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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES JEFFREY BOWDEN, Defendant and Appellant.	B186613 (Los Angeles County Super. Ct. No. BA276160)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruffo Espinosa, Jr., Judge. Affirmed as modified.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Charles Jeffrey Bowden appeals from the judgment entered upon his convictions by jury verdict of first degree burglary (Pen. Code § 459, count 1)[1] and receiving stolen property (§ 496, subd. (a), count 2). Defendant admitted four prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced him to an aggregate state prison term of 10 years. Defendant contends that (1) the trial court violated his right to counsel under the United States and California Constitutions by failing to consider his motion to relinquish self-representation and for reappointment of counsel; (2) the trial court violated his right to due process by constructively terminating previously appointed "standby counsel"; (3) the trial court erred in not staying execution of sentence on the receiving stolen property conviction pursuant to section 654; and (4) imposition of the upper term sentence on the receipt of stolen property count violated his right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution, as set forth in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

We modify the judgment and otherwise affirm.

FACTS

On December 20, 2004, Jordana Boggs lived with a roommate in a two-story town house on North Wilton Place in Los Angeles. Her roommate was out of town at the time. At Approximately 10:00 p.m., Boggs checked that the doors and windows were closed and locked, left the lights on downstairs and went upstairs to sleep. At approximately 11:00 p.m. she was awakened by the sound of loud footsteps and a slamming door downstairs. Initially, she thought that her roommate's ex-boyfriend, Aaron, who had the house key, might have stopped by. She went downstairs and called his name but received no response. She then looked through the rooms, but found no one. The dining room window was open and its screen was removed.

Approximately 30 seconds after hearing the noises, Boggs went outside, and, after an unsuccessful effort to find Aaron's car, knocked on the doors of several neighbors,

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

who did not answer. She then saw defendant with a shopping cart containing a large television that looked like hers. Boggs ran home and telephoned 911, and then entered her car and followed defendant, simultaneously describing this to police on her cell phone. She observed a person, subsequently identified as Rosa Garcia, join defendant and help him push the cart. They were the only two people on the street. The television was still on the cart, but was now covered with a blanket.

As Boggs followed the pair, Los Angeles Police Officer Brenda Hardy arrived. She saw two people pushing a shopping cart with a large item propped up in it, covered with a blanket. The officer detained the two people. Garcia had in her possession burglars tools. When the blanket was removed from the cart, a television and several pieces of computer equipment were uncovered. Boggs later identified the television and computer components that were in the cart as hers.

DISCUSSION

I. Right to Counsel

A. Procedural History

On January 6, 2005, defendant made a *Marsden*[2] motion to replace his court appointed counsel. After some discussion about his situation, defendant requested to represent himself. The next day, defendant executed a *Faretta* waiver form.[3] At the

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[2] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[3] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). In the *Faretta* waiver form, signed by the defendant and initialed next to each admonition, he certified that he could read and write and understood his constitutional rights, including his right to self-representation. With respect to that right, the form provided: "I further understand that if I am permitted to represent myself, I will have to conduct my own defense WITHOUT THE ASSISTANCE OF A LAWYER." (Caps in form.) The waiver form also warned defendant of the hazards of self-representation, advising that he had to follow "all the technical rules of substantive law, criminal procedure and evidence, WITHOUT THE ASSISTANCE OF A LAWYER OR THE COURT" (caps in orig.) and that if he later asked to relinquish his pro. per. status, "the Court may deny this request and [he] may have to proceed with trial without an attorney."

hearing on the motion, the trial court reiterated and emphasized many of the points contained on the waiver form, stating: "It is almost always unwise" to represent oneself. "You're not entitled to, nor will you receive, any special indulgence. . . . You will be required to follow rules that takes lawyers years to learn. You will also be opposed by an experienced criminal prosecuting attorney." The trial court found the waiver to be voluntary, knowing and intelligent, and granted defendant's motion. Before the waiver was taken, defendant did not request, nor did the trial court mention anything about, appointing advisory or standby counsel. Standby counsel, Randall Kincaid was present however, at the January 10, 2005 preliminary hearing.

At the January 25, 2005 arraignment, the trial court acknowledged Kincaid again as "standby counsel." The record does not contain the reporter's transcript of that hearing, making it impossible to determine what, if anything, the trial court said regarding Kincaid's responsibilities. The matter was set for pretrial conference on March 4, 2005 and jury trial, day 57 of 60, on March 23, 2005.

On March 4, 2005, Kincaid by telephone, advised the court that he was unavailable on March 23, 2005, but would arrange for a substitute.[4]

On March 23, 2005, Kincaid did not appear, and both sides announced ready for trial. The case was continued to the following day and transferred to master calendar as 58 of 60.

On March 24, 2005, the case was assigned to a trial court. Once in the trial court, defendant moved to relinquish his pro. per. status and obtain private counsel. The following colloquy ensued:

"[DEFENDANT]: Your Honor, at this point in the proceedings, I would give up my pro per counsel and get a private attorney.

"THE COURT: Okay. Your request is denied. It's not timely. All right. Anything else?

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[4] Kincaid recalls that the court clerk informed him that another bar panel attorney would be appointed since he was unavailable.

"[DEFENDANT]: No, Sir.

"[¶] . . . [¶]

"[DEFENDANT]: Then, well, your Honor, you know, I have a mental issue because I'm on medication.

"THE COURT: All right. The record will so note.

"[DEFENDANT]: Your Honor, I had stand-by counsel that was supposed to be here.

"THE COURT: You didn't have stand-by counsel. The court had stand-by counsel.

"[DEFENDANT]: He's not here.

"THE COURT: He has no responsibility to you.

"[DEFENDANT]: I have asked to -- If I --

"THE COURT: No, Sir. Your request to have me vacate your pro per status is not timely. You know, you do this right before we call the jury up here."

Thereafter the prosecutor commented:

"[THE PROSECUTOR]: I would like to put on the record, attempts have been made to contact stand-by counsel, and he hasn't called back.

"THE COURT: Well, we're on the record now. The case was sent up here for trial.

"[THE PROSECUTOR]: . . . The defendant has exercised his right to represent himself. Stand-by counsel has been appointed, but is not present here. . . . All sides have announced ready, and it's only that once we were here that Mr. Bowden expressed desire to have counsel present the case. But I believe that is just a delay tactic. There's been plenty of opportunity earlier on. . . . And if [standby counsel] is ready to proceed without any delay, the People have obviously no objection to him taking over. But I don't believe any motion should be granted to continue, either for stand-by counsel or to have to wait for counsel."

The trial court stated that Reggie Stewart, a private investigator, could sit next to defendant during trial and provide him whatever assistance he needed.

On March 25, 2005, the second and last day of trial, Kincaid appeared as standby counsel. The trial continued with defendant in pro. per.

On April 7, 2005, after the verdict had been reached and before trial on defendant's prior convictions, and after filing a motion for new trial, in pro. per., defendant informed the trial court that he wanted to give up his pro. per. status. The trial court granted the request and revoked defendant's pro. per. status and made Kincaid counsel of record. Kincaid said he would appear at the trial on defendant's prior convictions on April 14, 2005.

Kincaid appeared with defendant on April 14, 2005, and the trial was continued at defendant's request to July 15, 2005, for hearing on the new trial motion. At the hearing on the motion, Kincaid declared a doubt as to defendant's mental capacity. The trial court suspended proceedings for psychiatric evaluations. Two court-appointed psychological evaluations led to inconsistent conclusions. The parties agreed to a third psychologist who was appointed and found defendant competent to stand trial and for purposes of sentencing. The trial court so found and reinstated the proceedings. In doing so, it noted the doctor's report that defendant was competent and "appeared to be legally sophisticated."

After conferring with counsel, defendant admitted four of the six alleged prior prison terms. Defendant was then sentenced.

B. Relinquishment of Self-representation

1. Abuse of Discretion

Defendant contends that the trial court abused its discretion by "failing to consider [his] motion for reappointment of attorney," thereby depriving him of his constitutional right to counsel. He argues that the trial court denied the motion only because it believed it was untimely, without considering any other factors germane to the request. He further argues that the trial court's "failure to conduct a hearing, establish a proper record, and

make a correct ruling was an abuse of discretion." While we agree the record is scant we find sufficient basis for the court's exercise of discretion.

A criminal defendant is entitled under the federal and state Constitutions to the assistance of counsel at all critical stages of the proceedings. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Gideon v. Wainright* (1963) 372 U.S. 335, 344-345.) A federal constitutional right of a defendant to self-representation is implied in the Sixth Amendment. (*Faretta, supra,* 422 U.S. at p. 819.) This is because the Sixth Amendment gives a defendant, whose life and future are at stake, the right to control his own fate and not be forced to use counsel who may not present the case as the defendant wishes. (*People v. Windham* (1977) 19 Cal.3d 121, 130 (*Windham*).) "Accordingly, when a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*Id.* at p. 128.)

"[O]nce defendant ha[s] proceeded to trial on a basis of his constitutional right of self-representation, it is thereafter within the sound discretion of the trial court to determine whether such defendant may give up his right of self-representation and have counsel appointed for him." (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993; see also *People v. Gallego* (1990) 52 Cal.3d 115, 164.) Whether to allow the defendant to do so is determined based on the totality of the circumstances. (*People v. Smith* (1980) 109 Cal.App.3d 476, 484.) Some of the factors to be considered are: (1) the defendant's prior history with regard to substituting of counsel and relinquishing self-representation and re-obtaining counsel; (2) the reasons given for the request; (3) the length and stage of the proceedings when the request is made; (4) disruption and delay which reasonably might be expected to ensue if the motion is granted; and (5) the likelihood and effectiveness of the defendant's continued self-representation. (*People v. Elliott, supra,* at pp. 993-994 [adopting factors established by *Windham* to determine whether to permit self-representation]; *People v. Gallego, supra,* at p. 164 [finding *Elliott* factors relevant and helpful in determining midtrial request for appointment of counsel, but "'are not

absolutes, and . . . it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation at midtrial'"].) But a request to relinquish self-representation should not be granted where its purpose is to delay trial or otherwise manipulate the court system. (See *People v. Trujillo* (1984) 154 Cal.App.3d 1077, 1086-1087; see also *People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1125.)

At the time the request to relinquish pro. per. status was made here, the trial court noted, "It's not timely." The court further noted, "Everybody has answered ready in Department 100. The matter has been sent down here for trial" and "You do this right before we call the jury up here."

Thus the trial court apparently denied defendant's request to relinquish self-representation believing he was simply attempting to delay trial rather than seeking in good faith, representation by counsel. It clarified this later, at defendant's motion for new trial, when it indicated that it believed defendant had been manipulating the court system by game playing. Defendant made his request on the day set for trial and after answering ready. The only explanation he provided was that he had mental issues and was on medication. He made no effort to explain how that was germane to his request for counsel as this had been an ongoing circumstance. The logical inference is that the request to relinquish self-representation, one day after answering ready for trial, was solely to delay the trial. This is a different situation from those of *People v. Cruz* (1978) 83 Cal.App.3d 308 and *People v. Elliott, supra,* 70 Cal.App.3d 984 where the pro. per. defendants sought legal representation after realizing their relative incompetence and inexperience when compared with the prosecutor (*Cruz*, at p. 320; *Elliott*, at p. 994) and communicated that concern to the court. The trial court did not abuse its discretion in concluding delay was the basis of the defendant's request for reappointment of counsel.

2. Harmless Error

Even if the trial court erred in denying defendant's request to re-obtain counsel, that error was harmless. Where a defendant, as here, has exercised his constitutional

right of self-representation but subsequently decides that he wishes to be represented by counsel, the issue of whether the error of the trial judge in refusing the request is prejudicial error, should be governed by the *Watson*[5] standard rather than by the *Chapman*[6] standard. While the defendant had the constitutional right to represent himself, once that right was exercised, he was accorded all that the Constitution requires. His desire to change his mind and relinquish self-representation at the time of trial is not guaranteed by the Constitution but is controlled by the trial court's discretion. (See *People v. Elliott, supra,* 70 Cal.App.3d at p. 998.)

In the case at bench, the evidence of defendant's guilt was strong, if not overwhelming.[7] Boggs's residence was entered late at night. Within moments of hearing footsteps and a door slam downstairs, she went to her neighbors and saw defendant near her building, pushing a shopping cart that contained what appeared to be her television. No one else was on the street. As she followed defendant in her car he was joined by Garcia. The police arrived and arrested defendant and Garcia, both pushing the shopping cart containing Boggs's television set and computer accessories within a block of Boggs's residence. We are, therefore, unable to say that it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error discussed herein. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

C. Termination of Standby Counsel

Defendant contends that the trial court deprived him of due process by constructively terminating his previously appointed "standby counsel." He argues that by excusing standby counsel and failing to appoint him to take over the defense when

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5 *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [Not reasonably probable that a more favorable result would have been reached.]

6 *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) [Error harmless beyond a reasonable doubt.]

7 Defendant's attorney at the motion for new trial conceded that the evidence against his client was "overwhelming."

defendant requested, the trial court constructively terminated him without notice to defendant and a hearing. This contention is without merit.

In *Faretta*, the Supreme Court stated that when a defendant elected self-representation, "a State may--even over objection by the accused--appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46; see also *People v. Carson* (2005) 35 Cal.4th 1, 8.) The Supreme Court did not articulate the precise functions standby counsel could or must perform, and the context of the statement, a discussion of the obligation of a self-represented accused not to undermine the dignity of the trial court by engaging in conduct that would preclude the accused from continuing self-representation, suggested a very narrow use of such counsel. Nonetheless, various types of lawyer involvement in pro se cases have developed. (*Brookner v. Superior Court* (1998) 64 Cal.App.4th 1390, 1393.) While trial courts have discretion to appoint advisory or standby counsel (see *People v. Crandell* (1988) 46 Cal.3d 833, 861-862, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364; *Littlefield v. Superior Court* (1993) 18 Cal.App.4th 856, 858),[8] such appointments are not

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[8] We note the concerns of several appellate courts with appointment of counsel to assist a pro se defendant. As stated in *Brookner v. Superior Court, supra,* 64 Cal.App.4th at page 1394: "It seems to us that a defendant either has an attorney or he is his own attorney--period. There should be no middle ground. A defendant who represents himself does so voluntarily, knowingly, and intelligently; and only after being duly warned of the consequences of his decision. [Citation.] He is routinely told that no special treatment will be provided simply because he has competently elected to represent himself although he is not an attorney--but in the same breath the court may, and is told by higher courts that it should, provide just such a special treatment by appointing an advisory or standby counsel to assist the defendant." (See also *Chaleff v. Superior Court* (1977) 69 Cal.App.3d 721, 732 (conc. opn.) ["A defendant appearing in propria persona has elected to represent himself. *He is his own counsel*. He should not be allowed to have it both ways"]; see also *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1431 ["In reality, the concept of advisory counsel for the *Faretta* defendant is disingenuous. . . . [¶] It would seem that if a defendant who waives the assistance of counsel is competent to

constitutionally guaranteed. (*People v. Stewart* (2004) 33 Cal.4th 425, 518; *People v. Bradford* (1997) 15 Cal.4th 1229, 1368; *People v. Bloom* (1989) 48 Cal.3d 1194, 1218.)

The terms "advisory counsel," "standby counsel," and "cocounsel" have been given no consistent meaning and have been "loosely used" by the courts in describing a multitude of situations in which the accused and counsel are involved in the defense. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14; *Brookner v. Superior Court, supra,* 64 Cal.App.4th at p. 1395 ["the role and duties of advisory and/or standby counsel are not clearly established or defined"].)[9] As a result, the use of those terms, when a trial court appoints counsel concurrently with granting self-representation, is uncertain without a description of the precise role the attorney is to play.

Here, when originally seeking to represent himself, defendant did not request appointment of advisory counsel, standby counsel, or any other legal assistance. Before granting his request for self-representation, the trial court did not appoint, or even refer to, advisory or standby counsel. It explicitly advised defendant that he would not receive assistance of counsel or the trial court and that if he later sought to relinquish self-representation, he might not be permitted to do so.

Though standby counsel was present at the preliminary hearing and thereafter recognized at the arraignment, the minute order of that proceeding simply reflects the appointment, and does not specify the responsibilities of such counsel. The record does

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represent himself, he should do so, *by himself*; if he is not able to defend himself without the assistance of advisory counsel, then he is not competent to represent himself"].)

9 Some courts have attempted to characterize these terms. "Advisory counsel" has been described as an attorney present in the courtroom at the defendant's side, who does not speak for the defendant or participate in the conduct of the trial, but who only gives legal advice to the defendant. (*Chaleff v. Superior Court, supra,* 69 Cal.App.3d at p. 731, fn. 6 (conc. opn.); *People v. Blair* (2005) 36 Cal.4th 686, 725.) "Standby counsel" has been described as an attorney present in court to follow the evidence but not give legal advice. Standby counsel is appointed for the benefit of the court to step in and represent the defendant in the event it becomes necessary to revoke the defendant's pro se status or to remove the defendant from the court. (*Chaleff*, at p. 731, fn. 7; *Blair*, at p. 725.)

not contain a reporter's transcript of that hearing. We are therefore unable to discern whether the trial court defined the functions of appointed counsel. At the later hearing on defendant's motion for new trial, however, the trial court indicated what had been intended by "standby counsel," stating that, "[S]tandby counsel, as you know, is not there to help or assist the defendant. Standby counsel is only appointed by the court to take over the trial in the event during the trial the defendant displayed some sort of behavior that makes it necessary of the court's benefit, and--so the court can maintain control of its calendar to substitute standby counsel in. So it's not for the benefit of the defendant."

We cannot conclude that the trial court deprived defendant of due process by proceeding in the absence of counsel that defendant did not have a constitutional right to have, that he did not request, and that was appointed by the trial court for the court's convenience subsequent to granting defendant's request for self-representation. Defendant has cited no authority indicating that when granted under these circumstances, advisory or standby counsel cannot be limited or terminated without due process. Indeed, the cases he cites are inapposite.

In *People v. Ebert* (1988) 199 Cal.App.3d 40 (*Ebert*), the defendant made a motion for self-representation and appointment of "advisory counsel." When such counsel was provided with the order granting self-representation, the defendant was not informed that he had no right to advisory counsel. (*Id* at p. 42.) A few weeks later, the advisory counsel was allowed to withdraw without notice to the defendant. The Court of Appeal concluded that the defendant's *Faretta* waiver was invalid because the defendant was not told that he had no right to advisory counsel and had he "ever been so advised, it is conceivable that he would not have elected to engage in self-representation." (*Ebert*, at pp. 46-47.) Thus, it was the uninformed *Faretta* waiver, not the termination of standby counsel, that violated due process.

In *Wilson v. Superior Court* (1978) 21 Cal.3d 816, also cited by defendant, the California Supreme Court held that the defendant had a constitutionally protected interest that the pro. per. privileges initially granted to him would not be terminated or restricted

except for cause. (*Id.* at p. 821.) The rationale for this conclusion appears to be similar to that in *Ebert*; the defendant might not have waived his right to counsel had he not been accorded the pro se privileges, giving him a constitutionally based reliance interest in the privileges.

Finally, defendant's reliance on *People v. Bloom, supra*, 48 Cal.3d 1194 is misplaced. That case dealt with whether a trial court had authority to grant a midtrial request for self-representation in a capital case where the accused stated an intention to seek the death verdict. It said nothing regarding any constitutional rights attaching to the use of a court appointed advisory or standby counsel. (*Id.* at p. 1218.)

II. Sentencing Issues

A. The Sentences

Defendant was convicted of first degree burglary and receiving stolen property. At his sentencing hearing on September 29, 2005, the trial court made count 1, first degree burglary, the principal term and selected the upper term of six years, finding in aggravation that defendant had suffered many prior prison terms and that he was on probation at the time that he committed the most recent offense. It sentenced him to a concurrent upper term of three years on count 2, receiving stolen property, finding in aggravation that his prior performance on probation or parole was poor and that his most recent acts indicated that his conduct was becoming more brazen and dangerous. The trial court articulated no factors in mitigation. It imposed an additional four years for the four prior prison term enhancements.

B. Section 654 Stay

Defendant contends that the trial court erred in failing to stay execution of sentence on his receiving stolen property conviction pursuant to section 654, depriving him of due process under the United States Constitution. He argues that the evidence here only supports a conclusion that the two offenses of which he was convicted were indivisible and that the receiving stolen property charge was merely incidental to the burglary. Respondent agrees as do we.

Section 654 provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be punished under more than one provision*." (§ 654, subd. (a), italics added.) "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) A course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.)

Here, there was no evidence that defendant entered Boggs's residence to commit any offense other than theft of property. The offenses occurred in close temporal proximity. (*People v. Evers* (1992) 10 Cal.App.4th 588, 603, fn. 10 [temporal proximity, while not determinative of whether there was a single objective, is a relevant consideration].) The property taken in the burglary was the same property that was the basis of the receiving stolen property charge. Thus, defendant's intent in committing the burglary was to obtain the stolen property, one and the same objective. Hence, these offenses were indivisible, and section 654 precludes double punishment. Our Supreme Court has similarly concluded with respect to the two offenses involved here. (See *People v. Allen* (1999) 21 Cal.4th 846, 867 [finding section 654 applicable to the offenses of burglary and receiving the property stolen in the burglary]; see also *People v. McFarland* (1962) 58 Cal.2d 748, 762 [finding section 654 applicable to the offenses of burglary and grand theft where objective of burglary was to commit grand theft].)

The trial court erred in failing to stay execution of sentence on defendant's conviction of receiving stolen property and the sentence must be so modified.

C. Blakely

Defendant contends that the upper term sentences deprived him of his right to a jury determination beyond a reasonable doubt of all facts necessary to increase his

sentence beyond the statutory maximum and to due process, as set forth in *Blakely, supra*, 542 U.S. 296. He argues that those factors found by the trial court to support the imposition of that upper term sentence were neither found by the jury nor admitted by defendant. Respondent contends that defendant forfeited this claim by failing to object on this ground in the trial court.[10] We conclude that the claim was not forfeited but is without merit.

1. Forfeiture

In *Sandoval*, *supra,* 41 Cal.4th 825, our Supreme Court resolved the forfeiture question now before us. In that case, as here, the sentencing proceedings took place after the United States Supreme Court's decision in *Blakely*, *supra,* 542 U.S. 296 (June 20, 2004) and the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) (June 20, 2005), but before *Cunningham*. *Sandoval* concluded that the claim was not forfeited because the decision in *Black I*, in which our Supreme Court held that the California determinate sentencing law (DSL) did not implicate the Sixth Amendment right to a jury, was binding on the lower courts pursuant to *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, until it was overruled by the United States Supreme Court in *Cunningham*. "Had defendant requested a jury trial on

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10 In his initial brief in this matter, defendant only challenged the imposition of the upper term on his conviction of receiving stolen property. After the United States Supreme Court rendered its decision in *Cunningham* (2007) 549 U.S.___ [127 S.Ct. 856] (*Cunningham*), the parties submitted supplemental briefs on the propriety of the upper term sentencing. In his brief, defendant for the first time contends that the upper term sentences on his burglary conviction and receiving stolen property conviction were improper. In the People's brief, the Attorney General for the first time contends that defendant had forfeited his *Blakely* claim.

On August 1, 2007, we gave the parties the opportunity to file further supplemental briefs on this issue in light of the California Supreme Court's July 19, 2007 decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). In his brief, defendant took issue with *Black II,* arguing that it was inconsistent with *Cunningham*, while acknowledging our obligation to follow *Black II.*

aggravating circumstances, that request clearly would have been futile, because the trial court would have been required to follow our decision in *Black I* and deny the request." (*Sandoval*, *supra*, at p. 837, fn. 4.) An objection in the trial court is not required if it would have been futile. (*Ibid*.)

2. Right to Jury

For the reasons set forth in *Black II*, *supra*, 41 Cal.4th 799, we find no constitutional violation here in the trial court's imposition of the upper terms.

In *Blakely*, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum, that 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*," must be determined by a jury and proved beyond a reasonable doubt. (*Blakely*, *supra*, 542 U.S. at p. 303.) The high court recently made clear that "[i]n accord with *Blakely* . . . the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Cunningham*, *supra*, 127 S.Ct. at p. 868.) In *Cunningham*, contrary to the California Supreme Court's conclusion in *Black I*, the United States Supreme Court held that California's DSL was unconstitutional to the extent it authorized the trial court to impose an upper term sentence based on facts that were found by the court rather than by a jury beyond a reasonable doubt. (*Cunningham*, at p. 871.)

In *Black II*, construing *Cunningham*, the California Supreme Court reasoned that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi*[11] and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II*, *supra*, 41 Cal.4th at p. 812.) "[I]f one aggravating circumstance has been established in accordance with the constitutional

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11 *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

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.'" (*Black II*, at p. 813.)

The United States Supreme Court has consistently stated that the right to a jury trial does not apply to the fact of a prior conviction. (*Blakely, supra*, 542 U.S. at p. 301; see also *Black II, supra*, 41 Cal.4th at p. 818.) This exception is not to be read too narrowly. (*Black II*, at p. 819.) The fact of a prior conviction includes "other related issues that may be determined by examining the records of the prior convictions." (*Ibid*.) It has also been concluded that this exception relates more broadly to the issue of "recidivism." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222, cited with approval in *People v. McGee* (2006) 38 Cal.4th 682, 700-703.)

Applying *Black II* here, we conclude that defendant was not deprived of his constitutional right to a jury trial by imposition of the upper term sentences. Each was based on at least one aggravating factor that satisfied the Sixth Amendment. (*Black II, supra*, 41 Cal.4th at p. 813.) With regard to defendant's conviction of burglary, the trial court found as aggravating factors that he had numerous prior prison terms and was on probation when the charged offenses occurred. With regard to his conviction of receiving stolen property, the trial court found that he had a history of poor performance on probation or parole. The adverse criminal history factor has been explicitly held by our Supreme Court to be within the prior conviction/recidivism exception to *Apprendi* and its progeny. (See *Black II*, at p. 818.) The factors such as being on probation at the time of the offense and previously being unsuccessful on probation come within the prior conviction/recidivism exception.[12] Both may be ascertained simply by examining the records of prior convictions. (*Id*. at p. 819.)

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[12] The issue of whether a trial court can constitutionally impose an upper term based on the fact that the defendant was on parole when the crime was committed, without a jury determination, is currently before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677.

DISPOSITION

The judgment is modified to stay execution of the sentence on the receipt of stolen property conviction in count 2 and is otherwise affirmed. On remand, the trial court is directed to modify the abstract of judgment accordingly.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD