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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN A. GOODE,

Defendant and Appellant.

B188383

(Los Angeles County
Super. Ct. No. SA046610)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert P. O'Neill, Judge. Affirmed.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Steven Goode appeals from a judgment of conviction after a jury trial. The jury found defendant guilty of second degree robbery (Pen. Code, § 211).¹ Following his conviction, defendant waived his right to a jury trial as to a prior conviction of a serious felony (§§ 667, subds. (a)(1), (b)-(i), 1170.12) for which he served a prison term (§ 667.5, subd. (b)). The trial court found the prior conviction and prison term allegations to be true.

Defendant was sentenced to 15 years in state prison, which consisted of the upper term of five years for the second degree robbery, doubled pursuant to the Three Strikes law, plus five years for the prior serious felony conviction. The court struck the prison term enhancement.

On appeal, defendant contends that the trial court did not make a finding on the prior robbery conviction allegation and it must be found not true. He also claims the imposition of an upper term violated his right to a jury trial and due process. We disagree and affirm the judgment.

FACTS

On June 5, 2002, at about 1:50 a.m., Rebeka Emein (Emein) parked her car and was walking toward her home, when defendant rushed toward her. A struggle ensued with defendant pulling Emein down steps and dragging her 10 to 15 feet on the ground by the strap of her purse. Defendant successfully freed the purse from Emein and ran toward a black Honda Civic.

Young Jin Ghun (Ghun) witnessed the incident and called 911. At about 1:50 a.m., two separate surveillance units followed a black Honda Civic, losing sight of it at

¹ All further statutory references are to the Penal Code.

least twice. During the surveillance, they saw defendant enter the Honda. Sometime later, the Honda began driving erratically. A traffic stop was initiated. Defendant was found in the Honda's front passenger seat.

Emein's purse, with her driver's license, passport, and car key inside it, was found in the front passenger seat of the Honda. Emein and Ghun identified defendant as the assailant in a field lineup, and Emein identified the Honda as looking like the getaway car.

DISCUSSION

The Finding on the Truth of the Prior Conviction Allegations

Defendant contends that the trial court failed to make a finding on the prior robbery conviction allegations and his sentence must be reduced. We disagree.

The trial court conducted a trial on the priors. During the trial, the district attorney's office presented two witnesses. Melissa Popovic, a Forensic Print Specialist for the Los Angeles Police Department, testified that she took defendant's fingerprints and compared them to the section 969, subdivision (b), packet and the prints matched. A paralegal from the district attorney's office, Angela Hubbard, testified that defendant's section 969, subdivision (b), records were ordered and stored in her office. The section 969, subdivision (b), packet and the print card were admitted into evidence and the People rested.

The trial court then stated, "The People have rested. We need to put this matter over for probation and sentencing as well as to obtain the prior court file which I will order. That is case number YA038964. We'll put the matter on for probation and sentencing."

At the probation and sentencing hearing, the court gave both parties an opportunity to argue defendant's motion to strike the prior strike conviction. Defense counsel argued that there was little evidence to support the prior robbery conviction. The

court then discussed the severity of the current offense and defendant's prior record, prospects, and background and declined to strike the prior.

The trial court then imposed sentence, which included doubling of the base term "pursuant to 1170.12(a) through (d) and 667(b) through (i)" and adding a "term of five years for the prior serious robbery conviction which the court found true pursuant to 667(a)(1) for a total term in state prison of 15 years."

Section 1158 requires a court to make a finding as to whether a defendant's previous conviction is true or not true.² Defendant relies on the case of *People v. Gutierrez* (1993) 14 Cal.App.4th 1425 to support his claim that the trial court did not make the requisite finding. In *Gutierrez*, the defendant waived a jury trial regarding the priors, agreed to bifurcate them and stipulated that the trial court could determine their truth at the probation hearing by considering the probation report and other submitted evidence. At the sentencing hearing, there was a discussion about the sentence, but not about the bifurcated priors trial. The trial court apparently realized belatedly that no finding was made on the priors and stayed them. On appeal, the court found that the record did not show a finding was made within the meaning of section 1158, and the failure to make a finding was in effect a finding of not true. (*Id.* at p. 1440.)

However, the facts in *Gutierrez* are distinguishable, in that here, the trial court made an implicit true finding on the prior conviction allegations when it imposed sentence on the enhancements. In addition, in sentencing defendant, the trial court referred to "the fact that he was convicted of robbery in 1998."

² Section 1158 provides: "Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must unless the answer of the defendant admits such previous conviction, find whether or not he has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: 'We (or I) find the charge of previous conviction true,' or, 'We (or I) find the charge of previous conviction not true,' according as the jury or the judge find that the defendant has or has not suffered such conviction. If more than one previous conviction is charged a separate finding must be made as to each."

The California Supreme Court has upheld a trial court's implicit true finding on an allegation of a prior conviction. In *People v. Clair* (1992) 2 Cal.4th 629, the trial court conducted a trial on the allegation that the defendant had been convicted of a prior serious felony but did not expressly find the allegation to be true. At sentencing, the trial court imposed a five-year sentence enhancement on the serious felony. The Supreme Court held that “the [trial] court [had] impliedly—but sufficiently—rendered a finding of true as to the allegation when it imposed an enhancement *expressly* for the underlying prior conviction.” (*Id.* at p. 691, fn. 17.)

The Court of Appeal applied *Clair*'s holding to a firearm use allegation in *People v. Chambers* (2002) 104 Cal.App.4th 1047. The defendant was charged with robbery with a firearm use allegation. After a bench trial, the defendant was convicted of robbery, but the court did not mention any finding on the special allegation. At sentencing, the trial court imposed a sentence that included ten years for the firearm use enhancement. The appellate court held that the failure to comply with the statutory express-finding requirement of section 1158a did not compel striking the firearm use enhancement. The court, in imposing the ten-year prison term for the enhancement, impliedly made the required finding. (*Id.* at pp. 1050-1051.)

Sentence and Sixth Amendment Right to a Jury Trial

Defendant contends that the trial court's imposition of the upper term violated his Fifth, Sixth and Fourteenth Amendment rights to a jury trial and due process of law under *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, and *United States v. Booker* (2005) 543 U.S. 220. We disagree.

In *Cunningham v. California* (2007) 549 U.S. ____ [2007 WL 135687], the United States Supreme Court held that California's Determinate Sentencing Law violates a defendant's right to a jury trial to the extent it permits a trial court to impose an upper term based on facts found by the court rather than by a jury. (At p. ____, disapproving of *People v. Black* (2005) 35 Cal.4th 1238, 1244.) In the present case, *Cunningham* is not dispositive, however.

The trial court imposed the upper term sentence based on facts not found by the jury: defendant's multiple prior convictions and juvenile adjudications, a prior parole violation and the fact defendant was on probation at the time he committed the instant offense. In *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 the Supreme Court held that, “[o]ther 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.” (At p. 490, italics added.) The prior conviction exception to the *Apprendi* rule has been construed broadly, however, to apply not just to the fact of the prior conviction, but also to other factors based on the defendant's recidivism. (*People v. Earley* (2004) 122 Cal.App.4th 542, 549-550, review den. Oct. 10, 2004; *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222, review den. Oct. 31, 2001.) Thus, under *Apprendi*, the trial court properly relied upon defendant's multiple prior convictions and juvenile adjudications in imposing the upper term. (*Apprendi*, *supra*, at p. 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 247.)³ This factor alone is sufficient to uphold defendant's sentence. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 626.)

³ The question whether an upper term sentence may be imposed based on these factors currently is before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677.

The judgment is affirmed.

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JACKSON, J.*

We concur:

MALLANO, Acting P. J.

VOGEL, J.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.