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

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN ERIC GONZALES,

Defendant and Appellant.

F050109

(Super. Ct. No. 1101949)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Edward M. Lacy, Jr., Judge.

Larry L. Dixon, 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, Assistant Attorney General, and Michael A. Canzoneri, Deputy Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

*Before Wiseman, Acting P.J., Gomes, J., and Dawson, J.

Appellant, Justin Eric Gonzales, was found guilty after a jury trial of felony vehicle theft (Veh. Code, § 10851, subd. (a), count one) and felony evasion of a peace officer (Veh. Code, 2800.2, subd. (a), count two). On March 24, 2006, the trial court sentenced Gonzales to the upper prison term of three years on count one and to a concurrent upper term sentence on count two of three years. The court imposed a restitution fine and granted Gonzales 159 days of custody credits.

On appeal, Gonzales contends the trial court violated his right to a jury trial when it relied on aggravating factors to impose the upper term sentence. (*Cunningham v. California* 549 U.S. __ [127 S.Ct. 856] (*Cunningham*)). We disagree and affirm.

FACTS

Offense

On December 8, 2005, Katherine Davis was sitting in her parked car in a supermarket parking lot when two men drove up beside a red truck parked nearby and walked around it. The men got back into their vehicle and drove up beside the truck. A few minutes later, Gonzales climbed feet first into the passenger window of the red truck. He positioned himself behind the steering wheel and leaned over it. Within three minutes, he started the truck and drove away. Davis called the police to initially report suspicious behavior. Later she called the police to report that the truck was stolen.

Modesto Police Officer Troy Cross observed Gonzales driving the red truck shortly after receiving a dispatch that the truck was stolen. Cross followed Gonzales and activated his lights and siren to effectuate a vehicle stop. Gonzales immediately went into the opposite lane of traffic and passed three cars. Cross determined it was unsafe to chase Gonzales. Gonzales crashed into a parked vehicle and fled on foot.

Cross radioed for assistance to set up a perimeter. Officer Jared Ramirez spotted Gonzales and ordered him to the ground. Gonzales complied and was handcuffed. Gonzales spontaneously stated that he was going to hide in a refrigerator but was out of breath.

Sentencing

The probation officer's report noted there were no mitigating factors. The report listed six aggravating factors: (1) the manner in which the crime was carried out indicates planning, sophistication, or professionalism; (2) appellant's sustained petitions in juvenile delinquency proceedings are numerous and of increasing seriousness; (3) appellant served a prior commitment in the California Youth Authority (CYA); (4) appellant was on CYA parole when the instant offense was committed; (5) appellant's prior performance on probation and/or parole was unsatisfactory; (6) appellant was not a licensed driver when he committed the instant offense.

The court noted there was nothing mitigating about appellant's case. The court noted that had appellant been tried with a minimal record or no record, the People would likely recommend probation. The court found true the first five aggravating factors and expressly applied them to deny appellant probation. The court found no possible factors in support of granting appellant probation.

In applying the upper term sentence, the court noted it could not use the same factors it applied in denying appellant probation. The court found true factor six, that appellant was not a licensed driver when he committed the offense. The court noted it would not consider this factor "nearly enough alone or in conjunction with any other factor to impose the aggravated term." The court stated the probation officer did not list as a possible aggravating factor California Rules of Court, rule 4.421(a)(7).¹ The court explained it was adding this factor in its evaluation of appellant's sentence. The court found no factors in mitigation. The court imposed the upper term on both counts, ordering appellant's sentence on count two concurrent to count one.

¹ California Rules of Court, rule 4.421(a)(7) holds that circumstances in aggravation include: "The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed."

UPPER TERM

The trial court imposed the upper prison term on both counts and ordered the time to run concurrent. On appeal, appellant contends that he was denied his constitutional right to trial by jury and due process of law because the court imposed the upper term on both counts based on aggravating factors that were not found by a jury beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); *Cunningham, supra*, 549 U.S. __ [127 S.Ct. 856].) The trial court imposed the upper terms based on two factors: 1) that appellant was not a licensed driver when he committed the offense, and 2) that appellant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences were imposed instead. (Cal. Rules of Court, rule 4.421(a)(7).) There were other factors in the record which the trial court used to deny probation, including those related to appellant's recidivism; however, the trial court expressly did not use these factors to justify imposing the upper terms.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), a five-justice majority of the United States 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. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes 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. [Citations.]" (*Blakely, supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California's determinant sentencing scheme, the upper term can only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham, supra*, 549 U.S. __ [127 S.Ct. 856].)

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence: (a) "the fact of a prior conviction" (*Blakely, supra*, 542 U.S. at p. 301); (b) "facts reflected in the jury verdict" (*Id.* at p. 303, italics omitted); and

(c) facts “admitted by the defendant” (*ibid.*, italics omitted). The second type is at issue here, i.e., facts reflected in the jury verdict.

Appellant was convicted of two felony charges for which consecutive sentences could have been imposed. Instead, he received the upper term on each count and his time was ordered to run concurrent. After noting that appellant’s status as an unlicensed driver when he committed the offense was not “nearly enough alone or in conjunction with any other factor” to justify imposition of the upper terms, the court chose to include another aggravating factor in its evaluation. It stated that pursuant to rule 4.421(a)(7), given that appellant could have been given consecutive sentences, but was given instead concurrent sentences, the upper term was justified. In doing so, the court relied upon facts reflected in the jury verdict, i.e., the fact that the jury convicted him of two offenses. Therefore, the imposition of the upper term is supported by facts found by a jury. Given this additional factor, we conclude that appellant’s sentence does not violate *Apprendi*, *Blakely*, or *Cunningham*.

In any event, any error in considering the remaining factors not falling in one of the three permissible categories identified in *Blakely*, was harmless under either *Chapman v. California* (1967) 386 U.S. 18 (harmless beyond a reasonable doubt) or *People v. Watson* (1956) 46 Cal.2d 818, 836 (reasonable probability error did not impact outcome). The trial court stated that the other factor it was considering, which was invalid under *Blakely* because it included a fact not found by a jury, was not “nearly enough alone or in conjunction with any other factor” to justify the upper terms. The factor indisputably relied upon by the court in choosing the upper terms was that appellant had been convicted of two independent offenses for which concurrent rather than consecutive terms were being imposed. Under these circumstances, remand for resentencing is unnecessary.

DISPOSITION

The judgment is affirmed.