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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

REYNALDO L. MORAN,

Defendant and Appellant.

E040845

(Super.Ct.No. FVI023193)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata,
Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-
Ladendorf, Supervising Deputy Attorney General, and Heather F. Crawford, Deputy
Attorney General, for Plaintiff and Respondent.

Defendant and appellant Reynaldo Moran pled guilty to inflicting corporal injury on a spouse/cohabitant (Pen. Code, § 273.5, subd. (a))¹ and was placed on three years' probation. The trial court later found that he violated a term of his probation prohibiting him from possessing or consuming alcoholic beverages. The court revoked defendant's probation and sentenced him to the upper term of four years in state prison. Defendant's sole contention on appeal is that the sentence violates his Sixth Amendment right to trial by jury under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 2005, defendant was charged with corporal injury to a spouse/cohabitant (§ 273.5, subd. (a), count 1), resisting an officer (§ 69, count 2), being cruel to a child by endangering his/her health (§ 273a, subd. (b), count 3), and vandalism (§ 594, subd. (b)(2)(A), count 4). Pursuant to a plea agreement, defendant pled guilty to count 1 and the other counts were dismissed. The court placed defendant on probation for a period of three years, under certain terms, including that he not violate any law and not possess or consume any alcoholic beverages.

On May 23, 2006, defendant's probation officer filed a petition to revoke his probation. The petition alleged that defendant violated his probation terms by being arrested on April 26, 2006, for being drunk in public. In addition, defendant was arrested

¹ All further statutory references will be to the Penal Code unless otherwise noted.

on May 19, 2006, for battery on a spouse (§ 243, subd. (e)(1)), after his wife reported that he continued to abuse her while he was drunk.

A probation revocation hearing was held on June 30, 2006. After hearing testimony from the probation officer, the arresting officer, and defendant, the trial court determined that defendant violated the probation term prohibiting him from possessing or consuming alcohol. The court then proceeded to sentence defendant. The court relied on the following aggravating factors, as listed in the probation officer's report dated February 3, 2006: The crime involved great violence and the threat of great bodily harm, defendant took advantage of a position of trust, defendant was on probation at the time of this offense, and defendant's prior performance on probation was unsatisfactory. The court found no factors in mitigation. Furthermore, the court specifically noted defendant's prior criminal record, including that he had stolen property, committed battery causing serious injury, and violated a court order to prevent domestic violence. The court remarked that defendant's prior record was significant, since his previous misdemeanor convictions led up to the current felony conviction, and since his current offense also involved domestic violence. Based on these considerations, the court sentenced defendant to the upper term of four years in state prison.

ANALYSIS

The Trial Court Properly Imposed the Upper Term

Defendant contends that his Sixth Amendment right to a jury trial, as defined in *Blakely, supra*, 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), was violated when the trial court imposed the upper term sentence. We

disagree.

In *Blakely*, the U.S. Supreme Court affirmed that “[o]ther 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, quoting *Apprendi, supra*, 530 U.S. at p. 490.) The *Apprendi* exception for prior convictions has been broadly interpreted by California courts. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-223 (*Thomas*).)

The California Supreme Court later determined that “the judicial factfinding that occurs when a judge exercises discretion to impose an upper term . . . under California law does not implicate a defendant’s Sixth Amendment right to a jury trial.” (*People v. Black* (2005) 35 Cal.4th 1238, 1244 (*Black*).) The *Black* decision was controlling authority at the time of the sentencing hearing in the instant case. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) After the briefing was completed in the current case, however, the United States Supreme Court ruled that facts used to impose an upper term sentence under California’s determinate sentencing law *are* subject to the above stated rule set out in *Blakely/Apprendi*. This holding effectively overruled *Black* on this point. (*Cunningham v. California* (2007) ___ U.S. __ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).)² In any event, we conclude that the present sentence may be affirmed, based on recidivist aggravating factors.

² Because *Cunningham, supra*, 127 S.Ct. 856, was decided after briefing was complete in the instant case, we permitted the parties to file supplemental briefs. We note that neither party did so.

The court here cited as aggravating factors the circumstance that defendant was on probation when he committed the present offense and his unsatisfactory performance on probation—factors which presuppose one or more prior convictions. The court also referred to defendant’s prior convictions and noted the increasing seriousness of his crimes, specifically that his previous misdemeanor convictions led up to the current felony conviction. Because the facts that defendant was on probation at the time of the current offense, his prior performance on probation was unsatisfactory, and his convictions were increasing in seriousness arise out of the fact of a prior conviction, and so are closely related to the prior convictions themselves, they come within the prior conviction exceptions contained in *Blakely* and *Apprendi*. Also, as with a prior conviction, these facts can 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. 223.) Therefore, the upper term was supported by factors that need not be found by a jury beyond a reasonable doubt. (See *Blakely, supra*, 542 U.S. at p. 301; *Apprendi, supra*, 530 U.S. at p. 490.) It follows that reliance on those factors was not error under *Cunningham, supra*, 127 S.Ct. 856.)

Furthermore, a single factor in aggravation suffices to support imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The facts pertaining to defendant’s prior convictions alone were sufficient to support the trial court’s selection of the upper term. Thus, the court’s reliance on other non-prior-conviction-related facts was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18.

We conclude that imposition of the upper term in this case did not violate defendant's federal constitutional right to a jury trial under the Sixth Amendment or his right to due process under the Fourteenth Amendment.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.