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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KARL SELITSCH, Defendant and Appellant.	A114345 (Mendocino County Super. Ct. No. SCUK CRCR 03-55715)

Defendant and appellant Karl Selitsch appeals the sentence imposed following his guilty-plea conviction on the charge of conspiracy to commit burglary in the first degree, in violation of Penal Code sections 182, 459 and 460, subdivision (a).[1] Appellant contends the trial court violated his Sixth Amendment right to a jury trial by imposing the aggravated term of six years based on facts determined by the trial court rather than by a jury. We agree. Accordingly, we vacate the sentence and remand for further proceedings.

FACTS & PROCEDURAL BACKGROUND

On the morning of October 29, 2002, a Mendocino County Sheriff's Deputy responded to a dispatch about a shooting on Branch Road, Hopland. En route, dispatch informed the deputy Hopland Tribal Police were already on the scene and had taken one suspect into custody. Upon arrival, the deputy saw Raymond Fallis lying dead on his

[1] Further statutory references are to the Penal Code unless otherwise noted.

front steps. A tribal police officer on the scene informed the deputy a suspect was seen leaving the scene of the crime and had been taken into custody at gunpoint. This suspect was later identified as Michael Depriest.

On October 30, 2002, a detective received information from an anonymous source stating Depriest had been overheard planning to rob Fallis of coins and currency with the help of George Guertler and appellant. Depriest was brought from jail for questioning about this information. Depriest admitted he'd discussed the possibility of robbing Fallis with George Guertler and appellant, but averred it was just idle talk. Under further questioning, however, Depriest stated he and appellant had left the tribal casino on the day of the murder with the intention of going to Fallis' property to rob him. Depriest said appellant initiated the plan. According to Depriest, appellant handed him a bag containing gloves, a walkie-talkie, and the gun used to shoot Fallis. The plan was for Depriest to go to Fallis' residence on foot, subdue him at gunpoint, and then call appellant on the walkie-talkie. Appellant, parked nearby in his truck, would then come in to help tie up Fallis and look for the gold coins, which they believed were hidden in the residence. However, the plan went awry when Depriest shot Fallis during the course of the robbery.[2]

Subsequently, the police questioned George Guertler. Guertler said Depriest told him he (Depriest) had been approached by appellant to help rob a man. Appellant believed this man was storing gold coins stolen from the Shokowah Casino at his home. Depriest told Guertler appellant had an "Italian hit gun" with a silencer, which appellant kept at his home. According to Guertler, Depriest talked three or four times about going to steal the coins from the casino worker. Police also questioned Michael Frenier, a close friend of Depriest. Frenier said Depriest introduced him to appellant about one month before the murder. Appellant "freaked out" but Depriest assured appellant Frenier "was

[2] Depriest pleaded nolo contendere to a second degree murder charge, admitted the special allegation the murder was committed during the commission of first degree burglary, and received a sentence of 40 years-to-life.

cool." Appellant then outlined a plan to rob a man in Hopland. Frenier said appellant had drawn a map of the exterior of the victim's property. According to Frenier, the three drove to the victim's house to carry out the robbery, but aborted the plan because others were present at the residence. Frenier said he later came to his senses and pulled out of the plan.

On April 27, 2004, the People filed an information charging appellant with premeditated murder, in violation of section 187, subdivision (a) [count 1]; first degree robbery, in violation of sections 211 and 212.5, subdivision (a) [count 2]; first degree burglary, in violation of sections 459 and 460, subdivision (a) [count 3]; and conspiracy to commit robbery, in violation of section 459 [count 4]. The information alleged four overt acts in furtherance of the conspiracy as well as two special allegations.

At a change of plea hearing on March 9, 2006, the parties announced a negotiated plea which called for appellant to plead guilty to count 4 as amended to allege conspiracy to commit first degree burglary, in violation of sections 182, subdivision (a)(1) and 459. The plea also called for appellant to admit the first overt act alleged in the information as amended to state: "Said defendant, Karl Selitsch, discussed a plan to take coins with Michael Depriest and Michael Frenier." Under the plea, appellant would also admit overt act number four as amended to state: "Said defendant, Karl Selitsch, entered Raymond Fallis's residence with Michael Depriest and Michael Frenier to carry out the plan." The People agreed to dismiss all remaining counts in the interests of justice. The parties agreed the plea was open as to the sentence to be imposed. Before accepting the plea, the trial court advised appellant of, and appellant waived, his various constitutional rights. Regarding sentencing, the trial court also advised appellant as follows: ". . . The offense that you would be pleading guilty to today has a maximum confinement time of up to six years state prison. You could be sentenced to two years which is the mitigated term, four years which is the mid term, or six years which is the aggravated term. [¶] There would be no promises at the outset as to any amount of time you would have to serve in custody for this offense. [¶] You need to understand, sir, this is an offense for which you would be presumptively ineligible for probation. It would be your burden to show the court why

you should be granted probation, if that is your request at judgment and sentencing. [¶] Do you understand?" [¶] Appellant replied, "Yes."

At the end of the plea colloquy, appellant pleaded guilty to the crime of conspiracy to commit burglary and admitted overt acts numbers one and four, as amended. The trial court found a knowing, voluntary and intelligent waiver of rights. As to the factual basis for the plea, the court stated: "The court has . . . reviewed a portion of the preliminary hearing transcript which appears to supply a factual basis. [¶] And I understand that the People are going to offer the entire transcript as further evidentiary support for the plea. Is that correct?" Without objection from defense counsel, the prosecutor replied: "That's correct your honor." But after concurring in appellant's waiver of rights, defense counsel stated: ". . . And the partial [two-page excerpt from the preliminary hearing] transcript that I provided the court before, . . . I request it be made an exhibit to this proceeding and that a transcript of the oral action of the court be transcribed, made available to the Probation Department so that it's clear to them what went on." The court replied: "So ordered. The preliminary hearing transcript which was handed to the court consisting of two pages will be made an exhibit to the transcript of the plea today."

At the sentencing hearing on June 16, 2006, the prosecution argued the court was entitled to consider the entire transcript of the preliminary hearing in order to determine factors in aggravation and mitigation. The prosecution argued the preliminary hearing transcript showed appellant participated in the conspiracy to rob the victim right up to the point where Depriest shot the victim. On that basis, the prosecution stated "it's appropriate to consider the dismissed counts because they're transactionally related . . . to the target offense, what [*sic*] happened while [appellant] was still a member of the conspiracy," and to "consider this an aggravated case."

On the other hand, defense counsel stated he'd agreed to only two pages of the preliminary hearing transcript to be admitted at the change of plea hearing as the factual basis for the plea, not the entire preliminary hearing transcript. Defense counsel argued, based on appellant's admissions at the change of plea hearing, the conspiracy to rob the victim to which appellant pleaded guilty ended when he, Depriest and Frenier aborted the

first attempt to rob the victim. On that basis, defense counsel argued the murder was not transactionally related to the crime to which appellant pleaded guilty—conspiracy to commit burglary—and therefore, given appellant's minimal criminal history, an aggravated sentence was unwarranted.

The trial court overruled defense counsel's objection regarding the preliminary hearing transcript, ruling "the totality of the plea also was in effect a stipulation and understanding that the entire [preliminary hearing] transcript would be deemed the factual basis for the plea, despite two specific pages being appended to the plea transcript." Based on the preliminary hearing transcript, the court concluded the conspiracy continued beyond the aborted robbery attempt through the day of the murder, and therefore the "the murder of Mr. Fallis was transactionally related to the crime that Mr. Selitsch pled guilty to." "Accordingly," the court continued, "the factors in aggravation which are set forth in the probation report do apply." The court concluded the factors in aggravation outweighed the factors in mitigation, and sentenced appellant to the aggravated term of six years.

DISCUSSION

Appellant contends the imposition of an upper-term sentence violates his Sixth Amendment right to a jury trial under *Blakely v. Washington* (*Blakely*) (2004) 542 U.S. 296.[3] Specifically, appellant contends "the trial court expressly relied upon disputed facts

[3] In *Blakely*, the high court "appl[ied] the rule [] expressed in *Apprendi v. New Jersey* [*Apprendi*], 530 U.S. 466, 490: 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely, supra,* 542 U.S. at p. 296.) Applying the rule of *Apprendi*, the high court concluded the sentence imposed under the State of Washington's determinate sentencing scheme violated petitioner's Sixth Amendment right to a jury trial because he "was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with 'deliberate cruelty.' [and] [t]he facts supporting that finding were neither admitted by petitioner nor found by a jury." (*Blakely, supra,* 542 U.S. at p. 303.)

contained within hearsay statements which were not admitted by appellant at the time of his plea and not subjected to a jury determination" in imposing the aggravated sentence.

A. *Cunningham v. California*

Subsequent to the completion of briefing in this appeal, the high court issued *Cunningham v. California* (*Cunningham*) (2007) ___ U.S. ___, 127 S.Ct. 856, in which it held 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. 860.)[4] The Court observed the "DSL obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation. Based on a post-trial sentencing hearing, the trial judge found by a preponderance of the evidence six aggravating circumstances, among them, the particular vulnerability of Cunningham's victim, and Cunningham's violent conduct, which indicated a serious danger to the community. . . . In mitigation, the judge found one fact: Cunningham had no record of prior criminal conduct. Concluding that the aggravators outweighed the sole mitigator, the judge sentenced Cunningham to the upper term of 16 years." (*Id.* at pp. 860-861, citations omitted.)

"Under California's DSL," the high court noted, "an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance." (*Cunningham, supra,* 127 S.Ct. at p. 868.) In this regard, "[a]n element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance [in aggravation]." (*Ibid.*) "Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Ibid.*) The Court concluded: "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation],

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[4] However, the briefs reflect the parties knew the *Cunningham* decision was pending.

the DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [citation.]" (*Ibid.*)

Also, the high court explicitly rejected the California Supreme Court's conclusion in *People v. Black* (2005) 35 Cal.4th 1238, that the DSL survived the rule of *Apprendi.* (*Cunningham, supra,* 127 S.Ct. at pp. 868-870.) Rejecting the *Black* court's view the DSL was merely advisory, the high court stated: "Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. His instruction was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." (*Cunningham, supra,* 127 S.Ct. at p. 870.) Rather, the Court held the DSL violates the Sixth Amendment because it "allocates to judges sole authority to find facts permitting the imposition of an upper term sentence." (*Ibid.*)

The trial court's error in making the factual findings upon which it based its decision to impose the upper term sentence, is subject to harmless error analysis. (*Washington v. Recuenco* (2006) __ U.S. __; 126 S.Ct. 2546, 2547 [*Apprendi/Blakely* error not "structural error" requiring automatic reversal].) This type of error is reviewed under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). An error may be found harmless under *Chapman* only if, on appeal, the Attorney General demonstrates beyond a reasonable doubt the result would have been the same notwithstanding the error.

B. Application of *Cunningham*

1.

Appellant correctly notes the trial court relied on three aggravating factors set forth in the probation report to justify imposing the aggravated sentence: (1) the crime involved great bodily injury; (2) the victim was in his home and did not have a way to defend himself; (3) the defendant induced others to participate and occupied a position of

leadership. As in *Cunningham*, the trial court here found these factors in aggravation outweighed "the sole mitigator" — appellant's insignificant prior record of criminal conduct — and sentenced him to the upper term of 6 years. (See *Cunningham, supra,* 127 S.Ct. at pp. 860-861.) However, because these factors in aggravation were not submitted to a jury to be established beyond a reasonable doubt, but were found by the trial judge by a preponderance of the evidence, they violate "*Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [citation]" (*Cunningham, supra,* 127 S.Ct. at p. 868.) Thus, *Cunningham* compels the conclusion the upper-term sentence imposed on appellant was in violation of his right to a jury trial under the Sixth Amendment.

2.

Respondent, being aware *Cunningham* was pending at time of briefing, contends that "even if the rationale of *Black* were ultimately rejected by the United States Supreme Court, appellant would still not be entitled to relief." Because the rationale of *Black* was in fact rejected by the high court in *Cunningham*, we address respondent's contentions.

Respondent first contends "appellant forfeited any constitutional challenge to his sentence by explicitly acknowledging when he entered his plea that the maximum confinement time he faced was six years and by not objecting to such a sentence on constitutional grounds." Respondent argues appellant has waived the claim that imposition of the upper term violates his constitutional rights because he did not raise it at the sentencing hearing.

Black held "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*People v. Black, supra,* 35 Cal.4th 1238, 1244, abrogated in part by *Cunningham, supra*.) Decided in June 2005, *Black* was the governing law in California on this issue not only when appellant was sentenced in June 2006, but until the high court issued its *Cunningham* decision in

January 2007. Accordingly, we reject respondent's contention appellant forfeited his right to claim error by failing to raise this issue in the trial court because under *Black, supra,* any objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, [noting "there is a general exception to the waiver rule . . . where an objection would have been futile"]; *People v. Hill* (1998) 17 Cal.4th 800, 820 [defendant excused from failing to timely object if the objection would have been futile].)[5]

Respondent also contends *Cunningham* does not preclude imposition of the upper term because appellant admitted all the facts necessary for the court to impose it. Specifically, respondent contends appellant's "de facto stipulation that the [preliminary hearing] transcript could be considered as the factual basis for the plea is tantamount to an admission of the facts contained in that transcript for the purposes of sentencing. No further admissions by appellant or jury trial was required for the court to impose an upper-term sentence." This contention lacks merit.

As noted above, the record is less than crystal clear on what the parties intended to have submitted as support for the factual basis of the plea. The trial court understood (and so ruled) there was a stipulation the entire transcript of the preliminary hearing would be offered as the factual basis for the offense, whereas defense counsel understood only the two-page extract appended to the plea transcript contained the factual basis for the offense. However, even if the trial court was correct there was such a stipulation, respondent's contention still fails.

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[5] Moreover, because of the constitutional implications of the error at issue, there is a serious question whether the forfeiture doctrine even applies in these circumstances. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, since the purpose of the forfeiture doctrine is to "encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors," (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it inappropriate to invoke that doctrine when appellant was sentenced almost a year after *Black* was decided.

The trial court accepted the preliminary hearing transcript as providing the factual basis for the offense of conspiracy to commit first degree burglary, or, as stated by the trial court, "as further evidentiary support for the plea." Nowhere in the record does appellant admit to the truth of the testimony contained in the preliminary hearing transcript. Indeed, the only admissions from appellant were that he "discussed a plan to take coins with Michael Depriest and Michael Frenier" and "entered Raymond Fallis's residence with Michael Depriest and Michael Frenier to carry out [*sic*] plan." In short, the record does not indicate appellant's stipulation to admit the preliminary hearing transcript as a factual basis for the offense was anything more than his acknowledgement that he committed the elements of the crime to which he was pleading guilty: conspiracy to commit first degree burglary. And, as the high court noted in *Cunningham, supra,* "[a]n element of the charged offense . . . admitted in a defendant's guilty plea[] does not qualify as such a circumstance [in aggravation]." (*Cunningham, supra,* 127 S.Ct. at p. 868.)

There is another reason why the preliminary hearing transcript, even if stipulated to by appellant as the factual basis for the offense, cannot serve as the basis for the aggravated term: Appellant did not testify at the preliminary hearing and did not admit the facts necessary to support the factors in aggravation the trial used to justify the aggravated term. (*Blakely, supra,* 542 U.S. at p. 303 [sentence in excess of statutory maximum must be based on facts either admitted by appellant or found by a jury].) The factors in aggravation relied upon by the trial court—(1) the crime involved great bodily injury; (2) the victim was in his home and did not have a way to defend himself; (3) the defendant induced others to participate and occupied a position of leadership—were findings based on facts adduced from the hearsay testimony of co-participant Depriest and Frenier presented through the testimony of Detective Kevin Bailey at the preliminary hearing. But they were not findings based on facts admitted by appellant. Indeed, appellant stated he told Depriest he wanted nothing to do with the plan to rob the victim and denied being with Depriest on the day of the murder. We have grave reservations about the admissibility of the hearsay evidence contained in the preliminary hearing

transcript to support findings which must be made beyond a reasonable doubt. We do not mean to limit the parties from stipulating to facts from which sentencing factors may be found; we only hold that any such stipulation must be knowingly made, clear and unequivocal.

In sum, we conclude the trial court imposed the aggravated sentence in violation of appellant's Sixth Amendment right to a jury trial under *Cunningham, supra,* 127 S.Ct. 856. Applying the standard of *Chapman v. California, supra,* 386 U.S. 18, we cannot say the error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is vacated and the matter remanded for re-sentencing in accordance with *Cunningham.*

_____
Parrilli, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.