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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CALVIN EARL LEE,

Defendant and Appellant.

C052852

(Super. Ct. No.  
CM022501)

Defendant Calvin Earl Lee pled guilty to possession of methamphetamine, admitted he had served three prior prison terms, and was placed on probation pursuant to Proposition 36. Over the course of the next several months, he admitted four separate probation violations. Consequently, the trial court revoked defendant's probation and sentenced him to the upper term of six years in state prison, due to defendant's prior felony convictions and related factors.

On appeal, defendant contends (1) the imposition of the upper term violates the Sixth Amendment to the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*), and *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [166 L.Ed.2d 856] (hereafter *Cunningham*), and (2) the trial court impermissibly used the fact that defendant had served prior prison terms to both enhance and aggravate his sentence. We shall affirm the judgment.

#### DISCUSSION

##### I

*Apprendi* held that *other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant; thus, when a court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. at pp. 303-305 [159 L.Ed.2d at pp. 413-414].)

Accordingly, in *Cunningham, supra*, 549 U.S. at p. \_\_\_\_ [166 L.Ed.2d at p. 864], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term'

sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Ibid.*, overruling *People v. Black* (2005) 35 Cal.4th 1238 on this point, vacated in *Black v. California* (2007) \_\_\_ U.S. \_\_\_ [167 L.Ed.2d 36].)

Here, in imposing the upper term, the trial court cited the following aggravating factors: defendant's three prior felony convictions; his three prior prison terms; his status on parole at the time he committed the present offense; and his prior parole violations. As we will explain, the court's consideration of these aggravating factors that were not submitted to a jury did not run afoul of the Sixth Amendment to the United States Constitution.

As pointed out in *Apprendi*, *Blakely*, and *Cunningham*, the Sixth Amendment jury-trial guarantee does not apply to prior convictions that are used to impose greater punishment. (E.g., *Cunningham*, *supra*, 549 U.S. at p. \_\_\_ [166 L.Ed.2d at p. 864].)

The reasons for the exemption of prior convictions from the scope of the jury trial requirement for increased sentences are (1) the fact of a prior conviction "'does not relate to the commission of the offense'" for which the defendant is being sentenced (*Apprendi*, *supra*, 530 U.S. at p. 496 [147 L.Ed.2d at p. 458]), and (2) "the certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigate[s] the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Id.* at p. 488 [147 L.Ed.2d at p. 454, fn. omitted.]) It follows that the prior

conviction exception applies not only to the fact of a prior conviction, but also to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) Therefore, "'the fact of a prior conviction,' and related facts . . . may be judicially found at sentencing." (*U.S. v. Cordero* (5th Cir. 2006) 465 F.3d 626, 632-633, fns. omitted.) For example, the trial court may determine and rely on the defendant's probation or parole status to impose the upper term. (Cf. *United States v. Fagans* (2d Cir. 2005) 406 F.3d 138, 141-42; *United States v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820 ["the 'prior conviction' exception extends to 'subsidiary findings' such as whether a defendant was under court supervision when he or she committed a subsequent crime"].)

Thus, it was proper for the trial court to impose the upper term not only because of defendant's prior convictions, but also because he had served prior prison terms and was on parole when he committed the present offense--all of which were aggravating factors that did not have to be submitted to a jury.

In any event, we conclude beyond a reasonable doubt that the court would have imposed the upper term based solely on the aggravating fact of defendant having had three prior convictions. (*People v. Osband* (1996) 13 Cal.4th 622, 728 [one valid factor is sufficient to support the upper term].)

## II

Defendant also complains that the trial court used the same fact--defendant had served prior prison terms--to both enhance his sentence under Penal Code section 667.5 and impose the upper term.

Generally, a court is prohibited from using a fact to both impose an aggravated term and enhance that sentence. (Pen. Code, § 1170, subd. (b).) However, when a court imposes an enhancement for a *prior prison term* (Pen. Code, § 667.5), it is not a dual use of facts for a court to use the fact of a *prior conviction* to impose the upper term, even where that conviction underlies prior prison term enhancement; this is so "because [the conviction] is not the fact on which enhancement is based." (*People v. Hurley* (1983) 144 Cal.App.3d 706, 709.) "In contrast, a trial court may not impose a section 667.5 [prior prison term] enhancement *and* consider in aggravation that '[t]he defendant has served prior prison terms whether or not charged or chargeable as an enhancement under section 667.5.' [Citation.]" (*Id.* at p. 710, original italics.)

Here, defendant did not object when the trial court used defendant's prior prison terms to both aggravate and enhance his sentence. Thus, he has forfeited the claim of error. (*People v. Scott* (1994) 9 Cal.4th 331, 348; *People v. Steele* (2000) 83 Cal.App.4th 212, 226.) Moreover, an objection would have been futile (*People v. Price* (1991) 1 Cal.4th 324, 387) because the court stated other valid reasons to impose the upper term, including defendant's prior convictions. Given the absence of any mitigating factors and the fact that only a single aggravating factor is required to impose the upper term (*People v. Osband*,

*supra*, 13 Cal.4th at p. 728), there is no reasonable probability that defendant would have received a more favorable sentence absent the court's dual use of facts. (*People v. Coleman* (1989) 48 Cal.3d 112, 166 [improper dual use of the same fact for imposition of both an upper term and an enhancement does not necessitate resentencing if it is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error].)

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_ SCOTLAND \_\_\_\_\_, P.J.

We concur:

\_\_\_\_\_ SIMS \_\_\_\_\_, J.

\_\_\_\_\_ CANTIL-SAKAUYE \_\_\_\_\_, J.