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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMONDO PADILLA HERNANDEZ,

Defendant and Appellant.

C051810

(Super. Ct. No. 62053550)

Defendant Armando Hernandez was convicted by a jury of transportation of a controlled substance (count one), possession of a controlled substance (count two), felony driving under the influence of drugs (count three) and misdemeanor under the influence of a controlled substance (count four). As to three prior convictions alleged as enhancements under count three, defendant waived trial by jury and admitted those prior convictions as alleged.

The trial court imposed the upper term of four years as to count one, sentenced defendant to an aggregate term of four years and eight months in state prison as to all counts, and ordered him to pay specified restitution fines.

On appeal, defendant contends the upper term violates *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was pulled over by a Roseville police officer for driving with an inoperable headlight. He told the officer that he was test driving the car, which was owned by the passenger, Roy Loya, but was not driving it too far because he did not have a driver's license.

The officer noticed defendant had bloodshot, watery eyes, rapid speech, eyelid tremors and an elevated pulse, all possible signs, in the officer's opinion, of being under the influence of drugs. When asked whether he had used any illegal drugs, defendant responded that he "had not used any illegal drugs in years." A search of the car revealed a clear plastic baggie containing a substance later identified as approximately .20 grams of methamphetamine. Both defendant and Loya denied any knowledge or ownership of the baggie.

Defendant was arrested and taken to the Roseville City Jail, where his blood was drawn to test for illegal substances. The test results were positive for methamphetamine.

By an amended complaint deemed by stipulation of the parties to be the information, defendant was charged with transportation of a controlled substance (methamphetamine), possession of a controlled substance (methamphetamine), felony driving under the

influence of drugs and misdemeanor under the influence of a controlled substance (methamphetamine). Defendant pled not guilty to all counts.

Following a jury trial, defendant was found guilty on all counts. Following entry of the verdicts and outside the presence of the jury, defendant waived trial by jury on the three prior convictions (all for driving under the influence) alleged as to count three, admitting each of those priors.

The court sentenced defendant to the upper term of four years in state prison as to count one, the middle term of two years (stayed) as to count two, eight months or one-third the middle term as to count three to be served consecutively, and 180 days in county jail as to count four to be served concurrently.

In articulating the reasons for imposition of the upper term, the court stated, "[T]he factors in aggravation are stated as follows: And the court does concur that [defendant] has a prior record of convictions. It's quite a lengthy record, especially for the time that he has evidently been in the country. He was on probation on five different grants of probation at the time this occurred. His performance on probation is totally unsatisfactory." The court found no mitigating factors.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's sole contention on appeal is that the trial court's imposition of the upper term for count one violated his right to a jury trial under *Blakely* and under the sixth and fourteenth amendments to the United States Constitution.

Defendant recognizes that his claim of *Blakely* error must fail as a result of the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254-1256 (*Black*); *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, he raises the contention solely "because it has not been resolved by the United States Supreme Court and for preservation of federal court access and review."

In any event, we point out that not only does the holding in *Black* defeat defendant's claim of error, it fails because the trial court imposed the upper term due, at least in part, to defendant's prior record of convictions. The rule of *Blakely* does not apply to the use of prior convictions to increase the penalty for a crime. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 455].) Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of other factors, in addition to defendant's prior convictions, to impose the upper term did not violate the rule of *Blakely*.

DISPOSITION

The judgment is affirmed.

_____SIMS_____, Acting P.J.

We concur:

_____DAVIS_____, J.

_____HULL_____, J.