Filed 4/20/07 P. v. Rynhard CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JEFFERY ALLEN RYNHARD, Defendant and Appellant.	H030009 (Santa Clara County Super. Ct. No. CC577995)

A jury convicted defendant Jeffery Allen Rynhard of 15 counts of lewd and lascivious conduct with a child under 14. (Pen. Code, § 288, subd. (a).) The trial court sentenced defendant to 34 years in prison, which involved the trial court's reliance on aggravating facts so as to impose consecutive sentences. It also imposed a $70 AIDS education fine and a related $119 penalty assessment. On appeal, defendant contends that (1) the trial court's imposition of the consecutive terms violated his constitutional right to have his sentence based only on facts found by a jury (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *Blakely v. Washington* (2004) 542 U.S. 296), and (2) the trial court erred by imposing the fine and assessment. The People concede defendant's second point, and we agree that the concession is appropriate. We otherwise disagree with defendant. We therefore modify the judgment and affirm.

BACKGROUND

The trial court announced its reasons for consecutive sentences as follows: "Pursuant to Rules of Court 4.425, Court [*sic*] finds that the crimes involved were

separate acts and were committed at different times; Rules of Court 4.421(a)11, the defendant took advantage of a position of trust; 4.421(a)(b)(2), defendant's prior convictions as an adult are numerous, they also have increasing seriousness; and (b)(5), defendant's prior performance on probation was unsatisfactory. I state these reasons in the determining [*sic*] whether or not the sentence imposed in this case should be run concurrent or consecutive."

In imposing the fine and assessment, the trial court stated that it was doing so pursuant to Penal Code section "288 (a) (m)."

DISCUSSION

The California Supreme Court has held that "a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences." (*People v. Black* (2005) 35 Cal.4th 1238, 1262, overruled on another ground in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856]; accord *State v. Kahapea* (Hawai'i 2006) 141 P.3d 440, 451-453 [collecting cases].) That holding was not overturned by *Cunningham*. (*People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1269-1271). Thus, "entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under California's sentencing laws is not precluded by the decisions in *Apprendi*, *Blakely*, and *Cunningham.* In this state, every person who commits multiple crimes knows he or she is risking consecutive sentencing. While such a person has the right to the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, 'that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.' " (*Id.* at p. 1271.)

Defendant concedes as much and raises the *Apprendi/Blakely* issue in order to preserve it for further review.

Penal Code section 288a, subdivision (m), authorizes an AIDS education fine not to exceed $70 against persons convicted of violating section 288a. Defendant, however,

was convicted of violating section 288, subdivision (a). Section 288, subdivision (a), does not provide for imposition of an AIDS education fine.

DISPOSITION

The judgment is modified to strike the $70 fine and related $119 penalty assessment. As so modified, the judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.