Filed 5/31/07 P. v. McMahon CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **BRIAN THOMAS McMAHON,** **Defendant and Appellant.**	**A114149** **(Lake County Super. Ct. No. CR905358)**

Brian Thomas McMahon appeals his conviction by jury verdict of one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and one count of possession of a hypodermic needle and syringe. (Bus. & Prof. Code, § 4140.) In a bifurcated proceeding, the court found true the allegation that he had served three prior prison terms. (Pen. Code, § 667.5, subd. (b).) Appellant contends his attorney's failure to move to suppress the contraband constituted ineffective assistance of counsel. He also asserts three sentencing errors: (1) improper dual use of facts; (2) failure to consider his drug addiction as a factor in mitigation; and (3) imposition of an upper term contrary to *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

BACKGROUND

Clearlake Police Officer Dominic Ramirez was on patrol in his marked police car when he pulled alongside appellant, who was walking along a city street. Officer Ramirez rolled down his passenger window and asked appellant how he was doing and where he was headed. Appellant replied, "Fine," and that he was en route to babysit for a

friend. During the conversation Officer Ramirez asked if appellant had anything on his person he should not have. Appellant replied that he had a knife in his right front jacket pocket. The following colloquy occurred during Ramirez's direct examination.

"Q. Now, when he shared that information with you, did you ask him if you could check that out?

"A. Yes, I did.

"Q. You asked him, basically, if you could search his person?

"A. Yes.

"Q. And did he give your permission to do that?

"A. Yes, he did."

Ramirez got out of his squad car and conducted his search while appellant was standing alongside the right front fender. For his own safety Ramirez started his search with the jacket pocket, where appellant had said the knife would be. He found the knife and removed it. "For officer safety reasons, I wanted to make sure to get ahold of that . . . And then I just stayed with the right pocket, and that's where I found a hypodermic syringe." The syringe had an attached needle. Ramirez then asked appellant if he was a diabetic; appellant replied, "No." When Ramirez asked appellant how he knew the knife but not the syringe was in the pocket, appellant did not respond. He offered that the jacket was not his, but he did not say where he got it. He also volunteered that he used the syringe for "blowing up worms" when fishing. During the search Ramirez told him he was under arrest for possession of the hypodermic syringe.

Immediately before Officer Ramirez placed handcuffs on appellant he noticed a plastic baggie lying on the ground between appellant's feet. He had not seen it when he first left his car to walk over to appellant. It was situated in such a way that he believed he would have seen it had it been in the same position when he first contacted appellant. As he walked over to appellant he had paid special attention to the ground in appellant's vicinity because, in his experience, "people will drop things, discard things." He considered the baggie was significant because of the hypodermic syringe; based on his professional experience and training a baggie usually indicates methamphetamine use.

Ramirez retrieved the baggie; it contained a hard, semi-clear, crystal-like substance which, based on his experience, appeared to be methamphetamine.

After retrieving the baggie, Officer Ramirez continued his search of appellant. He found another syringe in appellant's right front pants pocket and a small muslin bag containing a spoon in his right rear pants pocket. The underside of the spoon bowl was discolored as if it had been burned, and the topside of the spoon bowl contained a hard crystal-like substance. The appearance of the spoon was consistent with its use for the preparation of methamphetamine crystals for injection.

Officer Ramirez subsequently weighed the contents of the baggie; it weighed .2 grams, which he considered a usable quantity.

Samantha Evans, a criminalist with the California Department of Justice, Bureau of Forensic Services, to which the baggie and its contents were sent, determined that the substance was a usable amount of methamphetamine.

The parties stipulated that appellant was familiar with methamphetamine and knew its nature and character as a controlled substance.

DISCUSSION

I. *Ineffective Assistance of Counsel*

Appellant contends he received ineffective assistance of counsel because defense counsel failed to move to suppress the contraband.

A criminal defendant's constitutional right to assistance of counsel means effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To show ineffective assistance, the defendant must show (1) counsel's performance was deficient because his or her representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) absent counsel's substandard performance, there is a reasonable probability the defendant would have obtained a more favorable result. (*People v. Wharton* (1991) 53 Cal.3d 522, 575.)

When a defendant asserts ineffective assistance of counsel due to counsel's failure to assert a Fourth Amendment unreasonable search-and-seizure claim, he must prove that such a claim was meritorious and there is a reasonable probability the verdict would have

been different without the excluded evidence. (*Wharton, supra,* 53 Cal.3d at p. 576.) Appellant asserts three reasons that a motion to suppress evidence of the hypodermic syringe found in his jacket pocket would have been granted.

First, appellant contends his consent to search was invalid because it was given in submission to Officer Ramirez's show of authority: as a convicted felon and drug addict in a small town confronted by a police officer, he did not reasonably feel free to leave. Accordingly, he reasons, the stop was in fact a "detention," and consent given during a detention is involuntary.

There is no constitutional proscription against an officer addressing questions to a person on the street. (*People v. Bennett* (1998) 68 Cal.App.4th 396, 401-402.) Officers have the same liberty to address questions as do any other citizen. (*Id*. at p. 402.) At the same time, the person addressed generally has an equal right to ignore the interrogator and walk away. (*Ibid*.) "'As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.' [Citations.]" (*Ibid*.) A Fourth Amendment seizure does not occur merely because an officer approaches a person and asks a few questions. "'So long as a reasonable person would feel free "to disregard the police and go about his business," [citation] the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature . . . . Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a [person] may we conclude that a 'seizure' has occurred."' [Citation.]" (*Ibid*.)

It is difficult to construe Officer Ramirez's encounter with appellant as anything other than classically consensual. Officer Ramirez did nothing during his initial contact to restrain appellant's liberty. He simply pulled his car over to appellant, exchanged some pleasantries, and asked if appellant had anything on his person he should not have. Nothing on this record suggests Officer Ramirez made his inquiries in other than a friendly, courteous tone of voice, applied any physical force or threat of physical force

during the encounter, or did anything to stop appellant from walking away without responding. Instead, for reasons known only to himself, appellant volunteered that he had a knife in his right front jacket pocket and agreed that Ramirez could "check that out." An individual's decision to cooperate with a police officer need only be consensual; it need not be intelligent or wise from the defendant's viewpoint. (*Bennett, supra*, 68 Cal.App.4th at p. 403, fn. 7.) If, in hindsight, appellant's decision to reply to Officer Ramirez's inquiries was a mistake, it was one for which he was responsible.

Appellant next contends Officer Ramirez had consent only to retrieve the knife. The People have the burden of proving a warrantless search was within the scope of the consent given. (*People v. Harwood* (1977) 74 Cal.App.3d 460, 466.) "'The authority to search pursuant to a consent must be limited to the scope of the consent.'" (*Ibid*., quoting *People v. Superior Court* (*Arketa*) (1970) 10 Cal.App.3d 122, 127.)

The standard for measuring the scope of consent under the Fourth Amendment is "objective reasonableness"--what would the typical reasonable person have understood by the exchange between the officer and the defendant? (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408.) The scope of a warrantless search is generally defined by its expressed objective. Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of the circumstances. (*Ibid*.)

Officer Ramirez testified that after appellant said he had a knife in his right front jacket pocket, he asked appellant if he could "check that out . . . basically, if [I] could search his person[.]" Describing the search procedure, Ramirez testified that he "*first* started with the right jacket pocket, where [appellant] told me where the knife was," and after finding the knife there, "then I *just stayed* with the right pocket." (Italics added.) Based on this testimony, a reasonable person would understand that the objective of Officer Ramirez's search was appellant's person in general and that appellant had given Officer Ramirez such permission. He had not limited the scope only to search for the knife.

Finally, appellant contends Officer Ramirez had no reason to believe that the hypodermic syringe was a weapon, and therefore had no right to seize it. We disagree.

We reiterate that appellant consented to Officer Ramirez's search of his person. While so doing, Officer Ramirez located the syringe with a needle in the same jacket pocket as the knife. A reasonable person, and particularly a prudent officer, could believe a hypodermic needle and syringe could readily be employed as a weapon to inflict harm to another person in the immediate vicinity of the possessor of the syringe. (See *People v. Autry* (1991) 232 Cal.App.3d 365, 369.) Under the circumstances, Officer Ramirez's seizure did not exceed the scope of the consent to search.

We conclude that the trial court would have denied a motion to suppress on appellant's proffered grounds. Our conclusion is bolstered by a description of the encounter made by the trial court at sentencing: "The evidence shows that on June 16th [appellant] was walking along a street in Clearlake when a police officer made a consensual contact." It follows that defense counsel was not ineffective for failing to make the motion. (*Wharton, supra*, 53 Cal.3d at p. 576.)

II. *Sentencing*

Appellant was sentenced to a total prison term of six years: the upper term of three years on count one, possession of methamphetamine, a concurrent term of 120 days on count two, possession of a hypodermic syringe, and three one-year terms for three prior prison terms, pursuant to Penal Code section 667.5, subdivision (b).

As factors in aggravation to impose the upper term the court stated: "By way of aggravation he has a prior criminal record which has been outlined and of course his prior performance on parole as stated before was abysmal in consideration of these at least 17 parole violations." The "outline" to which the court referred was its enumeration of appellant's prior convictions recited in conjunction with its conclusion that appellant was ineligible for parole. These prior convictions consisted of a 1997 felony conviction for possession of methamphetamine, a 1987 conviction for felony prisoner possession of a weapon and felony possession of a dangerous weapon, and a 1982 felony conviction for assault with a deadly weapon and a 2004 misdemeanor conviction for being under the influence of methamphetamine and a 1994 misdemeanor conviction of possession of a syringe. The present offense took place in June 2005.

The court found no factors in mitigation, nor did the presentence report identify any.

Appellant served prison terms for the 1997, 1987, and 1982 felony convictions. These prison terms were the basis of the court's three one-year enhancements pursuant to Penal Code section 667.5, subdivision (b).

Appellant asserts three sentencing errors: (1) improper dual use of the same facts to impose the upper term (Pen. Code, § 1170, subd. (b)), and to enhance his sentence by imposition of a one-year enhancement for each of his three prior prison terms (§ 667.5, subd. (b)); (2) failure to consider his drug addiction as a circumstance in mitigation; and (3) *Blakely* error by imposing an upper term based on the court's findings of prior convictions and appellant's "abysmal" performance on parole.

a. Dual Use of Facts

A court may not use the same fact on which an enhancement is based to impose an aggravated term. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c).) Here, the court specifically expressed that it had not relied on the fact of appellant's prior prison terms in selecting the base term. Indeed, the court did not refer to his prison terms in reciting the factors in aggravation; it referred to his "prior criminal record" and "his prior performance on parole [which] as stated before was abysmal in consideration of these at least 17 parole violations."

Of course, there can be no prior prison term without a criminal record. But appellant's prior criminal record encompassed offenses for which he did not serve a prison term. Moreover, the court also gave as a factor in aggravation his "abysmal" parole performance. Imposition of an aggravated term may be sustained on a single valid factor. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Because the court employed two other valid factors--"abysmal" performance on parole and non-prison term criminal history--there was no dual use of facts. We do not find error.

b. Mitigating Circumstances

When imposing sentence, the court may consider as a circumstance in mitigation the fact that a defendant was suffering from a mental or physical condition that

significantly reduced his culpability for the crime. (Cal. Rules of Court, rule 4.423(b)(2).) Alcoholism and drug addiction may be regarded as a "mental or physical condition" (*People v. Reyes* (1987) 195 Cal.App.3d 957, 963), and at least one decision has deemed alcoholism, under the particular circumstances of that case, a mitigating factor under this rule. (*People v. Simpson* (1979) 90 Cal.App.3d 919, 927.) However, the large majority of decisions have affirmed the trial court's rejection of substance abuse or addiction a circumstance in mitigation. (See *Reyes, supra*, 195 Cal.App.3d at p. 961, fn. 2.)

While a court is required to consider all relevant criteria enumerated in the rules for sentencing (Cal. Rules of Court, rule 409), it is not required to give reasons for rejecting a mitigating factor. (*People v. Reid* (1982) 133 Cal.App.3d 354, 371.) The court here was aware of appellant's drug addition. At the sentencing hearing it stated that it had read and was familiar with the probation report, which had noted appellant's "demonstrated history of substance abuse." The court also recited appellant's written statement to the probation officer in which appellant stated that since 1987 "all I've had is simple drug use. This time I don't see how prison will Help. [sic]. What I really need is a drug program please."

Appellant was 48 years old at the time of the present offense. He had a long history of drug abuse and drug-related offenses. His age and history reasonably imply he can not or will not deal with this problem. Officer Ramirez did not observe any objective symptoms of appellant's being under the influence when he encountered him. Given these facts, the court, having impliedly considered appellant's addiction, did not err in rejecting it as a factor that reduced his culpability for the instant offenses. (See *Reyes, supra*, 195 Cal.App.4th at pp. 963-964; *Reid, supra*, 133 Cal.App.3d at p. 371.)

c. *Blakely*

In *Blakely*, the United States Supreme Court elaborated on a rule established in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), which held that a criminal defendant's Sixth Amendment right to jury trial "proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. [Citations.]"

(*Cunningham v. California* (2007) ___U.S. ___; 127 S.Ct. 856 (*Cunningham*).) The relevant "statutory maximum" is not the maximum sentence a trial court may impose after finding additional facts, but the amount it may impose without any additional findings. (*Blakely, supra*, 542 U.S. at pp. 303-304.)

Subsequent to *Blakely*, *People v. Black* (2005) 35 Cal.4th 1238 held that California's Determinate Sentencing Law (DSL) (Pen. Code, § 1170) does not implicate a defendant's Sixth Amendment right to a jury trial. *Black* was extant at appellant's June 2006 sentencing hearing, although appellant argued that *Blakely* should apply to his sentencing, and the court acknowledged that the issue in *Black* was pending in federal court.

The United States Supreme Court has since held that the California's DSL violates a defendant's constitutional right to jury trial, overruling *Black*. (*Cunningham, supra*, 127 S.Ct. at pp. 860, 871.) *Cunningham* deemed the middle term prescribed for an offense in the DSL as the relevant "statutory maximum." Therefore, it held, because the DSL authorized the court to find aggravating factors by a preponderance of the evidence standard, it violated *Blakely* and *Apprendi*.**1** (*Cunningham*, at p. 860.)

As discussed, the court imposed the upper term based on the two factors of appellant's "prior criminal record" and his poor performance on parole. As we have noted, the "criminal record" factor included misdemeanor convictions in addition to the

---

1 Following *Cunningham*, the Legislature amended Penal Code section 1170 with the specific intent to respond to the *Cunningham* decision and "to maintain stability in California's criminal justice system while the criminal justice and sentencing structures in California are being reviewed. (Stats. 2007, ch. 3, Sen. Bill No. 40, enacted Mar. 30, 2007.) The Legislature declared that the amended statute would take effect immediately as an emergency statute.

Prior to *Cunningham*, Penal Code section 1170, subdivision (b) stated: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."

As amended, Penal Code section 1170, subdivision (b) now states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the choice of the appropriate term shall rest within the sound discretion of the court."* (Italics added.)

three prior felony convictions for which appellant served a prison term. "Prior convictions," for *Apprendi/Blakely/Cunningham* purposes, are not limited to felonies; nothing in these opinions states that a misdemeanor is not also a recidivist fact exempted from the requirement that a defendant is entitled to have the jury find all facts necessary for imposition of a punishment above the statutory maximum.

However, the other factor employed by the court, "abysmal parole performance," although related to recidivism, requires a finding beyond the bare fact of a prior conviction. Under *Cunningham* the court could not employ this fact to aggravate a sentence absent a jury finding or appellant's admission.

We cannot conclude on this record that the sentence was harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) ___U.S. ___; 126 S.Ct. 2546, 2550, 2553 [*Blakely* error not structural error]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320: *Apprendi* error governed by the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18.) Based on the court's remarks at sentencing wherein it placed heavy emphasis on the factor of appellant's parole performance, it appears the court impermissibly imposed the aggravated sentence in violation of our highest court's subsequent holding in *Cunningham*. We cannot say the court would have imposed an aggravated sentence based solely on the convictions encompassed in appellant's "prior criminal record"--the court's other aggravating factor--for which he did not serve a prison term. (See pp. 9, 10, *post*.)

DISPOSITION

The judgment is reversed and remanded with directions to resentence appellant pursuant to the holding of *Cunningham v. California*, *supra*, 127 S. Ct. 856. In all other respects the judgment is affirmed.

_____

Jones, P.J.

We concur:

_____

Simons, J.

_____

Gemello, J.