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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID BORGES DENIZ,

Defendant and Appellant.

F048787

(Super. Ct. Nos. 02CM2644 &
02CM2642)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Peter M. Schultz, Judge.

Julia L. Bancroft, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Hill, J., and Kane, J.

On September 3, 2002, in case No. 02CM2644 appellant, David Borges Deniz, pled no contest to possession of methamphetamine (Count 1/Health & Saf. Code, § 11377, subd. (a)) and admitted an on-bail enhancement (Pen. Code, § 12022.1). In case No. 02CM2642, Deniz pled guilty to transportation of methamphetamine for personal use (Health & Saf. Code, § 11379). On October 2, 2002, the court placed Deniz on Proposition 36 probation. Following a contested hearing, on June 8, 2005, the court found that Deniz violated his probation in both cases by possessing methamphetamine for sale on February 1, 2005.

On July 7, 2005, the court sentenced Deniz to an aggregate term of six years eight months. On appeal, Deniz contends 1) the court committed *Blakely*¹ error; and 2) the evidence is insufficient to support the court's true findings with respect to the convictions underlying the two aggravating circumstances the court found true. We will affirm.

FACTS

On April 22, 2002, a Kings County Sheriff's deputy conducting a traffic stop searched Deniz and found 5.23 grams of methamphetamine in Deniz's pocket (case No. 02CM2642).

On May 14, 2002, a deputy stopped Deniz after receiving a complaint from a juvenile that Deniz was bothering her. After arresting Deniz, the officer searched his car and found a piece of aluminum foil containing .63 grams of methamphetamine (case No. 02CM2644).

On February 1, 2005, a warrant search of Deniz's residence uncovered 364.3 grams of methamphetamine, 284.2 grams of marijuana, and \$1,326.38.

Deniz's probation report indicated that he had a lengthy record dating back to 1976 which included serving one prison term. Deniz also had two felony probation

¹ *Blakely v. Washington* (2004) 542 U.S. 296.

violations and one parole violation and he committed several of his offenses while on misdemeanor probation. The report cited the following as aggravating circumstances: (1) Deniz's convictions and juveniles adjudications were numerous and of increasing seriousness (California Rules of Court, rule 4.421, (b)(2)),² (2) he had served a prior prison term (rule 4.421, (b)(3)), and (3) his prior performance on probation or parole was unsatisfactory (rule 4.421, (b)(5)). The report also cited Deniz's voluntary acknowledgement of guilt at an early stage of the criminal process as a mitigating circumstance (rule 4.423(b)(3)).

On July 7, 2005, the court found that the circumstances in aggravation outweighed the mitigating circumstances and sentenced Deniz to an aggregate term of six years eight months as follows: the aggravated term of four years on his transportation conviction in case No. 02CM2642, a consecutive eight month term on his possession conviction in case No. 02CM2644 and a two year on bail enhancement.

In imposing the aggravated term on Deniz's transportation conviction, the court stated:

“[T]he Court has considered the aggravating and the mitigating circumstances which are present and it appears that the aggravating circumstances and Mr. Deniz'[s] prior unsatisfactory performance on probation, and his having served a prior prison term for which no enhancement has been pursued, outweigh the mitigating circumstances.”

DISCUSSION

The Blakely Issue

Relying on *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), Deniz now contends the trial court violated his Sixth Amendment right to trial by jury by imposing the upper term based on factors not admitted by Deniz or found by the jury to be true beyond a reasonable doubt.

² All further rule references are to the California Rules of Court.

Prior to Deniz's sentencing, the California Supreme Court undertook an extensive analysis of these cases (and *United States v. Booker* (2005) 543 U.S. 220) and concluded that the imposition of an upper term sentence, as provided under California law, was constitutional. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261 (*Black*).) Recently, however, the United States Supreme Court overruled *Black* in part and held that 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.'" (*Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856]) (*Cunningham*).) The middle term prescribed under California law, not the upper term, is the relevant statutory maximum. (*Ibid.*)

Consistent with *Cunningham*, the sentencing court imposed the upper term based upon the fact of defendant's prior convictions, among other circumstances in aggravation. Under well-established California law, only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Here, the sentencing court properly considered defendant's 10 prior misdemeanor and 2 prior felony convictions. Assuming the court's consideration of the other factors was error under *Cunningham*, the error was harmless under either *Chapman v. California* (1967) 386 U.S. 18, 24 (harmless beyond a reasonable doubt) or *People v. Watson* (1956) 46 Cal.2d 818, 836 (reasonable probability error did not impact the outcome.)

The Sufficiency of the Evidence Issue

Citing *Shepard v. United States* (2005) 544 U.S. 13, Deniz contends that the information in the probation report and the summary of his criminal record contained therein are insufficient to support the court's true findings with respect to the prior convictions underlying the aggravating circumstances it found true. Deniz is wrong.

In *People v. Arbuckle* (1978) 22 Cal.3d 749, the California Supreme Court stated,

the “In *Williams v. New York* (1949) 337 U.S. 241, 251 [93 L.Ed. 1337, 1344, . . .], the United States Supreme Court concluded that the federal due process clause does not extend the same evidentiary protections at sentencing proceedings as exist at the trial. A sentencing judge ‘may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or “out-of-court” information relative to the circumstances of the crime and to the convicted person’s life and characteristics.’ [Citation.]

“More directly, several courts have held the Sixth Amendment right of confrontation inapplicable at the sentencing stage of a criminal prosecution. [Citations.]

“We have previously examined due process protection in the context of probation and sentencing hearings. ‘While *Williams (v. New York)* does not require the same procedural safeguards at probation hearings as in the case of a trial on the issue of guilt, an applicant for probation is nevertheless entitled to relief on due process grounds if the hearing procedures are *fundamentally unfair*.’ [Citation.] Reliability of the information considered by the court is the key issue in determining fundamental fairness.” (*Id.* at pp. 754-755; italics added.)

Further, in *People v. Black, supra*, 35 Cal.4th 1238, the court stated,

“Under the determinate sentencing law, the court may rely on aggravating facts that have not been found true by the jury. The facts relevant to the choice of term are to be determined by the court, *which ‘may consider the record in the case, the probation officer’s report, other reports including reports received pursuant to [Penal Code] Section 1203.3 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing.’* [Citation.]” (*Id.* at p. 1248, italics added.)

It is clear from the above authorities that the court may properly consider the information included in defendant’s probation report and that the information it contains can be sufficient to sustain a court’s finding with respect to prior convictions underlying aggravating circumstances.

Shepard v. United States, supra, 544 U.S.13, does not require a contrary conclusion. In *Shepard*, the United States Supreme Court had to decide whether the defendant's Massachusetts's burglary convictions qualified as violent felonies within the meaning of the Armed Career Criminal Act (ACCA), which would have raised the defendant's sentencing range from between 30 to 37 months to a minimum of 15 years to life. Under Massachusetts's law, burglary included the unlawful entry into a boat or car. However, in *Taylor v. United States* (1990) 495 U.S. 575, the Supreme Court held that only "generic burglary," i.e., an "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime" qualified as a "violent felony" under the ACCA. (*Id.* at pp. 599, 602.) In *Shepard*, the United States Supreme Court held that in determining whether the defendant's Massachusetts's burglary convictions, which the defendant had pled to, qualified as violent felonies under the ACCA, the trial court was limited to considering the terms of the charging documents, the terms of a plea agreement, a transcript of the colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information. (*Shepard v. United States, supra*, 544 U.S. 13, at p. 26.)

Shepard is easily distinguishable because the issues there involved a determination of the nature of the defendant's four Massachusetts's burglary convictions in order to determine whether they qualified as convictions for violent felonies under the ACCA. Here, the court's finding of two aggravating circumstances did not involve a determination of the nature of the prior convictions underlying these circumstances. Instead, with respect to these prior convictions it simply involved a determination whether Deniz suffered these convictions. Further, under the cases cited above, the court could properly consider the information in the probation report in making this determination and this information is constitutionally sufficient to sustain the court's findings in this regard. Accordingly, we reject Deniz's contention that the evidence is

insufficient to sustain the court's finding that he suffered the two prior convictions underlying the two aggravating circumstances it found true.

DISPOSITION

The judgment is affirmed.