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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS D. BALTAZAR,

Defendant and Appellant.

D050137

(Super. Ct. No. SCE236907)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. The sentence is reversed and the matter remanded for resentencing.

A jury convicted Luis D. Baltazar of second degree murder. (Pen. Code, § 187, subd. (a).)¹ The jury also found Baltazar committed the offense for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(4)), and that he personally discharged a firearm proximately causing the victim's death (§ 12022.53, subd. (d)). Baltazar admitted a prior strike conviction allegation (a juvenile adjudication for robbery), and the trial court sentenced him to prison for 55 years to life--15 years to life

for second degree murder (§ 187, subd. (a)), doubled pursuant to the three strikes law (§ 667, subds. (b) - (i)), and 25 years for personally discharging a firearm proximately causing the victim's death (§ 12022.53, subd. (d)).

Baltazar appeals, contending that his sentence is invalid because the federal Constitution prohibits the trial court's reliance on Baltazar's prior juvenile adjudication as a prior strike conviction under the three strikes law.

I

FACTS²

After a party, Omar Gonzalez, who may have been affiliated with the Logan gang, apparently made a verbal challenge to members of the Market Street gang. Jose Luis Guadarama, a Market Street gang member, engaged in a brief fistfight with Gonzalez. Baltazar, also a Market Street gang member, apparently then pulled out a gun and shot Gonzalez in the head. Gonzalez died as a result of the gunshot wound.

II

DISCUSSION

Baltazar contends that the trial court violated his rights to a jury trial under the Sixth Amendment, as interpreted in the United States Supreme Court cases of *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*) and

¹ All statutory references are to the Penal Code unless otherwise specified.

² Baltazar does not challenge his conviction. We only briefly set forth the facts of the offense, which, as the trial court noted, depict a "totally senseless trag[edy]."

Apprendi v. New Jersey (2000) 530 U.S. 466 by using his prior juvenile adjudication to increase his sentence under the three strikes law.

A. *Procedural History*

While the jury was deliberating, the trial court asked Baltazar's counsel how his client wished "to proceed with regard to the strike prior." Counsel stated he had reviewed the documentary evidence regarding "the strike prior from juvenile court," and because "it appear[s] as though it is a valid prior," the defense planned to "admit the prior." Counsel added, "I've had a chance to discuss it with [Baltazar], Your Honor, and I believe he's prepared to admit the prior strike." The trial court addressed Baltazar directly, asking him whether he "underst[ood] that in connection with the prior, it's alleged that you suffered a prior robbery [conviction], which is a strike under the California [three] strike[s] law." The court explained that if the jury convicted him, "the fact that you have suffered the prior strike . . . will double whatever sentence is the sentence that will be required in the case." Baltazar stated that he understood.

The court informed Baltazar he had "the right to have a jury make the determination as to whether or not you suffered that strike prior," and in that jury trial he would enjoy "the same rights" as in the trial just concluded, including "the right to remain silent"; "the right to present evidence on your own behalf, to subpoena witnesses at no cost to you"; "the right to confront and cross-examine witnesses, call witnesses and the whole nine yards." Baltazar again stated that he understood. The court then stated:

"Mr. Baltazar, do you admit or deny the allegation[] that[,] pursuant to Penal Code section[s] 667[, subdivisions](b) through (i), 1170.12 and 668, . . . you were previously adjudicated as a juvenile from the

following serious or violent felonies under California law: that would be a robbery charge, for which the date of the adjudication is the 30th of September in 2002, in case No. JD7221, in the juvenile court of San Diego County?"

Baltazar stated that he "admit[ted]" the prior adjudication. The court then ruled: "I'm going [to] accept the admission" and "[f]ind that the defendant has given a knowing and intelligent waiver of his constitutional rights." The trial court added, "I've examined the file myself and there is a sufficient factual basis for the admission."

After the jury returned a guilty verdict, the trial court sentenced Baltazar to 55 years to life in prison: Fifteen years to life for the second degree murder conviction (§ 190, subd. (a)) doubled to 30 years to life because of the prior strike conviction under the three strikes law (§ 667, subd. (e)(1)), with an additional 25 years to life based on the firearm use enhancement (§ 12022.53, subd. (d)).

B. *Reliance on a Juvenile Adjudication as a Prior Strike Conviction Under the Three Strikes Law*

Baltazar contends the trial court's reliance on his prior juvenile adjudication for robbery to impose an enhanced sentence under the three strikes law violated his constitutional right to a jury trial as set forth in *Cunningham, supra*, 127 S.Ct. 856, 860, and *Apprendi, supra*, 530 U.S. 466, 490. This issue is currently pending before the California Supreme Court in *People v. Nguyen*, (2007) 152 Cal.App.4th 1205, review granted October 10, 2007, S154847. The California Supreme Court has also granted review in *People v. Grayson* (2007) 66 Cal.Rptr.3d 603, 610, review granted December 19, 2007, S157952, and *People v. Tu* (2007) 64 Cal.Rptr.3d 878, 886, review

granted December 12, 2007, S156995, which held that prior juvenile adjudications may be used to impose an upper term under the DSL.

In the 2007 *Cunningham* case, the United States Supreme Court held California's determinate sentencing law (the DSL) violated the jury trial right safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham, supra*, 127 S.Ct. at p. 860.)³ The Court explained that, as set out in *Apprendi*, "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham, supra*, 127 S.Ct. at p. 860.) In invalidating the DSL, the Court concluded that the statutory framework violated "*Apprendi*'s bright-line rule" because "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum," and imposition of an upper term was authorized on the basis of factual findings made by the trial court, not the jury. (*Id.* at p. 868.) *Cunningham* did not address the constitutionality of California's three strikes law or the use of a prior juvenile adjudication to enhance a sentence.

Baltazar contends the *Cunningham* ruling, and the *Apprendi* line of cases on which the *Cunningham* ruling was based, require reversal of his sentence. The Attorney General contends Baltazar's contention is forfeited because he did not make a constitutional objection to the use of the prior juvenile adjudication as a prior strike

³ The DSL has since been amended in response to *Cunningham*. (See generally *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*).)

conviction at sentencing. However, a constitutional challenge to a sentence on appeal is not forfeited by not raising the issue at sentencing if at time of sentencing "it was widely assumed" the challenge was contrary to existing law. (*People v. Black* (2007) 41 Cal.4th 799, 811.) We conclude that was the situation in this case.

The California Supreme Court has explained there are "two exceptions to a defendant's Sixth Amendment right to a jury trial on an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. First, *a fact admitted by the defendant may be used to increase his or her sentence beyond the maximum authorized by the jury's verdict.* [Citation.] Second, the right to jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction" (*Sandoval, supra*, 41 Cal.4th at pp. 836-837, italics added), the so-called *Almendarez-Torres*⁴ exception.

The People contend Baltazar's prior juvenile adjudication is within the first of the two separate exceptions recognized by our Supreme Court for a fact "admitted by the defendant." (*Sandoval, supra*, 41 Cal.4th at pp. 836-837; *Cunningham, supra*, 127 S.Ct. at p. 860 ["the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact,

⁴ *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*). As Baltazar notes, there is reason to believe the United States Supreme Court may rescind the *Almendarez-Torres* exception. (*Shepard v. United States* (2005) 544 U.S. 13, 27 ["*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided"] (conc. opn. of Thomas, J.).)

other than a prior conviction, not found by a jury *or admitted by the defendant*" (italics added)].)

Under the three strikes law, "the defendant has a statutory right to jury trial on the issue of whether he or she suffered" prior strike convictions, and those prior strikes, including any "qualifying juvenile adjudication[,] must be pleaded and proved beyond a reasonable doubt [citation]." (*People v. Smith* (2003) 110 Cal.App.4th 1072, 1079.) In this case, during a colloquy with the trial court, Baltazar (and his counsel) waived a jury trial on the fact of his prior juvenile adjudication and admitted that fact before sentencing. Consequently, the juvenile adjudication was a "fact admitted by the defendant" and could permissibly, under the federal Constitution, be relied on to increase Baltazar's sentence beyond the maximum term authorized by the jury's verdict alone. (*Sandoval, supra*, 41 Cal.4th at p. 836.)

Baltazar does not dispute he had a right to a jury trial to establish the prior juvenile adjudication and "admitted the truth of the prior strike allegation," but contends this "makes no difference" because the admission and jury trial right related solely to the question of "whether the [juvenile robbery] adjudication in fact occurred," in contrast to the truth of his commission of the underlying robbery or the right to a jury trial to establish the truth of the underlying robbery.

By enacting the three strikes law, the Legislature (and simultaneously the electorate exercising the initiative power) decreed that an adverse adjudication for certain juvenile offenses would have severe consequences should the juvenile offender later be convicted in criminal court for a serious or violent felony. In the statutory scheme it is

the prior adjudication itself and not any finding as to the truth of the offender's commission of the underlying juvenile offense that triggers the application of the three strikes law. (See § 667, subd. (d)(3) [setting forth circumstances by which a "prior juvenile adjudication" must be considered a "prior felony conviction" under the three strikes law]; § 667, subd. (e)(1) [requiring sentencing term for a defendant with "one prior felony conviction" to be "twice the term otherwise provided"].) The People contend that because in the instant case Baltazar admitted he suffered a qualifying juvenile adjudication--the very fact relied upon to enhance his sentence--there can be no constitutional violation. Baltazar's three strikes sentence was based solely on "the facts reflected in the jury verdict or admitted by the defendant" and did not depend on any additional factfinding by the trial court. (*Cunningham, supra*, 127 S.Ct. at p. 865, italics omitted.)

However, the People's argument does not address the issue raised in this case. The issue is not whether there was a right to a jury determination of the fact of the prior juvenile adjudication or whether that right was waived by Baltazar's admission of the fact of his prior juvenile adjudication. The issue is whether a prior juvenile adjudication as to which there was no right to a jury trial may be used to enhance the otherwise maximum sentence permitted by the three strikes law.

The *Almendarez-Torres* exception of a prior conviction relies on an assumption that a fact of a prior conviction is supported by an underlying jury verdict. (See *Jones v. United States* (1999) 526 U.S. 227, 249 [distinguishing holding in *Almendarez-Torres* on the ground that "unlike virtually any other consideration used to enlarge the possible

penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"]; *Apprendi, supra*, 530 U.S. at p. 496 [emphasizing in distinguishing *Almendarez-Torres* that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof"]; *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194 ["the 'prior conviction' exception to *Apprendi's* general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt"].)

Therefore, the *Apprendi* exception of a prior conviction to the requirement of a jury trial to enhance the sentence in this case does not apply and Baltazar's sentence was enhanced above the otherwise maximum sentence by a prior juvenile adjudication conducted without a right to a jury trial as required by the Sixth Amendment to the United States Constitution.

DISPOSITION

The sentence is reversed and the matter is remanded for resentencing. In all other respects the judgment is affirmed.

McDONALD, Acting P. J.

I CONCUR:

AARON, J.

IRION, J., Dissenting.

I would affirm the judgment. As the majority recognizes, a fact admitted by the defendant constitutes an exception to the *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) rule that is separate and distinct from the *Almendarez-Torres v. United States* (1998) 523 U.S. 224 exception for prior convictions. Here, the defendant *admitted* that he suffered a qualifying juvenile adjudication, and the Legislature has deemed that fact alone — the fact of the adjudication — necessitates an increase in his punishment. (See § 667, subd. (d)(3) [setting forth circumstances under which a "prior juvenile adjudication" must be considered a "prior felony conviction" under the three strikes law]; § 667, subd. (e)(1) [requiring sentencing term for a defendant with "one prior felony conviction" to be "twice the term otherwise provided"].) In light of Baltazar's admission, his three strikes sentence was based solely on "'the facts reflected in the jury verdict or admitted by the defendant,'" and did not depend on any additional factfinding by the trial court. (*Cunningham v. California* (2007) 549 U.S. 270, ___ [127 S.Ct. 856, 865], italics omitted.) Consequently, there is no *Apprendi* violation. (*Cunningham*, at p. 865.)

Thus, while there may be reasonable grounds to criticize *the policy* of utilizing juvenile adjudications as prior strikes, that policy does not violate the constitutional rule announced in *Apprendi*. (*People v. Smith* (2003) 110 Cal.App.4th 1072, 1079 [recognizing that under California law, "the defendant has a statutory right to jury trial on the issue of whether he or she suffered" prior strikes, and those strikes, including any "qualifying juvenile adjudication[,] must be pleaded and proved beyond a reasonable doubt"].) As neither Baltazar nor the majority cite any other constitutional rule or

provision that would permit the courts to override the Legislature's policy decision to treat certain juvenile adjudications as prior strikes, I dissent.

IRION, J.