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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANIEL S. COLORINA, Defendant and Appellant.	D048735 (Super. Ct. No. SCE255860)

APPEAL from a judgment of the Superior Court of San Diego County, Charles W. Ervin, Judge. Affirmed.

A jury convicted Daniel Steven Colorina of evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a); count 1) and of driving without a valid driver's license (Veh. Code, § 12500, subd. (a); count 2). Colorina subsequently admitted he had a prior prison conviction within the meaning of Penal Code[1] section 667.5, subdivision

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

(b). The trial court sentenced him to a total prison term of four years, consisting of the three-year upper term for the count 1 evading offense and one year for the prison prior enhancement, and imposed a sentence of credit for time served for the misdemeanor offense.

Colorina appeals, contending the trial court prejudicially erred when it failed to suppress all statements he made to a police officer after his arrest but before he was given his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Colorina also claims the court violated his constitutional rights to jury trial and due process by imposing an upper term sentence in violation of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

As to this second issue, the United States Supreme Court in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*) has recently determined that California's Determinate Sentencing Law (DSL), which permits a court to impose an upper term sentence based on aggravating facts not found true by a jury or beyond a reasonable doubt, is unconstitutional and violates the holdings in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely, supra*, 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220 (*Booker*). We thus asked the parties to submit supplemental letter briefs addressing whether Colorina had forfeited the *Blakely/Cunningham* issue, and if not, to address the effect of the holding in *Cunningham* on his upper term sentence. We affirm Colorina's convictions and sentence.

FACTUAL BACKGROUND

Because Colorina does not challenge the sufficiency of the evidence to support his convictions, we merely summarize the facts presented at trial as background for our discussion. At about 8:30 p.m. on September 1, 2005, California Highway Patrol Officer (CHP) Jonathan Neibert, on patrol on Interstate 8 near Campo and Boulevard, spotted a grey Mercedes with expired registration tags driving near the Golden Acorn Casino. When Neibert activated his patrol car's lights to stop the Mercedes, the driver slowed and moved to the shoulder of the road, but did not stop. Neibert then used his public address system to direct the driver to stop, but instead the driver merged back into the traffic lane and accelerated. Neibert turned on his siren and followed the Mercedes on the interstate and as it exited onto Ribbonwood, speeding past another car and a stop sign. At the intersection of Ribbonwood and Old Highway 80, the driver ran another stop sign and made a wide right turn onto Old Highway 80. Neibert followed the Mercedes for about five miles along Old Highway 80, and then back onto Interstate 8.

As the Mercedes accelerated on the freeway, Neibert pulled up slightly behind its left rear side in the next lane over and illuminated the interior of the car. Neibert believed the driver to be Hispanic or Asian, with dark hair, and saw that a woman was in the passenger seat. Although Neibert did not see the driver's full face, he saw his profile. When the driver of the Mercedes began driving erratically, Neibert backed away, but continued chasing after the car at up to 110 miles per hour until other CHP units deployed a spike strip across the freeway east of Kitchen Creek.

After the driver ran over the spike strip, he exited the freeway at Kitchen Creek, ran through another stop sign while traveling south, and at the intersection of Kitchen Creek and Old Highway 80, he failed to make the turn, going through the intersection and over an embankment. When Neibert came to a stop sign at the top of the embankment, he got out of his patrol car and illuminated the driver's side of the Mercedes which was about 15 feet below him. Neibert saw the driver, who appeared to be over six feet tall and wearing a black shirt, pants and hat, open the driver's door of the Mercedes, come out and turn briefly to face him before going through a barbed-wire fence and running through the brush. Although other officers and a Sheriff's helicopter helped search for the driver, they were unable to locate him that night.

At about 11:30 a.m. the next day, Neibert received a call from a state investigator to come to the U.S. Forestry Fire Station at Kitchen Creek, which was about a quarter of a mile from where the car had gone over the embankment, regarding a potential suspect. When Neibert arrived at the fire station, he recognized the man he saw driving the Mercedes sitting next to one of the walls of the station. When Neibert asked the man his name, he responded that it was "David Allen Cole." Because Neibert had been given contrary information, he told the man to "be honest" with him, but the man would not give Neibert his true name. Neibert was later able to confirm that the man's true name was Colorina and that his driver's license had expired. Although Colorina was then wearing U.S. Forestry green pants and a gray shirt, Neibert believed he was the driver of the Mercedes, saying he was "100 percent sure" of his identification.

The parties stipulated that Colorina had been under arrest at the time he was seated against the wall of the fire station and that he did not have a valid driver's license.

DISCUSSION

I

ALLEGED MIRANDA VIOLATION

In limine, the prosecutor advised the court that at the preliminary hearing, the judge had ruled that certain statements made by Colorina would be excluded as violative of *Miranda, supra,* 384 U.S. 436, and that he did not intend to mention those. The prosecutor noted, however, that there were also statements from Colorina before that point "when he misidentifies himself, and I don't believe . . . the court [ruled on those] or against those statements coming in . . . and I believe that those would come in as far as . . . giving the false information, consciousness of guilt." Defense counsel asked to have time to review the transcript of the preliminary hearing before the matter was addressed, explaining that the identification the prosecutor was talking about was when Colorina gave his name as "David Allen Cole."

Two days later, before jury selection, defense counsel argued that based upon a reading of the preliminary hearing transcript, the question, "[w]hat's your name?" asked Colorina by CHP Officer Neibert when Colorina was already under arrest but without *Miranda* advisements constituted custodial interrogation because identity of the driver was at issue and Neibert knew from an interview with the passenger of the Mercedes that the driver was a Filipino man named "Danny." Counsel asserted the booking exception

to *Miranda* for demographic information was inapplicable because Neibert was seeking to elicit information as to Colorina's identity which was inculpatory.

The prosecutor disagreed, noting that although Colorina had been arrested by a Sheriff's deputy, Neibert arrived at the fire station where Colorina was in custody before being transported to the Alpine substation where his parole agent later came to positively identify him so that Colorina's identity was not yet "set." Even though the female passenger had told Neibert that the driver in the high-speed chase the night before was named "Danny," Neibert independently recognized the man sitting at the fire station as the driver he had followed during the chase. At that point, Neibert asked the man what his name was to try to verify his identity for prebooking purposes so the police could start the process by running his report and record while he was being transported from the fire station to the Alpine substation where booking could then be completed.

Without stating any reasons, the court ruled that "the statement, [Colorina's] statement as to the name, what his name was, over defense counsel's objection" would be allowed in evidence.

On appeal, Colorina contends the trial court prejudicially erred in allowing his response to Neibert's question as to his name, arguing, as he did below, that the question was not a neutral booking question but rather a custodial interrogation intended to elicit incriminating evidence. We disagree. Having independently reviewed the undisputed underlying facts presented below for the motion in light of the controlling law (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402), we conclude the trial court properly ruled the response to Neibert's "[w]hat's your name?" question was admissible under the booking

exception to *Miranda*. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-602, 606-607 (conc. & dis. opn of Renquist, C.J.) (*Muniz*).)

The United States Supreme Court in *Muniz* held that questions during the booking process of a person who has been arrested which elicit the name, address, height, weight, eye color, date of birth and current age of the person fall within the "routine booking question" exception to the requirement for *Miranda* warnings and waivers. (*Muniz, supra*, 496 U.S. at pp. 600-602, 606-607 (conc. & dis. opn of Renquist, C.J.).) In other words, the right to remain silent generally does not apply to "questions seeking biographical information for booking purposes" (*Gladden v. Roach* (5th Cir. 1989) 864 F.2d 1196, 1198; cf., *People v. Powell* (1986) 178 Cal.App.3d 36, 40), and such "biographical data" derived from un-*Mirandized* routine booking queries is admissible evidence even if incriminating. (*Muniz, supra*, 496 U.S. at pp. 600-602, 606-607 (conc. & dis. opn of Renquist, C.J.); *People v. Hall* (1988) 199 Cal.App.3d 914, 921.) The court in *Muniz*, however, noted that the "booking exception" would not apply where there was proof the "question was designed to elicit incriminating admissions." (*Muniz, supra,* at p. 602, fn. 14.) The record here contains no such proof.

Contrary to Colorina's assertion that such proof is shown by Neibert's comments to him to tell the truth after he had given his response of a false name because Neibert had already learned from the passenger of the Mercedes that the driver's name was "Danny," such additional comments after the "biographical" question merely demonstrate that the officer was attempting to obtain the correct and full name of the person he had already

recognized as the driver, which is reasonably related to police administrative concerns. (*Muniz, supra*, 496 U.S. at pp. 601-602.)

Moreover, the record reflects that Colorina remained silent in the face of those additional comments and that Neibert only subsequently learned from another source that the man in custody was really named "Daniel Colorina." To the extent Colorina suggests Neibert's comments were improper statements or commentary on his postarrest silence in response to being confronted with the giving of a false name, no objection was made below regarding them. Nor could his counsel be faulted for not so objecting because questions or commentary regarding a defendant's postarrest silence where *Miranda* warnings have not yet been given do not violate federal law. (See *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1841-1842.)

Therefore, based on the totality of the record, we conclude the trial court properly ruled Colorina's response to Neibert's "biographical" question while Colorina was under arrest and awaiting transportation for booking did not violate *Miranda*, the Sixth Amendment or due process.

II

BLAKELY/CUNNINGHAM

In imposing an upper term for Colorina's count 1 conviction of evading an officer with reckless driving, the trial judge stated:

> "In looking at those possible circumstances in aggravation and those in mitigation, I note that the probation report . . . accurately identifies those circumstances in aggravation. [H]is prior convictions as an adult and sustained petition[s] in juvenile delinquency proceedings are numerous and many. [H]e has served a

> prior federal prison term. [H]is performance on parole is unsatisfactory. He was on parole when the crime was committed. [H]is prior performance on probation and parole [was] unsatisfactory because he failed to remain law abiding. Not only that but he was a parolee at large at the time this event occurred. [H]is girlfriend was a passenger in the vehicle at the time of this pursuit, at one point of time. . . reaching 110 miles per hour. [¶] I cannot find or I cannot see that there exists any possible circumstances in mitigation."

On appeal, Colorina contended that the trial court's imposition of an upper term based on facts not found true by the jury violated his federal constitutional rights to proof beyond a reasonable doubt, a jury trial, and due process under *Blakely, supra*, 542 U.S. 296 and *Apprendi, supra*, 530 U.S. 466, even though he recognized we were bound to follow our Supreme Court's holding in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) that *Blakely* did not invalidate the California DSL sentencing scheme as to the choice of an upper term. (*Id*. at p. 1244.) He further argued that the issue was not waived even though his counsel did not object below based on *Blakely*, because such objection would have been futile after the decision in *Black*. Alternatively, Colorina claimed that if this court found the issue was forfeited, he was denied effective assistance of counsel for the failure of his counsel to preserve the issue when the law was unsettled by the United States Supreme Court having granted certiorari in *Cunningham*.

While Colorina's appeal was pending, the high court issued its decision in *Cunningham*, which overruled *Black, supra*, 35 Cal.4th 1238, and struck down the DSL on precisely the grounds urged by Colorina in this appeal. (*Cunningham*, *supra*, 127 S.Ct. 856.) As that court stated, "Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not

the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra*, 127 S.Ct. at p. 871, fn. omitted.) In so holding, the high court again reaffirmed *Apprendi's* bright-line rule, that had been reiterated in both *Blakely, supra*, 542 U.S. 296 and *Booker, supra*, 543 U.S. 220, that "[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.' [Citation.]" (*Cunningham, supra*, at p. 868.)

As noted earlier, we requested supplemental briefing regarding the effect of *Cunningham, supra,* 127 S.Ct. 856, on the upper term imposed in this case and whether the issue in the first instance had been waived. In his supplemental brief, Colorina reiterates his arguments regarding waiver and ineffective assistance of counsel, as well as asserting he suffered prejudice by the court's imposition of the aggravated term under the *Chapman v. California* (1967) 386 U.S. 18 harmless error test which applies when the court fails to submit a sentencing factor to the jury. (*Washington v. Recuenco* (2006) ___ U.S. ___, 126 S.Ct. 2546, 2549.)

Although conceding that *Cunningham, supra,* 127 S.Ct. 856, generally precludes a trial court from finding facts to impose an upper term sentence and that the middle-term is the statutory maximum for a valid sentence in California in the absence of jury-found aggravating facts., the People contend Colorina forfeited his *Cunningham/Blakely* claim because he failed to object under *Apprendi, Blakely* or the right to a jury trial at the time

he was sentenced on May 9, 2006, long after *Blakely* had been decided. The People assert that even if the issue is reached, there was no *Cunningham* violation in this case because of the recidivism exception under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*).

We agree with the People that Colorina has forfeited his *Cunningham/Blakely* issue on appeal. *Blakely, supra*, 542 U.S. 296, was filed on June 24, 2004, almost two years before Colorina's sentencing, which occurred about three months after *Cunningham* had been granted certiorari. (*People v. Cunningham* (2005, A103501) [nonpub. opn.], cert. granted sub nom. *Cunningham v. California* (Feb. 21, 2006, No. 05-6551) ___U.S. ___ [2006 U.S. Lexis 1136].) Colorina's counsel did not object on *Blakely* grounds at sentencing. Generally, issues not raised in the trial court are waived on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 590 & fn. 6; *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.)

Nor do we believe Colorina can show that his counsel was ineffective for failing to object on *Blakely* grounds in this case. Essentially, each of the factors the court used to impose the upper term, except for the fact that Colorina's girlfriend was a passenger in the Mercedes, concerned recidivist factors, several of which Colorina had admitted throughout his trial. Specifically, Colorina conceded he was currently on parole for the prior conviction for auto theft which he admitted he had served a prior prison term under section 667.5, subdivision (b). He also conceded that at the time of the criminal conduct in this case he was "in absconder status," or a "parolee at large," and had been returned to prison, released and returned to parole supervision shortly before trial. Under these

circumstances, regardless of whether the "*Almendarez-Torres* exception" will be more narrowly construed in California after the decision in *Cunningham, supra*, 127 S.Ct. 856, because Colorina admitted several of the factors the court used to impose the upper term and a single aggravating circumstance is sufficient for imposing such a term (*People v. Osband* (1996) 13 Cal.4th 622, 728-729), it would have been futile for counsel to have objected under *Blakely, supra*, 542 U.S. 296. No prejudicial *Cunningham/Blakely* error is shown.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

I CONCUR:

NARES, J.

Aaron, J., Concurring and Dissenting

I agree with the majority that the trial court did not err in denying Colorina's motion to suppress Colorina's pre-*Miranda*[1] statements. However, I disagree with the majority's conclusion that Colorina has forfeited his right to challenge on appeal the trial court's imposition of an upper term sentence.

The essence of an allegation of *Blakely*[2] error is that the defendant was deprived of his constitutional right to a jury trial on the factors on which the trial court relied in imposing an upper term sentence. A defendant is not precluded from asserting on appeal that he was denied his constitutional right to a jury trial, despite a failure to raise the issue in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5; see also Cal. Const. art. I, § 16; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [waiver of the right to a jury trial must be expressed].) While a claim of *Blakely* error involves a claim of only a partial deprivation of the right to a jury trial, I see no reasonable basis for distinguishing the right to a jury trial on aggravating factors from the right to a jury trial in general, for purposes of forfeiture. I would conclude that Colorina's challenge to his upper term sentences is cognizable on appeal despite his failure to raise the issue in the trial court.

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1 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

2 *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

Further, prior to Colorina's sentencing, the California Supreme Court concluded in *People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261 (*Black*) that the imposition of an upper term sentence under California law was constitutional. In light of *Black*, any objection Colorina might have made at sentencing based on *Blakely*, *Apprendi*, or the United States Constitution would have been futile, even in view of the fact that the United States Supreme Court granted certiorari in *Cunningham* prior to Colorina's sentencing.

I would remand the case for resentencing. The majority is correct that Colorina admitted several aggravating factors at trial. However, most of the factors the trial court mentioned as constituting circumstances in aggravation were neither found true by the jury nor admitted by Colorina. While the trial court did observe that it did not find any circumstances in mitigation, it is possible that if the court had not relied on impermissible factors in imposing the upper term, the court might have sentenced Colorina to the midterm. For this reason, I believe the trial court should be provided the opportunity to reconsider the sentence in this case.

AARON, J.