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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,
v.
LYSA CHANEY,
Defendant and Appellant.

A114559

(Alameda County
Super. Ct. No. S478405)

As part of an agreement to plead no contest to drug possession, defendant Lysa Chaney was placed on three years' probation conditioned, among other things, on completion of a residential drug treatment program. Three years later, following her arrest for robbery, the trial court revoked her probation after a contested hearing. The court sentenced her to serve the full three-year upper term for her original offense. On appeal, defendant contends that the trial court erred in imposing the upper term sentence for the underlying offense. We affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant pled no contest to a charge of illegal possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) in 2002. At that time, she was placed on probation and ordered into substance abuse treatment. Progress reports filed by the probation department indicate that defendant's performance in treatment was unsatisfactory. On August 9, 2004, her probation was extended 18 months, effective December 5, 2005.

On December 23, 2004, defendant waived herself out of "Prop 36" probation. The court found her to be in violation of probation, but restored it on the condition that she serve nine months in county jail.

On the afternoon of August 15, 2005, Ruth Williams was accosted and grabbed by defendant and another woman. The other woman reached behind towards where Williams' purse was. After Williams was released, she looked into her purse and found that her money was missing. Defendant and the other woman were arrested shortly thereafter. Williams was brought to the site of the detention and identified defendant as one of the suspects. Defendant was arrested.

A motion to revoke defendant's probation was filed on August 18, 2005. Williams and the arresting officer testified at the probation revocation hearing. Williams identified the defendant as one of the perpetrators.

Defendant failed to appear for the second day of the hearing. The court proceeded with the hearing in her absence, citing Penal Code section 1043.[1] The court revoked probation and issued a warrant for her arrest.

Defendant was subsequently arrested. On May 25, 2006, the court stated that it would not reinstate probation and imposed the aggravated prison term of three years. This appeal followed.

DISCUSSION

At defendant's sentencing hearing, the trial court noted that she had sustained convictions for robbery and assault with a deadly weapon in 1986, for which she had been sentenced to state prison. Before imposing the upper term, the court observed: "She hasn't been crime free since then. The crimes have been relatively minor, but basically I note that she's in a position where she was kind of lucky here, in that she didn't end up charged with a new case, that she ends up getting convicted for, because if she had, she was looking at a second strike conviction and a rather long prison sentence at 85 percent. The fact that she has previously been convicted of this felony ─ felonies for which she

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[1] All subsequent statutory references are to the Penal Code.

served a prior prison term, coupled with her significant criminal history since then leads me to conclude that the aggravating circumstances outweigh any mitigating circumstances. She's, therefore, sentenced to the upper term of three years."

Defendant's probation report indicates that she was sentenced to state prison in 1986 after being convicted of robbery (§ 211) and assault with a deadly weapon (§ 245). Subsequent to that conviction, she sustained a series of misdemeanor convictions before her arrest on the felony charge for which she was sentenced in this case.

Defendant claims that the imposition of the aggravated term was illegal under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) because it was based on facts neither found to be true beyond a reasonable doubt nor admitted by defendant. She also claims the court erred because it "relied upon facts that appellant suffered a prior conviction which would have subjected her to a doubled sentence under the 'three strikes' statute." Noting that prior convictions must be pled and proven beyond a reasonable doubt in strike cases, she contends that her prior convictions "were neither alleged nor proven."

***A. No Error Under* Blakely**

The Attorney General asserts that defendant's claim is waived because she did not make a *Blakely* objection to the imposition of the upper term at her sentencing hearing. We decline to find a waiver in this case. " 'Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.' [Citation.]" (*People v. Belmares* (2003) 106 Cal.App.4th 19, 27.)

Turning to the merits, we believe *Apprendi* and *Blakely* do not apply to the present case because those decisions do not pertain to the consideration of prior convictions and recidivist behavior as sentencing factors. Preliminarily, we note the Attorney General relies on *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) in arguing that defendant's claim is foreclosed. *Black* held that California's Determinate Sentencing Law (DSL) was exempt from *Blakely*. After the present case was briefed and submitted, however, the

United States Supreme Court reversed the *Black* decision in *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 U.S. __ [127 S.Ct. 856, 866] (*Cunningham*).

The facts of *Cunningham* involved a defendant who was tried and convicted of continuous sexual abuse of a child under the age of 14, which under the determinate sentencing law is punishable by imprisonment for a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. (§ 288.5, subd. (a).) At the sentencing hearing the trial court found by a preponderance of the evidence six aggravating circumstances, all related to commission of the offense—as the defendant had no prior record of criminal conduct—and on that basis imposed the upper term.

The high court held "[i]n accord with *Blakely* . . . the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, [citation], the DSL 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, supra,* 127 S.Ct. 856, 866, italics added.)

At issue in *Blakely* was whether determinate sentencing procedures in the state of Washington deprived the petitioner of his "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." (*Blakely, supra,* 542 U.S. 296, 301.) *Blakely* relied on the conclusion reached in prior decisions in *Apprendi* and *Ring v. Arizona* (2002) 536 U.S. 584, that a defendant's constitutional rights were violated when a judge "imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." (*Blakely, supra,* at p. 303.)

The aggravating factors that relate to defendant's prior convictions and other recidivist conduct, however, do not implicate the right to a jury trial under the current state of the law. In *Apprendi* the court specifically held, based on its prior decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, (*Almendarez-Torres*) that,

"*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." (*Apprendi, supra,* 530 U.S. 466, 487–490, italics added; see also *People v. Taylor* (2004) 118 Cal.App.4th 11, 28; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 831; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1314.) Thus, "*Apprendi* was absolutely clear in excepting the fact of prior convictions from its new rule." (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 154.)

"[C]ourts have construed *Apprendi* as requiring a jury trial except as to matters relating to 'recidivism.' Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' [Citations.] Appellate courts have held that *Apprendi* does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221–222 (*Thomas*); see also *People v. Belmares, supra,* 106 Cal.App.4th 19, 27–28.)

Thus, in *Thomas,* the court concluded that under *Apprendi* the defendant was not entitled to a jury trial on two prior prison term allegations. Following an analysis of *Apprendi* and its predecessor *Almendarez-Torres, supra,* 523 U.S. 224, 226, the court stated: "With the foregoing legal analysis in mind, we reach the following conclusions. In terms of recidivism findings that enhance a sentence and are unrelated to the elements of a crime, *Almendarez-Torres* is the controlling due process authority. *Almendarez-Torres* does not require full due process treatment of an issue of recidivism which enhances a sentence and is unrelated to an element of a crime. *Apprendi* did not overrule *Almendarez-Torres*. The language relied upon by defendant in *Apprendi,* '[o]ther than the fact of a prior conviction,' refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations." (*Thomas, supra,* 91 Cal.App.4th 212, 222–223; see also *People v. Taylor, supra,* 118 Cal.App.4th 11, 28–29.)

Nothing articulated in the *Blakely* opinion casts doubt upon the exclusion in *Apprendi* of prior conviction allegations from the constitutional right to jury trial, and we note the California Supreme Court has observed that "[t]he right, if any, to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution." (*People v. Epps* (2001) 25 Cal.4th 19, 23; *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Wiley* (1995) 9 Cal.4th 580, 585.)

We similarly conclude that the trial court in the case before us did not violate defendant's jury trial rights by finding aggravating circumstances based upon her recidivism. Defendant's prior convictions, previously found by the trier of fact or admitted by her, were established by review of court records and did not relate to commission of the current offense, so therefore were properly relied upon by the court to impose an upper term without affording defendant the right to a jury trial.

In her reply brief, defendant claims that the court committed error under *Blakely* and *Apprendi* because her " 'significant criminal history *since then*,' was not established true beyond a reasonable doubt." Defendant appears to argue that "then" refers to her 2002 conviction. However, a reasonable reading of the court's statement is that "then" refers to her 1986 conviction. As noted above, defendant's probation report lists several misdemeanor violations that occurred subsequent to her 1986 conviction but prior to her 2002 conviction.

Cunningham does not cast constitutional doubt upon the imposition of the upper term by the trial court in the present case. We therefore conclude that defendant was not denied her due process rights to a jury trial and finding of guilt beyond a reasonable doubt under *Blakely* by the trial court's imposition of the upper term in conjunction with the revocation of her probation.

B. Three Strikes Law Does Not Apply

Defendant also argues that prior convictions are strike enhancement allegations and must therefore be pled and proven beyond a reasonable doubt. However, this case does not implicate the three strikes law. This case concerns the decision to revoke probation pursuant to section 1203.2. This statute provides, in part: "Upon any

revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced." (§ 1203.2, subd. (c).)

Here, defendant was not tried for the robbery of Williams. She was not sentenced under the three strikes law, nor did she receive any sentencing enhancement based on the alleged robbery. Rather, the facts underlying that robbery were used by the prosecutor solely to argue for the revocation of her probation. The underlying offense in this case was not charged as a strike. And the alleged robbery of Williams was not charged at all. With respect to the alleged robbery, defendant herself correctly notes that "there was no conviction because appellant was not charged with new offenses." Accordingly, the law regarding three strikes has no bearing on this case.

Moreover, there is no requirement that prior convictions be proved beyond a reasonable doubt in the context of a hearing to revoke a defendant's probation: "Our trial courts are granted great discretion in determining whether to revoke probation. [Citation.] Such discretion 'implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice.' [Citation.] . . . [I]t would be anomalous to, on the one hand, grant trial courts broad discretion to revoke probation and, on the other, require fact-finding by a standard such as 'clear and convincing,' which requires evidence ' " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " ' [Citation.]" (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445.)

"In placing a criminal on probation, an act of clemency and grace [citation], the state takes a risk that the probationer may commit additional antisocial acts. Where probation fails as a rehabilitative device, as evidenced by the probationer's failure to abide by the probation conditions, the state has a great interest in being able to imprison the probationer without the burden of a new adversary criminal trial. [Citation.] Requiring proof of probation violations by a standard stricter than preponderance of the evidence would diminish the flexibility with which probation revocation may be employed by judges and could, in some instances, force our already overburdened trial

judges to give probationers virtually a second trial of their violations. [Citation.] This could result in poor-risk convicted criminals remaining at large [citation], and would further tax limited judicial resources by complicating and lengthening revocation proceedings." (*People v. Rodriguez, supra,* 51 Cal. 3d 437, 445–446.)

As to the trial court's reference to the potential for a strike based on the Williams robbery, we believe the court was merely noting that defendant could have suffered more serious consequences had she been charged and convicted of that robbery. The court did not need to rely on that factor for purposes of sentencing, as her prior convictions were a matter of record.

The judgment is affirmed.

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Swager, J.

We concur:

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Marchiano, P. J.

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Margulies, J.