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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANSELMO NICHOLAS MACIEL, Defendant and Appellant.	F050064 (Super. Ct. No. 05CM4988) **OPINION**

THE COURT[*]

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

James L. Lozenski, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

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[*]Before Wiseman, Acting P.J., Levy, J., and Hill, J.

Defendant Anselmo Nicholas Maciel was convicted of theft after he took a television set from a residence in Hanford. On appeal, he argues that his sentence, which included the upper term for theft, violated the Sixth Amendment as interpreted in *Blakely v. Washington* (2004) 542 U.S. 296. While Maciel's appeal was pending, the United States Supreme Court issued its decision in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856], holding that the imposition of upper terms under California law is governed by *Blakely*.

We affirm. The sentence imposed in this case was consistent with *Blakely* and *Cunningham.* Alternatively, any error was harmless.

FACTUAL AND PROCEDURAL HISTORIES

The district attorney filed a five-count amended information against Maciel and a codefendant on February 16, 2006. Count 1 alleged that Maciel and his codefendant committed robbery (Pen. Code, § 211)[1] by taking the property of Jimmy Crawley by force or fear. Count 2 alleged that the two defendants had committed theft (§ 487, subd. (c)). Counts 3 and 4 were against the codefendant alone. Count 5 charged Maciel with theft with a prior burglary (§ 666, subd. (a)). The information also alleged that appellant had served two prior prison terms (§ 667.5, subd. (b)) and was previously convicted of a prior serious felony under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court dismissed count 2. Defendant admitted the prior serious felony conviction and the two prior prison terms.

Maciel took the television from Crawley's house after he, the codefendant, Crawley, and a fourth person smoked crack cocaine together in Crawley's bedroom. At trial, there was conflicting testimony about whether Crawley gave the two defendants permission to take the television.

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[1]Subsequent statutory references are to the Penal Code unless indicated otherwise.

The jury found Maciel not guilty of count 1 and guilty of count 5. The court sentenced him to a total of eight years in prison: the upper term of three years for count 5, doubled as a result of the strike (§ 667, subds. (b)-(i)), plus an additional consecutive year for each prior prison term (§ 667.5, subd. (b)).

DISCUSSION

Maciel argues that the imposition of the upper term violated the Sixth Amendment as interpreted in *Blakely v. Washington, supra*, 542 U.S. 296. In *Blakely*, the Supreme Court held that a sentence for kidnapping imposed under the Washington sentencing scheme violated the defendant's Sixth Amendment right to a jury trial. (*Id*. at pp. 298, 304.) Under Washington law, the trial court could impose a sentence longer than 53 months only if it found substantial and compelling reasons to do so. (*Id.* at p. 299.) The judge found that the crime was committed with "deliberate cruelty" and imposed a sentence of 90 months. (*Id.* at p. 298.) The Supreme Court held that this violated the Sixth Amendment as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490: "'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.'" (*Blakely v. Washington, supra*, 542 U.S. at p. 301.) It did not matter that the offense was a class B felony and that class B felonies carried a maximum sentence of 10 years because the state's sentencing law did not allow the sentence to exceed 53 months without judicial factfinding. "Our precedents make clear … 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.*" (*Id.* at p. 303.) The court continued:

> "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,'

> [citation], and the judge exceeds his proper authority." (*Blakely v. Washington, supra,* 542 U.S. at pp. 303-304.)

After briefing was completed in this case, the United States Supreme Court issued its decision in *Cunningham v. California, supra*, ___ U.S. ___ [127 S.Ct. 856], overruling *People v. Black* (2005) 35 Cal.4th 1238 and holding that *Blakely* applies to the imposition of upper terms under California law. (*Cunningham, supra*, ___ U.S. ___ [127 S.Ct. at pp. 860, 871].) The imposition of an upper term under California law is unconstitutional, therefore, unless it is based on prior convictions, facts found by the jury, or facts admitted by the defendant.

We need not decide whether the imposition of the upper term ran afoul of the Supreme Court's precedents in this case. Any error was harmless.

The court's findings in support of imposing the upper term were these:

> "With regard to sentencing choices under Rule 4.421, the Court notes the defendant has an extensive record which includes violent crimes. The victim in this case was especially vulnerable because of his advanced age and ill health. The defendant was on parole at the time of the offense. And he has a history of prior violations of parole. These are all substantial circumstances in aggravation. [¶] There are no significant circumstances in mitigation."

According to the probation report, defendant's adult record included the following felony convictions: first degree burglary (§ 459); possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)); and failure to appear on a felony charge (§ 1320, subd. (b)). His adult record included the following misdemeanor convictions: public intoxication (§ 647, subd. (f)); possession of drug paraphernalia (Health & Saf. Code, § 11364); and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). When he was a juvenile, petitions were sustained against him for possession of stolen property (former § 496, subd. (1)); second degree burglary (§ 459); and petty theft (§ 488). His driving record included two misdemeanor convictions of driving under the influence (Veh. Code, § 23152, subd. (b)), one with injuries; six

convictions of driving without a license (Veh. Code, § 12500, subd. (a)); one misdemeanor conviction of reckless driving (Veh. Code, § 23103, subd. (a)); one misdemeanor conviction of driving on a suspended license with a prior DUI conviction (Veh. Code, § 14601.2, subd. (a)); one conviction of contempt of court (former § 166, subd. (4)); and one infraction for transporting a person in the back of a truck without a seat belt (Veh. Code, § 23116, subd. (a)).

The court's findings reflected several of the factors set forth in California Rules of Court, rule 4.421: "[t]he defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness" (rule 4.421(b)(2)); "[t]he victim was particularly vulnerable" (rule 4.421(a)(3)); "[t]he defendant was on probation or parole when the crime was committed" (rule 4.421(b)(4)); and "[t]he defendant's prior performance on probation or parole was unsatisfactory" (rule 4.421(b)(5)).

Three of the court's findings presupposed prior convictions: defendant's extensive criminal record; that he was on parole when he committed the current offense; and that he had a history of prior parole violations. At least one of these—defendant's extensive criminal record—cannot meaningfully be distinguished from *Blakely*'s formulation, approving the use of "'the fact of a prior conviction'" (*Blakely v. Washington, supra*, 542 U.S. at p. 301) to increase a sentence. It would not make sense to say that the trial court is entitled to rely on one prior conviction but not on several.

Assuming it was error for the trial court to rely on other factors in addition to defendant's prior convictions, we are confident that the error was harmless beyond a reasonable doubt under the circumstances of this case. (*Chapman v. California* (1967) 386 U.S. 18.) Because Maciel's criminal history was the dominant fact in the background of three of the four aggravating factors the court found, there is no likelihood that the court would have imposed a different sentence if it had been directed that it could

rely only on "'the fact of a prior conviction'" (*Blakely v. Washington, supra*, 542 U.S. at p. 301) in imposing the upper term.

DISPOSITION

The judgment is affirmed.