997)
57 Cal.App.4th 620 5, 7

STATE STATUTES

Penal Code sections:

1385 3, 5

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APPELLANT'S REPLY BRIEF

INTRODUCTION

By this Reply Brief, no attempt is made to set forth a response to each of respondent's contentions, most of which are fully covered by the opening brief. Only those points requiring additional comment will be raised to assist this court in resolving the pertinent issues.

ARGUMENT

THE COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT APPELLANT'S *ROMERO* MOTION AND STRIKE THE "STRIKE" PRIOR

A. The Error is Appealable

Respondent, citing *People v. Benevides* (1998) 64 Cal.App.4th 728, urges that appellant's contention that the trial court abused its discretion in refusing to strike appellant's strike prior should be "summarily dismissed." (RB 4) Respondent recognizes that there is a split of authority as to whether appellate review of a trial court's denial of a request to strike is available (see *ibid.*; but see *People v. Myers* (1999) 69 Cal.App.4th 305, 309; *People v. Gillispie* (1997) 60 Cal.App.4th 429), but urges that *Benevides* provides the correct view and that following *Benevides* in this case precludes review of the issue. (RB 4-5)

Respondent is wrong. The *Benevides* holding does not preclude review in this case. Moreover, to the extent *Benevides* limits review in other cases, it is wrongly decided. (See *People v. Myers, supra*, 69 Cal.App.4th at 309; *People v. Gillispie, supra*, 60 Cal.App.4th 429.)

Respondent states that, under *Benevides*, appellate "review is available only when a trial court's refusal or failure to exercise its section 1385 discretion is based on a mistaken belief regarding its authority to do so, or when the trial court exercises its section 1385 authority to strike." (RB 4) Respondent overstates the *Benevides* holding.

In *Benevides*, the court's introduction explained that in many cases the trial

court refuses to exercise discretion under Penal Code section 1385 and “provides no explanation for its inaction.” (*People v. Benevides, supra*, 64 Cal.App.4th at 730.) “*Under these circumstances*, we conclude there is only a limited right to appellate review for alleged abuse of discretion. If the record shows the court was *aware* of its discretion, summary denial ... is generally the appropriate disposition.” (*Ibid.*, emphasis added.) Later, the court referred to a “limited review” of the matter on appeal and concluded that, where the record shows the trial court recognized it had the discretion to strike, but is silent as to the reasons for the decision not to do so, the appellate court has no ability to review the trial court’s decision. (*Id.*, at 733-734.)

In so holding, however, the *Benevides* court noted “Of course, where the trial court expresses clearly improper reasons for refusing to exercise its discretion, the appellate court must correct the error.” (*Id.*, at 735 fn. 6.) Here, the trial court did explain its decision not to strike appellant’s prior, and it is that explanation which appellant attacks in urging there was an abuse of discretion. (AOB 8-12) Thus, contrary to respondent’s assertion, even under *Benevides*, this court should review the decision of the trial court here.

Moreover, to the extent that *Benevides* would deny review of a decision not to strike a prior where the record is silent as to the reasons for the denial, the holding is wrong. The *Benevides* holding was premised on the fact that appellate courts have no power to substitute their discretion for that of the trial court, but may only review for an abuse of discretion. From this rule, the court concluded that no review is available where

the record is silent as to the reasons for the refusal to exercise recognized discretion. This was seemingly based on the presumption that courts exercise their discretion legally and, in the absence of an affirmative contrary showing on the record, will be upheld. (See *People v. Gillispie, supra*, 60 Cal.App.4th at 435.) While application of these rules undoubtedly will lead to affirmance in most silent record cases (see *ibid*), these rules do not support the conclusion that under no circumstances could an appellate record manifest an abuse of discretion by a failure to act where the inaction would be an abuse as a matter of law. (See *People v. Gillispie, supra*, 60 Cal.App.4th at 434 [the issue of whether the trial court declined to exercise its discretion in a lawful manner may be raised on appeal]; see also *People v. Myers, supra*, 69 Cal.App.4th at 309.)

B. The Trial Court Abused Its Discretion in Refusing to Strike the Prior.

Respondent correctly notes that the issue presented by a *Romero* motion is “whether an examination of the defendant’s present felonies, prior felony convictions, background, character and prospects, indicates that the defendant ‘may be deemed outside the [three strikes law] scheme’s spirit, in whole or in part, and hence should be treated as though he has . . . not previously been convicted of one or more serious and/or violent felonies.’ (*People v. Williams* [(1998)] 17 Cal.4th [148,] 161; accord *People v. Garcia* (1999) 20 Cal.4th 490, 503.)” (RB 5) Respondent further correctly observes that appellant has the burden of establishing an abuse of discretion which must be viewed with deference and with the presumption that the trial court considered all relevant factors “in the absence of an affirmative record to the contrary.” (RB 5-6) Respondent then

concludes that the “record herein unquestionably shows that the trial court was well aware of its discretion under section 1385 and carefully considered all the relevant factors.” (RB 6)

Respondent again is wrong. While it is clear that the court understood that it had the power to strike the strike under Penal Code section 1385, it misunderstood the scope of the “relevant factors.” Thus, the court limited its consideration of appellant’s positive behavior to only that occurring prior to the date on which sentencing was initially scheduled. (AOB 10, RT 22) Later, in selecting which term to impose, the court *expressly* would not consider positive behavior occurring after the initial sentencing date. Thus, the court stated “[appellant] should [not] really benefit from the fact that he failed to appear at his sentencing back in 1999 in June. To his credit, he has apparently done better in Hawaii, although certainly not as good as he could have done, but he should not be in a better position, it seems to me, having failed to appear than he would have had he appeared at that time.” (RT 25) Accordingly, the record in this case does affirmatively show that the trial court did not consider all relevant factors (see e.g. *In re Saldana* (1997) 57 Cal.App.4th 620, 624-626 [where the properly used factors apparently included the defendant’s in-prison behavior after he was first sentenced in the case and before the re-sentencing hearing conducted some two years later]; see also *People v. Williams, supra*, 17 Cal.4th at 161; cf., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978-981), and therefore, the usual deference to its ruling need not be afforded. (See *In re Cortez* (1971) 6 Cal.3d 78, 85-86; compare *People v. Myers, supra*, 69 Cal.App.4th at

310.)

Respondent next asserts that the court properly exercised its discretion. (RB 6) In doing so, respondent reverts to the presumption that the court considered all relevant factors and concludes that, in light of those factors, the court did not abuse its discretion. (RB 6-7)

Respondent reaches this conclusion based upon a comparison of the factors in *Myers*, in which the denial of a *Romero* motion was upheld, with the factors in this case. Respondent urges that appellant's record was worse than *Myers* because, while appellant's *single* strike was for a 1992 robbery (an offense that was 10 years old at the time of the motion and six years old at the time of appellant's current offense), appellant had an earlier battery conviction and later misdemeanor convictions, whereas *Myers's two* strikes were committed on *one* remote occasion and were the only priors mentioned in the opinion. (RB 7) Given that appellant's current offense involved possession of drugs by a person with one prior strike (a purse-snatch-turned-robbery), and *Myers's* current offense involved possession of firearms by a three-strike defendant, respondent's conclusion that appellant compared poorly to *Myers* is incorrect.

The comparison fails for a more significant reason, however. In *Myers*, the court did not decline to consider all favorable relevant factors; it just failed to mention them. Here, the court declined. Moreover, in this case, it is clear that, in light of the *entire picture*, application of the strikes law in this case does not further its objectives or the interests of society in curbing recidivist activity. (See *People v. Sipe* (1995) 36

Cal.App.4th 468, 483 [the Legislature's goal in enacting the strikes law was to curb recidivist activity]; *In re Saldana, supra*, 57 Cal.App.4th at 626; *People v. Williams, supra*, 17 Cal.4th at 161.) Appellant's prospects for the future were good at the time of sentencing. He had become a stable, employed, 30-year-old, husband and father, who had apparently rehabilitated himself and no longer qualified as a habitual drug user. (See CT 63-64, Defense Written Motion to Strike; POR 1) Imposing the lengthy mandatory prison term here, took him away from this stability and made it more likely, rather than less likely, that he would fail in the future. As a result, the trial court erred in refusing to strike appellant's prior serious felony conviction.

Appellant's sentence should therefore be reversed and the matter remanded to the trial court with directions to strike appellant's prior serious felony conviction and then reconsider a grant of probation or the imposition of a lesser term.¹

¹In addressing the second issue raised in the opening brief, respondent re-asserts the basic rules governing the abuse of discretion in failing to strike a prior and disagrees with appellant as to the application of them to the facts of this case. (RB 8-9) Respondent is wrong. As appellant fully expressed his position on the law and its application in the opening brief, however, appellant relies on the arguments made in the opening brief and no further comment will be made on them here.

CONCLUSION

For the forgoing reasons and those stated in the opening brief, the sentence in this case should be vacated, and the matter remanded to the trial court for re-sentencing.

Dated: November 26, 2002

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is *. I am employed by a member of the bar of this court.

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APPELLANT'S REPLY BRIEF

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I declare under penalty of perjury that the foregoing is true and correct.

Executed * at *, California.