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OPINION FOLLOWING RECALL OF REMITTITUR

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD BOOTH,

Defendant and Appellant.

D047740

(Super. Ct. No. JCF14228)

APPEAL from a judgment of the Superior Court of Imperial County, Juan Ulloa, Judge. Affirmed in part, reversed in part and remanded for further proceedings.

A jury convicted Edward Booth of first degree murder (Pen. Code,¹ §§ 187, subd. (a), 189), two counts of attempted murder (§§ 187, subd. (a), 664), two counts of

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

assault with a semiautomatic firearm (§ 245, subd. (b)), and two counts of criminal threats (§ 422). The trial court sentenced Booth to 122 years to life in prison.

Booth appeals, contending that his sentence is invalid because: (i) the sentence with respect to certain of the counts (counts 4 and 7) was computed in violation of the applicable statutes; and (ii) the sentence was enhanced by the trial judge based on factual findings made by the court and not the jury in violation of his constitutional rights as defined in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*). As Booth is correct with respect to both of his contentions, we reverse the judgment and remand for resentencing on the affected counts.

FACTS

On June 16, 2004, Booth, accompanied by Patrice Jefferson, drove to the Brentwood Apartments complex in Brawley to collect an outstanding drug debt owed to him by Marcus Williams. Williams was at the complex visiting his girlfriend, Jennifer Havens, who was staying with her cousin, Tamra Honeysuckle. When he arrived, Booth called Williams over to his car and asked for the money he was owed. When Williams approached, Booth got out of the car and pointed a semiautomatic handgun at him. Williams told Booth he had the money and asked why Booth was "'tripping.'" Booth shot Williams in the leg and Williams fell to the ground.

Havens approached the two men, yelling. Booth walked towards her and shot her two times and she fell to the ground. Booth then walked into Honeysuckle's apartment. He first encountered 16-year-old Tiffany Walker, who was also visiting Honeysuckle;

Walker was holding a baby. Booth held the gun against Walker's head and said, "Don't say anything." He pulled the trigger. The gun jammed. As Booth struggled with the gun, Honeysuckle ran into the kitchen, exclaiming, "Oh, my God. What are you doing?" Booth threatened to kill both Honeysuckle and Walker.

Booth then left Honeysuckle's apartment and shot Havens two more times as she lay on the ground. He jogged back to the car and drove away with Jefferson. Booth and Jefferson were arrested at the United States/Mexico border. Havens died as a result of the gunshot wounds.

DISCUSSION

On appeal, Booth contends that his sentence is invalid on two grounds. First, he asserts that the trial court imposed a sentence on counts 4 and 7 that is not authorized by the applicable sentencing statutes. Second, he contends the sentence is invalid because the court violated his constitutional rights by imposing upper term sentences on four of the counts and ordering that the sentences imposed run consecutively, based on factors found by the court by a preponderance of the evidence instead of by a jury beyond a reasonable doubt. We address each contention below after detailing the sentence Booth received.

A. *Facts Regarding Sentencing*

With respect to the seven counts for which the jury found Booth guilty and made accompanying true findings, the trial court sentenced Booth as follows:

Count 1, first degree murder of Jennifer Havens (§§ 187, subd. (a), 189): 25 years to life plus an additional 25 years to life for the accompanying true finding of personally discharging a handgun (§§ 190, 12022.53, subd. (d));

Count 2, attempted murder of Marcus Williams (§§ 187, subd. (a), 664): upper term of nine years, plus an additional 25 years to life for the accompanying true finding of personally discharging a handgun causing great bodily injury (§§ 664, subd. (a), 12022.53, subd. (d), 12022.7);

Count 3, assault with a semiautomatic firearm on Marcus Williams (§ 245, subd. (b)): upper term of nine years stayed, plus an additional 10 years stayed for the accompanying true finding of personally discharging a handgun (§§ 12022.5, subd. (a), 654);

Count 4, willful, deliberate and premeditated attempted murder of Tiffany Walker (§§ 187, subd. (a), 664): 25 years to life, plus an additional 10 years on the accompanying true finding of personally using a handgun (§ 12022.53, subds. (b), (a)(1) & (18));

Count 5, assault with a semiautomatic firearm on Tiffany Walker (§ 245, subd. (b)): upper term of nine years stayed, plus an additional 10 years stayed on the accompanying true finding of personally using a handgun (§§ 12022.5, subd. (a), 654);

Count 6, making a criminal threats to Tiffany Walker (§ 422): upper term of three years stayed (§ 654);

Count 7, making a criminal threat to Tamra Honeysuckle (§ 422): upper term of three years.

The court ordered that sentence on each of the nonstayed counts would run consecutively.

B. *The Trial Court's Sentence on Counts 4 and 7 Conflicts with the Applicable Sentencing Statutes*

Booth contends that the trial court's sentence on counts 4 and 7 is invalid on the ground that the court misapplied the applicable statutory sentencing provisions. The Attorney General agrees, as do we.

1. *The Sentence on Count 4 is Erroneous*

The jury convicted Booth in count 4 of attempted murder of Tiffany Walker and made additional factual findings that the attempted murder was willful, deliberate and premeditated, and that Booth personally used a handgun in committing the offense. The trial court sentenced Booth on count 4 to 25 years to life, plus an additional 10 years for having personally used a firearm. (§§ 187, subd. (a), 664, 12022.53, subds. (b), (a)(1) & (18).)

As Booth points out, under section 664, an attempt to commit willful, deliberate, and premeditated murder "shall be punished by imprisonment in the state prison for life with the possibility of parole." (§ 664, subd. (a).) Thus, the trial court's sentence of 25 years to life on count 4 is in error. Consequently, the sentence for count 4 must be modified to life with the possibility of parole, rather than 25 years to life.²

² The 10-year sentence on the applicable enhancement is unaffected. (§ 12022.53, subds. (b), (a)(1) & (18).)

2. *The Sentence on Count 7 Was Calculated Erroneously*

The jury convicted Booth on count 7 of making a criminal threat to Tamra Honeysuckle (§ 422). The trial court sentenced Booth on that count to three years in prison to run consecutively to his sentence on the other counts. As the trial court also sentenced Booth to a determinate sentence of nine years in prison on count 2, the imposition of a consecutive, determinate sentence on count 7 triggered section 1170.1. Under that statute, "the aggregate term of imprisonment" for the two counts must be "the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements." (§ 1170.1, subd. (a).) The principal term is defined as "the greatest term of imprisonment imposed" on the counts, and the subordinate term is determined by calculating "one-third of the middle term of imprisonment prescribed" for the remaining counts. (*Ibid.*; *People v. Felix* (2000) 22 Cal.4th 651, 653.)

Under this statutory framework, the nine-year sentence on count 2 is the principal term, and the resulting subordinate term for count 7 is eight months — one-third the two-year middle term for a conviction of criminal threats (§§ 18, 422). Thus, the trial court's three-year sentence (the upper term sentence for criminal threats) was erroneous.

3. *The Abstract of Judgment Erroneously States that the Sentences on Counts 3, 5 and 6 Are Consecutive*

The trial court ruled that sentence on counts 3, 5 and 6 should be stayed, but did not state whether those sentences should run consecutively. Where the trial court is silent as to whether a sentence will run consecutively or concurrently, the sentence is presumed to run concurrently. (§ 669.) Thus, as the Attorney General and Booth both recognize,

the current abstract of judgment, which states that the stayed sentences on counts 3, 5 and 6 are to run consecutively, is in error.

C. *The Upper Term Sentences Imposed on Counts 2, 3, 5 and 6 Must Be Reversed Under Cunningham*

Booth contends that the trial court violated his constitutional rights as stated in *Blakely, supra*, 542 U.S. 296, by imposing upper term sentences on counts 2, 3, 5 and 6, and by imposing consecutive sentences on counts 1, 2, 4 and 7 based on facts found by the judge by a preponderance of the evidence, rather than by a jury beyond a reasonable doubt. In our initial resolution of this appeal, we ruled that Booth's *Blakely* challenge was precluded by our Supreme Court's rejection of identical contentions in *People v. Black* (2005) 35 Cal.4th 1238.

After we issued our initial opinion but before Booth exhausted his appeals to the federal and California Supreme Courts, the United States Supreme Court overruled *Black* in *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856]. Consequently, we granted Booth's unopposed motion to recall the remittitur and requested further briefing from the parties in light of *Cunningham*.³

In *Cunningham*, the United States Supreme Court held that California's Determinate Sentencing Law (the DSL) violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution, as set

³ *People v. Arguello* (1965) 63 Cal.2d 566, 573 (recalling remittitur and reversing judgment in light of decision of United States Supreme Court where time had not run for defendant to petition for certiorari from United States Supreme Court and thus judgment "was not final").

out in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490. (*Cunningham, supra*, 549 U.S. ____ [127 S.Ct. at p. 860].) Under the *Apprendi* line of cases, "[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Cunningham*, at p. 868, quoting *Apprendi*, at p. 490.)

In *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856], the Court concluded that the DSL violated "*Apprendi's* bright-line rule" because, under the DSL, circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt. (*Cunningham*, at p. 868.) Stating that "[t]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," *Cunningham* concluded that "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Cunningham*, at p. 868.) Consequently, imposition of an upper term sentence based on facts (other than the fact of a prior conviction) found by a judge is unconstitutional. (*Ibid.*) *Cunningham* did not address the portion of the DSL that governs consecutive sentencing.

1. *The Upper Term Sentences Must Be Reversed*

In the instant case, the trial court imposed an upper term sentence on counts 2, 3, 5 and 6.⁴ In doing so, the trial court stated the only factor in mitigation was that "the defendant has no prior convictions." The court found the aggravating factors "clearly" outweighed this mitigating factor, the "vulnerability of the victims . . . is established," and "[c]learly, if not imprisoned, the defendant is likely to continue to be a danger to others." The court added, "This is clearly an upper term case, no question."⁵

While recognizing that *Cunningham* "generally precludes a trial court from finding facts to impose an upper term sentence," the Attorney General contends that resentencing is not required in the instant case because Booth's sentence "fully satisfied the constitutional requirement[s]" and because any error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24. This argument is based on the Attorney General's assertion that the trial court's finding that Walker was vulnerable "was correct" because

⁴ Relying on the ruling in our initial decision reversing the sentence on count 7 on statutory grounds (*People v. Booth* (Nov. 7, 2006, D047740) [nonpub. opn.]), Booth withdraws his challenge to the constitutionality of the upper term sentence imposed on that count.

⁵ The probation officer's report listed the following circumstances in aggravation: (1) the crimes involved great violence, cruelty and viciousness; (2) Booth used a weapon; (3) the victims were vulnerable; (4) Booth was in a position of leadership; (5) Booth induced others to participate in the crimes; (6) Booth threatened witnesses; (7) the crimes were sophisticated; (8) Booth took advantage of a position of trust; and (9) Booth had previously engaged in violent conduct (misdemeanor battery). The trial court specifically indicated that contrary to the probation officer's report, Booth's offense was not sophisticated and did not involve abuse of a position of trust.

there is "no dispute" that Walker, a 16-year old holding an infant, was a vulnerable victim.⁶ We believe the Attorney General's legal analysis to be flawed.

It is clear that by relying on factors found by the court under a preponderance of evidence standard and not by a jury beyond a reasonable doubt to impose a sentence beyond the prescribed statutory maximum, the trial court violated Booth's Sixth and Fourteenth Amendment right to a jury trial. (*Cunningham, supra*, 549 U.S. ____ [127 S.Ct. at p. 860].) We disagree with the Attorney General's contention that this violation is excused because the trial court's finding was "inherent in the jury's verdict" or can be deemed harmless because "the jury would have found at least one aggravating circumstance [vulnerable victim]" beyond a reasonable doubt. Instead, we believe the required remedy is to vacate the sentence for resentencing by the trial court in a proceeding that is constitutionally sound under *Cunningham* (i.e., where imposition of any upper term does not depend on any *judicially* determined facts).

2. *The Imposition of Consecutive Sentences Did Not Violate Booth's Constitutional Rights*

Booth also contends that the trial court violated his constitutional right to a jury trial by imposing consecutive sentences, arguing that although *Cunningham* "did not directly rule on California's concurrent-consecutive sentencing scheme," the reasoning of the case "makes clear that such a system . . . violates the Sixth Amendment."

⁶ In fact, the vulnerability factor is disputed. Booth contends a jury could have found Walker's vulnerability not to have been proven beyond a reasonable doubt. Further, even if undisputed, Walker's vulnerability would only support an upper term sentence on counts 5 and 6, the counts for which she was the victim.

Booth's attempted analogy of California's consecutive/concurrent sentencing framework to the upper term/middle term framework struck down in *Cunningham* is unavailing because under the concurrent/consecutive sentencing system established by section 669, there is no mandatory statutory presumption. (§ 669 [when a defendant is convicted of multiple offenses, the trial court "shall direct whether the terms of imprisonment . . . to which he or she is sentenced shall run concurrently or consecutively"].) Rather, the trial court is granted full discretion to sentence consecutively or concurrently — discretion that is not conditioned, as it is in selecting an upper term, upon any additional factual findings. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923; *People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1270.) Thus, the jury's guilty verdict on multiple counts *alone* authorizes the imposition of consecutive sentences, and consequently no *Cunningham* error occurs when the trial court imposes consecutive sentences.⁷ (*Hernandez, supra*, 147 Cal.App.4th at p. 1271 ["entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under

⁷ While it is true that the trial court is generally required to state a reason for its decision to run sentences concurrently or consecutively (Cal. Rules of Court, rule 4.406), this type of limitation on the trial court's sentencing discretion does not implicate the Sixth and Fourteenth Amendments. (*Hernandez, supra*, 147 Cal.App.4th at p. 1271; cf. *United States v. Booker* (2005) 543 U.S. 220, 264 [approving as constitutionally sound sentencing system where district courts are required to "consult the [sentencing] Guidelines and take them into account when sentencing," and sentences must be reasonable].) Similarly, the fact that if the court fails to exercise its discretion, "the term of imprisonment on the second or subsequent judgment shall run concurrently" does not establish a mandatory statutory presumption within the meaning of the *Cunningham* line of cases. (§ 669; *Hernandez*, at p. 1271.) Simply put, neither of these factors change the dispositive factor that consecutive sentences can be imposed based upon the jury's verdicts *alone*. (*Cunningham, supra*, 549 U.S. ____ [127 S.Ct. at pp. 865, 868].)

California's sentencing laws is not precluded by the decisions in *Apprendi*, *Blakely*, and *Cunningham*"; *People v. Brown* (2007) 148 Cal.App.4th 911, 917 ["Allowing a judge to decide whether terms should be served consecutively or concurrently . . . is constitutionally proper"].) We therefore reject Booth's contention that the trial court erred in imposing consecutive sentences.

DISPOSITION

The judgment is reversed in part and the case is remanded for the trial court to conduct a new sentencing hearing. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.