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

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY LAVELLE ROSS,

Defendant and Appellant.

F050599

(Super. Ct. No. 06CM0972)

OPINION

THE COURT*

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

Catherine White, 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, and Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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This is an appeal from judgment after defendant and appellant Ricky LaVelle Ross was sentenced to prison pursuant to a plea bargain. Defendant contends the sentence

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

imposed by the trial court violated his Sixth and Fourteenth Amendments right to jury trial. There is no merit to defendant's claim; we will affirm the judgment.

Facts and Procedural History

Defendant and another man stole two all-terrain vehicles (ATVs) from a retailer. Defendant was driving a pickup truck and pulling a trailer onto which the ATVs were loaded. After a description was broadcast to police agencies in the area, a police officer saw the truck and gave chase. Defendant pulled over to the shoulder of the road and stopped. As the police officers approached the truck, defendant sped away, leading those officers and others on a lengthy chase. Eventually, defendant abandoned the truck. He was caught a short time later.

Defendant was charged with two counts of grand theft of an automobile (Pen. Code, § 487, subd. (d)(1)), two counts of vehicle theft (Veh. Code, § 10851, subd. (a)), one felony count of evading a peace officer (Veh. Code, § 2800.2, subd. (a)), and one misdemeanor count of delaying or obstructing a peace officer (Pen. Code, § 148, subd. (a)(1)). The information also alleged five prior prison term enhancements. (Pen. Code, § 667.5.)

Pursuant to *People v. West* (1970) 3 Cal.3d 595, defendant agreed to plead no contest to one count of grand theft and one count of evading a peace officer in return for dismissal of the remaining counts and the enhancement allegations. He acknowledged he could receive a maximum prison term of three years, eight months.

At the sentencing hearing on May 31, 2006, the court imposed the upper term of three years for grand theft based on defendant's "extensive record of criminality, and the prior prison commitment, and the fact that he's on parole or on probation, and has a history of violations of probation and parole." The court imposed a consecutive sentence for evading a peace officer because that offense was separate and distinct: the theft "had been resolved by apprehension before the second crime, the evasion[,] began."

Defendant filed a timely notice of appeal.

Discussion

In briefing completed prior to the decision of the United States Supreme Court in *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 U.S. ____ [2007 WL 135687], defendant contends the court imposed the upper term sentence and the consecutive sentence in violation of the Sixth and Fourteenth Amendments as interpreted by the line of cases culminating in *United States v. Booker* (2005) 543 U.S. 220. Defendant contends he neither had nor waived a jury trial on the factors upon which the trial court relied in imposing the upper term and consecutive sentences.

To impose the upper term sentence for grand theft, the trial court relied on defendant's prior convictions and failures on parole and probation. There is no requirement under the Sixth and Fourteenth Amendments that the fact of prior convictions be admitted or found true by a jury for this factor to be used in sentencing. (*Almendarez-Torres v. United States* (1998) 523 U. S. 224, 243; see *Cunningham v. California, supra*, 549 U.S. ____ [2007 WL 135687] (slip opn. at p. 9).) Accordingly, reliance by the trial court on defendant's prior convictions was not error under *Booker* and *Cunningham*. Even if there were such error, the error was harmless beyond a reasonable doubt; furthermore, there was no abuse of discretion by the court.

To impose the consecutive sentence for evading a peace officer, the trial court relied on the fact that this crime was separate and distinct from the theft. (See Cal. Rules of Court., rule 4.425(a)(1) ["The crimes and their objectives were predominantly independent of each other"].) Defendant has not, however, convincingly explained why cases such as *Booker* and *Cunningham* should apply to the consecutive sentencing issue at all. Defendant's sentence for evading a peace officer was only one-third the middle term for that crime, and the middle term is specified in *Cunningham* as the maximum sentence permitted without further factfinding. Because defendant's sentence does not exceed the maximum sentence permitted for the crime, the *Booker/Cunningham*

restrictions do not apply. (See *Cunningham v. California*, *supra*, 549 U.S. ____ [2007 WL 135687] (slip opn. at p. 16).)

Even assuming the decision to impose consecutive sentences is subject to the limitations in *Booker* and *Cunningham*, by entering a no contest plea as part of a plea bargain that expressly permitted a total sentence of three years, eight months (and therefore necessarily contemplated consecutive sentences), we hold that defendant has admitted the facts necessary to support imposition of that term of imprisonment. Finally, even assuming the matter was required to be addressed directly in defendant's waiver of his right to jury trial, defendant has not claimed the failure to expressly waive the right to jury trial on this limited issue rendered his guilty plea involuntary or in any other manner has prejudiced him.

Disposition

The judgment is affirmed.