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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH RUSHING, Defendant and Appellant.	C054676 (Super. Ct. No. 05CR8510)

APPEAL from a judgment of the Superior Court of Amador County, David Sargent Richmond, J. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, and Michael P. Farrell, Assistant Attorneys General and Julie A. Hokans, Supervising Deputy Attorney General, for Plaintiff and Respondent.

In an information filed in October 2005, defendant Kenneth Rushing was charged as follows:

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II and III of the DISCUSSION.

Count I: Failure to register as a sex offender following a change of address, between March 26, 2005, and July 5, 2005, in violation of former Penal Code section 290, subdivision (a)(1)(A);[1]

Count II: Failure to file a change of address between March 26, 2005, and July 5, 2005, in violation of former section 290, subdivision (f)(1);

Prior Convictions: it was alleged that defendant had sustained five prior serious or violent felony convictions (strikes);

Prior Prison terms: It was alleged that defendant had served six prior prison terms.

Pursuant to a plea bargain, defendant pled guilty to count I and admitted the five prior strikes and serving two prison terms.

In exchange for defendant's plea, the prosecution agreed to dismiss count II, a felony, and an unrelated misdemeanor charge for driving under the influence.

In connection with the entry of his plea, defendant agreed in writing as follows:

"I understand that the maximum term facing me as a result of this plea is 27 yrs to life."

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[1] Undesignated statutory references are to the Penal Code.

In addition, the oral colloquy between the court and defendant, when defendant entered his plea, includes the following:

"THE COURT: Do you understand that based upon your plea to these charges you have an exposure of twenty-seven years to life state prison.

"DEFENDANT []: Yes Sir.

"THE COURT: You understand this court has the discretion under what we call the *Romero* case to strike the strike priors if the Court deemed to be appropriate, but that's not part of the plea-bargain. It could happen, not happen. What you have to understand is that that is your maximum exposure.

"You understand that?

"DEFENDANT []: Yes, sir.

"THE COURT: You still want to proceed?

"DEFENDANT []: Yes, sir."

Defendant was sentenced to 27 years to life in prison. Without obtaining a certificate of probable cause, defendant appeals, contending:

(1) A sentence of 25 years to life violates the cruel and/or unusual punishment prohibitions of the federal and state constitutions as well as their double jeopardy provisions.

(2) The trial court erred in refusing to strike his prior strikes under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

In the published portion of this opinion, we conclude that defendant's constitutional contentions are not cognizable on

appeal without a certificate of probable cause. In the unpublished portion of the opinion, we conclude defendant's *Romero* contention is cognizable on appeal, but the trial court did not err in refusing to strike any of defendant's prior convictions.

We shall therefore affirm the judgment.

DISCUSSION

I

Defendant contends:

(1) "Notwithstanding His Recidivism, As Applied to Appellant, A Sentence of 25 Years to Life for the Technical Offense of Failing to Register Violates the Ban Against Cruel And/Or Unusual Punishment Under Both the United States and California Constitutions"; and

(2) "Appellant's Constitutional Right Not To Be Placed in Double Jeopardy Was Violated Because His Current Offense Was So Minor That What Amounts to a Life Sentence Results In Twice Being Punished for His Prior Offenses To Aggravate His Sentence Even when His Recidivism is Considered."

The Attorney General contends defendant cannot advance these constitutional claims on appeal without a certificate of probable cause. We agree with the People.

"A defendant may not appeal 'from a judgment of conviction upon a plea of guilty of nolo contendere,' unless he has obtained a certificate of probable cause. [Citations.] Exempt from this certificate requirement are postplea claims, including sentencing issues, that do not challenge the validity of the

plea. [Citations.]" (*People v. Cuevas* (2008) 44 Cal.4th 374, 379 (*Cuevas*).)

This case requires us to consider two recent California Supreme Court decisions construing this rule: *People v. French* (2008) 43 Cal.4th 36 (*French*), and *Cuevas, supra,* 44 Cal.4th 374.

In *Cuevas*, the defendant was charged with "27 counts of robbery, one count of grand theft, one count of attempted robbery, and two counts of kidnapping for robbery (§§ 211, 487, subd. (c), 664, 209, subd. (b)(1))." There were also 31 firearm use allegations (§ 12022.53, subd. (b)). (*Cuevas*, *supra*, 44 Cal.4th at p. 377.) On all charges and allegations, Cuevas could have been sentenced to two life sentences plus 37 years. (*Id.* at pp. 382-33.) He negotiated a plea agreement under which the prosecution reduced the kidnapping charges to simple kidnapping and dismissed the 31 firearm use allegations but added a single allegation of using a deadly or dangerous weapon. (*Id.* at pp. 377-378.)

Under the deal, the maximum sentence was 37 years eight months. (*Cuevas, supra,* 44 Cal.4th at p. 383.) While taking Cuevas's plea, the trial court said to him, "Your maximum is going to be a determinant sentence of thirty-seven years [*sic*]. . . . Do you understand that?" Cuevas answered, "Yes, ma'am." (*Id*. at p. 383.) The trial court imposed an aggregate term of 35 years eight months, consisting of the upper term of eight years for one kidnapping count, 27 consecutive one-year terms

for the robbery counts, and a consecutive term of eight months for grand theft. (*Ibid.*)

On appeal, at the urging of the appellate court following the filing of a brief under *People v. Wende* (1979) 25 Cal.3d 436, Cuevas argued that his sentence was improper because 15 of the robbery counts and the attempted robbery count arose from eight different occasions in which he robbed (or attempted to rob) both a store and the store employee. (*Cuevas, supra,* 44 Cal.4th at pp. 378-379.) Thus, he argued that sentence should have been stayed under section 654 on eight duplicative counts. (*Id*. at p. 379.) The Supreme Court held that a certificate of probable cause was required for this argument because, as in *People v. Shelton* (2006) 37 Cal.4th 759, the section 654 argument was, in essence, a challenge to the validity of the plea. (*Cuevas, supra*, 44 Cal.4th at pp. 376, 384.)

The Supreme Court ruled, contrary to the Court of Appeal's decision, "the presence or absence of a sentence lid [did] not dictate the result." (*Cuevas, supra*, 44 Cal.4th at pp. 378, 381.) What was significant to the Supreme Court was that "defendant agreed to a maximum possible sentence of 37 years eight months," he was not "merely *advised* of the maximum sentence." (*Id.* at p. 382.) "In this case, defendant received a significant reduction in sentence, or in the prosecutor's words, 'two very large breaks,' in exchange for his plea." (*Id.* at p. 383.) The court thus concluded that "by negotiating the reduction and dismissal of these charges, defendant necessarily understood and agreed that he faced a significantly reduced

sentence of 37 years eight months. This maximum sentence was 'part and parcel' of the plea bargain the parties negotiated. [Citations omitted.]" (*Id*. at pp. 383-384.)

The foundation of the Supreme Court's decision in *Cuevas* is by now well-established: (1) a challenge to the court's authority to impose an agreed upon maximum sentence is a challenge to the validity of the plea requiring a certificate of probable cause, but (2) a challenge to the trial court's exercise of individualized sentencing discretion within an agreed maximum sentence does not require a certificate of probable cause because it does not challenge the trial court's authority to impose the upper term, *i.e.*, it does not attack the validity of the plea agreement but instead attacks the court's exercise of discretion permitted by the agreement. The Supreme Court's holding, however, is amplified by the its prior ruling in *French* where it explains what it means to challenge a trial court's authority to impose a particular sentence.

In *French, supra,* 43 Cal.4th 36, the defendant faced an aggregate term of 180 years to life in prison. (*Id.* at p. 42.) He negotiated a charge bargain, *i.e.,* he agreed to plead guilty to certain charges in exchange for the dismissal of others but did not negotiate a sentence lid or stipulated term, resulting in a maximum allowable term of 18 years in prison. (*Id.* at p. 42) Finding true a single aggravating factor, the trial court imposed the maximum term under the plea agreement. (*Id.* at pp. 42-43)

On appeal, French argued the trial court violated his Sixth Amendment right to counsel in the course of determining the aggravating factor, and thus erred in imposing the maximum allowable term reached in the charge bargain. (*French, supra,* 43 Cal.4th 36, 40.) The People argued French could not raise his claim on appeal because he failed to obtain a certificate of probable cause. (*Id.* at p. 43.) The Supreme Court ultimately ruled as follows:

"A certificate of probable cause is not required in the present case, because defendant's claim does not constitute an attack upon the validity of the plea agreement. In contrast to a case in which the maximum term under the plea agreement would be unlawful under section 654, the Sixth Amendment would not render an upper term unlawful for defendant's crimes under all circumstances. Whether an upper term sentence was permissible for defendant's offenses depended upon whether aggravating factors were established at the sentencing hearing, and not upon the facts of the offenses themselves. Even without a jury trial on aggravating circumstances, the upper term would have been authorized if the prosecution had established an aggravating factor at the sentencing hearing based upon defendant's prior convictions or upon his admissions. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 836-837 (*Sandoval*)). Defendant's claim is that the upper term was not authorized because the prosecution failed to establish an aggravating circumstance at the sentencing hearing in the manner required by the Sixth

Amendment. Such a claim does not affect the validity of the plea.

"Furthermore, we held in *Sandoval, supra*, 41 Cal.4th at pages 845-852, that a defendant who has established prejudicial Sixth Amendment error under *Cunningham* [*v. California* (2007)] 549 U.S. 270 [(*Cunningham*)], is entitled to be resentenced under a scheme in which the trial court has full discretion to impose the upper, middle, or lower term, unconstrained by the requirement that the upper term may not be imposed unless an aggravating circumstance is established. Under our holding in *Sandoval*, if a defendant is successful in establishing *Cunningham* error on appeal, the trial court is not precluded from imposing the upper term upon remand for resentencing. The defendant is entitled only to be resentenced under a constitutional scheme and is afforded the opportunity to attempt to persuade the trial court to exercise its discretion to impose a lesser sentence. In contrast to the claims raised in *Panizzon* and *Shelton* ([*People v*.]*Panizzon* [(1996)] 13 Cal.4th 68; [*People v*.]*Shelton*, *supra,* 37 Cal.4th 759), defendant's claim, if successful, would not deprive the People of the benefit of the plea agreement, because they still would have the opportunity to convince the trial court that the full 18-year term should be imposed. Accordingly, defendant is entitled to have his *Cunningham* claim addressed on appeal. [Fn.]" (*French, supra*, 43 Cal.4t at pp. 45-46.)

In short, French's legal argument on appeal - that he was denied a jury trial on aggravating factors - was not a challenge

to the trial court's authority to impose the maximum allowable term. Consequently, if his claim on appeal succeeded, it did not mean the trial court would be precluded from imposing the maximum sentence when the case was remanded to the trial court. The prosecution would still be able to prove the aggravating factors by appropriate procedures. (*French, supra,* 43 Cal.4th at pp. 45-46.) For that reason, there was no attack on the validity of the plea, and thus, no violation of the plea bargain.

On the other hand, in *Cuevas*, if the defendant's section 654 argument was successful on appeal, the maximum sentence could not be imposed on remand. Accordingly, the section 654 claim was a challenge to the trial court's authority to impose that sentence. Importantly, the Supreme Court also held that a challenge to the court's authority to impose the maximum term reached in a charge bargain was an attack on the validity of the plea, and a certificate of probable cause is required. (*Cuevas, supra,* 44 Cal.4th at p. 381-382.)

Read together, *Cuevas, supra,* 44 Cal.4th 374, and *French, supra*, 43 Cal.4th 36*,* make clear that the maximum allowable term reached in a charge bargain, and agreed to by the defendant, is "part and parcel" of the plea agreement. Consequently, a defendant is required to obtain a certificate of probable cause before challenging the trial court's authority to impose the maximum allowable term reached in a charge bargain. And finally, a claim challenges the trial court's authority if a

successful appeal would preclude the trial court from imposing on remand the maximum term reached in the plea bargain.

Here, in terms nearly identical to those in *Cuevas*, defendant agreed on the maximum possible term in writing and in open court and acknowledged his exposure. On appeal, he makes two constitutional arguments: (1) the maximum sentence agreed to constitutes cruel and/or unusual punishment, and (2) the maximum sentence agreed to violates the double jeopardy provisions of the federal and state constitutions. If either argument is successful on appeal, the maximum sentence agreed to could not be imposed - like *Cuevas*.

Defendant argues that *Cuevas* is distinguishable because there the Supreme Court found substantial consideration for the plea bargain in that Cuevas received a "significant reduction" in his potential prison term, *Cuevas, supra*, 44 Cal.4th at page 383, but here defendant contends he did not.[2] Defendant argues he would have been exposed to the same term had the Count II felony not been dismissed because any sentence imposed on that count would have been stayed pursuant to section 654.

We decline defendant's invitation to inject a relativity calculation into evaluating plea bargains. Defendant had a felony charge dismissed that likely would have resulted in a felony conviction. A felony conviction itself is a serious

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[2] Defendant also argues the unrelated misdemeanor charge was not dismissed as part of his plea bargain, but was merely an afterthought. The record indicates otherwise.

matter. For example, if defendant committed future criminal conduct, the prior felony conviction would be an aggravating reason for imposing the maximum allowable sentence. (See *People v. Black* (2007) 41 Cal.4th 799, 815 [a single aggravating factor is sufficient to impose the upper term]; Cal. Rules of Court, rule 4.421, subd. (b)(2) [numerous prior convictions as aggravating factor].) This is sufficient consideration to enforce the plea bargain and require a certificate of probable cause before defendant disturbs the maximum term to which he agreed.

Because defendant failed to obtain a certificate of probable cause, his constitutional claims are dismissed.

II

At oral argument, defendant's counsel contended that trial counsel provided defendant ineffective assistance for failing to obtain a certificate of probable cause. Recognizing that that issue cannot be raised for the first time at oral argument, counsel indicated she intended to litigate the issue by a petition for writ of habeas corpus.

In the interest of judicial economy, we address the issue now and reject the contention because, even had defendant obtained a certificate of probable cause, his constitutional claims on appeal would not have succeeded.

We add some factual background:

Criminal History

Born in 1948, defendant is a high school graduate who served in the United States Marine Corps from 1968 to 1975.[3] Defendant's first conviction occurred in 1974, when he was convicted in San Mateo County for driving under the influence, followed in 1975 by a conviction for obtaining aid by fraud for which defendant received probation. In 1985, defendant spent five days in jail in Washington for driving under the influence. He was convicted of driving under the influence again in 1986 and twice more in 1987.

Then, in 1988, defendant was convicted of four counts of lewd and lascivious conduct with a child under 14 (§ 288, subd. (a)) and one count of oral copulation of a child under 14 (§ 288a, subd. (c)). Defendant claimed he was too drunk to remember committing the offenses. Defendant was sentenced to 14 years in state prison for these crimes, which were alleged as strike offenses in the current matter.

In 1995, after being paroled for his 1988 convictions, defendant was convicted of driving under the influence and violating his parole; he was given probation. Defendant violated his parole again in 1997 and twice again in 1998.

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[3] According to defendant's 1988 pre-plea probation report, defendant went "Absent Without Leave" (AWOL) from the Marines in 1971. When located, he was turned over to the military police. He was later discharged in 1975, although there is conflicting evidence in the record about whether that discharge was honorable.

Defendant was convicted of driving under the influence with a prior in June 2000, and was again granted probation.

In July 2000, defendant was convicted by a jury of failing to register as a sex offender. (*People v. Rushing* (June 28, 2002, C038463) [nonpub. opn.].) As a result of his conviction, defendant was sentenced to state prison for a term of 25 years to life. He appealed his sentence to this court and we reversed, remanding the matter to the trial court for resentencing. (*People v. Rushing*, *supra*, C058463) On remand, defendant was sentenced to six years in state prison.

Current Offense

In November 2004, Amador County Sheriff's Sergeant Charles Andrew Ray received notification that defendant, a registered sex offender, would soon be released into Amador County. Then, in April 2005, district attorney investigator Weldon Lincoln contacted Ray and told him that defendant had actually been paroled into San Joaquin County. Since his release on March 28, however, defendant had not checked in with his parole officer. Lincoln asked Ray if defendant had registered in Amador County; he had not.

On July 5, 2005, four months after defendant was paroled into San Joaquin County, Ray contacted Lincoln and told him that defendant had been arrested for driving while intoxicated and was being held in the Amador County jail. Ray went to the jail and interviewed defendant. During that interview, defendant acknowledged that he had been ordered not to return to Amador County, but did anyway. He admitted that he knew he was

supposed to register when he relocated to Amador County, saying that he "went down this road before," but he chose not to because he was "just glad to be out from prison." Defendant also explained that he failed to check in with his parole officer because he knew he was already in violation of parole for absconding; he was waiting until he knew "what [he] had to do."

A. *California Constitution*

Defendant contends that his sentence of 27 years to life violates the state constitution's prohibition against cruel or unusual punishment. We disagree.

A punishment violates the California Constitution "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In applying this principle, we look to: (1) the nature of the offense and the offender, (2) a comparison with the penalty for more serious crimes in the same jurisdiction, and (3) a comparison with the punishment imposed for the same offense in different jurisdictions. (*Id*. at pp. 425-427.)

Defendant goes to great lengths to catalogue the punishment in other states for failing to register and the punishment imposed for "more serious" crimes committed in California in order to show that his sentence is grossly disproportionate. He also argues that the sentence imposed shocks the conscience by

attempting to minimize the egregious nature of his offense and his own criminal history. None of his arguments are persuasive.

Defendant was before this court six years ago, facing a state prison term of 25 years to life for failing to register as a sex offender. (*People v. Rushing*, *supra*, C038463) On remand, his sentence was reduced to six years. Then, after his release from prison, defendant absconded, returning to Amador County in violation of a direct order. Knowing he violated his parole, defendant compounded his offense by intentionally keeping secret his relocation, not checking in with his parole officer, and not registering a change of address.[4] (CT 126-129) As defendant himself stated, he had been "down this road before," he knew he was required to register in Amador County, but chose not to simply because he was "glad to be out from prison."

Additionally, since his multiple convictions for molesting a minor in 1988, defendant has been convicted no fewer than five times for driving under the influence of alcohol, repeatedly violating the conditions of his parole.[5] Yet, despite being given multiple opportunities to seek help for what appears to be a significant alcohol abuse problem and improve his situation by

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[4] It is not clear from the record whether defendant also failed to register in San Joaquin County.

[5] Defendant argues that his numerous convictions for alcohol-related offenses are irrelevant because he has not been convicted of a sex-related crime since 1988. That argument is not persuasive. The law does not require that in order for defendant to be considered a recidivist he must repeatedly commit the same or similar crimes.

complying with the conditions of his parole, defendant has made no effort to do either.

Given the nature of this defendant and his current offense, the sentence does not shock the conscience, nor is it disproportionate under California law.

B. *Federal Constitution*

Defendant's sentence does not shock the conscience and is not disproportionate under California law. He fares no better under federal law. "The Eighth Amendment [to the United States Constitution], which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' [Citations.]" (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108].) "[T]he gross disproportionality principle [is] applicable only in the 'exceedingly rare' and 'extreme' case. [Citations.]" (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73 [155 L.Ed.2d 144.)

As discussed in connection with the California constitutional claim, defendant's sentence is not grossly disproportionate to the crime. Therefore, his Eighth Amendment claim fails as well.

C. *Double Jeopardy*

Defendant contends the state and federal constitutional prohibitions against double jeopardy prohibit imposition of defendant's 27-year-to-life sentence under the "Three Strikes" law. Defendant argues that the sentence constitutes punishment for his past strike offenses, not for his current failure to register.

In support of defendant's double jeopardy objection, he relies on *People v. Carmony* (2005) 127 Cal.App.4th 1066 at page 1080 (*Carmony)*, wherein the court stated: "Past offenses do not themselves justify imposition of an enhanced sentence for the current offense. [Citation.] The double jeopardy clause prohibits successive punishment for the same offense. [Citations.] The policy of the clause therefore circumscribes the relevance of recidivism. [Citations.] To the extent the 'punishment greatly exceeds that warranted by the aggravated offense, it begins to look very much as if the offender is actually being punished again for his prior offenses.' [Citation.]"

Defendant claims his sentence is based primarily on his prior convictions, and therefore the sentence violates the prohibition against double jeopardy. We disagree.

Constitutional protections against double jeopardy guard "against multiple punishments for the same offense." (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [23 L. Ed. 2d 656], superseded by statute on other grounds.) However, "[r]ecidivist statutes do not impose a second punishment for the first offense in violation of the double jeopardy clause of the United States Constitution. [Citation.] Moreover, the double jeopardy clause does not prohibit the imposition of multiple punishments for the same offense where the legislature has authorized multiple punishments. [Citation.]" (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1520, criticized on other grounds in *People v. Fuhrman* (1997) 16 Cal.4th 930, 944-945.) Since recidivist

statutes such as the Three Strikes law do not impose a second punishment for the first offense, but rather impose an increased punishment based on the defendant's recidivism, they do not violate the double jeopardy clause. (*People v. White Eagle, supra,* 48 Cal.App.4th at p. 1520.)

Here, use of defendant's prior felony convictions in sentencing does not violate the prohibition against double jeopardy because multiple punishments are authorized by the Legislature under the Three Strikes law, a recidivist statute. In addition, defendant's sentence is not founded solely on his five strikes. It is also based on the fact he has a lengthy, continuous criminal history, indicating that he will continue to commit crimes against society. The charged offense reflects that, despite the likelihood of receiving a severe Three Strikes sentence, defendant disregarded the law and the conditions of his parole and failed to register for a second time. Thus, the imposition of defendant's current sentence, pursuant to the Three Strikes law, does not violate double jeopardy.

For the foregoing reasons, these claims would not have been meritorious even if defendant had obtained a certificate of probable cause.

III.

Defendant also contends the trial court abused its discretion in denying his *Romero* request to strike "all but one" of his prior strike convictions. This is the one claim on appeal that was preserved by defendant's plea agreement:

"[Defense Counsel]: In any case we anticipate if [defendant] completes the form, setting the matter for sentencing and filing a Romero motion.

"The Court: The court is in recess.

"[¶] . . . [¶]

"The Court: You understand this Court has the discretion under what we call the Romero case to strike the strike priors if the Court deemed to be appropriate, but that's not part of the plea-bargain. It could happen, not happen. What you have to understand is that that is your maximum exposure.

"You understand that?

"Defendant: Yes Sir."

"[¶] . . . [¶]

"The Court: . . . Now briefing schedules. If you are going to file any Points and Authorities as relates to any issue whether Romero, or whatever, circumstances in mitigation or aggravation whatever --"

Defendant subsequently filed a *Romero* motion, asking the court to strike at least four of his prior strikes. The parties then litigated the issue at eight hearings over six months before the court denied defendant's request. This is the quintessential sentencing issue arising after the plea that is exempted from section 1237.5 and may be considered on appeal without a certificate of probable cause. (*People v. Buttram* (2003) 30 Cal.4th 773, 784-785, citing *People* v. *Lloyd* (1998) 17 Cal.4th 658 [affirming prior ruling that an appeal does not

attack the validity of a plea if it seeks to assert *Romero* error in sentencing proceedings that occurred after the plea].)

Addressing the merits of defendant's claim, the sum of his argument is that he believes the court refused to strike any of his priors solely because the court found him to be an alcoholic. Broken down into its numerous parts, defendant's argument is that: (1) there was insufficient evidence to support the trial court's inference that defendant will re-offend based on his alcoholism; (2) defendant's alcoholism does not necessarily mean he is a pedophile or will molest more children; (3) he is not a violent criminal and there is no evidence that defendant's alcoholism is a public safety concern; (4) defendant has failed to register only twice since 1998; and (5) the parole officer should have known where he was. None of defendant's arguments is persuasive.

A trial court has the discretion to strike a prior serious felony conviction for purposes of sentencing only if the defendant falls outside the spirit of the Three Strikes law. (§ 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161; *Romero, supra,* 13 Cal.4th at pp. 529-530.) In deciding whether to do so, the court "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." (*Williams*, *supra*, 17 Cal.4th at p. 161.)

The trial court's "failure to . . . strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) "[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss." (*Id*. at p. 378.) 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."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [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." (*Id*. at pp. 376-377.)

Thus, only in "an extraordinary case--where the relevant factors described in *Williams*, *supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ" would the failure to strike be an abuse of discretion. (*Carmony*, *supra*, 33 Cal.4th at p. 378.)

Here, the trial court acknowledged its authority to strike any of defendant's priors. The court then carefully reviewed defendant's more than 30-year criminal history, along with the applicable law. The court also weighed the fact that, despite having been given numerous opportunities, defendant continued to consume alcohol and violate the conditions of his probation and his parole. Noting defendant's "chronic" denial of his alcoholism, and how that has impacted defendant's ability and/or willingness to follow the law and comply with the conditions of his probation and parole, the court determined that defendant was likely to reoffend and refused to strike any of his priors. Such a finding was well within the court's discretion.

Defendant's claim that his parole officer should have been able to find him also is meritless. Defendant left the county in which he was paroled, did not check in with his parole officer, and did not register a change of address. Simply returning to his brother's home is an insufficient substitute for registering his change of address, particularly when he was ordered not to return to the county in which his brother resides. Accordingly, we find no error.

DISPOSITION

Defendant's constitutional claims on appeal are dismissed and the judgment is affirmed.

SIMS, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.