Filed 3/22/07 P. v. Melles CA1/2
Opinion Following Rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AMAN MELLES, Defendant and Appellant.	A111523 (Alameda County Super. Ct. No. C146509)

Pursuant to a negotiated plea agreement, defendant Aman Melles pleaded no contest to a charge of felony petty theft with a prior and, in exchange, received a promise that three prior felony convictions would be stricken "for sentencing purposes" and that he would be placed on probation. The court granted probation, but after defendant violated the terms of his probation, probation was revoked and defendant was sentenced to the upper term of three years in state prison. Defendant argues three sentencing errors on appeal: (1) that the aggravating factors cited by the trial court when it imposed the upper term were not supported by substantial evidence; (2) that the trial court breached the terms of the plea agreement when it cited the three prior felony convictions as factors in aggravation supporting imposition of the upper term; and (3) that the imposition of the upper term violated the Sixth and Fourteenth Amendments of the United States Constitution pursuant to *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

On January 18, 2007, we filed an opinion in which we rejected all of defendant's arguments. The last of those arguments was rejected on the basis of *People v. Black*

(2005) 35 Cal.4th 1238 (*Black*). Four days after we filed our opinion, the United States Supreme Court concluded in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*) that *Black* had misapplied *Blakely*. We granted rehearing to consider the impact of *Cunningham* on defendant's last contention. With appropriate changes in our initial opinion, we again conclude that defendant's arguments do not establish error, and affirm the judgment of conviction.

I. Factual and Procedural Background

On December 7, 2003, defendant entered Albertson's grocery store at Marina Village Parkway in Alameda carrying a tote bag. He placed nine bottles of liquor in his bag and exited the store without paying for the items. Defendant was promptly arrested outside the store, and the liquor was returned to Albertson's.

By complaint filed December 8, 2003, defendant was charged with felony petty theft with a prior in violation of Penal Code sections 484(a)/666.[1] The prior allegedly occurred on August 1, 1995. The complaint also alleged that defendant had suffered three prior felony convictions for which he received prison terms, specifically on August 1, 1995 (second degree commercial burglary in violation of § 459), on July 24, 1995 (possession for sale of a controlled substance in violation of Health & Safety Code, § 11351), and on October 14, 1993 (second degree commercial burglary in violation of § 459).

On December 19, 2003, pursuant to a negotiated plea agreement, defendant pleaded no contest to a felony violation of sections 484(a)/666. In exchange for his plea, the prosecution agreed that defendant's prior convictions would be stricken for purposes of sentencing and he would be granted probation for three-to-five years in lieu of a prison sentence. After defendant entered his no contest plea, the court found him guilty and stated, "Three prior felony convictions as charged in the complaint are stricken for sentencing purposes . . . ."

On January 21, 2004, the court denied a motion by defendant to withdraw his plea, which motion was based on a claim that one of the alleged priors was invalid. The court

[1] All further statutory references are to the Penal Code unless otherwise noted.

then suspended imposition of sentence and granted five years' probation. The court also imposed the standard conditions of probation, which included a requirement that defendant obey all laws and be of good conduct—which defendant failed to do.

On February 15, 2005, Lorenzo Legaspi, the chief financial officer for the Alameda Unified School District, arrived at work and discovered that a laptop computer, its carrying case, and a box of coins were missing from his office. No one associated with the district had any knowledge of what happened to the items. Legaspi's secretary, Joice Frye, reported the theft to the police, who were able to recover several fingerprints from the computer docking station on Legaspi's desk.

On March 21, 2005, Frye, whose office was adjacent to Legaspi's, discovered a blue backpack "stuffed" behind a printer stand in her office. The backpack contained the missing coin box, now empty, and a BART fare and schedule booklet, from which the police recovered a fingerprint. The police were able to identify the fingerprints on the computer docking station and the BART pamphlet as belonging to defendant. As defendant was neither an employee of the district nor a student at the school, there was no legitimate justification for his prints being in the office.

During the ongoing investigation, the police gave a photograph of defendant to Frye, who passed it on to Legaspi. Legaspi did not recognize him, but Angelia Nava, another district employee, saw the photo on Legaspi's desk and reported that she had seen the individual in the photo outside the school district offices on March 25, 2005. Nava identified defendant in court as the same individual she had seen outside the offices.

On April 20, 2005, the district attorney filed a petition to revoke probation in the case involving the theft of liquor from Albertson's, alleging that defendant "violated the terms and conditions of his probation in that he committed a violation of Section 459 of the Penal Code . . . ." Two days later, the trial court ordered defendant's probation summarily revoked.

On July 18, 2005, following two days of testimony, the court found defendant in violation of his probation and affirmed revocation of probation.

On August 25, 2005, defendant was sentenced to the upper term of three years in state prison. In imposing the upper term, the court stated that "the aggravating circumstances outweigh any mitigating circumstances, and I point specifically to the fact that he has three prior felony convictions, two of which were prison, involve prison commitments."[2]

This timely appeal followed.

II. Discussion

A. Court Properly Imposed The Aggravated Term

Defendant argues that the factors in aggravation on which the trial court relied, namely the three prior felony convictions and two prior prison terms, were not supported by substantial evidence, such that the trial court abused its discretion in relying on them to support the imposition of the aggravated term. Defendant's argument fails for several reasons, both procedural and substantive.

As to the procedural reasons, the People argue that defendant did not object below when the court cited the reasons for the sentence and, as a consequence, he waived his right to assert this challenge here. Defendant counters that that "even though the general principle of forfeiture prohibits parties from addressing on appeal issues not raised at trial, the argument that a judgment is not supported by substantial evidence, as is here, is an 'obvious' exception to the rule."

The California Supreme Court considered this issue in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), and held that defendant may not challenge the trial court's discretionary sentencing choices on appeal if he did not did not object below. (*Id.* at p. 353; accord, *People v. Zuniga* (1996) 46 Cal.App.4th 81, 83-84 (*Zuniga*).) "[C]laims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Scott*, *supra*, at p. 354.)

[2] Defendant's probation was revoked by, and he was sentenced by, Judge Rolefson, who had not presided when defendant changed his pleas or was admitted to probation. It should also be noted that defendant was represented by a deputy from the public defender's office who had not appeared at the change of plea hearing. The same was true for the deputies of the district attorney.

Neither *Scott* nor any other authority we have reviewed suggests that there is an exception in instances where defendant claims a lack of substantial evidence supporting the aggravating circumstances. Imposition of the aggravated term is a choice left to the sentencing court's discretion. (E.g., *People v. Stitely* (2005) 35 Cal.4th 514, 575 and authorities cited.) We conclude that use of a sentencing factor in aggravation that is not supported by substantial evidence qualifies as a sentence "imposed in a . . . factually flawed manner" (*Scott*, *supra*, 9 Cal.4th at p. 354), and is thus subject to the waiver rule. Accordingly, defendant has waived his right to assert this claim on appeal. Assuming arguendo that defendant had preserved the issue for appellate review, we would nevertheless reject it on the merits.

It is, of course, the rule that each aggravating factor on which the trial court relies must be supported by evidence in the record. (*People v. Searle* (1989) 213 Cal.App.3d 1091, 1096; *People v. Nunley* (1985) 168 Cal.App.3d 225, 235 (*Nunley*) [finding substantial evidence to support lower court's choice of sentence].) As noted above, the trial court imposed the "upper term of three years," observing that it was "selecting the upper term because the aggravating circumstances outweigh any mitigating circumstances" and pointing "specifically to the fact that [defendant] has three prior felony convictions, two of which were prison, involve prison commitments." Defendant asserts two different theories as to why these aggravating factors were unsupported by evidence. Both theories fail.

First, defendant submits that "contrary to the trial court's suggestion, [he] did not have 'three prior felony convictions' " as alleged in the complaint. As to the first prior, the complaint alleged that defendant "on or about August 1, 1995, was convicted in the Superior Court of the State of California for the County of Alameda, of the crime of a Felony, to wit: Second Degree Commercial Burglary, in violation of Section 459 of the Penal Code of California, and received a prison term therefor." According to defendant, this first prior conviction "does not exist." In claimed support, defendant cites to the probation officer's report and recommendation, which lists defendant's criminal history, including juvenile offenses, but does not identify any such felony conviction, and in fact

only lists two, not three, prior adult felonies. Defendant also notes that he "did not admit any of the three prior convictions alleged in the complaint." While correct, these facts are of no avail.

In *Nunley, supra,* 168 Cal.App.3d 225, defendant argued that one of two enhancements for two prior burglary convictions should be stricken because it was not referenced in the probation report. (*Id.* at p. 235.) The court rejected defendant's argument, stating that "where, as here, a defendant who is charged with having suffered a previous conviction pleads guilty, his plea is conclusive of the fact of having suffered such conviction." (*Ibid.*)

Here, defendant was charged with "petty theft with prior(s)." The one prior expressly alleged was an August 1, 1995 violation of section 459. Defendant pleaded no contest to the charge, and the court found him guilty. Pursuant to *Nunley,* this conclusively established the fact of that prior. Since defendant does not dispute that the remaining two prior convictions are supported by evidence in the record, it follows that the three prior convictions on which the trial court relied in imposing the aggravated term are all supported by the record.

Second, defendant contends that the trial court erroneously relied on his having served two prior prison terms, when he had in fact served only one prison commitment. This argument fails for two reasons. First, while the trial court did initially indicate that defendant had two prison commitments, defendant corrected the court on this point:

"DEFENDANT: You said I've been in prison three times?

"THE COURT: Two.

"DEFENDANT: I've been in prison one time my whole adult life.

"THE COURT: I'm looking at a—more important is the fact that you suffered the prior felony convictions, including two for burglary. . . ."

Thus, the court was aware that defendant had only been imprisoned on one occasion when it imposed the upper term.

Further, while the probation report supports defendant's assertion that he has "been in prison one time [his] whole adult life," the report also indicates that defendant

has in fact been sentenced to two separate prison terms, one for an August 20, 1993 second-degree burglary and one for a June 11, 1994 possession for sale of a controlled substance. It appears, however, that defendant served those two terms concurrently. Thus, while defendant has only been committed to prison on one occasion as an adult, the fact remains that he has been sentenced to two prison terms arising out of two separate criminal cases against him. This is but a difference of semantics that in no way undermines the court's reliance on defendant's criminal past in selecting the upper term. In light of the above, we conclude that the factors in aggravation on which the trial court relied are supported by evidence in the record.

Further, even if we did determine that the factors on which the court relied were unsupported by evidence in the record, which we do not, we still would not conclude that the trial court abused its discretion in imposing the aggravated term because the imposition of the upper term is abundantly supported by other aggravating factors. (See *People v. Arbee* (1983) 143 Cal.App.3d 351, 357 [although reference to aggravating factor was clearly erroneous, the trial court listed a number of additional reasons which justified imposition of the upper term]; *People v. Dreas* (1984) 153 Cal.App.3d 623, 636 ["It is well settled that the imposition of the aggravated term may be sustained upon a single valid factor . . . ."].) Here, there are the two felony convictions and defendant's prior prison term, all of which are supported by the record and were referenced by the trial court as justification for imposition of the upper term. Additionally, the probation report identifies other circumstances in aggravation. It states that "defendant's prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness" and "defendant's prior performances on court and formal probation, as well as parole, were unsatisfactory."

As a final matter, in arguing the case should be remanded for resentencing, defendant notes that his counsel identified numerous factors in mitigation and submits that based on the record, "a result more favorable to [defendant] is reasonably probable on remand." However, it is settled that "[t]he trial court need not explain its reasons for rejecting mitigating factors." (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

B. Trial Court's Consideration Of Defendant's Prior Convictions In Imposing The Aggravated Term Did Not Breach The Negotiated Plea Agreement

We turn next to defendant's argument that the trial court's reliance on defendant's prior felony convictions breached the negotiated plea agreement. Defendant contends that he agreed to plead no contest to the petty theft charge, in exchange for which the three prior convictions alleged in the complaint would be stricken for purposes of sentencing. The prosecutor acknowledged these terms, as did the court when it stated that the "[t]hree prior felony convictions as charged in the complaint are stricken for sentencing purposes." According to defendant, he adhered to the terms, but the court failed to do so, pointing "specifically to the fact that he has three prior felony convictions" when imposing the three-year upper term following probation revocation.[3]

Again, we agree with the People that defendant waived this argument by failing to object below at the time of sentencing. (See *Scott*, *supra*, 9 Cal.4th at p. 353 [defendant may not challenge the trial court's discretionary sentencing choices on appeal if he did not object at trial]; *Zuniga*, *supra*, 46 Cal.App.4th at pp. 83-84.) Defendant seeks to avoid application of the waiver rule by submitting that an objection is not necessary to preserve it for appellate review where the sentence in dispute was unauthorized and, he claims, the sentence here was unauthorized "because the original negotiated disposition specified that the 'prior convictions will be stricken for purposes of sentencing.' " Defendant misconstrues the meaning of an "unauthorized sentence."

The *Scott* court described an "unauthorized sentence" as one that "could not lawfully be imposed under any circumstance in the particular case." (*Scott*, *supra*,

[3] The People claim that defendant is "precluded from raising this issue on direct appeal because he never obtained a certificate of probable cause." Pursuant to section 1237.5, a certificate is required where defendant appeals "from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation . . . ." Here, defendant's revocation of probation followed a contested hearing, not an admission of violation. A certificate of probable cause was therefore not required. Moreover, a certificate is not required because defendant is raising only issues related to his sentence that do not call into question the validity of his plea. (See *People v. Shelton* (2006) 37 Cal.4th 759, 766 and authorities cited.)

9 Cal.4th at p. 354.) And in *People v. Welch* (1993) 5 Cal.4th 228, 235, the Supreme Court explained that unauthorized sentences "generally involve pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." Here, defendant does not submit that the sentence was unlawful in that it could never be imposed, but instead contends that it was contrary to the terms of the plea agreement. Resolution of this issue is a question of fact that depends on the sentencing record. **(**See *Lyons v. Superior Court* (1977) 73 Cal.App.3d 625, 627-628.**)** This exception therefore does not apply.

Alternatively, defendant submits that "[a] plea bargain is contractual in nature and subject to general principles of contract law" and here, where "the critical facts in a plea agreement are undisputed, the issue is cognizable on appeal." This assertion is devoid of authority and is contrary to the rule recognized in *Scott, supra*, 9 Cal.4th 331. But even if we were to consider the merits, we would reject defendant's argument.

Defendant presents his argument in terms of due process, citing *People v. Mancheno* (1982) 32 Cal.3d 855, 860, for the proposition that if the state violates the plea agreement, the accused has a due process right to a remedy. The People, on the other hand, disagree that the issue has due process implications. They theorize that because the plea agreement was between defendant and the prosecution, and the court was not a party, it could not breach the agreement. Accordingly, the People urge, we should instead evaluate whether the trial court abused its discretion in considering the three prior convictions when it imposed the upper term. We need not resolve this dispute, however, because the result is the same under either theory: defendant received what he bargained for, and there was no error.

As noted above, defendant's plea of no contest to the petty theft charge was in exchange for the promise that the three prior convictions alleged in the complaint would be stricken for purposes of sentencing and he would be granted probation. The court then struck the priors, suspended imposition of sentence, and granted probation. Had the court not struck the priors, defendant would have been ineligible for probation absent exceptional circumstances. (§ 1203, subd. (e)(4).) It is thus clear that the terms of the

plea bargain had one goal—to render defendant eligible for probation—a goal that was only attainable by striking the three priors. Once defendant was granted probation, he received the benefit of his bargain.

The People cite multiple cases that are dispositive of this issue. One is *People v. Turner* (1975) 44 Cal.App.3d 753 **(***Turner***),** where pursuant to a negotiated plea agreement defendant pleaded guilty to a charge of burglary and the prosecutor agreed to strike a prior conviction and stipulated to local time. Defendant was then granted probation, but he was charged a few weeks later with committing an armed robbery, his probation was revoked, and he was sentenced to prison. (*Id.* at p. 755.) On appeal, defendant argued, inter alia, that the court did not comply with the terms of the plea agreement when it sentenced him to prison instead of county jail upon revocation of his probation. (*Id.* at pp. 756-757.) The Court of Appeal disagreed, stating, "There was nothing in this plea providing for what would happen if probation were violated. Needless to say, such a bargain would be difficult to negotiate since neither party would know in advance what the violation of probation might be. Here, after the violation occurred, there was no plea bargain involved because the bargain contemplated the initial sentencing proceeding only. It was within the discretion of the trial court to look at the situation anew . . . ." (*Id.* at p. 757.)

Another is our opinion in *People v. Martin* (1992) 3 Cal.App.4th 482 (*Martin*). There, defendant pleaded no contest to a burglary charge on the "condition that he be sentenced to no more than the low term of two years in state prison or placed on probation with residential treatment." (*Id.* at pp. 484-485.) The court then "placed [defendant] on probation for three years with conditions including that he serve one hundred eighty days in county jail and commit himself to a specified treatment program." A few months later, defendant violated the terms of his probation by leaving the

treatment program, and probation was revoked. (*Id.* at p. 485.) The court then sentenced defendant to the middle term of four years on the burglary charge.[4] (*Id.* at p. 486.)

On appeal, defendant argued "that the trial court impermissibly violated the terms of the original plea bargain . . . by sentencing him to a four-year prison term when the plea bargain provided for a maximum term of two years in prison or probation." (*Martin, supra,* 3 Cal.App.4th at p. 487.) In rejecting defendant's argument, Presiding Justice Kline observed, "Several cases have concluded that where a defendant granted probation as part of a plea bargain violates that probation, subsequent sentencing is not limited by the terms of the original plea," citing *People v. Bookasta* (1982) 136 Cal.App.3d 296, 299-300 (*Bookasta*); *People v. Jones* (1982) 128 Cal.App.3d 253, 262; *Turner, supra,* 44 Cal.App.3d 753, 757; and *People v. Allen* (1975) 46 Cal.App.3d 583, 590. And in a passage equally applicable here, Justice Kline quoted the court in *Bookasta, supra,* 136 Cal.App.3d at pp. 299-300: " 'A consummated plea bargain is not a perpetual license to a defendant to violate his probation. The plea bargain does not insulate a defendant from the consequences of his future misconduct. "A defendant gets the benefit of his bargain only once. Like time, a plea bargain once spent is gone forever." ' " (*Martin, supra,* 3 Cal.App.4th at p. 487; accord *People v. Hopson* (1993) 13 Cal.App.4th 1, 2-3 (*Hopson*) [trial court complied with terms of the plea bargain when it placed defendant on probation, and when defendant violated the terms of probation, there was no agreement limiting the court's discretion to impose sentence].)[5]

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[4] At the same time, defendant was also sentenced in two additional cases, receiving an aggregate term of seven years and eight months in state prison. (*Martin, supra,* 3 Cal.App.4th at p. 486.)

[5] In *People v. Alkire* (1981) 122 Cal.App.3d 119, Division One of the Fourth District Court of Appeal held to the contrary in a divided panel opinion. However, in *Hopson, supra,* 13 Cal.App.4th at pp. 2-3, that same court subsequently re-examined the issue in light of the "clear weight of authority" rejecting *Alkire* and revised its position to be consistent with *Turner, supra,* 44 Cal.App.3d 753, *Martin, supra,* 3 Cal.App.4th 482, *Bookasta, supra,* 136 Cal.App.3d 296, and *Jones, supra,* 128 Cal.App.3d 253. (*Hopson, supra,* 13 Cal.App.4th at pp. 2-3.)

Defendant attempts to distinguish *Turner* by quoting the *Turner* court's observation that the defendant "bargained for local time [and] he received probation." (*Turner, supra,* 44 Cal.App.3d at p. 757.) Similarly, he notes that as to *Martin*, "the defendant argued that his plea bargain was violated when he was sentenced upon revocation of probation to a four-year prison term; 'the plea bargain provided for a maximum term of two years in prison or probation.' " (Quoting *Martin, supra,* 3 Cal.App.4th at p. 487.) And he claims *Hopson* is distinguishable because as stated in *Hopson, supra,* 13 Cal.App.4th at p. 3, "there was no agreement limiting the court's discretion to impose sentence. The plea bargain form advised Hopson he would face the maximum term if he violated probation." These factual distinctions are completely insignificant and in no way render the holdings of *Turner*, *Martin*, and *Hopson* inapplicable here.

Defendant also advances a theory that the phrase "stricken for sentencing purposes" must have referred to more than just the granting of probation, because at the time the court granted probation, defendant had not yet been sentenced. He explains: "This is so because, 'when the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of probation.' [Citation.] 'In such cases, no judgment has been entered and no sentence has been imposed.' [Citation.] Upon revoking probation, however, the trial court 'may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced.' [Citation.]" While defendant may be correct as far as the technical definition of "sentencing," that is not how the term is commonly used and understood, a fact evidenced by *Turner*, *supra*, 44 Cal.App.3d at p. 757, where the court observed that "[p]robation was a more, not less, lenient sentence than [defendant] bargained for." Clearly, the term is commonly used to refer to the punishment imposed, be it probation or a prison commitment. And, clearly, that is how it was used in the instant case.

In sum, defendant is incorrect in his assertion that "[i]t was reasonable for [him] to expect, and for the prosecution and court to understand, that a reasonable implication of

the agreement was that 'his prior convictions [would] be stricken for purposes of sentencing' following revocation of probation, when the suspension of the imposition of sentence is lifted and the trial court pronounces judgment and sentence." To the contrary, this expectation was unreasonable and contrary to the controlling legal authority. And we reject it.

C. The Trial Court's Imposition Of The Aggravated Term Did Not Violate *Blakely v. Washington*

Finally, defendant challenges the trial court's imposition of a three-year upper term sentence, arguing that the sentence is unconstitutional as recognized by *Blakely, supra*, 542 U.S. 296, where the United States Supreme Court held that a Washington State court denied a criminal defendant his constitutional rights to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with " 'deliberate cruelty.' " (*Blakely, supra*, 542 U.S. at pp. 303-304.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, " '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, supra*, 542 U.S. at p. 301.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "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." (*Blakely, supra*, 542 U.S. at pp. 303-304.)

Defendant contends his sentence must be reversed pursuant to *Blakely, supra*, 542 U.S. 296, because the trial court committed constitutional error by imposing an upper term sentence based on aggravating factors that were not supported by jury findings.

Prior to January 22, 2007, we would—and in our initial opinion we did—have rejected defendant's argument on the basis that the issue had been authoritatively decided in *Black, supra*, 35 Cal.4th 1238, which we would be bound to apply under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. On that date, however, the

United States Supreme Court in *Cunningham*, *supra*, ___ U.S. ___ [127 S.Ct. 856], held that *Black* was a misapplication of *Blakely*, *supra*, 542 U.S. 296. Defendant and the People submitted written argument on the impact of *Cunningham* in their respective materials on rehearing. After consideration of these materials, we conclude that imposition of the aggravated term for defendant's violation of section 484 did not contravene *Blakely* or *Cunningham*.

Apprendi, *Blakely*, and *Cunningham* all exempted prior convictions from the category of facts that must be found by a jury in order to increase a defendant's sentence beyond the statutory maximum. (*Apprendi*, *supra*, 530 U.S. at pp. 488, 490; *Blakely*, *supra*, 542 U.S. at p. 301; *Cunningham*, *supra*, ___ U.S. ___ [127 S.Ct. at p. 860].) It is undisputed that defendant had three prior felony convictions. This factor would have supported imposition of the upper term without violating *Blakely or Cunningham* because it involves objective facts provable from court records, whose ascertainment is traditionally performed by judges as part of the sentencing function. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244; *People v. McGee* (2006) 38 Cal.4th 682, 709.) "Only a single aggravating factor is required to impose the upper term. . . ." (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Defendant's claim of *Blakely-Cunningham* error fails accordingly.

III. Disposition

The judgment is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.