

1. MEMORANDUM

To: JOSEPH INIGUEZ
Interim Chief Deputy District Attorney

From: Appellate Division

Re: Power and Discretion to Dismiss Strike Priors

Date: December 10, 2020

2. ISSUE PRESENTED

What is the scope of the prosecutor's ability to compel a court to dismiss a strike allegation?

3. SUMMARY OF ANSWER

The court has the ultimate power to dismiss a strike allegation under Penal Code¹ [section 1385](#). That power is not conditioned on the consent of the prosecutor. Similarly, if the prosecutor moves for the court to dismiss a strike allegation, the court is not bound to grant the motion.

It is true that in considering whether to grant or deny the motion, the court must consider the interest of “the People,” but this is not limited to the prosecutor's opinion. While the prosecutor acts in the name of “the People” as sovereign in all criminal actions, “the People” also enacted the Three Strikes law, and within it constrained the discretion of the prosecutor and the court. Thus, from the court's perspective, it makes no difference whether the prosecutor is the one moving to dismiss, or whether it is considering such action on its own motion—its decision to grant or deny the motion must be based on a valid judicial reason within the limits of the Three Strikes law.

In light of this, the prosecutor's general belief that the Three Strikes law should not be enforced would probably not provide a valid judicial reason to strike a strike. Nevertheless, if the court

¹ Further statutory references are to the Penal Code unless otherwise indicated.

grants our motion, that would likely end the matter in that case, barring some avenue of review, which is unlikely (though not impossible). Conversely, if the court denies our motion, we would likely not have a valid ground to compel it to do otherwise, assuming that such a ruling is even reviewable (which itself is unlikely).

In sum, the prosecution does not have the right to dismiss a strike allegation once filed. The grant or denial of the motion is within the discretion of the court.

4. ANALYSIS

I. Analysis of the court's discretion to dismiss under section 1385.

It is clear that the Three Strikes law allows dismissal of a strike allegation after filing, but only within the limits of section 1385. The relevant language is as follows:

(2) The prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to [Section 1385](#), or if there is insufficient evidence to prove the prior serious or violent felony conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction, the court may dismiss or strike the allegation. This section shall not be read to alter a court's authority under [Section 1385](#).

([§§ 667, subd. \(f\)\(2\); 1170.12, subd. \(d\)\(2\).](#)) In turn, the pertinent portion of section 1385 reads:

(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record.

([§ 1385, subd. \(a\).](#))

Read together, a few things are apparent.

First, the People have no unilateral power to dismiss a strike under sections 667 or 1170.12 once it is filed; the section states explicitly that we may “*move* to dismiss or strike” the allegation pursuant to section 1385. It is well settled that the power to dismiss under section 1385 is purely judicial. (*People v. Tenorio* (1970) 3 Cal.3d 89, 94.) In turn, the prosecutor’s motion is “merely a recommendation” that the court may either accept or reject. (See *People v. Johnson* (1966) 247 Cal.App.2d 331, 333; *People v. Parks* (1964) 230 Cal.App.2d 805, 812; *People v. Romero* (1936) 13 Cal.App.2d 667, 670; see also § 1386 [“The entry of a nolle prosequi is abolished, and neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in Section 1385.”].)

Second, since the dismissal of the charge or allegation is a judicial function, it follows that the court may exercise this power only for valid judicial reasons. The court’s decision not to exercise its section 1385 discretion is reviewable for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) It is also well settled that the court’s power to dismiss under section 1385 “requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal.” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530.) The Supreme Court has further clarified what this means in the context of the Three Strikes law:

We therefore believe that, in 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(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.) Conversely, a court abuses its discretion by considering factors extrinsic to the scheme, such as court congestion or “bare antipathy to the consequences for any given defendant.” (*Ibid.*) Thus, in exercising its discretion, the court is constrained by the spirit of the Three Strikes law.

Third, even though *Romero* and *Williams* concerned the scope of the court’s discretion when considering dismissal of strikes on its own motion, there is no reason to believe the analysis is different when it considers dismissal on the prosecutor’s motion. This is because the power to dismiss is still exclusively a judicial power, irrespective of whether it is initiated on the court’s own motion, invitation of the defendant, or motion of the prosecutor. The grounds for the dismissal must still be ones that would motivate a reasonable judge. And under the Three Strikes law, they must also conform to the Supreme Court’s limitations articulated in *Williams* and *Romero*.

It is true that *Romero*, as well as other cases interpreting section 1385, discuss the “the interests of society represented by the People.” (See, e.g., *People v. Orin* (1975) 13 Cal.3d 937, 945.) But this usage of “the People” likely refers to the general interest of the people as sovereign in the enforcement of the law, not the particular views of the public prosecutor in a case (though they may, of course, often overlap). Elsewhere in the *Romero* opinion the Court made clear that the limitations on section 1385 applied to both dismissal on the court’s own motion and on motion of the prosecutor:

To guide the lower courts in the exercise of their discretion under section 1385(a), whether acting on their own motion *or on motion of the prosecuting attorney*, we emphasize the following: A court’s discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385(a), and is subject to review for abuse.

(*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530, italics added.) Further, in other contexts courts have articulated factors relevant to the 1385 analysis without referencing “the People” or the individual prosecutor’s views. For example:

A determination whether to dismiss in the interests of justice after a verdict involves a balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed upon the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented upon a retrial.

(*People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505.)

Finally, as already noted, since 1872 the power to terminate prosecutions has resided solely with the court, not the prosecutor. (See §§ 1385, 1386.) Requiring dismissal on the prosecutor’s motion on the ground that it reflects the sole interest of “the People” would effectively nullify section 1386. Indeed, in 1887, the California Supreme Court described the court’s 1385 power as follows:

The court, for the purposes of the order of dismissal, takes charge of the prosecution, *and acts for the people*. It holds the power to dismiss, as the attorney-general in England holds the power to enter a *nolle prosequi*, by virtue of the office and the law; and it is exercised upon official responsibility.

(*People v. More* (1887) 71 Cal. 546, 547, first italics added.) In short, when the court acts for the People under section 1385, it is not bound by the individual prosecutor’s view.

This is not inconsistent with the district attorney being the exclusive representative of “the People” in criminal actions. “The district attorney is the public prosecutor, except as otherwise provided by law. [¶] The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.” (Gov. Code, § 26500.) Each criminal action is prosecuted in the name of

“the people of the state of California.” (§ 684.) But this is so because the people of California are sovereign, so all prosecutions are conducted in their name. (Gov. Code, § 100; see also Cal. Const., art. II, § 1 [“All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”].) The district attorney therefore represents “the People” in the sense that he or she wields the sovereign power to prosecute. But since the power to dismiss is exercised by the court independent of the prosecutor, it is neither conditioned on, nor beholden to, the prosecutor’s views. Indeed, implicit in the court’s ability to deny the prosecutor’s motion to dismiss is the ability to consider the public interest generally.

Moreover, irrespective of the general dismissal power, it is clear that the drafters of the Three Strikes law sought to constrain the prosecutor’s discretion, both at the charging stage and after filing. The statutes require the prosecutor to plead *and prove* all known strikes. (§§ 667, subd. (f)(1); 1170.12, subd. (d)(1).) Further, it forbids the use of strikes in plea bargaining. (See §§ 667, subd. (g); 1170.12, subd. (e).) It strains credulity to believe the drafters of the Three Strikes law would require pleading and proof, forbid the dismissal of strikes to reach an agreed-upon disposition, but nevertheless allow the dismissal of strikes at any other time for any reason.

In sum, the prosecution may move to dismiss strikes under the Three Strikes law, but the court may deny the motion. The court’s grant or denial of the motion must be for valid judicial reasons as articulated in *Romero* and *Williams*.

II. Possibilities on a motion to dismiss a strike

In light of the above, the following are the possible outcomes from moving to dismiss all prior strikes.

First, if we make the motion without stating the grounds, and the court grants the motion without stating its reasons, this would be procedurally deficient, but would nevertheless likely end the matter in that case. The prosecutor in moving to dismiss is required to state the reasons for the dismissal (§ 1192.6, subd. (b)), and the court must state its reasons for granting the motion on the record (§ 1385, subd. (a)). Even though

procedurally deficient, it is unlikely that this ruling would be reviewed by a higher court. This memorandum does not explore all possibilities for how this ruling might be reviewed.

Second, if we make the motion to dismiss, the court may require us to state our grounds. The deputy making the motion would have two choices. First, the deputy could cite case-specific factors favoring dismissal (a traditional *Williams/Romero* analysis), which the court could accept, in which case there would be no problem. The defendant could join in such a motion as well, adding additional information. The second choice would be to cite only the change in office policy. If the court accepts this, it would probably not be legally sufficient, since a belief that the law should not be enforced (i.e., “antipathy to the effect of the law”) is not a ground to dismiss a strike. Nevertheless, as above, it is unlikely that this would be reviewed by a higher court, so the matter would end.

Third, if a court denies our motion to dismiss, we would likely not have any basis to compel a different ruling. The denial of the motion would be reviewed for abuse of discretion. If a dismissal motivated by a disagreement with the law would be an abuse of discretion, by definition denying a motion with that as the sole ground would not be an abuse of discretion. Thus, so long as there is a plausible basis for the defendant being within the spirit of the Three Strikes law, the trial court’s denial of a dismissal motion would be upheld.

On top of this, we probably could not even seek review of the denial of motion to dismiss. The denial of a motion to dismiss is not an appealable order under [section 1238](#). Further, the People may not ordinarily seek extraordinary relief by writ for a non-appealable order, unless the order is in excess of the court’s jurisdiction and the need for review outweighs the risk of harassment to the accused. (*People v. Superior Court (Stanley)* (1979) 24 Cal.3d 622, 625–626.) Here, the power to grant or deny a motion to dismiss is clearly within the court’s power. The denial of our motion is therefore not reviewable by a higher court, so we would not even get to the merits.

5. CONCLUSION

The Three Strikes law compels the district attorney to plead and prove all known strikes, subject to a motion to dismiss under section 1385. In turn, whether to dismiss a prior strike is within the sole discretion of the court; it is not bound to grant our motion to dismiss a prior, so long as it does so for valid reasons. If the court denies our motion to dismiss, that decision is likely not reviewable at all, but even if it were, it would be reviewed under a deferential abuse-of-discretion standard. We would not be able to prevail under that standard solely by citing our disagreement with the current law.

Absent intervening case law holding that these mandatory plead-and-prove aspects of the Three Strikes law are invalid, any change must come from the Legislature or the voters.

Matthew Brown
December 2020