

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JERMAINE BROWN,

Defendant and Appellant.

In re JERMAINE BROWN,

on Habeas Corpus.

H025981

(Monterey County
Super. Ct. No. SS020847)

H026927

Defendant Jermaine Brown appeals from a judgment of conviction entered after a jury found him guilty of attempted murder (Pen. Code, § 664/187 – count 1),¹ robbery (§ 211 – count 2), and assault with a firearm (§ 245, subd. (a)(2) – count 4). As to counts 1 and 2, the jury also found true the allegations that defendant personally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c), and (d)) and caused great bodily injury (§ 12022.7). As to count 4, the jury found true the allegations that

¹ All further statutory references are to the Penal Code.

defendant personally used a firearm (§ 12022.5) and caused great bodily injury (§ 12022.7). In a bifurcated proceeding, the trial court found that defendant had suffered a prior strike conviction (§§ 1170.12, subs. (a)-(d), 667, subs. (b)-(i)). The trial court sentenced defendant to 59 years to life in state prison. On appeal, defendant contends: (1) trial counsel rendered ineffective assistance; (2) the trial court erred when it considered a juvenile adjudication as a prior felony conviction under the “Three Strikes” law; (3) the imposition of the upper term and consecutive sentences violated his rights to jury trial and due process; and (4) the trial court erred by imposing consecutive sentences in counts 1 and 2. In our original opinion, we held that the trial court erred in imposing the upper term. (*People v. Brown* (Jan. 10, 2005, H025981, H026927) [nonpub. opn.]) After the California Supreme Court transferred the case to this court for consideration in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), we affirmed the judgment. Following the United States Supreme Court’s remand to this court for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), we reverse and remand for resentencing.²

I. Statement of Facts

On February 2, 2002, Fernando Gomez Flores attended the Red Barn car auction with his friend Noel Cruz Lerna. Flores bought five vehicles including a van. While Flores was at the auction, defendant spoke to him. Flores, who recognized defendant from previous auctions, did not respond.

On February 2, 2002, James Burnett, an employee of the Red Barn auction, saw defendant and his companion Joshua Chioino at the auction. Defendant and Chioino were yelling at Flores, because Flores outbid Chioino several times. Flores did not argue with the two men.

² We also deny defendant’s petition for writ of habeas corpus, which has been considered with this appeal.

Flores left the auction in the van that he purchased, while Lerna and his relatives drove the other vehicles. Flores drove to the gas station across the highway from the Red Barn. Defendant and his companion were talking to two women, who were in a red convertible Mustang, at the gas station. Defendant approached Flores and offered him \$20 for a ride. After Flores refused, defendant returned to his companion and the two women.

Flores left the gas station. As Flores was driving on Highway 101, he noticed a white Cadillac that was following him. When the Cadillac pulled into the lane next to him, defendant, who was the front passenger, pointed a gun at Flores and gestured for him to pull over. Flores drove faster, but the Cadillac cut in front of him. Flores pulled over.

The driver of the Cadillac stood at the rear of his vehicle on the driver's side. Defendant entered the passenger side of Flores's van, pointed a gun at Flores's head, and demanded money. After Flores gave him change from his pockets, defendant said that he wanted more money and rifled through Flores's pockets. Defendant took Flores's wallet, which contained \$300, and documents relating to the vehicles that Flores had purchased. Defendant then exited the vehicle, pointed the gun 15 inches from Flores's head, and shot him in the face. Flores pretended to be dead and fell against the steering wheel.

After defendant and his companion drove away, Flores exited his van, stood on the side of the highway, and tried to get help. When no one stopped, he drove to Lerna's home, and was eventually taken to a hospital in King City. He was later taken by ambulance to a hospital in Salinas.

Dr. Robert Block performed surgery on Flores. He retrieved a .38 caliber bullet that had traveled through Flores's top lip, destroyed four teeth, went through his tongue, pierced his left tonsil, broke his jaw in several places, and stopped just short of his carotid artery.

Deputy Sheriff Mike Richards interviewed Flores at the hospital in King City while a nurse acted as a translator. Flores was in a lot of pain and had a difficult time communicating due to the injuries that he had suffered. At times he could not speak.

Deputy Sheriff Santiago Limas interviewed Flores on three occasions in February 2002.³ When Limas first interviewed Flores on February 5, 2002, Flores was in the intensive care unit, his mouth was wired, and he had a tube in his throat to assist him with breathing. Limas would ask Flores questions, and he would write his responses. Limas had to piece the story together from Flores's responses.

On February 8, 2002, Officer William Clark searched defendant's home at 700 Diaz Street in Sand City. Clark found an expended .38 caliber bullet in the master bedroom. Defendant claimed that he occasionally stayed at this residence with his girlfriend Michelle Collins and with his father at a different address. Clark had also instructed Officer Barry Pasquarosa to conduct a traffic stop of defendant and Joshua Chioino 10 days earlier.

On February 12, 2002, Limas took Flores to the Red Barn, and Flores retraced his steps from the night of the incident. Limas testified that he found dried blood on the ground where Flores stated that he had exited his van to seek help. Flores identified defendant as his assailant from a photo lineup, but he was not sure of his identification of the driver of the Cadillac from a second photo lineup.

Lauren Zephro, a forensic evidence technician, examined Flores's van. She positively identified a palm print belonging to defendant on the driver's side of Flores's van.

On February 13 and 14, 2002, defendant called Collins from the county jail. They discussed the search warrant executed on their residence and the items seized by the

³ Flores's prior inconsistent statements are summarized in the defense case portion of this statement of facts.

police. The search warrant listed the items that the police were authorized to seize from the residence, including firearms and ammunition. Defendant asked Collins which of his belongings were seized. Collins told him that the police had overlooked some items during their search. One of those items was an orange ticket that Collins burned.

Scott Armstrong, a criminalist, compared the bullet taken from Flores's face to the bullet found in defendant's residence. Armstrong testified that the bullets were the same make, model, caliber and had been expended from a revolver. According to Armstrong, it was "very likely" the bullets were fired from the same gun. He was reluctant to positively identify the bullets as having been "fired from the same gun to the exclusion of all other [guns] in the world without any doubt whatsoever."

Defense Case

Defendant called several witnesses to testify and extensively cross-examined Flores about his numerous prior inconsistent statements.

Richards interviewed Flores at the hospital in King City on February 2, 2002, shortly after he was shot. Flores told him that a large white sedan pulled in front of his van as he left the gas station. Two men exited their vehicle and approached his van. Flores described them as a tall black man and a tall white man with short brown hair. They robbed him of \$700, and shot him. When no one at the gas station would help him, he drove on Highway 101. His assailants followed him and drove in front of him for about seven minutes.

On February 5, 2002, Limas interviewed Flores while he was in the hospital. Flores told Limas that the two women in the Mustang left the gas station before his assailants arrived, that the robbery occurred at the gas station, that after the shooting occurred, he was unsuccessful in getting help from other motorists at the gas station, that when he left the gas station the Cadillac followed him, and that one of the suspects was white and the other was black.

On February 8, 2003, Limas again interviewed Flores. Flores told him that both suspects were black, that after the robbery he picked up some papers the robber had thrown on the ground, that the robber pushed the gun against his head, and that the robber was still inside the van when he fired his gun.

On February 12, 2002, Flores identified defendant as his assailant from a photo lineup. For the first time, Flores told Limas that the robbery did not occur at the gas station. Flores also told him that defendant was talking to two women at the gas station. Flores told Limas that he had been in the Mexican military police, that he was familiar with guns, and that he was certain that defendant had shot him with either a .22 or .25 caliber semiautomatic firearm. Flores did not tell Limas that defendant offered him \$20 for a ride to the gas station.

Eliseo Uribe, an investigator and interpreter with the public defender's office, testified that he speaks fluent Spanish and English, and that he interviewed Flores on September 5, 2002. Flores told Uribe that he did not have a disagreement with anyone at the auction, he did not speak to defendant at the auction, the suspects were at the gas station when Flores arrived, and defendant offered him \$20 for a ride. Flores also said that the robber took \$300 from him.

Clark described Joseph Horne as a black male, six feet tall, 180-185 pounds, and approximately 22 years old.

Mark Stewart operates the Red Barn car auction. Stewart identified Horne from a photograph and testified that Horne attended the car auctions. Horne bought a silver Mustang on February 2, 2002. Michelle Chioino, Joshua Chioino's sister, bought a white Cadillac at the same auction.

II. Discussion

A. Ineffective Assistance of Counsel

Defendant contends that he was deprived of his state and federal constitutional rights to the effective assistance of counsel, because trial counsel failed to file a motion to

suppress the .38 caliber bullet that was seized from defendant's residence. Defendant also argues that trial counsel should have filed a motion to unseal the police affidavit used to issue the search warrant to determine whether the search warrant was supported by probable cause, and whether the information provided by the confidential informant was reliable.

1. Procedural History

On September 16, 2002, defendant filed a motion to suppress the jewelry and a moped that were found in defendant's residence. On the same day he also filed a motion to suppress the .22 ammunition that was found in his vehicle. Defendant argued that the seizure of the moped and jewelry during the search of his residence were beyond the scope of the search warrant, and the seizure of the ammunition from his vehicle was the result of an unlawful detention. On October 4, 2002, the parties filed supplemental points and authorities regarding whether the search of the vehicle was an inventory search. That same day, the trial court heard evidence and took the motion under submission.

On October 7, 2002, the prosecutor brought a motion to admit evidence regarding the .38 bullet found at defendant's residence, because it was the same caliber as the bullet removed from Flores's neck. Trial counsel objected on the ground that the evidence was disclosed too close to the trial date. The trial court granted the motion and continued the trial at defendant's request. When the prosecutor stated that she would not seek to admit the .22 ammunition found in defendant's vehicle, trial counsel withdrew his motion to suppress this evidence. Trial counsel did not request additional time to file a motion to suppress the .38 bullet. Trial counsel also did not file a motion to unseal the police affidavit used to issue the search warrant.

On November 20, 2002, the trial court denied defendant's motions to suppress and specifically found that the .38 bullet was admissible since ammunition was named in the search warrant.

2. Legal Analysis

“A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel’s failings.” (*People v. Price* (1991) 1 Cal.4th 324, 440; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

“Where defense counsel’s failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excluded evidence in order to demonstrate actual prejudice.” (*People v. Wharton* (1991) 53 Cal.3d 522, 576, quoting *Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.)

Here defendant has failed to show that a motion to suppress the .38 bullet would have been meritorious. The search warrant included any firearm and ammunition, and thus a motion to suppress that specifically mentioned the .38 bullet would not have been successful. Defendant’s alternative argument that trial counsel should have filed a motion to unseal the police affidavit also has no merit. After independently reviewing the sealed affidavit used to issue the search warrant, we have found no information that would have served as the basis to challenge the search warrant on the grounds that the search warrant was not supported by probable cause, or that the information provided by the confidential informant was not reliable. Accordingly, we reject defendant’s claim of ineffective assistance.

B. Prior Juvenile Adjudication

Defendant next argues that the trial court erred by finding that his prior juvenile adjudication could be used as a “strike,” because he did not have the right to a jury trial in the juvenile proceeding.

Though defendant acknowledges that this court has rejected his argument in *People v. Lee* (2003) 111 Cal.App.4th 1310, he relies on the United States Supreme Court decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), which was applied to juvenile adjudications by the Ninth Circuit in *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187. He also relies on the dissent in *Lee*. (*People v. Lee, supra*, 111 Cal.App.4th at pp. 1319-1323.) After carefully considering the analysis in *Apprendi* and *Tighe*, this court concluded that there were sufficient procedural safeguards in juvenile adjudications to satisfy the concerns of the Supreme Court in *Apprendi*. (*People v. Lee, supra*, 111 Cal.App.4th at p. 1316.) Thus, we find no error.⁴

C. Rights to Jury Trial and Due Process

Relying on *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi, supra*, 530 U.S. 466, defendant contends that he had a constitutional right to a jury trial and proof beyond a reasonable doubt regarding the facts that the trial court used to impose the upper term and consecutive sentences.

In *Apprendi, supra*, 530 U.S. 466, the United States Supreme Court held: “Other than the fact of 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.” (*Id.* at p. 490.) In that case, the court focused on “the narrow issue”

⁴ Defendant also argues that he was deprived of his federal constitutional right to the effective assistance of counsel, because trial counsel did not object to the use of the juvenile adjudication as a “strike.” In light of our previous discussion, there is no merit to this argument, since it is not reasonably probable that the objection would have been sustained.

of whether the sentence for a single crime exceeded the statutory maximum. (*Id.* at p. 474.) The court further defined the statutory maximum in *Blakely*. It concluded “that the ‘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*. . . . In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Blakely, supra*, 542 U.S. at p. 303.)

In *Black, supra*, 35 Cal.4th 1238, the California Supreme Court considered the effect of *Blakely* on California’s determinate sentencing law. It held that “the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant’s Sixth Amendment right to a jury trial.” (*Id.* at p. 1244.)

Recently, the United States Supreme Court overruled *Black* in part in *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856]. The court held that California’s determinate sentencing law “violates a defendant’s right to trial by jury safeguarded by the Sixth and Fourteenth Amendments” to the extent that it allows a judge to impose an upper term sentence “based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (*Id.* at p. 860.) Thus, the trial court may impose the upper term only if the factors relied upon meet the requirements of *Apprendi and Blakely*. (See *id.* at p. 871.)

In imposing a prison term, the trial court shall impose the middle term unless there are circumstances in aggravation or mitigation of the crime. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(a) & (b).)⁵ Rules 4.421 and 4.423 list the possible circumstances in aggravation and mitigation. Any fact that is an element of the crime or the basis for a sentence enhancement cannot be used to justify imposition of the upper

⁵ All further references rules are to the California Rules of Court.

term. (§ 1170, subd. (b); rule 4.420(c) & (d).) However, the trial court may strike the enhancement and use it as a factor in aggravation.

Here the trial court relied on four factors, including that the crime involved great violence and great bodily harm, defendant used a weapon, the crime was carried out in a sophisticated or professional manner, and defendant's prior performance on probation or parole was unsatisfactory. Though the jury found that defendant used a weapon and caused great bodily injury when he robbed the victim, these facts were the bases for sentence enhancements, which were not stricken by the trial court, and thus could not be used to justify an upper term. The finding relating to the manner in which defendant carried out the crime was not submitted to a jury and proved beyond a reasonable doubt, and thus violated the *Apprendi/Blakely* rule.

However, the People argue that both *Blakely* and *Apprendi* recognized that *Almendarez-Torres v. United States* (1998) 523 U.S. 224 created an exception to the requirements of a jury finding of proof beyond a reasonable doubt, that is, that "the fact of a prior conviction" could serve as the basis for increasing the penalty without violating the defendant's rights to a jury trial or due process. (*Blakely, supra*, 542 U.S. at p. 296; *Apprendi, supra*, 530 U.S. at pp. 487-488, 490.) They claim that the trial court's finding regarding defendant's performance on probation is the equivalent of "the fact of a prior conviction." We disagree. First, defendant had no prior adult convictions. Second, even assuming that defendant's juvenile adjudications come within the prior conviction exception, here the trial court's finding related to defendant's performance on probation, not the fact of the prior conviction. Thus, this finding also ran afoul of the *Apprendi/Blakely* rule. Accordingly, we remand for further proceedings.

We next consider defendant's challenge to California's consecutive sentencing scheme. The *Black* court held that "a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences." (*Black, supra*, 35 Cal.4th at p. 1262, overruled on another ground in *Cunningham, supra*, 549 U.S. ____ [127 S.Ct. 856].) A

trial court makes the decision to impose consecutive sentences only after the defendant has been afforded the right to a jury trial and been found guilty beyond a reasonable doubt of two or more offenses. Thus, a defendant does not have a constitutional right to a jury trial and proof beyond a reasonable doubt regarding the facts that the trial court used to impose consecutive sentences.⁶

D. Imposition of Consecutive Sentences

Defendant also contends that the trial court erred by imposing consecutive sentences in counts 1 and 2. He asserts that the two crimes and their objectives were not predominately independent of each other.

The trial court stated that “the Court is going to be running sentence consecutively. And, for that purpose, the Court does find that the crimes and their objectives are predominantly independent of each other.” The trial court first imposed a determinate term on count 2 (second degree robbery) and a consecutive term for the personal use of a firearm enhancement. The trial court then sentenced defendant on count 1 (attempted murder) consecutive to count 2 and imposed a term for the personal use of a firearm enhancement consecutive to count 1. The trial court stayed the sentence imposed for count 4.

Rule 4.425 provides in relevant part that the “[c]riteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) . . . Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other.” “Even when violent crimes against the same victim on one occasion have separate motives, . . . consecutive sentencing is proper. (See, e.g., *People v. Nguyen* (1988) 204 Cal.App.3d 181.)” (*People v. Calderon* (1993)

⁶ Relying on *Crawford v. Washington* (2004) 541 U.S. 36, defendant contends that the trial court erred by relying on inadmissible hearsay in the probation report when it found factors in aggravation. A defendant’s failure to object or challenge the contents of the probation report waives any defects. (*People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 15.)

20 Cal.App.4th 82, 87.) The trial court is required to state only one criterion in aggravation in order to impose a consecutive sentence. (*People v. Davis* (1995) 10 Cal.4th 463, 552.) We will affirm the trial court's finding on this issue where it is supported by substantial evidence. (*People v. Galvan* (1986) 187 Cal.App.3d 1205, 1220.)

Here defendant and his companion forced the victim off the road. Defendant then entered Flores's vehicle, pointed a gun at him, and demanded money. After taking Flores's wallet, defendant exited the vehicle and shot him in the face. Since defendant had already obtained Flores's property and Flores was not resisting, the act of shooting him was not part of the robbery, but rather a gratuitous act of violence. Thus, there was substantial evidence to support the trial court's finding that the crimes and their objectives were predominantly independent of each other.

Defendant also argues that trial counsel rendered ineffective assistance when he failed to object to the sentence on the ground that it was contrary to rule 4.425. Since the trial court did not err, defendant's argument has no merit.

III. Disposition

The judgment is reversed and remanded for resentencing. The petition for writ of habeas corpus is denied.

Mihara, J.

I CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J., Dissenting and Concurring.

I respectfully dissent from that portion of the opinion that concludes, in reliance on *People v. Lee* (2003) 111 Cal.App.4th 1310, that a prior juvenile adjudication may constitutionally be used as a “strike” despite the fact that there is no right to a jury trial in juvenile proceedings. I continue to hold the view that this result runs counter to *Apprendi v. New Jersey* (2000) 530 U.S. 466, as the Ninth Circuit Court of Appeals found in *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187. I further adopt the reasoning set forth in the dissenting opinion of Justice Rushing in *People v. Lee, supra*, 111 Cal.App.4th 1310, 1319. See also the dissenting opinion of Justice Johnson in *People v. Smith* (2003) 110 Cal.App.4th 1072, 1082.

That said, I concur in the analysis and disposition of the other issues addressed by the majority concerning the claims of ineffective assistance of counsel and any other error in the imposition of sentence.

McAdams, J.