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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS MARCOS LOPEZ, Defendant and Appellant.	F047215 (Super. Ct. No. BF107225A) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Clarence Westra, Jr., Judge.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and J. Robert Jibson, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Cornell, J., and Gomes, J.

On December 15, 2004, a jury convicted appellant, Carlos Marcos Lopez, of arson (count one/Pen. Code § 451, subd. (c)) and possession of methamphetamine (count 2/Health & Saf. Code, § 11377, subd. (a)).

On January 14, 2005, the court sentenced Lopez to the aggravated term of six years on his arson conviction and a concurrent aggravated term of three years on his possession conviction.

On January 18, 2005, Lopez filed a timely appeal. On September 23, 2005, Lopez filed an opening brief citing *Blakely v. Washington* (2004) 542 U. S. 296 (*Blakely*) to argue that the imposition of the aggravated term based on facts not found true by a jury beyond a reasonable doubt violated his right to a jury trial under the Sixth Amendment and due process under the Fourteenth Amendment.

On April 3, 2006, this court relied on *People v. Black* (2005) 35 Cal.4th 1238 to reject this contention.

On May 10, 2006, Lopez petitioned for review in the California Supreme Court. Following the denial of this petition, on July 26, 2006, Lopez petitioned for a writ of certiorari in the United States Supreme Court.

On January 22, 2007, the United States Supreme Court issued its opinion in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*), holding that *Blakely* applies under California law.

On February 20, 2007, the United States Supreme Court granted Lopez's petition for writ of certiorari, vacating the judgment in this matter, and remanding it back to this court for further consideration in light of *Cunningham*.

On March 27, 2007, Lopez filed a supplemental opening brief again arguing that under *Cunningham*, the imposition of the aggravated term based on facts not found true by a jury violated his right to jury under the Sixth and Fourteenth Amendments. We will reject this contention and affirm.

FACTS

On August 4, 2004, appellant, Carlos Marcos Lopez, set two fires in a vacant warehouse in Bakersfield. Shortly after the fires were set, he was seen exiting the building and arrested. During a booking search, officers found a small quantity of methamphetamine on Lopez.

In imposing the aggravated terms on each count, the court stated,

> "As to whether or not there are factors in mitigation and/or aggravation, none are found in mitigation.
>
> "The Court does find as an aggravating factor that the defendant was convicted of another crime for which [a] consecutive sentence could be imposed, and the Court does find that he was on felony probation at the time of the commission of the offense. Both those reasons are in the Court's estimation, of sufficient weight and significance that having found no mitigating factor, the Court does find that the upper term is the appropriate term and, therefore, sentences the defendant to the upper term of six years. [¶] . . . [¶]
>
> "As to count two, probation is denied, and he is sentenced to the Department of Corrections for the upper term of three years for the same reasons as stated with regard to the aggravating and mitigating factors. That sentence is ordered to be served concurrent with the sentence imposed in count one."

The court also ordered Lopez's sentence to run concurrent to a sentence of two years eight months he received in a separate proceeding in case No. SF01145A.

DISCUSSION

Lopez contends his sentence should be reduced to the midterm because his sentence violates the Sixth and Fourteenth amendments under *Cunningham*. We will reject these contentions.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), a five-justice majority of the United States Supreme Court held, "Other 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." (*Id*. at p.

490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.]" (*Blakely*, *supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California's determinant sentencing scheme, the upper term can only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856].)

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence: (a) " 'the fact of a prior conviction' " (*Blakely*, *supra*, 542 U.S. at p. 301); (b) "facts reflected in the jury verdict" (*id*. at p. 303, italics omitted); and (c) facts "admitted by the defendant" (*ibid*., italics omitted). Here, the court found no mitigating circumstances and two aggravating circumstances, Lopez's probationary status when he committed the underlying offenses and that it imposed a concurrent term on count 2 instead of a consecutive term. Lopez's probationary status when he committed the underlying offenses is so closely related to the underlying conviction that resulted in the probationary term that it comes within the prior conviction exception to *Apprendi*, *Blakely*, and *Cunningham*. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 27-28, *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-223.) Also, as with a prior conviction, this fact can easily be established by a review of the court records relating to the prior offenses. (See *People v. Thomas, supra*, 91 Cal.App.4th at p. 221.)

Moreover, *Blakely* error is subject to harmless error analysis (*Washington v. Recuenco* (2006) __U.S.__ 126 S.Ct 2546 (*Recuenco*) in accord with *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) and it is settled that only a single aggravating factor is required to impose the aggravated term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

Here, in imposing the aggravated term in each count the trial court found one recidivist circumstance and no mitigating circumstances. In view of this, we conclude

that any error in the court's reliance on one non-recidivist circumstance to impose the aggravated term was harmless beyond a reasonable doubt.

Lopez contends that the *Blakely* error here is reversible per se and not subject to harmless error analysis under *Chapman*. He concedes that *Recuenco* held that the trial court's *Blakely* error in that case was subject to harmless error analysis under *Chapman*. However, he contends *Recuenco* is distinguishable from the instant case because the *Blakely* error there involved a sentencing factor actually charged in the information. We disagree.

In *Recuenco*, the jury found true allegations in a special verdict form that the defendant assaulted his wife with a deadly weapon. At sentencing, the trial court imposed three-year firearm enhancement instead of a one-year deadly weapon enhancement based on the court's finding that the defendant used a firearm to assault his wife. (*Recuenco*, *supra*, 126 S.Ct. at pp. 2549-2550.) The United States Supreme Court found that this was *Blakely* error and subject to harmless error analysis under *Chapman*. However, the fact that the deadly weapon allegation had been presented to the jury in a special verdict form was of no import in the court's decision. (*Id*. at pp. 2551-2553.) Instead, the salient fact in the court's decision was that the error involved the failure of the trial court to submit a sentencing factor to the jury which the court found similar to the failure to submit an element of an offense to a jury. (Id. at pp. 2551-2552.) Accordingly, we reject Lopez's contention that the *Chapman* harmless error standard does not apply to any *Blakely* error that may have occurred here.

DISPOSITION

The judgment is affirmed.