Filed 2/8/07 P. v. Hernandez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOAQUIN HERNANDEZ,

Defendant and Appellant.

F050800

(Super. Ct. No. 05CM4447)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

Eleanor M. Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Dawson, J. and Kane, J.

STATEMENT OF THE CASE

On November 22, 2005, the Kings County District Attorney filed an information in superior court charging appellant as follows:

Count I—unlawful sale of a controlled substance (Health & Saf. Code, § 11379, subd. (a));

Count II—unlawful possession of a controlled substance for purpose of sale (Health & Saf. Code, § 11378);

Count III—unlawful possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a));

Count IV—misdemeanor false identification (Pen. Code, § 148.9, subd. (a));

Count V—misdemeanor fighting in a public place (Pen. Code, § 415, subd. (1));

Count VI—misdemeanor being under the influence in a public place (Pen. Code, § 647, subd. (f)); and

Count VII—misdemeanor possession of not more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (b)).

As to counts I-III, the district attorney specially alleged appellant had served a prior prison term (Pen. Code, § 667.5, subd. (b)).

On November 23, 2005, appellant was arraigned, pleaded not guilty to the substantive counts, denied the special allegations, and requested a jury trial.

On March 3, 2006, appellant entered into a plea agreement with the prosecution. Appellant agreed to plead guilty to count III (Health & Saf. Code, § 11377, subd. (a)), admitted a prior prison term, and stipulated to ineligibility under Proposition 36. The prosecution agreed to dismiss the remaining substantive counts and special allegations and agreed not to file an additional felony charge arising from appellant's failure to appear for a scheduled court hearing on December 16, 2005.

On May 8, 2006, the court denied appellant probation and sentenced him to a total term of four years in state prison. The court imposed the upper term of three years on

count III and a consecutive one-year term for the prior prison term enhancement (Pen. Code, § 667.5, subd. (b)). The court imposed an $800 restitution fine (Pen. Code, § 1202.4, subd. (b)) and imposed and suspended a second such fine pending successful completion of parole (Pen. Code, § 1202.45). The court also ordered appellant to pay a $165 laboratory fee (Health & Saf. Code, § 11372.5, subd. (a)) and a $20 court security fee (Pen. Code, § 1465.8). The court ordered appellant to submit to DNA testing/profiling and to provide samples of bodily fluids and prints (Pen. Code, §§ 296, 298.1, subd. (b)(1), (2)). The court also ordered appellant to register as a narcotics offender (Health & Saf. Code, § 11590).

On July 10, 2006, appellant filed a notice of appeal based on the sentence or other matters occurring after the plea and challenging the validity of his plea or admission.

On July 12, 2006, the court granted appellant's request for a certificate of probable cause.

STATEMENT OF FACTS

The following facts are taken from the probation officer's report filed March 30, 2006:

> "On October 2, 2005, at approximately 0003 hours, Hanford Police Officer Lundin was dispatched to the area of Douty and Seventh Streets regarding a fight. While en route, Officer Lundin was advised that one of the individuals involved was a Hispanic male wearing a white shirt.
>
> "Upon arrival, Officer Lundin was directed to the area of Seventh and Irwin Streets, where a Hispanic male wearing a white shirt was observed. Officer Lundin contacted the male, later identified as the defendant Joaquin Hernandez, who refused to give the officer his name. Officer Lundin detected an odor of alcohol coming from the defendant and observed him to have an unsteady gait. The defendant was arrested and transported to the Kings County Jail. At the jail, the defendant identified himself as Joseph Flores with a date of birth of May 23, 1970. While patting down the defendant, Officer Lundin found a plastic baggie containing a white crystal substance consistent with methamphetamine, in the defendant's left front jeans pocket. In the same pocket, he located another plastic bindle

containing the same crystal-like substance. While searching the defendant's right front jeans pocket, Officer Lundin found a baggie containing a green leafy substance consistent with marijuana. Also, the defendant had in his possession $861.00 in the following denominations: two $100.00 bills, four $50.00 bills, one $1.00 bill, and the rest in $20.00 bills.

"While being questioned by the booking officer, the defendant told him his name was Joaquin Hernandez with a date of birth of March 23, 1977. This name was run through dispatch, which advised Officer Lundin the defendant had a $3,000 warrant out of Kings County.

"The crystal-like substance was later analyzed by the Department of Justice and was confirmed to be 2.96 grams of methamphetamine."

DISCUSSION

Appellant's appointed counsel has filed an opening brief which adequately summarizes the facts and adequately cites to the record, which raises no issues, and asks this court independently to review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) By letter of October 3, 2006, this court invited appellant to submit additional briefing and state any grounds of appeal he may wish this court to consider. Appellant has not done so.

Our independent review discloses no reasonably arguable appellate issues.[1]

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[1] We note the trial court imposed the upper term of three years on count III. In *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) ___ U.S. ___ [2007 D.A.R. 1003, 1005], the Supreme Court reiterated:

> "… [T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, *other than a prior conviction*, not found by a jury or admitted by the defendant." (Italics added.)

A single factor in aggravation will support imposition of an upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615.) In making its sentence choice in the instant case, the trial court cited appellant's "extensive record which includes crimes of violence, he has a history of prior prison commitment, and a history of prior violation of parole." From this statement, we may reasonably infer the trial court relied on appellant's prior convictions as one of those

"[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

The judgment is affirmed.

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factors in imposing the upper term of imprisonment. The *Cunningham* rule does not require a jury trial for this factor. Moreover, this circumstance in aggravation—by itself—is sufficient for imposition of the upper term under well-established California law. Even if we were to assume error under *Cunningham* on this record, the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24; furthermore, there was no abuse of discretion under *People v. Watson* (1956) 46 Cal.2d 818, 836.