Filed 2/21/07 P. v. Crouch CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIK JAMES RICHARD CROUCH, Defendant and Appellant.	A113345 (Marin County Super. Ct. No. SC130399A)

INTRODUCTION

Erik James Richard Crouch appeals from the judgment of the Marin County Superior Court revoking his probation and imposing an aggravated prison sentence upon finding that he had violated the terms of his probation for corporal injury on a spouse. (Pen. Code, § 273.5, subd. (a).) We affirm.

PROCEDURAL BACKGROUND[1]

On August 8, 2003, appellant pleaded guilty to one count of corporal injury on a spouse/cohabitant (Pen. Code, § 273.5, subd. (a).) The court placed appellant on probation for five years on the condition that he serve one year in county jail.

On October 26, 2005, a petition to revoke probation was filed, alleging that appellant had assaulted the same victim on August 14, 2005. On March 3, 2006, over appellant's objection under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), the

court refused to reinstate probation and sentenced appellant to the aggravated term of four years in state prison, citing his substantial criminal history as the primary reason for the sentence.

DISCUSSION

Appellant contends that imposition of the upper term violates his federal constitutional rights to due process and a jury trial as recognized in *Blakely, supra,* 542 U.S. 296.) He argues the trial court violated *Blakely* and committed constitutional error by imposing the upper term based on an aggravating factor that was not supported by jury findings or admitted by him.

A. *The law*

The controlling principle was announced by the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), which states: "*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 *Blakely, supra,* 542 U.S. 296, the Supreme Court held that a Washington State court violated the *Apprendi* rule and denied a criminal defendant his constitutional right to a jury trial by increasing that defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with " 'deliberate cruelty.' " (*Blakely, supra,* 542 U.S. at pp. 303-304.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the " '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." (*Ibid*.)

Blakely raised concerns about the constitutionality of California's Determinate Sentencing Law (DSL). Under our DSL, the maximum sentence a judge may impose for

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1 It is unnecessary to relate the facts underlying the original conviction and the probation revocation, in order to address appellant's claim on appeal. Both involved

a conviction without making any additional findings is the middle term. Penal Code section 1170, subdivision (b), states that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Furthermore, California Rules of Court, rule 4.420(b), states that "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." If, pursuant to *Blakely*, the statutory maximum sentence under California's DSL is the middle term, then an upper term sentence based on aggravating circumstances, other than the fact of a prior conviction, that are found by the trial court rather than by a jury would violate the *Apprendi* rule.

The California Supreme Court attempted to resolve the constitutional issue in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). The *Black* court 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.) The court reasoned that, under California's sentencing system, "the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and [*United States v.*] *Booker* [(2005) 543 U.S 220 (*Booker*)]." (*Black*, at p. 1254.)

However, the United States Supreme Court recently found that California's DSL does violate the constitutional principle embodied in the *Apprendi* rule. (*Cunningham v. California* (2007) __U.S.__ [127 S.Ct. 856, 2007 U.S. LEXIS 1324] (*Cunningham*).) *Cunningham* held that the DSL, "by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (2007 U.S. LEXIS 1324 at p. 11.) The court reasoned that, under the DSL, the middle term—not the upper term—is the relevant statutory maximum because (1) an upper term sentence can be imposed only if the judge finds aggravating

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domestic violence against the same victim.

circumstances, and (2) aggravating circumstances "depend on facts found discretely and solely by the judge." (*Id.* at p. 35.) Furthermore, the court found, "[b]ecause 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, . . . 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.]" (*Id*. at pp. 35-36.)[2]

B. ***Application***

In the present case, appellant's counsel argued that mitigating and aggravating factors were balanced and also objected to the upper term based on *Blakely.* Immediately thereafter, the court revoked appellant's probation and sentenced him to the aggravated term, stating: "[A]ll of the factors in aggravation and mitigation considered, the Court finds that the upper term is the appropriate term particularly in view of your substantial history preceding the charge for which you have been convicted in this case of violent offenses. That's the biggest factor and most important factor." Clearly the court was referring to appellant's history of prior convictions.

Although stating generally that it had considered the aggravating and mitigating factors, the court relied upon appellant's "substantial history" of violent offenses preceding the charge as the preeminent factor warranting the aggravated term. Indeed, it was the only factor expressly relied upon by the court. Appellant argues that he did not admit that he had a " 'substantial history' " and that there was "no documentation of appellant's 'substantial history.' " We disagree that there was no documentation

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[2] The *Cunningham* court expressly disagreed with the California Supreme Court's decision in *Black, supra*, 35 Cal.4th 1238, stating that "[c]ontrary 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*, 2007 U.S. LEXIS 1342 at p. 44.)

supporting the court's finding. The probation report prepared before appellant's 2003 sentencing hearing, which was part of the record in this action revoking probation, detailed appellant's previous convictions, including: two prior convictions for assault with a deadly weapon or by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), as well as convictions for battery (Pen. Code, §§ 242, 243, subd. (a)), driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)), petty theft (Pen. Code, § 488), disorderly conduct (Pen. Code, § 647, subd. (f)), and fighting in public (Pen. Code, § 415, subd. (1)). The 2006 probation violation report prepared in connection with the instant probation revocation petition also relates: "The defendant has had three reported incidents of violence against the victim while on this grant of Probation and is on misdemeanor Probation in Contra Costa County for domestic violence against the same victim." At no time during the sentencing hearing did appellant or counsel indicate there were any inaccuracies in these reports, which in any event, were objectively verifiable.

The requirement that a fact that increases a sentence beyond the statutory maximum must be found by a jury does not apply to the fact of a prior conviction. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi, supra*, 530 U.S. at pp. 488, 490; *Blakely*, *supra*, 542 U.S. at p. 301; *Cunningham*, *supra*, 2007 U.S. LEXIS 1324 at pp. 35-36.) This prior conviction exception to the *Apprendi* rule has been construed broadly to apply not just to the fact of the prior conviction, but to other issues relating to the defendant's recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.) However, the law in this area is not settled; extrinsic facts relating to a recidivist aggravating circumstance may well implicate *Apprendi*.

In our view, the factor relied upon by the court to impose the upper term clearly fell within the prior conviction exception to the *Apprendi* rule.[3] Further, the prior

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[3] The same could be said for the defendant's status as a probationer, a fact that can also be established by a review of the court record relating to the prior offense. However, the trial court did not specifically rely on this factor in imposing the upper term and therefore we do not rely upon it.

conviction aggravating factor did not in any way " 'relate to the commission of the offense, but goes to the punishment only . . . .' " (*Almendarez-Torrez v. United States, supra,* 523 U.S. at p. 244, italics omitted.) Therefore, this factor did not need to be supported by jury findings.

Accordingly, we conclude that imposition of the aggravated term in this case did not violate appellant's federal constitutional right to a jury trial under the Sixth Amendment or his right to due process under the Fourteenth Amendment as explicated in *Blakely, supra,* 542 U.S. 296 and *Cunningham, supra,* 2007 U.S. LEXIS 1324.

DISPOSITION

The judgment is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Richman, J.