

Filed 11/15/06 P. v. Holdaway CA2/4  
Opinion following order vacating prior opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT CARROLL HOLDAWAY,

Defendant and Appellant.

B183720

(Los Angeles County  
Super. Ct. No. NA057653)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Tomson T. Ong, Judge. Affirmed.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,  
Ana R. Duarte and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff  
and Respondent.

Robert Carrol Holdaway appeals from judgment entered sentencing him to nine years in prison following his conviction for the unlawful driving or taking of a vehicle. (Veh. Code, § 10851, subd. (a).) His sentence was composed of the upper term of four years doubled to eight years pursuant to the Three Strikes law (Pen. Code, § 1170.12, subds. (a)-(d)) plus one year for a prior prison term enhancement. (Pen. Code, § 667.5, subd. (b).)<sup>1</sup> He contends imposition of the upper term violated his right to a jury trial guaranteed by the Sixth Amendment and his right to due process guaranteed by the Fourteenth Amendment. For reasons explained in the opinion, we affirm the judgment.

### **FACTUAL AND PROCEDURAL SUMMARY**

The sufficiency of the evidence to support the conviction is not challenged. It will suffice to observe that on May 21, 2003, a Long Beach police officer saw appellant standing next to the driver's side of a stolen automobile, trying to get into it. Appellant claimed the vehicle belonged to a friend of his and that he had borrowed it from the friend several days ago. He did not know the friend's name or where that person lived.

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<sup>1</sup> Previously he had been convicted of the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) and receiving stolen property (Pen. Code, § 496, subd. (a)). In an unpublished opinion filed by this court on February 21, 2005, the judgment was reversed and the matter was remanded for further proceedings consistent with the holding in *People v. Jaramillo* (1976) 16 Cal.3d 752, 757-759. We specified that on remand, the People were to make an election whether to retry appellant on either or both counts. If no election was made within 30 days, the trial court was directed to reinstate the conviction on the Vehicle Code section 10851 offense only and to enter judgment accordingly. On May 3, 2005, the remittitur issued. On May 25, 2005, the conviction for the unlawful driving or taking of a vehicle (Veh. Code, § 10851) was reinstated and the receiving stolen property count (Pen. Code, § 496) was dismissed.

At sentencing, the court stated it was imposing the upper term based on appellant's unsuccessful participation on parole as well as probation and based on the fact that at the time he committed the instant offense he was on probation. The court was of the opinion that this aggravating factor outweighed any mitigating circumstance and that the high term was warranted.

## DISCUSSION

Appellant contends he was improperly sentenced to the upper term in violation of his federal constitutional rights to a jury trial and due process. (*Blakely v. Washington* (2004) 542 U.S. 296.) He claims the trial court erroneously imposed an upper term based on its own findings of aggravating facts that were not tried or found true by a jury. He recognizes that this court is bound to follow the holding of *People v. Black* (2005) 35 Cal.4th 1238, but asserts he is making this argument to preserve it for federal review.

In *People v. Black, supra*, 35 Cal.4th 1238, 1254, the California Supreme Court held that *Blakely* does not invalidate California's upper-term sentencing procedure. Appellant's argument raises no issues not resolved in *Black*.<sup>2</sup> We are bound to follow decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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<sup>2</sup> The United States Supreme Court has granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], certiorari granted *sub nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) \_\_\_ U.S. \_\_\_ [126 S.Ct. 1329], on the issue of whether *Blakely* applies to California's determinate sentencing law.

**DISPOSITION**

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.