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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ALEXANDER ALLEN,

Defendant and Appellant.

B193296

(Los Angeles County
Super. Ct. No. BA230552)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Carol H. Rehm Jr., Judge. Affirmed as modified and remanded with directions.

Murray A. Rosenberg, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kevin H.
Borjon and Sharlene A. Honnaka, Deputy Attorneys General, for Plaintiff and
Respondent.

SUMMARY

Joseph Allen was convicted of two counts of assault with a firearm and one count each of second degree robbery, possession of cocaine for sale, possession of a controlled substance while in possession of a firearm and felon in possession of a firearm, with firearm and great bodily injury allegations found true. The trial court originally sentenced Allen to a term of 30 years in state prison. In a prior appeal, we found some of Allen's claims of sentencing error to have merit and, as a result, stayed punishment on two counts, partially reversed Allen's sentence on another count and remanded the matter for resentencing. Thereafter, the trial court imposed a sentence of 27 years, 4 months in state prison.

In this appeal, Allen challenges his sentence upon remand, arguing that the trial court erroneously imposed a concurrent sentence as to one count for which we previously ordered Allen's sentence stayed. In this regard, we agree. However, we reject Allen's further claims of error in the trial court's imposition of the upper term on the robbery count as well as its imposition of a consecutive sentence on one of the assault with a firearm counts.¹

¹ In January 2007 (after the completion of briefing in this appeal), the United States Supreme Court issued its decision in *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856], and both parties filed supplemental letter briefs addressing the impact of this decision on the sentencing issues Allen raises. Similarly, when our Supreme Court issued its decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825, both parties filed supplemental letter briefs to address the significance of these decisions with respect to Allen's pending appeal.

FACTUAL AND PROCEDURAL SYNOPSIS

The facts and prior proceedings in this matter are set forth in our unpublished opinion in connection with Allen’s first appeal. (*People v. Allen* (Dec. 7, 2005, B174223) [nonpub. opn.].) Accordingly, we will not repeat them here.

As relevant here, the trial court on remand (just as at the time of Allen’s original sentencing) selected the robbery count (count 4 involving victim Gregory Jones) as the base count and imposed the upper term of five years and further imposed a consecutive one-year sentence (one-third the midterm) for the assault with a firearm committed against Martin Davis (count 2). The court also imposed a concurrent three-year sentence for possession of a controlled substance while carrying a firearm (count 6). Allen does not challenge the remaining components of his sentence.

Allen appeals.

DISCUSSION

I. The Sentence on Count 6 Must Be Stayed.

In our prior opinion, we noted that, in count 5, the jury convicted Allen of possession for sale of cocaine base, with a related allegation he was armed with a firearm found true. In count 6, the jury convicted him of possession of a controlled substance while armed with a loaded and operable firearm. Accordingly, we found “imposing concurrent terms on these two counts was the classic situation of imposing multiple punishment for the same act” such that the lesser punishment on count 6 should be stayed. (*People v. Allen, supra*, B174223, pp. 15-16.) Although the trial court on remand initially noted this point, as Allen argues and the People concede, the court apparently misspoke in ultimately stating Allen was sentenced to a concurrent state prison term of three years on this count. Again, this sentence must be stayed.

II. The Trial Court Did Not Err in Imposing the Upper Term on the Robbery Count (Count 4).

At Allen's sentencing hearing on remand, in (again) imposing the upper term on the robbery count, the trial court stated as follows: "The high term is selected because of defendant's 20-year criminal record, his wanton and dangerous conduct, the extreme danger he posed to the community, and the fact that he was on probation when he committed this crime."

According to Allen, under *Cunningham v. California*, *supra*, ___ U.S. ___ [127 S.Ct. 856]; *Blakely v. Washington* (2004) 542 U.S. 296; and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the trial court violated his jury trial rights by imposing the upper term based on facts not found by the jury. He acknowledges that the trial court relied, at least in part, on his prior convictions. In *Cunningham*, *supra*, ___ U.S. ___ [127 S.Ct. 856], the United States Supreme Court reaffirmed its prior holdings that a trial court may increase the penalty for a crime based on a defendant's prior convictions without submitting that question to a jury. (*Cunningham*, *supra*, 127 S.Ct. at p. 868; see *Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Blakely*, *supra*, 542 U.S. at p. 301.) Further, before *Cunningham*, California courts broadly construed this prior conviction exception to *Blakely* and *Apprendi* to apply not only to the fact of the prior convictions, but also to other issues relating to the defendant's recidivism, including the existence of "numerous" or increasingly serious prior convictions. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222 ["courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism'"]; see also *People v. McGee* (2006) 38 Cal.4th 682, 706-707 ["numerous state and federal court decisions have interpreted the *Almendarez-Torres* exception more broadly than defendant urges here, and have concluded that *Apprendi* does not preclude a court from making sentencing determinations related to a defendant's recidivism"].) Allen urges nonetheless that the *Almendarez-Torres* exception should be narrowly construed.

Furthermore, Allen argues, “because other factors were cited by the trial court that blended into its decision to impose the high term,” his upper term sentence cannot stand. He concedes, however, that our Supreme Court’s decision in *Black II, supra*, 41 Cal.4th 799, is contrary to his position here. The *Black II* Court expressly reaffirmed the pre-*Cunningham* appellate decisions broadly construing the *Almendarez-Torres* prior conviction exception, emphasizing that recidivism is a traditional judicial sentencing consideration that need not be tried to the jury under the Sixth and Fourteenth Amendments. Accordingly, the *Black II* Court concluded, the defendant’s criminal history established an aggravating circumstance under California Rules of Court, rule 4.421(b)(2) “defendant’s prior convictions . . . are numerous or of increasing seriousness” [and] “that independently satisf[ies] Sixth Amendment requirements and render[s] him eligible for the upper term.” (*Black II, supra*, 41 Cal.4th at p. 820.)

Here, the trial court cited not only Allen’s 20-year criminal history but also the fact he was on probation at the time he committed this crime—either of which rendered him *eligible* for the upper term. Allen has demonstrated no Sixth Amendment violation.

III. The Trial Court Did Not Err in Imposing a Consecutive Sentence on Count 2.

Allen also argues in this appeal that it was error to impose a consecutive sentence on count 2 (assault with a firearm as to Martin Davis). At the sentencing hearing on remand, the trial court specifically stated: “It’s consecutive because of the fact that this is a separate . . . act of violence committed by the defendant.” In *Black II, supra*, 41 Cal.4th 799, our Supreme Court reaffirmed its determination that the “imposition of consecutive terms under [Penal Code] section 699 does not implicate a defendant’s Sixth Amendment rights.” There is no presumption that concurrent sentences will be granted; the sentencing court is not required to make factual findings, but rather must only set forth its reasons. Consequently, Allen has demonstrated no Sixth Amendment violation with respect to the imposition of a consecutive sentence on this count involving a separate act of violence against a separate victim.

DISPOSITION

The concurrent term imposed on count 6 is stayed. This matter is remanded to the trial court with directions to prepare a new abstract of judgment indicating that this sentence is stayed and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.