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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ZAMEER RIAZ AZAM,

Defendant and Appellant.

A108492

(Alameda County
Super. Ct. No. CH35692)

Respondent's petition for rehearing is granted and the opinion filed on July 13, 2007, is vacated and replaced by this opinion. This case is one of several remanded to us by the United States Supreme Court due to their decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*). In light of our Supreme Court's recent decision in *People v. Black* (July 19, 2007, S126182) ___ Cal.4th ___ (*Black II*), we now affirm the judgment.

PROCEDURAL BACKGROUND

In June 2006, we affirmed defendant's convictions for kidnapping, inflicting corporal injury on a cohabitant, making criminal threats, attempting to induce false testimony, and disobeying a written court order. (*People v. Azam* (June 28, 2006, A108492) [nonpub. opn.].) Relying upon *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), we rejected defendant's argument that the court's imposition of the upper term for

kidnapping violated his right to a jury trial on the aggravating factors under *Blakely v. Washington* (2004) 542 U.S. 296.¹

On February 26, 2007, the United States Supreme Court granted certiorari in this case, vacated the judgment, and remanded to this court for further consideration in light of its decision in *Cunningham, supra*, 127 S.Ct. 856. Pursuant to its mandate, we recalled the remittitur. We have reexamined our initial opinion in this case, which we incorporate by reference, and we have received supplemental briefing from the parties.

The Trial Court's Sentencing Decision

The trial court imposed the upper term of eight years for defendant's kidnapping conviction, with consecutive sentences of one-third the midterm for corporal injury on a cohabitant and making criminal threats. In imposing the upper term the court found several aggravating factors: the crime involved great violence that caused great bodily injury to the victim, the victim was particularly vulnerable, the beatings of the victim increased in seriousness, the defendant was on probation when the crime was committed, the defendant continued to violate restraining orders by writing letters to the victim while he was incarcerated, and the defendant's prior performance on probation was unsatisfactory.² The probation officer reported no circumstances in mitigation, but the court observed that "[t]he fact that he's taken advantage of educational opportunities is a factor in mitigation."

¹ The United States Supreme Court later granted certiorari and vacated the judgment in *Black I*, and remanded the case to the California Supreme Court for further consideration in light of *Cunningham*. (*Black v. California* (2007) ___ U.S. ___ [127 S.Ct. 1210].)

² Defendant had prior misdemeanor convictions for driving under the influence and misdemeanor battery (upon the same victim as in this case). Defendant was on probation for that battery at the time he committed the current offenses. The probation report showed an additional out-of-county conviction for contempt of court. Defendant disputed that conviction at sentencing, and the prosecutor stated that probation was revoked based on the arrest and the charges were dismissed.

ANALYSIS

A. Imposition of Upper Terms

In *Cunningham*, the high court concluded California's determinate sentencing law (DSL) violates the Sixth Amendment because it "allocates to judges sole authority to find facts permitting the imposition of an upper term sentence[.]" (*Cunningham, supra*, 127 S.Ct. at p. 876.) Relying on *Cunningham*, appellant contends the trial court's imposition of upper terms in the present case violated his Sixth Amendment right to a jury trial. This contention fails under *Black II*.

In *Black II*, our Supreme Court addressed the same issue that we address here. (See *Black II, supra*, ___ Cal.4th at p. ___ [2] [considering whether imposition of the upper term violated appellant's right to a jury trial].) The Court noted that in *Blakely*, the high court "explicitly recognized the legitimate role of 'judicial factfinding' in indeterminate sentencing, in which the judge may 'implicitly rule on those facts he deems important to the exercise of his sentencing discretion.'" (*Blakely, supra*, 542 U.S. at p. 309.)" (*Id.* at p. ___ [12].) Accordingly, the court concluded that "so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Ibid.*) The court added that "[t]he facts upon which the trial court relies in exercising discretion to select among the terms available for a particular offense 'do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.'" (*Id.* at p. ___ [13].) Noting "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term" under California's DSL, the court therefore concluded that "if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and

the upper term sentence is the ‘statutory maximum’ ” for Sixth Amendment purposes. (*Ibid.*)

Applying these conclusions to the facts before it, the *Black II* court noted the high court “consistently has stated that the right to a jury trial does not apply to the fact of a prior conviction[,] [citations] [and that] ‘[r]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.’ ” (*Black II, supra*, ___ Cal.4th at p. ___ [20].) On that basis, the court reasoned defendant’s criminal history alone rendered him eligible for the upper term sentence. (*Ibid.*) In sum, the court concluded “defendant’s criminal history and the jury’s finding that the offense involved the use of force or violence establish two aggravating circumstances that independently satisfy Sixth Amendment requirements and render him eligible for the upper term. Therefore, he was not legally entitled to the middle term, and his Sixth Amendment right to jury trial was not violated by imposition of the upper term sentence for the offense of continuous sexual abuse of a child.” (*Id.* at p. ___ [24].) Similarly here, the court identified a recidivist factor—defendant was on probation at the time he committed these crimes—which rendered him eligible for the upper term. (*Id.* at p. ___ [20] [numerous decisions have held that consistent with the Sixth Amendment, trial courts may determine “not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions”].) Thus, defendant suffered no Sixth Amendment violation by the trial court’s exercise of its discretion in selecting the upper term in this case. (*Id.* at p. ___ [22].)

B. Imposition of Consecutive Terms

Appellant also claims he was wrongly denied a jury trial on factors used to impose consecutive terms. The California Supreme Court rejected such a claim in *Black I, supra*, 35 Cal.4th at page 1262: “[A] jury trial is not required on the aggravating factors that justify imposition of consecutive sentences.” With respect to the same issue, the *Black II* Court stated: “The high court’s decision in *Cunningham* does not call into question the conclusion we previously reached regarding consecutive sentences. The determination whether two or more sentences should be served in this manner is a ‘sentencing

decision [] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense’ and does not ‘implicate[] the defendant’s right to a jury trial on facts that are the functional equivalent of elements of an offense.’ (*Black I, supra*, 35 Cal.4th at p. 1264.) Accordingly, we again conclude that defendant’s constitutional right to jury trial was not violated by the trial court’s imposition of consecutive sentences on all three counts.” (*Black II, supra*, ___ Cal.4th at p. ___ [27].) *Black II* is binding on this court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and dispositive of this aspect of appellant’s challenge to his sentence.³

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Parrilli, Acting P.J.

Pollak, J.

³ We also conclude that, in light of the multiple circumstances in aggravation cited by the trial court, the court’s failure to state specific reasons for imposing consecutive sentences in defendant’s case was harmless error. (See *People v. Champion* (1995) 9 Cal.4th 879, 934.)