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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO RAMOS,

Defendant and Appellant.

F051122

(Super. Ct. No. 06CM1934)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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

This is an appeal from judgment after a jury found defendant Ricardo Ramos guilty of one count of arson of property (Pen. Code, § 451, subd. (d)). Defendant contends the court abused its discretion in imposing the upper term of three years for the crime. He also contends the court violated his Sixth and Fourteenth Amendment rights in basing the sentence on facts not admitted or found true by the jury. (See *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856].) We will affirm the judgment.

Facts and Procedural History

In a neighborhood dispute, defendant poured gasoline over his neighbor's car and lit it. The car was damaged in the amount of \$2,253.50.

At sentencing, the court announced its tentative disposition: Based on defendant's "rather extensive" criminal record and "his history of probation violations," and the absence of mitigating factors, the court found appropriate the upper term of imprisonment. In response, defense counsel took "just slight issue" with the court's characterization of defendant's criminal history as extensive. Counsel pointed out that defendant had only one prior felony conviction (as to which a prior prison term enhancement was imposed); all other convictions were for misdemeanors such as sale of alcohol to a minor (Bus. & Prof. Code, § 25658, subd. (a)), possession of drug paraphernalia (Health & Saf. Code, § 11364), and failure to appear for court (Pen. Code, § 853.7). Counsel said defendant's record reflected more "scofflaw behavior" than extensive criminality. Defendant did not suggest any mitigating factors.

The court, for the reasons stated in the tentative decision, imposed the upper term of three years for arson of property, plus one year for the prior prison term enhancement (Pen. Code, § 667.5.) Defendant filed a timely notice of appeal.

Discussion

In essence, defendant contends the trial court abused its discretion because defendant disagrees with the court's determination that his criminal record was

“extensive.” According to defendant, “although appellant’s criminal record may, technically, be extensive, his offenses are relatively minor misdemeanors.”

The trial court is not required to narrowly focus on the nature of a defendant’s prior crimes. It may determine, instead, that prior punishments have failed to deter the defendant’s criminal behavior, and such a conclusion supports imposition of the upper term of imprisonment for the present offense. (*People v. Whitten* (1994) 22 Cal.App.4th 1761, 1767-1768.) Here, defendant’s prior imprisonment had not deterred him from further misdemeanor conduct nor had it convinced him to appear in court when he promised to do so. Pursuant to California Rules of Court, rule 4.421(b)(2), the trial court was justified in imposing the upper term in this case.

Defendant also contends imposition of the upper term in this case violated the Sixth and Fourteenth Amendments to the United States Constitution pursuant to the rule articulated in *People v. Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856]. *Cunningham*, however, does not prohibit a sentencing court from relying on prior convictions as a sentencing factor, even if other sentencing facts must be admitted or found true by the finder of fact. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

Clearly, the trial court’s focus in imposing the upper term in this case was upon defendant’s record of prior convictions. To the extent the court mentioned defendant’s prior violation of probation, that factor was merely peripheral to the court’s determination. If such reliance is error, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

The trial court neither abused its discretion nor deprived defendant of constitutionally protected rights.

Disposition

The judgment is affirmed.