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Opn. on remand

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARIO CHAVOLLA PEREZ, Defendant and Appellant.	F048570 (Super. Ct. No. 05CM0420) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Peter M. Schultz, Judge.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson and Dane R. Gillette, Chief Assistant Attorneys General, Mary Jo Graves and Michael P. Farrell, Assistant Attorneys General, Stephen G. Herndon, Julie A. Hokans and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Vartabedian, Acting P.J., Wiseman, J., and Dawson, J.

A jury convicted appellant Mario Perez of possession of methamphetamine for purposes of sale (Health & Saf. Code, § 11378; count 1) and possession of marijuana for purposes of sale (Health & Saf. Code, § 11359; count 2). The court imposed a prison term of three years eight months, consisting of the three-year upper term on count 1 and a consecutive eight-month term on count 2. The court also made various monetary orders, including that Perez pay "$115 in penalty assessments as to each count."

Perez appealed, arguing that (1) the imposition of the upper term violated his right to trial by jury under the United States Constitution, and (2) the court erred in failing to separately list, and identify the statutory bases of, the "penalty assessments" imposed. This court rejected Perez's first argument, relying on *People v. Black* (2005) 35 Cal.4th 1238, but, finding merit in his second, remanded the matter for the trial court to correct its error.

Thereafter, in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*) the United States Supreme Court found that *Black* was wrongly decided; vacated our previous opinion; and remanded the matter to this court for further consideration in light of *Cunningham*.

On remand, Perez renews his constitutional attack on his sentence and, presumably, agrees with this court's conclusion with regard to the penalty assessments issue. We will reject Perez's challenge to the upper term and remand the matter for the court to correct its error with respect to the penalty assessments.

DISCUSSION[1]

Imposition of Upper Term

The court imposed the upper term on count 1 based on its findings of the following two circumstances in aggravation: Perez's performance on probation was

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1 Because the facts of the instant offenses are not relevant to the issues raised on appeal, we will forgo a recitation of those facts.

unsatisfactory and he committed the count 1 offense while on probation. Perez argues that because the court chose the upper term based on aggravating factors that were not found by a jury beyond a reasonable doubt or admitted by Perez, he was denied his right to trial by jury under the Sixth Amendment to the United States Constitution.[2]

In *Blakely v. Washington* (2004) 542 U.S. 296, 490 [124 S.Ct. 2531, 2534] (*Blakely*), the United States Supreme Court held: " '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.' " (*Id.* at p. 301, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 2534] (*Apprendi*).) In *Cunningham* the United States Supreme Court held that the middle term in California's determinate sentencing law was the relevant statutory maximum for the purpose of applying *Blakely* and *Apprendi*. (*Cunningham, supra,* 549 U.S. at p. ___ [127 S.Ct. at p. 868].) *Cunningham* also reaffirmed the exception enunciated in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219], and affirmed in *Blakely* and *Apprendi*: "[T]he Federal Constitution's jury-trial guarantee 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, supra,* 549 U.S. at p. ___ [127 S.Ct. at p. 860, italics added; *Blakely, supra,* 542 U.S. at p. 301; *Apprendi, supra,* 530 U.S. at pp. 488 & 490.)

As the foregoing makes clear, the high court in *Cunningham* plainly recognized the validity of imposing aggravated terms based on the fact of a prior conviction. (*Cunningham, supra,* 549 U.S. at p. __ [127 S.Ct. at p. 868].) And in our view the aggravating factors at issue here--Perez's performance on probation and the fact that he

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[2] The People argue this contention is forfeited because Perez failed to raise it in the trial court. We assume without deciding that Perez's challenge to his sentence is cognizable on this appeal.

was on probation at the time of the instant offenses--fell within the prior-conviction exception and therefore did not implicate Perez's right to jury trial. We recognize that neither of these factors is, strictly, " 'the *fact* of a prior conviction.' " (*Blakely*, *supra*, 542 U.S. at p. 301, italics added.) However, "[C]ourts have construed *Apprendi* as requiring a jury trial except as to matters relating to 'recidivism.' Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' " (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221.) Thus, in *Thomas* the court held "the language … in *Apprendi*, '[o]ther than the fact of a prior conviction,' refers broadly to recidivism enhancements which include [Penal Code] section 667.5 prior prison term allegations." (*Id*. at p. 223.) Each of the aggravating factors at issue here presuppose a prior conviction and, in our view, like the prior prison term enhancement, each is so closely related to recidivism that it falls within the prior-conviction exception.

Perez contends that exception "is read very narrowly and applies only to the mere fact of a prior conviction," and therefore the imposition of the upper term here ran afoul of his constitutional right to trial by jury. He bases this contention on *Shepard v. United States* (2005) 544 U.S. 13 [125 S.Ct. 1254] (*Shepard*).

In *Shepard* the issue before the United States Supreme Court concerned whether the defendant's Massachusetts burglary convictions qualified as violent felony convictions within the meaning of the federal Armed Career Criminal Act (ACCA) (18 U.S.C. § 924(e)). The ACCA provides for increased sentences under certain circumstances where a defendant has suffered three violent felony convictions, and under the ACCA, as interpreted in *Taylor v. United States* (1990) 495 U.S. 595 [110 S.Ct. 2143], only "generic burglary"--burglary committed in a building or an enclosed space--is a violent felony. As our Supreme Court explained in *People v. McGee* (2006) 38 Cal.4th 682, 707, "In *Shepard*, the high court addressed whether, under the [ACCA], a

sentencing court may look to police reports or complaint applications in determining whether a guilty plea in an earlier criminal proceeding formed the basis for a conviction of 'generic' burglary . . . . In *Shepard*, a majority of the high court held that 'a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.' [Citation]."

In reaching this conclusion--and rejecting the assertion that the sentencing court properly could consider all the documents contained within the record of the prior criminal proceeding--the majority opinion in *Shepard* stated, in a passage upon which Perez relies, as follows: "While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* [*v. United States* (1999) 526 U.S. 227 [119 S.Ct. 1215]] and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality . . . therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea . . . ." (*Shepard, supra,* 544 U.S. at p. __ [125 S.Ct. at pp. 1262-1263].)

Shepard does not assist Perez. As our Supreme Court concluded in *McGee*, although the *Shepard* decision may suggest that a majority of the high court would view the question of the scope of the prior-conviction exception as presenting a serious constitutional issue, "the high court's decision did not purport to resolve that issue." (*People v. McGee, supra,* 38 Cal.4th at p. 708.) The court in *McGee* held that the defendant there was not entitled to have a jury decide whether his Nevada robbery

convictions qualified as "strikes"[3] under California law, rejecting that claim that *Shepard* dictated a contrary result, concluding that that "*Shepard* does not provide the type of clear resolution [of the issue of whether the prior-conviction exception extends beyond the mere fact of the conviction] that would justify overturning the relevant California precedents [such as *Thomas*]." (*Ibid*.) The court found it "worth noting that in the several months following the *Shepard* decision, a number of federal lower courts have reaffirmed the viability of the *Almendarez-Torres* exception. (See, e.g., *United States v. Reeves* (8th Cir. 2005) 410 F.3d 1031, 1035, quoting *United States v. Marcussen* (8th Cir. 2005) 403 F.3d 982, 984 ['We previously have rejected the argument that the nature of a prior conviction is to be treated differently from the fact of a prior conviction'; *Shepard* supports 'the rule that the sentencing court, not a jury, must determine whether prior convictions qualify as violent felonies']; *United States v. Williams* (7th Cir. 2005) 410 F.3d 397, 402 [trial court can make findings of fact respecting criminal history, 'be they findings as to the fact of [a defendant's] prior convictions or as to the nature of those convictions,' because *Shepard* 'acknowledges the continuing validity of *Almendarez-Torres*'].)" (*People v. McGee*, *supra*, at p. 708.)

As the *McGee* court recognized, the United States Supreme Court may, in future decisions, extend the *Blakely*/*Apprendi*/*Cunningham* right to jury trial to encompass matters related to recidivism, including, as pertinent to Perez, a court's imposition of an upper term sentence based on the court's finding that the defendant was on probation at the time of the crime and/or performed unsatisfactorily on probation. But until the United States Supreme Court limits or abolishes the prior-conviction exception in this

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3 A "strike" is a "prior felony conviction" within the meaning of the "three strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

manner, we are bound by the *McGee* decision. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Imposition of "Penalty Assessments"

As indicated above, the court ordered Perez to pay, inter alia, "$115 in penalty assessments as to each count." Perez contends, and the People concede, the court erred in failing to separately list, and identify the statutory bases of, the "penalty assessments." We agree.

All "fines, fees and penalties" must be stated separately at sentencing, with the statutory basis specified for each, and the abstract of judgment must reflect these matters. (*People v. High* (2004) 119 Cal.App.4th 1192, 1201.) As the court in *High* stated, "Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment." (*Id*. at p. 1200.)

DISPOSITION

The matter is remanded for the trial court to separately list, with the statutory basis, all fines, fees, and penalties imposed. An amended abstract of judgment shall be prepared and forwarded to the appropriate authorities. In all other respects, the judgment is affirmed.