Filed 6/26/07 P. v. Baldwin CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL EUGENE BALDWIN, Defendant and Appellant.	B192318 (Los Angeles County Super. Ct. No. LA049773)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Affirmed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Eugene Baldwin appeals from the judgment entered following a jury trial in which he was convicted of two counts of petty theft with a prior (Pen. Code, §§ 484, subd. (a), 666)[1] and a court trial in which he was found to have suffered two prior convictions of a serious or violent felony within the meaning of the Three Strikes law (Pen. Code, §§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i))[2] and four prior convictions and prison terms within the meaning of Penal Code section 667.5, subd. (b).[3] The court struck one of the prior "strikes" in the interest of justice and sentenced appellant to prison for a total of 11 years and four months. The term consisted of the upper term of three years for count 2, doubled pursuant to the Three Strikes law, one-third the middle term of two years, doubled, for count 3 and one year for each of the four prior prison term enhancements. Appellant contends imposition of the upper term sentence violated his federal constitutional rights to proof beyond a reasonable doubt and a jury trial. For reasons stated in the opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On February 8, 2005, appellant visited Jill Gutsche at her apartment in Sherman Oaks. He looked depressed because his mother had passed away, and Ms. Gutsche talked to him for approximately one hour. Thereafter, in preparing to take a shower, Ms. Gutsche removed her engagement ring and put it on the kitchen counter. When appellant asked her if he could borrow the ring, she told him, "No." After Ms. Gutsche

---

[1] The prior was a conviction for violating Vehicle Code section 10851 for which he was sentenced to prison for three years.

[2] The court found appellant had been convicted in 1980 of voluntary manslaughter and in 1989 of attempted robbery.

[3] These convictions were for attempted robbery (Pen. Code, §§ 664/211) on November 3, 1989, taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)) on December 30, 1992, writing a check with insufficient funds (Pen. Code, § 476, subd. (a)) on February 8, 1995, and welfare fraud (Welf. & Inst. Code, § 10980, subd. (c)(2)) on March 20, 2002.

finished her shower, appellant and her ring were gone. She made a police report that day.

On June 7, 2005, appellant told social worker Roberta Burkenheim that he had visited his mother's friend, Ms. Gutsche. He had asked her if he could borrow her ring, and she said no. When she left the room, he took the ring and left. He pawned the ring for money and had intended to get the ring back in a week or two when he got paid. At the time of this discussion, he had not been able to get the ring back and wanted to discuss ways to get money so he could.

Richard Black had known appellant for approximately 10 years. On June 1, 2005, appellant came to stay in Mr. Black's one-bedroom apartment. It was agreed appellant could use the living room, the dining room, the kitchen and bathroom, but Mr. Black's bedroom was "off limits." Appellant was expected to move out of the apartment on July 9, which he did. After he left, the apartment was inspected and everything was in order.

On July 11, appellant returned to Mr. Black's apartment and stated he was tired; he had been out all night and needed a place to "crash." All of Mr. Black's furniture had been sold as he was preparing to move to a retirement home and Mr. Black told appellant he could sleep on the floor. When Mr. Black returned from work that day, appellant was gone.

On July 13, appellant returned to the apartment and was there when Mr. Black left for work that day. Mr. Black called appellant that day and told him he had to leave the apartment. When Mr. Black returned home that night, his DVD player, approximately 50 DVD's and an expensive watch were missing.

On July 15, 2005, appellant told Ms. Burkenheim that he burglarized Mr. Black's apartment. He said he was starving and needed the property "to turn into money to eat." When asked why he selected Mr. Black and Ms. Gutsche as victims, appellant said he selected them because they were mentally handicapped and would make bad witnesses if he was arrested or brought to court.

DISCUSSION

After stating it was cognizant of *Blakely*[4] and "the fact that the California Supreme Court says *Blakely* did not apply in California [and that] that case is now in front of the Supreme Court," the court observed, "there is no question that the factors in aggravation would include the vulnerability of the victims and the fact that they were selected because of their vulnerability. However, the court finds that although those are factors in aggravation, the other factors in aggravation which I'm about to [cite] are sufficient to support the high term notwithstanding those factors that relate to the facts of this case, and those are that the defendant was on parole when this crime was committed; that the defendant's past performance on parole and probation has been repeatedly unsatisfactory. In looking at the probation report[5] that was prepared for this case, after nearly every one of the defendant's numerous commitments to state prison, all resulted in parole violations where he was returned to state prison. That also

---

[4] *Blakely v. Washington* (2004) 542 U.S. 296.

[5] The probation report reflects that on December 16, 1980, appellant was convicted of voluntary manslaughter (Pen. Code, § 192) with use of a firearm (Pen. Code, § 12022.5) and sentenced to prison for six years. On June 30, 1989, he was convicted of shoplifting (Pen. Code, § 484, subd. (a)) and placed on probation. On November 20, 1989, he was convicted of attempted robbery (Pen. Code, § 211) and sentenced to prison for two years. In 1991, he violated parole and was returned to state prison. On December 30, 1991, he was convicted of petty theft with a prior (Pen. Code, § 666) and placed on probation. He was returned to prison, however, on a parole violation as a result of the conviction. On January 20, 1993, he was convicted of taking a vehicle without the owner's consent (Veh. Code, § 10851) and sentenced to prison for three years. On February 8, 1995, he was convicted of making, drawing or passing a worthless check (Pen. Code, § 476a) and sentenced to four years in prison. In 1998, he violated parole and was returned to state prison. In 2000, he was returned to prison on a parole violation for committing an assault with a deadly weapon or by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).) In 2001, he was returned to prison on a parole violation. On November 14, 2001, he was returned to prison on a parole violation. On April 18, 2002, he was convicted of perjury (Pen. Code, § 118, subd. (a)) and sentenced to prison for 16 months. The report also states appellant was on parole when he committed the instant offense.

goes for the times he was placed on probation. He was violated on probation. So those two factors are sufficient. Also although it came after the *Romero*[6] motion – we tried to get it before the *Romero* motion – the court did receive a court file in case BA006296, which was one of the state prison priors. And looking at that one, in that case in 1989, the defendant attempted to rob a disabled woman who resided in a hospital. He struck her in the right eye with a closed fist, and she fell to the ground. The victim was contacted by phone. She resides in a convalescent home as a result of severe disabilities, including seizures, asthma. The victim is legally blind and has been disabled for many years. Perhaps had I known the facts of that case, I would have had a different opinion on my *Romero* motion. But that case file, luckily for Mr. Baldwin, arrived too late."

In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856], the United States Supreme Court concluded California's determinate sentencing law, authorizing a judge to find the facts permitting an upper term sentence and to permit the finding based on a preponderance of the evidence, violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and the Sixth Amendment. It also, however, reiterated that the fact of a prior conviction did not have to be submitted to a jury. (See *Cunningham v. California*; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239-247.) Here, the trial court's independent reliance on recidivism factors, that appellant was on parole when this offense was committed and his past performance on parole and probation had been repeatedly unsatisfactory, permitted the upper term sentence. Use of appellant's recidivism did not violate his right to a trial by jury. (See *Blakely v. Washington*, *supra*, 542 U.S. at p. 303.)

---

[6] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.