Filed 3/23/07 P. v. Phillips CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. PRESTON L. PHILLIPS, Defendant and Appellant.	C051711 (Super. Ct. No. 05F05718)

Defendant Preston L. Phillips pled no contest in Merced County to receiving stolen property (a car) and reckless driving. In a related action, he was charged in Sacramento County with carjacking and second degree robbery of a cell phone. The Sacramento County court granted his motion to dismiss the carjacking count but denied the motion as to the charge of robbery, for which defendant was then tried and convicted by a jury. He was sentenced to the upper term of five years in state prison for the robbery and was ordered to pay various fines and fees.

On appeal, defendant contends (1) the rejection of his motion to dismiss the robbery charge denied him due process of law and

exposed him to double jeopardy, and (2) imposition of the upper term violated his right to a jury trial on the aggravating factors used to enhance his sentence. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 2005, Kisha Singleton drove from her Sacramento home to a restaurant to pick up dinner for her family. When she discovered the restaurant was closed, she called her husband on her cell phone to discuss alternate dinner plans. While she talked on the phone, she pulled over to the side of the road and stopped, leaving the engine running.

When Singleton hung up the phone, defendant appeared at the passenger side window of her car, then went around the back and "charged" towards the driver's side window. He reached inside the open window with his left hand and tried to pull Singleton out, saying, "[G]et the fuck out of [the] car. I will not hurt you. Just get the fuck out of the car." Defendant had his right hand in his pants, moving it around as if he had a gun.

When Singleton did not comply with his demand, defendant opened the door from the inside and yanked her out. As she was being pulled from the car, Singleton took the keys out of the ignition and grabbed her cell phone and purse.

Once she was out of the car, defendant forcefully grabbed the keys and cell phone from her hands. He struggled to take her purse from her, but finally let go, jumped in the car, and drove away. Singleton ultimately called the Sacramento Police Department, reported what had happened, and gave a physical description of

defendant. Several weeks later, Singleton identified defendant in a photo lineup.

On June 10, 2005, City of Merced police officer Jim Gurden noticed defendant, driving a car in front of him, acting nervous, and repeatedly looking at Gurden in the rearview mirror. Gurden called dispatch and learned that the car defendant was driving had been stolen in a carjacking in Sacramento. Defendant evaded a pursuit by Gurden, but was later apprehended and taken into custody.

The Merced County District Attorney's office charged defendant with unlawful taking or driving of a car, receiving stolen property (the car), reckless driving, driving with a suspended license, resisting arrest, and possessing a switchblade knife. All counts were alleged to have occurred "on or about June 10, 2005."

Defendant entered a negotiated plea of no contest to receiving the stolen car and reckless driving. The remaining charges were dismissed in the interest of justice. The trial court imposed but suspended a sentence of two years in prison, and placed defendant on probation under various conditions, including that he serve eight months in jail.

In the meantime, on June 20, 2005, the Sacramento County District Attorney's office charged defendant with carjacking and robbery (the forcible taking of Singleton's cell phone), both of which were alleged to have occurred "on or about May 27, 2005."

Prior to the commencement of trial of the Sacramento County action, defendant moved to dismiss both counts based on Penal Code section 654's prohibition against multiple prosecution of offenses

arising from the same act or course of conduct. (*Kellett v. Superior Court* (1966) 63 Cal.2d 822 (hereafter *Kellett*).)

Finding carjacking to be akin to a robbery involving theft of a vehicle, the trial court ruled the carjacking charge was barred by defendant's no contest plea to receiving stolen property in the Merced County action, and therefore dismissed the carjacking charge. But the court declined to dismiss the charge of robbery involving the cell phone, finding the "objectives and the purpose and the intent behind [that charge] was much different from the intent and objective behind the [carjacking]."

A jury found defendant guilty of the robbery charge, and the trial court imposed the upper term, in part based upon defendant's prior convictions as both a juvenile and an adult.

DISCUSSION

I

Defendant contends that dismissal of the robbery charge was required by the prohibition against multiple prosecutions in Penal Code section 654, as interpreted in *Kellett, supra,* 63 Cal.2d 822. (Further section references are to the Penal Code.) We disagree.

Section 654, subdivision (a) states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

In *Kellett,* the California Supreme Court interpreted this statutory bar against multiple prosecutions. In that case, police officers were dispatched to the scene of a "disturbance" and saw Kellett holding a pistol. They arrested him, and he was charged that same day with exhibiting a firearm in a threatening manner, a misdemeanor. (§ 417.) He was later charged in a second case with being a convicted felon in possession of a pistol capable of being concealed, a felony. (§ 12021.) After entering a plea of guilty to the misdemeanor and being sentenced to 90 days in jail, Kellett moved to dismiss the felony offense, citing section 654. The Supreme Court held that the trial court erred in denying the motion: "When, as here, the prosecution is or should be aware of more than one offense *in which the same act or course of conduct plays a significant part*, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Kellett*, *supra*, 63 Cal.2d at p. 827, fn. omitted, italics added.)

Here, defendant contends the same act or course of conduct played a significant part in both the receiving stolen property charge in Merced County and the carjacking and robbery charges in Sacramento County. We disagree.

An act or course of conduct plays a "significant part" in two different offenses if "the evidence needed to prove one offense necessarily supplies proof of the other." (*People v. Hurtado*

(1977) 67 Cal.App.3d 633, 636, citing *People v. Flint*, (1975) 51 Cal.App.3d 333, 338.) That is not the case here.

Because the trial court dismissed the carjacking charge, the charge at issue is the allegation that defendant committed robbery in taking the victim's cell phone. Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The victim testified that after defendant forcefully removed her from her car, he grabbed her cell phone from her hand and tried unsuccessfully to take her purse before jumping in the car and speeding away. Although the parties' stipulated that the victim told investigators she dropped the cell phone in the car at some point, her trial testimony was sufficient to prove that defendant robbed her of her cell phone after he removed her from the car and already had control of the car keys.

Section 496, on the other hand, makes it a crime to knowingly receive property "that has been stolen or that has been obtained in any manner constituting theft or extortion" or to knowingly withhold any property from the owner. (§ 496, subd. (a).) In the Merced County prosecution, defendant admitted the crime of receiving the victim's stolen car. Evidence necessary to prove that charge did not necessarily supply proof of the charge of robbery regarding the cell phone, which occurred after defendant had taken possession of the victim's car. Moreover, the evidence supports the court's conclusion that defendant's objective in robbing the victim of her cell phone was different from his objective in taking the car.

The victim's cell phone, which could be used for purposes unrelated to the carjacking, had value to defendant separate from that of the victim's car.

Accordingly, the trial court correctly denied defendant's motion to dismiss the robbery charge.

II

We also reject defendant's claim that imposition of the upper term for the robbery ran afoul of the Sixth Amendment of the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*).

In *Apprendi*, the Supreme Court held 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 tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. at p. 303-305 [159 L.Ed.2d at pp. 413-414].)

In *Cunningham v. California* (2007) ___ U.S. ___ [166 L.Ed.2d 856] (hereafter *Cunningham*), the Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term'

sentence," California's determinate sentencing law (DSL) "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Id*. at p. ___ [166 L.Ed.2d at p. 864], overruling *People v. Black* (2005) 35 Cal.4th 1238 on this point, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [2007 WL 505809].)

Here, however, the trial court cited as a basis for imposing the upper term the fact that defendant's prior criminal adjudications and convictions both as a juvenile and an adult were "numerous or increasing[ly] serious," as well as the facts that defendant was on probation for a prior criminal conviction when he committed the crime in this case and that he had served a prison term for another prior criminal conviction.

The imposition of the upper term based on these facts did not violate the rule of *Apprendi*, *Blakely*, and *Cunningham* because that rule does not apply to a aggravated sentence based on a defendant's prior convictions. (*Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].)

One valid aggravating factor is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Here, there were three valid aggravating factors relating to his prior criminal adjudications and convictions. We are satisfied beyond a reasonable doubt that the trial court would have imposed the upper term based on those three valid factors alone, indeed, that it would have done so based solely on the prior criminal convictions. Therefore, any error in considering the facts that defendant had engaged in violent conduct, indicating he is a danger to society,

when he robbed the victim, and that defendant's prior performances on probation or parole were "abysmal," was harmless.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

DAVIS, J.

RAYE, J.