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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA THOMAS RODRIGUEZ, Defendant and Appellant.	F049092 (Super. Ct. No. F05903671-6) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

Robert L. S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Harris, J. and Levy, J.

A jury found defendant Joshua Thomas Rodriguez guilty of two counts of corporal injury to a cohabitant with a prior conviction of the same. (Pen. Code,[1] § 273.5, subd. (e).) The court sentenced defendant to concurrent upper terms for these offenses. Defendant appealed, claiming the court violated his Sixth and Fourteenth Amendment rights under the United States Constitution by imposing the upper term without a jury determination of the aggravating circumstances. We affirmed the judgment in an unpublished opinion. On February 20, 2007, the Supreme Court of the United States granted defendant's petition for writ of certiorari. The court vacated the judgment in this case and remanded the matter to us for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*).

We have further considered the matter. We again affirm the judgment.

Facts

On June 13, 2005, defendant was charged by information with two counts of corporal injury to a cohabitant with a prior (§ 273.5, subd. (e)), resulting from two incidents on May 9, 2005. Defendant waived his right to a jury trial on the prior misdemeanor conviction under section 273.5, subdivision (a), and admitted the truth of the prior allegation.

On August 18, 2005, a jury found defendant guilty of both counts. At his sentencing hearing on September 15, 2005, the court sentenced defendant to the upper term of five years in state prison for each count, with the two terms to run concurrently.[2] In imposing the sentence, the trial court expressly relied upon the probation officer's report, a series of letters received by the court, defendant's statement, and a review of defendant's prior conviction and probation records. It found no mitigating factors, but found multiple aggravating factors, including that defendant's prior record of criminal

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[1] All further references are to the Penal Code unless otherwise stated.

[2] Less credit for 195 days served.

conduct shows increasing recency and frequency and indicates a pattern of increasingly serious conduct. The court also sentenced defendant to a concurrent middle term of three years on a previous conviction for stalking. (§ 646.9, subd. (b); Fresno Co. Super. Ct. case No. F03902176-7.) Defendant filed a timely notice of appeal on October 24, 2005.

Discussion

Defendant contends the trial court violated his constitutional rights by using aggravating factors not admitted or found true by a jury to impose the upper term under California's Determinate Sentencing Act. (*Blakely v. Washington* (2004) 542 U.S. 296.) Under the determinate sentencing law as applicable in this case, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Former § 1170, subd. (b), as amended by Stats. 1998, ch. 926, § 1.) To determine if circumstances justify the imposition of the upper or lower term, the court may consider "the record in the case, the probation officer's report . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim … and any further evidence introduced at the sentencing hearing." (*Ibid.*)

In *Cunningham, supra*, the United States Supreme Court held that a trial court's imposition of the upper term sentence under the determinate sentencing law violates a defendant's constitutional right to jury trial if the court's determination is made in reliance on aggravating factors not found true by a jury or admitted by the defendant. (549 U.S. at p. ___ [127 S.Ct. at p. 860].) The *Cunningham* court, however, reaffirmed an exception to the jury verdict/admission rule when the trial court uses the fact of prior convictions to impose the upper term. (*Id*. at p. 868.)

In the present case, the court relied on defendant's record of prior convictions, along with a multitude of other factors that, standing alone, would appear to violate *Cunningham*. These errant factors did not stand alone, however, and when taken in conjunction with the valid prior-convictions factor, may not be subject to the

Cunningham rule at all. (See *People v. Black* (2005) 35 Cal.4th 1238, 1270 (conc. & dis. opn. of Kennard, J.).)

In any event, the court found no factors in mitigation. It has long been established that, in the absence of mitigating factors, the presence of a single, valid aggravating factor is sufficient for imposition of the upper term. (See *People v. Castellano* (1983) 140 Cal.App.3d 608, 615.) "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

We can see no basis to distinguish between aggravating factors not found true by a jury and, for example, not supported by the record. Accordingly, in our view, the standard of review specified in *People v. Price*, *supra*, 1 Cal.4th at page 492 (see *People* v. *Watson* (1956) 46 Cal.2d 818, 836) is applicable in the present circumstances. Based on a review of the transcript of the sentencing hearing, the report of the probation officer, and the other documents before the trial court, it is not reasonably probable that the court would have chosen a lesser sentence had it known its determination of aggravating factors was limited to defendant's prior record. Even if the appropriate standard was that established in *Chapman* v. *California* (1967) 386 U.S. 18, the result would not change: it is clear beyond a reasonable doubt the trial court would have imposed the upper term on the basis of defendant's prior convictions alone, in the absence of any mitigating factors.

Disposition

We affirm the judgment.