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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TROY KIM MURPHY, Defendant and Appellant.	H030175 (Monterey County Super.Ct.Nos. SS051452, SS052318, SM970648)

Defendant, Troy Kim Murphy, a South Korean citizen,[1] is in poor mental health and is a long-time drug abuser with an accompanying history of criminal convictions. The trial court, sitting without a jury after defendant waived his right to jury trials, convicted defendant of various offenses in two of the three cases that form the basis of

[1] The significance of defendant's status as a non–United States citizen will become apparent when we discuss his claims on appeal. As he alludes to on appeal and explained in more detail to the superior court, the eventual consequences of his convictions may be severe. (See *In re Resendiz* (2001) 25 Cal.4th 230, 257 (conc. & dis. opn. of Mosk, J.).) Defendant's American parents adopted him at age two but failed to seek citizenship for him, and he never thought to apply for it. As a result, he is liable to be deported to South Korea with no knowledge of Korean and no ties to that country.

this appeal (SS051452 and SS052318). It revoked defendant's probation in the third case (SM970648), and sentenced him to six years in prison.[2]

On appeal, defendant asserts that the trial court abused its discretion in failing to have him evaluated for possible commitment to the California Rehabilitation Center, and that it relied on facts neither charged nor found true beyond a reasonable doubt to impose aggravated and consecutive prison terms, in violation of federal constitutional guaranties announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and post-*Apprendi* United States Supreme Court cases.

We will affirm the judgment.

I. *Eligibility for Commitment to California Rehabilitation Center*

A. *Procedural Background*

During the proceedings[3] in this case, the trial court commented: "One other thing that came to my mind, in looking at [defendant's] background and history, is the possibility . . . of perhaps a [California Rehabilitation Center] commitment. But we can take that up at the time of the actual sentencing."

At defendant's sentencing hearing, defense counsel noted that defendant had "failed at least three programs. And I don't know what—I mean, I don't know what more

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[2] In case No. SS051452, defendant was convicted of possessing a controlled substance for sale (Health & Saf. Code, § 11378), transporting a controlled substance (*id*., § 11379, subd. (a)), and possessing a deadly weapon (Pen. Code, § 12020, subd. (a)(1)). In case No. SS052318, defendant was convicted of burglary (Pen. Code, § 459), forgery (*id*., § 470, subd. (d)), and possessing a forged instrument (*id*., § 475). In case No. SM970648 defendant was convicted of two counts of grand theft (Pen. Code, § 487, subd. (a)), theft by use of a credit card exceeding $400 (*id*., § 484g), burglary (*id*., § 459), and grand theft by receiving an access card with intent to defraud (*id*., § 484e, subd. (c)). The foregoing citations are to the statutes in effect at the time of the crimes.

[3] The facts of the crimes that led to defendant's convictions and sentences are not at issue in this appeal, and it is not necessary to describe them for the disposition of this case.

we could do with him. The only thing I could think of was [California Rehabilitation Center]. And I don't know whether the criminality would bar that or not." The trial court replied: "Well, quite frankly, based on the sentence I plan on imposing, he would—even if he was acceptable to [California Rehabilitation Center], he wouldn't be eligible. [¶] . . . [¶] . . . As I understand it, . . . there's a homeland security immigration hold on him as well. For a number of reasons I don't think he'd be eligible for a [California Rehabilitation Center] commitment."

Defense counsel replied: "I think that's probably true too. I don't know about the hold on that." But counsel maintained that defendant was "so ruled by drug abuse and drug addiction that he is barely a functioning human being. So I'm going to ask the Court to weigh heavily the . . . physical and mental condition he is in and fashion a sentence that's fair."

The trial court invited defendant to express his view, and he answered: "If you sentence me to prison, I want to go to [California Rehabilitation Center] if I'm eligible." The court replied, "for a number of reasons I don't think you are eligible for [California Rehabilitation Center] . . . . That's not—that won't be an option, unfortunately." The court sent defendant to prison for the prescribed term.

B. *Discussion*

On appeal, defendant claims that the trial court abused its discretion in not having him evaluated for possible placement at the California Rehabilitation Center. He asserts that the law required the court to articulate a proper basis for its decision, and that what he considers to be the court's summary denial of his request was improper.

Welfare and Institutions Code section 3051 provides, as relevant here:

"Upon conviction of a defendant for a felony, or following revocation of probation previously granted for a felony, and upon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics[,] the judge shall suspend the

execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility [i.e., the California Rehabilitation Center] unless, in the opinion of the judge, the defendant's record and probation report indicate such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section."

We review for abuse of discretion a trial court's determination that evaluation for placement at the California Rehabilitation Center is or is not warranted. (*People v. McGinnis* (2001) 87 Cal.App.4th 592, 595.) The trial court is charged with assessing, on the basis of the information available to it, whether " 'the defendant's main problem is drug abuse or a criminal orientation as reflected in a pattern of criminality' " (*id*. at p. 597), a subjective inquiry that requires deference from the reviewing court (*ibid.*).

The trial court is not required to state facts, but is required to give reasons, when refusing to order an evaluation for commitment to the California Rehabilitation Center. (Cal. Rules of Court, rule 4.406(b)(9); *People v. Granado* (1994) 22 Cal.App.4th 194, 201-203.) Unfortunately, one of the reasons the trial court articulated was inapposite.

To reiterate, the court stated, "based on the sentence I plan on imposing, he would—even if he was acceptable to [California Rehabilitation Center], he wouldn't be eligible. [¶] . . . [¶] . . . As I understand it, . . . there's a homeland security immigration hold on him as well. For a number of reasons I don't think he'd be eligible for a [California Rehabilitation Center] commitment." In sum, the court appeared to rely on two factors: the length of the sentence it was going to impose on defendant, and its expectation that defendant would be deported after serving his sentence.

In fact, however, only a defendant who is sentenced to more than six years in state prison, once possible prison credits are taken into account, is ineligible for California Rehabilitation Center placement. (Welf. & Inst. Code, § 3052, subd. (a)(2).) The trial

court erred in relying on that factor, because it did not exist. Defendant was sentenced to six years in prison for the crimes committed in the three cases filed against him.

The trial court's other stated reason for refusing a California Rehabilitation Center evaluation is, however, well taken, and suffices for us to reject defendant's claim. With regard to defendant's noncitizen and hence deportable status, he argues that under *People v. Arciga* (1986) 182 Cal.App.3d 991, only the Director of Corrections, and not the trial court, may consider his immigration and nationality status in deciding his suitability for treatment. But *Arciga* noted: " 'The rehabilitation program contemplates an extended period of institutional and outpatient treatment. The law contemplates a seven-year commitment, and a minimum of six months spent as an inpatient, with the addict then being placed on outpatient status (Welf. & Inst. Code, §§ 3151, 3152, 3201), and pending deportation makes this program impossible.' " (*Id*. at p. 998.) The program's outpatient component remains in effect (Welf. & Inst. Code, §§ 3151, 3152, 3201), and it stands to reason that the trial court would be in as good a position as the Director of Corrections to determine defendant's likelihood of successfully completing treatment, given the possible later need to place defendant on outpatient status and the fact that the U.S. Immigration and Customs Enforcement service had placed on defendant a so-called immigration hold, meaning that defendant would be transferred to federal custody for deportation on completing his state prison term. An alien who is deportable because of conviction of an "aggravated felony" under federal law for immigration purposes (a condition that, as represented to the court below, applied to defendant at an early stage of the proceedings) is subject to apprehension and confinement by the U.S. Immigration and Customs Enforcement agency on leaving prison and is unlikely to be released to the community. (See 8 U.S.C. § 1226, subd. (c)(1)(C); *Lopez v. Gonzales* (2006) __ U.S. __, __ [127 S.Ct. 625, 627]; *U.S. v. Amador-Leal* (9th Cir. 2002) 276 F.3d 511, 516-517; *In re Resendiz, supra,* 25 Cal.4th at p. 255 (conc. & dis. opn. of Mosk, J.).)

We perceive that the trial court spoke in the disjunctive. Its twice-uttered statement that "a number of reasons" warranted not sending defendant for a California Rehabilitation Center evaluation makes this clear. The court did not invoke "a combination of reasons," "a number of reasons in combination," or similar words. Each reason, in the court's mind, justified not having a California Rehabilitation Center evaluation done. And defendant's liability to confinement and deportation on leaving state prison sufficed to permit the court to decide he was not fit for evaluation for possible placement at the California Rehabilitation Center. (See *People v. Arciga*, *supra*, 182 Cal.App.3d at p. 998.) The trial court could so determine without waiting for the Director of Corrections to make the same determination at a later stage. Thus, the court's error in calculating the length of defendant's prison term against his statutory eligibility for California Rehabilitation Center placement is of no significance.

Defendant argues that this case is distinguishable from *People v. Arciga*, *supra*, 182 Cal.App.3d 991, in that he is not an illegal, i.e., undocumented, alien. Whether that is true or not, we see no difference: as an alien with a qualifying criminal conviction, he is deportable on that ground whether or not he would be deportable on some other ground, such as being illegally present in the United States. He also argues that it is possible the immigration hold could be lifted or that he could be released on bail from U.S. Immigration and Customs Enforcement custody so as to participate in the California Rehabilitation Center outreach program. Both assertions are, however, speculative and therefore unpersuasive.

II. *Sentencing Issues*

A. *Procedural Background*

In case No. SS051452, following a trial by the court, the court convicted defendant of the following crimes, committed in 2005: possessing a controlled substance for sale

(Health & Saf. Code, § 11378),[4] transporting a controlled substance (*id*., § 11379, subd. (a)), and possessing a deadly weapon (Pen. Code, § 12020, subd. (a)(1)). The court imposed a sentence of four years, the upper term for the transporting count, declaring that the aggravating circumstances outweighed the mitigating.

In case No. SS052318, following a trial by the court, the court convicted defendant of the following crimes, committed in 2005: burglary (Pen. Code, § 459), forgery (*id*., § 470, subd. (d)), and possessing a forged instrument (*id*., § 475). The court imposed a sentence of eight months for the burglary count, to run consecutively to the sentence imposed in case No. SS051452.

Resolution of case No. SM970648 took several years. Defendant committed the crimes charged in this case in 1997. In 2004 defendant offered to plead no contest to the five counts charged, and the court accepted the pleas. Thus, defendant was convicted of the following crimes: two counts of grand theft (Pen. Code, § 487, subd. (a)), theft by use of a credit card exceeding $400 (*id*., § 484g), burglary (*id*., § 459), and grand theft by receiving an access card with intent to defraud (*id*., § 484e, subd. (c)). In 2006, after defendant had violated his probation, the trial court revoked it and imposed an eight-month term on one of the grand theft counts and an eight-month term for the credit card–based theft. These two terms were consecutive to the sentence imposed in case No. SS051452, for a total of 16 months' confinement.

In imposing the upper term and the three consecutive terms, the trial court stated only that defendant deserved the upper term because the aggravating factors outweighed the mitigating factors. The court did not articulate any explicit reason for imposing the consecutive terms. Counsel did not ask the court to explain or further explain, as the case

[4] As noted, all citations of the statutes encompassing defendant's crimes are to the statutes in effect at the time of his crimes.

may be, its reasons for imposing those terms, perhaps because up to the point of pronouncing sentence, the sentencing hearing had focused on defendant's long history of continuing to commit a variety of crimes, his inability to reform, and his squandering of probation opportunities. The court said to defendant: "Your case is one of the more tragic cases I've seen . . . . You're almost like a person without a country, because of your citizenship status . . . . And that's through no fault of your own. But . . . you've been given the opportunity previously to try and make something productive out of your life. And . . . you haven't done that. [¶] So I'm going to [give] you what I think is an appropriate and fair sentence based on all those considerations."

B. *Discussion*

1. *Constitutionality of Consecutive and Aggravated Terms*

In *Cunningham v. California* (2007) 549 U.S. __ [127 S. Ct. 856]), which the United States Supreme Court issued while this appeal was pending, the high court overruled in part the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238, which had held, among other things, that the provisions of California's determinate sentencing law authorizing the trial court to find the facts permitting an upper term sentence did not violate a defendant's right to a jury trial. (*Cunningham, supra,* 549 U.S. at p. ___ [127 S.Ct. at p. 860].) The United States Supreme Court concluded that because our determinate sentencing law "authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our *Sixth Amendment* precedent." (*Id*. at p. ___ [127 S.Ct. at p. 871].)

The decision in *Cunningham* did not address consecutive sentencing, and therefore we remain bound by the California Supreme Court's holding in *People v. Black, supra,* 35 Cal.4th at page 1262, that a defendant's Sixth Amendment right to a jury trial is not violated when the trial court exercises its discretion to determine whether to impose

sentences consecutively or concurrently. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We turn to defendant's aggravated term. Under *Cunningham v. California*, *supra*, 549 U.S. __ [127 S. Ct. 856], it was error under the Sixth Amendment to the United States Constitution for the trial court (which with defendant's agreement had tried the case without a jury, so no question of decision-making by jury rather than judge arises in this case) to impose the upper term in case No. SS051452 without declaring on the record that it found beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors. (*Id*. at p. __ [127 S.Ct. at p. 868]; see *id*. at pp. __, __ [127 S.Ct. at pp. 863-864, 870].)

In this case, however, the error was harmless. *Cunningham* states that the upper term is authorized if imposed pursuant to facts admitted by the defendant. (*Cunningham v. California*, *supra*, 549 U.S. at pp.__, __ [127 S.Ct. at pp. 865, 868].) Only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) As described, defense counsel essentially conceded at the sentencing hearing that defendant had an unsatisfactory performance on probation and a pattern of criminal conduct. Counsel acknowledged that his client had "failed at least three programs," referring to one or more programs in which defendant was placed as part of his probation. And counsel acknowledged defendant's habitual "criminality." If we were to remand the case for resentencing, undoubtedly the trial court (or a jury, if impaneled to decide the sentencing issue) would find beyond a reasonable doubt that these aggravating factors exist. Thus, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326, 327.)

2. *Adequacy of Statement of Reasons for Imposing Aggravated and Consecutive Terms*

Defendant has forfeited his claim that the trial court failed to state adequate reasons for imposing upper and consecutive terms. He may not complain for the first time on appeal about the manner in which the trial court articulated the reasons for its sentencing choices. (*People v. Scott* (1994) 9 Cal.4th 331, 356.) "Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id*. at p. 353.) By not objecting in a timely manner to any lack of an adequate statement of reasons for the court's sentencing decisions, defendant has failed to preserve his claim for review.

In addition to defendant's forfeiting this claim, he would not be entitled to relief on the merits. As noted, the sentencing hearing focused on defendant's long history of continuing to commit a variety of crimes, his inability to reform, and his squandering of the benefits of probation. Plainly, the trial court had in mind the aggravating factors of defendant's numerous criminal convictions (Cal. Rules of Court, rule 4.421(b)(2)) and his unsatisfactory performance on probation (*id*., rule 4.421(b)(5)). Even if the court failed to articulate its reasons for imposing the consecutive and upper terms as fully as required (see *id*., rules 4.406(a), (b)(5) [consecutive terms]; 4.406(a), (b)(4), 4.420(e) [upper term]), any error was harmless, because on this record, there is no reasonable probability (*People v. Scott*, *supra*, 9 Cal.4th at p. 355) of a different result if we were to remand the case for resentencing.

DISPOSITION

The judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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McAdams, J.