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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR BRUNO JONES,

Defendant and Appellant.

A114027

(San Francisco County
Super. Ct. No. 197669)

Defendant Edgar Jones appeals from a judgment sentencing him to the upper term of five years in state prison after a jury found him guilty of second degree robbery. (Pen. Code, § 212.5, subd. (c).¹) His sole contention is the trial court committed *Blakely* error (*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*)) in imposing the upper term. We agree, but finding the error to have been harmless, affirm the judgment.

BACKGROUND

Defendant was arrested after he forcibly removed \$30 from the pocket of his victim, Kevin Healy. Defendant had approached Healy, who was disheveled and appeared to be intoxicated, asking him for a cigarette. After Healy gave him a cigarette, defendant grabbed Healy and pushed him back over a police barricade, effectively rendering him helpless. Defendant took the money from Healy's pocket and started to walk away. Healy called out to defendant to give him back his money. Defendant turned around, raised his fists towards Healy and said, "Fuck you." Unfortunately for defendant, Healy was a police decoy.

¹ All statutory references are to the Penal Code.

Defendant was charged under the name of Calvin Bradley with a single count of second degree robbery (§ 212.5, subd. (c).) It also was alleged, for purposes of enhancement, that defendant had suffered three prior prison terms (§ 667.5, subd. (b).) Trial was bifurcated so that the jury considered the issue of defendant's guilt before receiving evidence of the prior convictions. At the completion of the first phase of the trial, the jury found defendant guilty of the robbery charge. During the second phase of the trial, defendant's fingerprints were compared with those on Calvin Bradley's court records, and it was discovered that defendant was not Calvin Bradley. The court therefore directed a verdict that the allegations of prior convictions could not be proven.

SENTENCING

The trial court found no mitigating circumstances relating either to the crime or to defendant himself. It found no aggravating circumstances relating to the crime, but found several aggravating circumstances relating to defendant. Specifically, the court found defendant has engaged in violent conduct indicating a serious danger to society, his prior convictions have been numerous and of increasing seriousness, defendant has served prior prison terms and his prior performance both on probation and parole has not been satisfactory. (Cal. Rules of Court, rule 4.421(b).) The court imposed the aggravated term after finding the aggravating circumstances outweighed the mitigating circumstances.

Defendant contends his federal constitutional rights to a jury trial and due process were violated because the court failed to submit the question of the existence of aggravating factors to a jury. Defendant cites *Blakely, supra*, 542 U.S. 296, where the United States Supreme Court, applying a rule it had established in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), held, "[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." (*Blakely, supra*, at p. 301.) In *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856], decided after the briefing in this case, the United States Supreme Court, overruling *People v. Black* (2005) 35 Cal.4th 1238, found California's Determinate Sentencing Law (DSL) violates the principles underlying *Apprendi* in that it allows a judge to impose an

upper term sentence based on the judge's finding by a preponderance of the evidence that circumstances in aggravation outweigh circumstances in mitigation. (*Cunningham, supra*, 127 S.Ct. at p. 868.) "[O]ur decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 871.)

That the trial court here imposed the upper term sentence based on its own findings of aggravating circumstances does not end the matter. A defendant does not have a federal constitutional right to a jury trial, for sentencing purposes, on whether the defendant has suffered a prior conviction. (*People v. McGee* (2006) 38 Cal.4th 682, 699.) It follows that the trial court is entitled to determine that fact for itself. (See *Apprendi, supra*, 530 U.S. at pp. 487-488, recognizing the "*Almendarez-Torres* exception," named after *Almendarez-Torres v. United States* (1998) 523 U.S. 224.) The court's authority is not confined to a determination of the simple fact of a prior conviction. It is entitled to consider a defendant's "recidivism," and therefore may determine such things as whether the defendant had suffered a prior conviction, whether the defendant was the person who suffered a prior prison term, or whether the elements of a prior crime qualifies the crime as a "serious prior felony conviction" for purposes of sentence enhancement under the Three Strikes Law. (*People v. McGee, supra*, at pp. 701, 706, 709.)

Here, all, or most, of the circumstances listed by the court pertained to defendant's recidivism and, therefore, are circumstances that were not required to be submitted to a jury under *Apprendi, supra*, 530 U.S. 466. While certain circumstances, such as that defendant had engaged in violent conduct, at least arguably should have been submitted to a jury, the majority of the circumstances on which the court relied were circumstances it was entitled to determine. As there are no mitigating circumstances, there is no likelihood the court would have imposed a different sentence had it followed *Blakely, supra*, 542 U.S. 296, and *Cunningham, supra*, 127 S.Ct. 856. The error, if any, was

harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546]; *Chapman v. California* (1967) 386 U.S. 18 , 24; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.)

DISPOSITION

The judgment is affirmed.

STEIN, J.

We concur:

MARCHIANO, P. J.

MARGULIES, J.