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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL CLAUDE BROOKS,

Defendant and Appellant.

E041690

(Super.Ct.No. FSB034640)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, David Delgado Rucci and Robert M. Foster, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant pleaded guilty to possession of a firearm by a felon in violation of Penal Code section 12021, subdivision (a)(1),¹ and admitted the gang enhancement allegation (§ 186.22, subd. (b)(1)). In return, defendant was placed on formal probation for three years on various terms and conditions, including serving 388 days in county jail.

Subsequently, while on probation in this case, defendant was convicted of commercial burglary (§ 459) in Orange County. As a result, his probation in this case was revoked, and he was sentenced to a total term of seven years in state prison as follows: the upper term of three years for the gun possession charge, plus the upper term of four years for the gang enhancement allegation.

Defendant's sole contention on appeal is that he was deprived of his federal and state constitutional rights to a jury trial and due process under *Cunningham v. California* (2007) ___ U.S. ___, ___ [127 S.Ct. 856, 868] (*Cunningham*), *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*) when the trial court imposed the upper term. Pursuant to the prior conviction exception articulated in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350], we reject this contention and affirm the judgment.

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

I

FACTUAL AND PROCEDURAL BACKGROUND²

On May 2, 2002, San Bernardino police officers executed a search warrant on defendant's residence. They found a gun on the floor of defendant's bedroom closet. Defendant was a convicted felon and a member of a criminal street gang.

On July 3, 2003, following a negotiated plea, defendant pleaded guilty to possession of a firearm by a felon and admitted the gang enhancement allegation. In return, defendant was placed on probation for three years.

Sometime in early 2004, defendant's probation officer was advised that defendant had been sentenced to four years in state prison following his conviction for commercial burglary in Orange County. Defendant's probation officer then reviewed a record of defendant's criminal history and determined that the Orange County burglary conviction had occurred while defendant was on probation in the instant case.

A petition to revoke defendant's probation in this case was filed. On September 8, 2006, defendant was found to be in violation of his probation and was sentenced to a total term of seven years in state prison.

II

DISCUSSION

At sentencing, the trial court imposed the upper term on the felon in possession of a firearm conviction and the gang enhancement allegation based on the following aggravating factors: (1) that defendant had engaged in violent conduct, which indicates a

² The factual background of defendant's original crime is taken from the probation report. The factual background of defendant's probation violation is taken from the probation revocation hearing.

serious danger to society; (2) that defendant's prior convictions as an adult were numerous and of increasing seriousness; (3) that defendant had served prior prison terms; and (4) that defendant's prior performance on probation or parole was unsatisfactory.

Relying on *Cunningham*, *Blakely*, and *Apprendi*, defendant contends the upper term sentence violates his Sixth Amendment rights because the sentence was based on aggravating factors not reflected in the jury verdict or admitted by defendant.

The People argue that defendant forfeited the error by not objecting at the sentencing hearing. We reject that argument. On June 20, 2005, over a year before defendant's sentencing hearing in this case, our state Supreme Court concluded that the imposition of an upper term sentence, as provided under California law, was constitutional and does not implicate a defendant's Sixth Amendment right to a jury trial. (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) At that time, the trial court was compelled to follow *Black*. Therefore, it would have been futile for defense counsel to object at sentencing based on *Blakely*, *Apprendi*, or the United States Constitution. Under these circumstances, defendant's *Blakely* challenge was not forfeited. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6; *People v. Turner* (1990) 50 Cal.3d 668, 703-704.)

In *Cunningham*, *supra*, 127 S.Ct. 856, 868, the United States Supreme Court overruled *Black* and held that the middle term in California's determinate sentencing law was the relevant statutory maximum for the purpose of applying *Blakely* and *Apprendi*. (*Cunningham*, at p. 868.) However, *Cunningham* reaffirmed the exception enunciated in *Almendarez-Torres v. United States*, *supra*, 523 U.S. 224 and affirmed in *Apprendi*: "[T]he 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. [Citations.]” (*Cunningham*, at p. 860, italics added; see also *Apprendi*, *supra*, 530 U.S. at pp. 488, 490.)³ The court explained California’s determinate sentencing law violates *Apprendi*’s bright-line rule: “Except 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.’ [Citation.]” (*Cunningham*, at p. 868.)

Defendant’s assertion that the sentence violates *Cunningham* is without merit. The rule of *Cunningham* does not apply to the use of prior convictions to increase the penalty for a crime. (*Cunningham*, *supra*, 127 S.Ct. at p. 868; see also *Apprendi*, *supra*, 530 U.S. at p. 490; *Blakely*, *supra*, 542 U.S. at p. 301.) The *Almendarez-Torres/Apprendi* exception is sufficiently broad to encompass all matters ascertainable from the face of the prior judgment of conviction. (*People v. McGee* (2006) 38 Cal.4th 682, 707-709; *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.) As the record of sentencing would show whether probation was granted and whether defendant was on probation or parole when the current offense was committed or whether defendant’s performance on probation or parole was unsatisfactory, we conclude that the exception extends to these facts as well. Defendant’s sentencing report shows that he has an extensive criminal history as well as a history of repeatedly violating probation and/or parole. It also shows that he had served numerous prior prison terms. As the probation officer aptly explained, “The defendant has six prior felony convictions and was granted probation after the first

³ In *Cunningham*, the defendant had no prior criminal history; the sentencing judge imposed the upper term in reliance on such factors as the particular vulnerability of the victim and the violence of the crime. (*Cunningham*, *supra*, 127 S.Ct. at pp. 860-861.)

conviction[;] however, that probation was revoked and he was sentenced to prison. In each of the remaining five felony convictions the defendant was also sentenced to prison. The defendant violated his parole in every case. He was finally discharged, the second time, from parole on March 25, 2002, a little over a month prior to committing this offense [possession of a firearm by a felon].” Hence, imposition of the upper term based on defendant’s criminal recidivism was proper.

It is settled that only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Earley* (2004) 122 Cal.App.4th 542, 550.) Here, the trial court relied on defendant’s prior convictions, prior prison terms, prior performance on probation and parole, and recidivism to impose the upper term, as permitted by *Cunningham* and *Blakely*. Even if we were to assume error under *Cunningham* based on the trial court’s reference to other aggravating factors, the error was harmless beyond a reasonable doubt (see *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705, 711]). (*Washington v. Recuenco* (2006) ___ U.S. ___, ___ [126 S.Ct. 2546, 2553] [“[f]ailure to submit a sentencing factor to the jury . . . is not structural error” and is subject to harmless error rule]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.)

The United States Constitution does not mandate a jury trial on prior convictions, and any right to a jury trial would be purely statutory. (*Apprendi, supra*, 530 U.S. at pp. 487-490; *People v. Epps* (2001) 25 Cal.4th 19, 23; see § 1025.) By statute in California, a defendant is afforded a jury trial only as to the fact of those prior convictions alleged in the accusatory pleading as statutory sentence enhancements. (§ 1025; *Epps*, at pp. 29-30.) Prior convictions considered as aggravating factors for the purpose of imposing the

upper term may be determined by the court upon facts shown in the probation report, as the trial court did here, and need be established only by a preponderance of the evidence. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(b).) Thus, as defendant was not entitled to a jury trial, *Blakely* and *Apprendi* have no application here. (See *Epps*, at p. 23; § 1025; see also *Cunningham, supra*, 127 S.Ct. at pp. 860, 868; *Apprendi*, at pp. 488, 490.)

III

DISPOSITION

The judgment is affirmed.

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RICHLI

J.

We concur:

RAMIREZ

P.J.

McKINSTER

J.