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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KENNETH WAYNE EAGLES, Defendant and Appellant.	F050174 (Super. Ct. No. BF106770A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. James M. Stuart, Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell and Stan Cross, Assistant Attorneys General, and Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Gomes, J., and Kane, J.

In July 2004, appellant Kenneth Eagles was charged with four counts of unlawful sexual intercourse with a minor (Pen. Code, § 261.5;[1] counts 1-4) and one count of willfully failing to register as a sex offender (§ 290, subd. (g)(2); count 5). In December 2004, pursuant to a plea agreement, the four counts of violating section 261.5 were dismissed and appellant pled no contest to the count 5 offense. In January 2005, the court suspended imposition of sentence and placed appellant on three years' probation. The conditions of probation included that appellant serve one year in county jail and have no contact with Loretta T., the minor alleged to be the victim in the dismissed counts.

In March 2006, following a probation revocation hearing, the court found appellant violated the latter condition of probation. In April 2006, the court imposed the three-year upper term on the count 5 offense and awarded appellant 420 days of presentence credit.

On appeal, appellant contends he was denied his rights to trial by jury and due process of law under the United States Constitution because the court imposed the upper term on count 5 based on circumstances in aggravation that were not found by a jury beyond a reasonable doubt. We will vacate the sentence and direct the court to proceed as set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's Criminal History

The report of the probation officer indicates the following. In 1971, when appellant was 18 years old, he was convicted in New Mexico of sale of marijuana. He was placed on, and successfully completed, five years' probation. In 1996, he was convicted of incest (§ 285) and was sentenced to a three-year prison term. Between April

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

1998, when he was first paroled, and April 2002, when he was discharged, he violated his parole on four occasions.

Sentencing

At the April 2006 sentencing hearing, the court found as circumstances in mitigation that in the 1971 case appellant successfully completed probation and in the instant case he had entered his plea at an early stage in the proceedings. As circumstances in aggravation, the court found that appellant "took advantage of a position of trust"; his "prior conviction as an adult is significant"; he had served a prison term for a prior conviction; and his performance on parole had been unsatisfactory. The court further found that the circumstances in aggravation outweighed those in mitigation, and on that basis imposed the upper term.

DISCUSSION

Appellant argues that because the aggravating factors were not found by a jury beyond a reasonable doubt, the imposition of the upper term violated his constitutional rights to trial by jury and due process of law. He bases this contention on *Blakely v. Washington* (2004) 542 U.S. 295 [124 S.Ct. 2531] (*Blakely*). In that case, the 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. 301.)

The People, relying on *People v. Black* (2005) 35 Cal.4th 1238, contend the imposition of the upper term was constitutional. In *Black*, the California Supreme Court held that the imposition of upper terms under California law does not constitute an increase in the penalty for a crime beyond the statutory maximum, and therefore "the judicial fact finding that occurs when a judge exercises discretion to impose an upper term sentence . . . does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.)

However, very recently, and after briefing was completed in the instant case, the United States Supreme Court, in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*) found that *Black* was wrongly decided. The high court held: "Under California's DSL [determinate sentencing law], an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. [Citation.] [A]ggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, . . . the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] ('[T]he "statutory maximum" . . . 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*.' (emphasis in original)). 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 [the] . . . bright-line rule [announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348]]: 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. at p. 868.)

Here, the trial court based its imposition of the upper term on at least one aggravating factor that did not come within the prior conviction exception, viz., that appellant took advantage of a position of trust, presumably in committing acts underlying the dismissed charges.[2] Because this factor was found by the judge, who was

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[2] It is clear that the court's finding as a circumstance in aggravation that appellant had suffered a conviction of incest in 1996 did not run afoul of *Cunningham* and *Blakely*. However, neither of the two remaining aggravating factors, viz., appellant's prior prison term and his unsatisfactory performance on parole, are, precisely speaking " 'the fact of a prior conviction . . . .' " (*Blakely*, *supra*, 542 U.S. at p. 301.) We nonetheless assume without deciding that these two factors also fall within the prior conviction exception.

obligated to apply only a preponderance-of-the-evidence standard, and was not found true beyond a reasonable doubt by a jury, reliance on this factor was error under *Cunningham*.

Respondent also argues that because appellant did not challenge the imposition of the upper term below, his claim of constitutional error is not cognizable on appeal. We disagree.

At the time of appellant's sentencing, the trial court was bound by *Black*, which had been decided some 10 months prior. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, the constitutional objection appellant raises on appeal would have been futile under controlling precedent. Therefore, that claim is properly before us on this appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].)[3]

This is not, however, the end of our analysis. A single factor in aggravation suffices to support imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Thus, because the court based the imposition of the upper term on at least one recidivist factor, i.e., a factor that came within the prior conviction exception, we cannot say for certain on this record that the same term may not be imposed anew, consistent with *Cunningham*. However, because the court found two mitigating factors and at least one nonrecidivist factor, i.e., a factor upon which, under *Cunningham*, it could not rely,

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3 In light of this conclusion, we need not consider appellant's argument that his constitutional right to a jury trial cannot be waived by implication or mere failure to assert the right in the trial court. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5.)

we likewise cannot say with any confidence that the court would have imposed the upper term had it been aware it could not rely on nonrecidivist factors.[4]

"An appellate court is not restricted to the remedies of affirming or reversing a judgment. Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the need for a retrial. [Citations.]' [Citation.]" (*People v. Edwards* (1985) 39 Cal.3rd 107, 118.)

An analogous situation exists here. Accordingly, the judgment of sentence is vacated, with directions as follows: If the People do not bring the matter before the trial court for a contested resentencing hearing within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a sentence of the middle term of two years and shall so modify the abstract of judgment. The People shall in writing notify the trial court and appellant's trial counsel of their intentions in this regard within 30 days after the filing of the remittitur. Should the People state an intention to not contest the modification to the middle term or fail to timely notify the trial court and unless the trial court on its own

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4 The People argue that neither of the mitigating factors found by the court "should be considered persuasive when determining appellant's sentence." First, the People argue that appellant's successful completion of probation "should not be considered a mitigating factor" because (1) it occurred more than 30 years ago and (2) appellant "has continued to violate the law" and therefore that probation, although completed, "was not . . . successful . . . ." The People also argue that the fact that appellant pled no contest at an early stage of the proceedings "should be discounted" because "[f]or his plea, appellant received the benefit of having four felony charges for engaging in unlawful sexual intercourse with a minor dismissed."

However, appellant's post-1971 criminal conduct does not render his successful completion of probation invalid as a circumstance in mitigation. And even if, as appellant suggests, an early admission of guilt cannot, as a matter of law, be considered a circumstance in mitigation when a defendant admits guilt in exchange for the dismissal of other charges, one valid mitigating factor remains.

decides to set a resentencing hearing, the trial court shall promptly modify the abstract of judgment as provided herein.

DISPOSITION

The judgment of conviction is affirmed. The judgment of sentence is vacated with directions to the trial court to proceed as ordered in the preceding paragraph.