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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL JOSEPH HEIMS,

Defendant and Appellant.

B188946

(Los Angeles County

Super. Ct. Nos. BA275842, BA279191)

APPEAL from a judgment of the Superior Court of Los Angeles County.

George Gonzalez Lomeli, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Dane R. Gillette and Robert R. Anderson, Chief Assistant Attorneys General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, Dawn S. Mortazavi, Michael R. Johnsen, and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Paul Joseph Heims challenges the sentence imposed for his possession of cocaine base conviction on the ground the trial court violated his right to a jury trial by imposing the upper term. We conclude the trial court permissibly relied upon recidivism-type factors to impose an upper term.

BACKGROUND AND PROCEDURAL HISTORY

In case No. BA275842, filed in December 2004, appellant was charged with possessing cocaine base. The complaint also alleged he had served a prior prison term. Appellant pled guilty and was placed on probation under Proposition 36.

In case No. BA279191, filed in February 2005, appellant was charged with attempted possession of cocaine base. The complaint alleged a prior prison term and two prior similar convictions. Appellant pled guilty and was placed on probation under Proposition 36.

Appellant was arrested again on May 29, 2005. The People filed a new case against appellant and sought to revoke his probation in case Nos. BA275842 and BA279191. Appellant sought, and was permitted, to represent himself. After a hearing, he was found in violation of the terms of his probation in case Nos. BA275842 and BA279191. The court sentenced him to the upper term of three years in case No. BA275842 and the middle term of one year in case No. BA279191.

DISCUSSION

The trial court based its choice of the upper term upon the fact that appellant was on probation in both cases and had performed poorly on probation.

Citing *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), appellant contends the imposition of the upper term in Case No. BA275842 violated his right to a jury trial, in that it was based upon facts found by the court, not a jury.

Apprendi essentially requires any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be charged, submitted to a jury, and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490.) *Blakely* clarified that the relevant “‘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.*” (*Blakely, supra*, 542 U.S. at p. 303.)

In *Apprendi*, the court explained that recidivism was distinguishable from other matters used to increase a sentence because (1) recidivism traditionally has been used by sentencing courts to increase the length of a sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial procedural protections. (*Apprendi, supra*, 530 U.S. at p. 488.) The recidivism exception to *Apprendi* has been deemed by many courts to extend beyond the mere fact of a prior conviction to include closely related matters, such as the nature of the prior conviction. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223; *People v. McGee* (2006) 38 Cal.4th 682, 702-706.)

Appellant’s probationary status stemmed from a prior conviction. It was part of his criminal record, and could be determined from an examination of the court records showing a grant of probation in each of the two cases, on a particular date, the duration of the probation, and the date of his arrest. His probationary status did not turn on factual matters pertaining to the recent arrest or the commission of the offenses that gave rise to the probation. Indeed, appellant did not contest his probationary status. The unsatisfactory quality of appellant’s performance on probation was a matter the court had already permissibly determined when it revoked probation in both cases. Moreover, appellant’s guilty plea in case No. BA279191 constituted an admission he attempted to acquire cocaine base, which would necessarily have violated his Proposition 36 probation in the earlier case, case No. BA275842. Accordingly, the factors upon which the court

relied to select an upper term were functionally equivalent to recidivism. No jury finding was required.¹

DISPOSITION

The judgment is affirmed.

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BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.

¹ This conclusion is unaffected by the U.S. Supreme Court's recent ruling in *Cunningham v. California* (2007) --- S.Ct. ---- [127 S.Ct. 856].