

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRYL LAMONT SILAS,

Defendant and Appellant.

B195194

(Los Angeles County
Super. Ct. No. VA086430)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick T. Meyers, Judge. Affirmed.

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

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, Michael R. Johnsen and Sharlene A. Honnaka, Deputy Attorneys General, for Plaintiff and Respondent.

Darryl Silas was convicted by jury of burglary and attempted rape, each with use of a knife, and in a bifurcated court trial was found to have suffered two prior felony convictions, both of which qualified under the “Three Strikes” law. The case arose from an incident in which defendant entered a woman’s apartment with a knife, acted in a threatening manner, and later told police that he wanted to “take” the woman. On his appeal from the judgment, we reversed one of the strike findings. (*People v. Silas* (March 22, 2006, B185226) [nonpub. opn.].) We concluded that the finding, which arose from an Oklahoma conviction of assault and battery with a dangerous weapon, did not qualify as a strike because the essential element of defendant’s personal use of the weapon was based on inadmissible hearsay. We reversed the finding and the matter was remanded for resentencing. (*Id.* at pp. 6–7.)

On remand, the trial court imposed a sentence that included an upper term for burglary, doubled under the Three Strikes law. In so doing, the court stated that it had read and considered the probation officer’s report and noted that at the original sentencing, it had “engaged in an extended discussion and analysis of the defendant’s prior criminal history, which I incorporate by reference.” The court continued: “[H]arking back to that extended review, in summary the defendant’s extensive juvenile record, which includes sex-related offenses beginning at age 14 and a first felony conviction at age 19 in 1985 for rape and use of a deadly weapon, which is the alleged strike and found true in this case and involves, based on a rather extensive discussion when the matter was last here, strikingly similar circumstances to the case heard in this court[,] other charges for essentially transportation of drugs under Health and Safety Code section 11352 subdivision (a) for which the defendant was granted probation but violated his probation, the Oklahoma conviction in . . . the nineties for a generally violent crime involving firearm use: The defendant has four felony convictions, three involving violent activity, three California Youth Authority and/or state prison sentences.”

The court then invited counsel to respond. Defense counsel argued that defendant had a history of drug abuse, but his use of violence had subsided and the current crime

did not involve violence. The prosecutor disagreed with defense counsel's characterization of the crime.

In pronouncing sentence, the court again referred to defendant's record. The court further stated, "[T]here is no question [the Oklahoma offense] involved a violent activity, the use of a firearm. It was clearly violent. I don't think there is any question that [defendant] was the person involved in that, and there is nothing in the [Court of Appeal] opinion to preclude my considering that in terms of selection of the appropriate term. And, accordingly, it seems to the court that the high term is the appropriate term, and the court selects the high term."

Defendant appeals from the resentencing, contending that the trial court's imposition of the upper term violated his right to a jury determination of aggravating factors beyond a reasonable doubt under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] (*Blakely*), and *Cunningham v. California* (2007) ___U.S. ___ [127 S.Ct. 856] (*Cunningham*). We disagree.

Cunningham held that California's Determinate Sentencing Law violates a defendant's right to a jury trial to the extent it permits a trial court to impose an upper term sentence based on facts found by the court under the preponderance-of-the-evidence standard rather than by a jury beyond a reasonable doubt. (*Cunningham, supra*, 127 S.Ct. at pp. 868–871, disapproving *People v. Black* (2005) 35 Cal.4th 1238, 1244.) Nevertheless, the United States Supreme Court has made clear these requirements do not apply to an increased sentence based on "the fact of a prior conviction." (*Apprendi, supra*, 530 U.S. at p. 490, relying on *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219] (*Almendarez-Torres*)). The prior conviction exception to the *Apprendi* rule has been construed broadly to apply factors based on a defendant's recidivism. (See *People v. Earley* (2004) 122 Cal.App.4th 542, 549–550; *People v. Thomas* (2001) 91 Cal.App.4th 212, 221–222.)

In imposing the upper term in this case, the trial court relied on the recidivism factors of defendant's prior convictions in California and Oklahoma. Accordingly, a jury

determination and the reasonable doubt standard were not required by *Almendarez-Torres*, *Apprendi*, *Blakely*, or *Cunningham*.¹

The judgment imposed on resentencing is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

¹ On February 7, 2007, the Supreme Court ordered supplemental briefing in *People v. Towne* (review granted July 14, 2004, S125677) on issues including whether *Cunningham* and *Almendarez-Torres* permit an upper term sentence based on aggravating factors of the defendant's prior convictions being numerous and of increasing seriousness, the defendant having served a prior prison term, the defendant being on parole at the time of the offense, and the defendant having performed unsatisfactorily on probation or parole.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.