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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WAYMAN ZACHARIAH BARROW, Defendant and Appellant.	H030041 (Santa Clara County Super. Ct. No. CC584419)

Defendant Wayman Zachariah Barrow was charged with eight counts arising from pimping and other misconduct involving two minor girls. During trial he entered guilty pleas to all charges. The trial court sentenced him to a total of 18 years in prison, consisting of a base term of 6 years, numerous concurrent terms, and two consecutive terms of 6 years each.

On appeal defendant's sole contention is that the imposition of consecutive terms rested on facts not found by a jury nor admitted by defendant, and thus violated his right to trial by jury as articulated in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). He concedes that the California Supreme Court rejected a similar contention in *People v. Black* (2005) 35 Cal.4th 1238, **** (*Black*), vacated sub nom. *Black v. California* (Feb. 20, 2007, No. 05-6793) ___ U.S. ___ [167 L.Ed.2d 36]. He also acknowledges that we are generally bound by that court's decisions under *Auto Equity Sales, Inc. v. Superior*

Court (1962) 57 Cal.2d 450, 455. He is raising the point, he says, to preserve it for federal court review. He further contends that counsel's failure to raise the point in the trial court does not waive it for purposes of appellate review, or in the alternative that counsel's failure to raise the point was ineffective assistance of counsel.

We reach the issue on the merits because any objection in the trial court would manifestly have been futile in light of the then-extant decision in *Black.* The reason for requiring a predicate objection is not to ease the workload of appellate courts by blindly imposing the forfeiture of meritorious arguments, but to increase the efficiency of trial proceedings and thwart procedural gamesmanship by requiring that the objecting party give the trial court an opportunity to correct its mistakes. This objective, and the resulting requirement, have no logical place where sustaining an objection would require the trial court to defy paramount, binding authority. Such an objection is presumptively futile, and its absence cannot operate to forfeit a challenge on appeal.

On the merits the only real question is whether *Black*'s treatment of consecutive sentences remains the law of this state. The *Black* decision has now been vacated for reconsideration in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*). (*Black v. California* (Feb. 20, 2007, No. 05-6793)___ U.S. ___ [167 L.Ed.2d 36].) *Cunningham* itself was concerned only with the imposition of the upper term under California sentencing law, not with consecutive sentencing, but the high court vacated *Black* in its entirety. (See *Black v. California*, *supra*, ___ U.S. ___ [167 L.Ed.2d 36].) We see no reason to doubt that, like any other judgment, one rendered by our state Supreme Court is rendered null and void when reversed or vacated. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 758, p. 783, italics added ["The effect of an unqualified reversal . . . is to *vacate* the judgment, and to leave the case 'at large' for further proceedings as if it had never been tried, and *as if no judgment had ever been rendered*"].) It follows that the vacated decision in *Black* is not strictly binding on *any* point of law.

It appears to us, however, that upon reconsideration, the California Supreme Court is likely to reach the same result as before with respect to consecutive sentences. In *Black* the court identified two grounds for its conclusion that a defendant is not entitled to a jury trial on factors justifying the imposition of consecutive sentences. The first ground was "the same reasoning that leads us to conclude that a jury trial is not required on the aggravating factors that justify imposition of the upper term," i.e., that the choice to impose consecutive sentences fell within a discretionary sentencing range, and " 'Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.' " (*Black, supra,* 35 Cal.4th at p. 1262, quoting *Harris v. United States* (2002) 536 U.S. 545, 558.) This rationale was repudiated in *Cunningham, supra,* 549 U.S. ___ [127 S.Ct. 856].

But *Cunningham* appears not to have affected, at least in any direct or obvious way, *Black*'s second ground of decision for its treatment of consecutive sentences: "*Blakely*'s underlying rationale," which formed the basis for *Cunningham*, "is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently." (*Black, supra,* 35 Cal.4th at p. 1262.) "The jury's verdict finding the defendant guilty of two or more crimes authorizes the statutory maximum sentence for each offense. When a judge considers the circumstances of each offense and the defendant's criminal history in determining whether the sentences are to be served concurrently or consecutively, he or she cannot be said to have usurped the jury's historical role. Permitting a judge to make any factual findings related to the choice between concurrent or consecutive sentences does not create an opportunity for legislatures to eliminate the right to a jury trial on elements of the offenses." (*Id.* at p. 1263.)

We believe the court is likely to reaffirm this rationale and to once again hold that the concerns underlying *Blakely* and its prodigy are not implicated by the imposition of consecutive sentences.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.