Filed 1/2/08 P. v. Silla, Jr. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MUSA SILLA, JR., Defendant and Appellant.	B191989 (Los Angeles County Super. Ct. No. SA038481)

APPEAL from a judgment of the Los Angeles Superior Court. Stephanie Sautner, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * *

In 2001, pursuant to a plea bargain, appellant Musa Silla, Jr., pled no contest to one count of rape by threat, arising from an incident that the prosecutor described as "date-rape." He was placed on five years of probation with numerous conditions. In 2006, just before the five-year period ended, probation was revoked and he was sentenced to prison for the upper term of eight years. On appeal, his sole contention is that imposition of the upper term violated his Sixth and Fourteenth Amendment rights to jury trial and due process under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*).

On March 9, 2007, we filed our previous unpublished decision in this case. We found merit in appellant's contention and remanded the case for resentencing.

The California Supreme Court granted respondent's petition for review. It has transferred the matter to us with directions to vacate our decision and reconsider the cause in light of *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). Each side has submitted supplemental briefing regarding those cases.

Pursuant to the direction of the Supreme Court, our previous decision is vacated, and this new one is issued. We repeat our previous summary of the *Blakely* and *Cunningham* decisions, adding summaries of *Black II* and *Sandoval* (part A). We repeat the previous summary of the record with some additional facts (part B). We provide a new discussion of waiver based on *Black II* and *Sandoval* (part C). We repeat our analysis of the nature of the plea (part D). Utilizing *Black II* and *Sandoval*, we reanalyze the questions of *Blakely* error, prejudice, and remedy (part E). Based on *Black II* and our recent decision in *People v. Brock* (2007) 155 Cal.App.4th 903 (*Brock*), we affirm appellant's upper term sentence because appellant was on probation for a previous crime at the time of this offense, and showed unsatisfactory performance on probation through commission of the new offense.

A. Blakely, Cunningham, Black II, *and* Sandoval

Blakely, supra, 542 U.S. 296 was decided on June 24, 2004. Like the present case, it involved a guilty plea. Pursuant to a plea bargain, the defendant pled guilty to a form of kidnapping. The sentencing court added over three years to his sentence based on a finding of an aggravating factor, "deliberate cruelty," that was specified in the Washington State Penal Code, but had not been admitted as part of the plea. *Blakely* held that the sentencing procedure deprived the defendant of his Sixth Amendment right to a jury determination of all the facts that were legally essential to his sentence. (*Blakely,* at pp. 301-305.) In doing so, it applied this rule from *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*): " '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,* at p. 301, quoting *Apprendi,* at p. 490.) It further held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Id.* at p. 303.)

Subsequent to *Blakely*, in *People v. Black* (2005) 35 Cal.4th 1238, 1254 (*Black*), the California Supreme Court held that California's determinate sentencing law (DSL) does not violate the Sixth Amendment because, under the California scheme, the upper term is the " 'statutory maximum.' " *Black* was decided on June 20, 2005. It was overturned by the United States Supreme Court on January 22, 2007, in *Cunningham, supra,* 549 U.S. at page __ [127 S.Ct. at p. 871].

Cunningham held that it is the midterm of a DSL sentence, and not the upper term, that constitutes the statutory maximum sentence. (*Cunningham, supra,* 549 U.S. at p. __ [127 S.Ct. at p. 871].) It further held that the DSL violates a defendant's Sixth Amendment right to jury, because it gives the trial

judge, and not the jury, the authority to find the facts that permit an upper term. (*Cunningham, supra,* 549 U.S. at p. __ [127 S.Ct. at p. 871].)

In response to *Cunningham*, our Legislature revised the DSL effective March 30, 2007.[1] The Judicial Council then amended the sentencing rules to conform to the new version of the DSL. (See Cal. Rules of Court, rules 4.405-4.452.)

The California Supreme Court provided guidance on the meaning of *Cunningham* in *Black II*, *supra*, 41 Cal.4th 799 and *Sandoval*, *supra*, 41 Cal.4th 825, which were decided on July 19, 2007.

We recently discussed *Black II* in *Brock*, *supra*, 155 Cal.App.4th 903, filed September 26, 2007. We explained: "*Black II* interpreted *Cunningham* to mean that 'imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions.' [Citation.] *Black II* identified two aggravating circumstances, each of which was sufficient to support the upper term. One was the jury's finding that the defendant used force, which was made in the context of a finding that the defendant was ineligible for probation due to the use of force. The other was the defendant's criminal history." (*Id.* at pp. 912-913.)

Our opinion in *Brock* went on to hold that, as in *Black II*, the defendant's criminal history justified imposition of the upper term.

The same day it decided *Black II*, the Supreme Court decided *Sandoval*, *supra*, 41 Cal.4th at pages 838-843, which reversed an upper-term sentence due to prejudicial *Blakely* error.

---

[1] A new version of the statute will be effective January 1, 2009. (Stats. 2007, ch. 3, § 3.)

The sentencing issue in *Sandoval* concerned imposition of the upper term on one of two counts of voluntary manslaughter. The trial court cited these factors in aggravation: "(1) the crime involved a great amount of violence; (2) defendant engaged in callous behavior; (3) defendant lacked any concern regarding the consequences of her actions; (4) the victims were particularly vulnerable because they were unarmed, inebriated, and ambushed from behind; (5) defendant was the 'motivating force' behind the crimes; and (6) defendant's actions reflected planning and premeditation." (*Sandoval*, *supra*, 41 Cal.4th at p. 841.)

Comparing those aggravating factors to the principles set forth in the *Cunningham* and *Blakely* decisions, *Sandoval* concluded: "None of the aggravating circumstances cited by the trial court come within the exceptions set forth in *Blakely*. Defendant had no prior criminal convictions. All of the aggravating circumstances cited by the trial court were based upon the facts underlying the crime; none were admitted by defendant or established by the jury's verdict. We conclude, accordingly, that defendant's Sixth Amendment rights were violated by the imposition of an upper term sentence." (*Sandoval*, *supra*, 41 Cal.4th at pp. 837-838.)

Sandoval then proceeded to the issue of prejudice. It found the harmless error standard of *Chapman v. California* (1966) 386 U.S. 18, 24, to be the appropriate test. The critical issue is "whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence." (*Sandoval, supra,* 41 Cal.4th at p. 838.) "[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless." (*Id*. at p. 839.) The reviewing court is also to keep in mind that the record may not contain all of

the possible evidence on the issue of the aggravating circumstances, and the somewhat vague or subjective language in some of the circumstances may make it difficult to assess what the jury would have decided. (*Id.* at pp. 839-840.)

In *Sandoval*, the Attorney General contended that the evidence justified a conclusion, beyond a reasonable doubt, that the jury would have found each of the aggravating circumstances named by the trial court to be true. (*Sandoval, supra,* 41 Cal.4th at pp. 840-843.) Taking each of the circumstances in turn, the *Sandoval* court was unable to reach that conclusion. For example, the record did not "reflect such a clear-cut instance of victim vulnerability" that the court could be confident that "the jury would have made the same findings, as might be the case if, for example, the victims had been elderly, very young, or disabled, or otherwise obviously and indisputably vulnerable." (*Id.* at p. 842.) Similarly, it was impossible to be confident that the jury would have found the defendant to be a motivating factor in the shootings due to disputes in the evidence and verdicts for manslaughter rather than murder. Similarly, since the defendant was not one of the actual shooters, and some of the facts were unclear, the court could not conclude "with any degree of confidence, much less beyond a reasonable doubt, that the jury would have found that defendant demonstrated callous behavior and a lack of concern for the consequences of her actions, or that the offense was planned and premeditated." (*Id.* at p. 841.) Therefore, the Sixth Amendment error was not harmless, and a reversal for resentencing was necessary. (*Id.* at pp. 840-843.) On remand, the trial court would have discretion to impose any of the three terms without making a finding of aggravating and mitigating circumstances. (*Id.* at p. 852.)

B. The Record

Appellant was charged with two counts of forcible rape (Pen. Code, § 261, subd. (a)(2)),[2] two counts of rape by threat (§ 261, subd. (a)(6)), and one count of criminal threats (§ 422). At the preliminary hearing, a police officer described what the victim told him. She was a female college student from Japan who lived in a one-room studio apartment. She knew appellant. Several days before the incident, he had visited her at her apartment. On that occasion, they had discussed movies and not sex.[3] At 3:30 a.m. on the night of the crime, he telephoned her from a party to say that he was drunk and wanted to see her. Although she told him not to come, he went to her building, called her on the building's buzzer, and telephoned her from his cell phone. She let him into her apartment because she did not want her neighbors to be annoyed. He sat on the bed and repeatedly asked her to have sex with him. She refused. He then became angry. He threatened to have his friends come to the apartment and break down the door. She was frightened, especially since she had heard that he was a drug dealer.[4] He ordered her to give him a condom. She gave him one and he put it on. She did not want to

---

[2] Further code references are to the Penal Code unless otherwise stated.

[3] Further facts about the offense appear in one of the probation reports. A couple of weeks before the incident, the 22-year-old victim met three men at a party. After the party, she had consensual sex with one of them, whose name was Sam. Several days later, a man who identified himself as "Sam" telephoned and asked to visit her. She gave him her address. When she heard the buzzer and went to the security gate, she discovered that the man was not Sam, but was appellant, whom she had never seen before. Appellant told her he was Sam's cousin and had heard she was " 'easy.' " She allowed him into her apartment to use the bathroom. They talked for a while, and he left without incident. The crime happened several days later.

[4] The latter testimony was introduced solely on the issue of the victim's state of mind.

have sex with him, but she did. He made her change positions twice and achieved penetration twice.[5] After he left, she called the police and was treated at the rape center of a hospital.

On January 17, 2001, appellant accepted a plea bargain. The prosecutor explained why the People were willing to offer a plea. One reason was that there were credibility issues regarding consent, as the victim had willingly allowed appellant into her home in the middle of the night. Other reasons were that there were problems bringing the victim back from Japan; no force or violence was used other than the offense itself; appellant had no prior adult history involving a felony; he had been going to counseling; and he realized he had a problem.

Pursuant to the plea bargain, appellant pled no contest to count 2, one of the counts alleging rape by threat (§ 261, subd. (a)(6)). He agreed to five years of formal probation and numerous conditions including 365 days in county jail, a year of sexual offender counseling, and lifetime registration as a sex offender.

The probation report prepared for the December 8, 1999 hearing recommended the upper term in prison. However, at the plea proceedings, the judge and counsel *for both sides* recognized that there were problems with the criminal history section of that probation report, which overstated appellant's criminal record. Indeed, after hearing from counsel, the court stated, "It's not a great report."

We summarize the report and then discuss the problems with the report that were raised at the plea proceedings.

The probation report had three entries under "Juvenile History." (Capitalization and underscoring omitted.) One was an arrest in March 1993

---

[5] The use of multiple positions was apparently the basis of the multiple counts.

for unlawfully taking or driving a vehicle. A juvenile court petition was requested, but apparently not filed. The second was an arrest for extortion in October 1993. It resulted in a sustained petition for receiving stolen property and placement in the community camp program. The third was a burglary arrest the following month, resulting in another sustained petition for receiving stolen property and another camp commitment.

The "ADULT HISTORY" (underscoring omitted) section of the probation report stated:

"10-25-95 Memphis, TN SO – aggravated assault; forgery – no further information shown this entry

"(Included as it may tend to show a pattern of behavior.)

"5-5-98 Los Angeles PD – 261 (A)(2) PC (rape by force or fear) – 5-6-98 rel/admiss evid insuff

"(Included as it may tend to show a pattern of behavior.)

"4-15-99 Los Angeles PD – 243.4 (a) PC (sexual battery by restraint) – 9-16-99 Hollywood Municipal Court Case #9HL01270 – Convicted: 415 PC (disturbing the peace) – 24 months summary probation, fine; 243.4(C)PC (sexual battery forcing victim to masturbate) – dismissed per 1385 PC

[¶] . . . [¶]

"The present offense appears to represent a violation of this grant of probation."

At the oral proceedings on January 17, 2001, the prosecutor indicated that, as to the first entry in the adult section, appellant was never arrested for aggravated assault. The second entry, for rape, was rejected by the district attorney's office due to insufficient evidence. Defense counsel added that the 1999 arrest was for sexual battery, not sexual battery by restraint, and the offense was then reduced to disturbing the peace.

The trial court then observed: "He's got problems with women apparently." Defense counsel replied that appellant knew that fact and had

begun counseling. The court was willing to go along with the plea, but warned appellant, "if you re-offend, I'll put you in prison for eight years." Appellant said he understood. He also indicated that he understood he faced a term in state prison if he violated "any of the terms and conditions of probation." He then made the plea.

The judge made handwritten corrections onto the aggravating circumstances section of the report, deleting references to planning or premeditation and to appellant's having been on parole. The judge did not, however, write corrections onto the criminal history section of the probation report.

Two weeks later, on January 31, 2001, imposition of sentence was suspended, and appellant was placed on five years of probation with numerous conditions. The remaining charges were dismissed.

A year later, in January 2002, a new probation report showed that appellant had completed his jail term and had no new arrests. He also had "complied with all of his terms and conditions of probation; such as, registered as a sex offender, enrolled in sex offender counseling at the Valley Community Counseling Center, provided medical proof of HIV and DNA, and has been paying probation/court fees." He had requested permission to travel out of the county for work-related affairs. The court gave him permission to leave the country for up to six weeks and to travel outside the county or state with the approval of his probation officer.

On January 11, 2006, shortly before his five years of probation was due to expire, appellant returned to court for violation proceedings. The report prepared for the February 9, 2006 hearing indicated that there was a "technical violation." There were no new arrests. The problem was that appellant had "been performing the routine tenets of probation such as reporting and paying, but otherwise appears to be living a double life free of probation supervision and evading sex offender registration." A sex offender task force had recently

discovered that other members of appellant's family, but not appellant, lived at the address that appellant had provided for the purposes of sex offender registration and probation supervision. Appellant himself lived at another address, a luxurious home. He insisted that he operated his magazine and movie production businesses from that location but did not live there, even though his personal possessions were there. His probation officer had given him permission to travel outside the country three times in 2005. He actually made 13 such trips in that year to "such exotic locations as Palau, the Caribbean, and Dubai." While in Hawaii, he had tried to purchase a $5,000 plane ticket with a stolen credit card, and then used cash.

A contested violation hearing occurred in May 2007. The court heard extensive testimony verifying the problems described in the probation report. The court was particularly displeased with appellant's dishonesty, both during his testimony at the violation hearing and when he had previously requested permission to travel out of the country to purchase African art.

After finding a violation of probation, the court proceeded to sentencing. Appellant and the People were both represented by attorneys who had not been present when probation was granted over five years earlier. Indeed, appellant's attorney said he was not familiar with the underlying facts of the case.

Before imposing the upper term, the trial court said that the 1999 conviction for disturbing the peace involved an initial misdemeanor arrest for sexual battery, based on forcing the victim to masturbate. The court recalled that appellant had received a " 'sweet deal' " on the present case because the victim had returned to Japan, which made it difficult to obtain her testimony. The court then imposed the upper term, based on the aggravating factors set forth in the five-year-old probation report. Those factors were that the crime involved violence, great bodily harm, and other acts disclosing a high degree of cruelty, viciousness, and callousness; appellant had a pattern of violent

conduct; his prior convictions were of increasing seriousness; he was on probation when he committed the crime; his prior performance on probation was unsatisfactory; and there were no mitigating factors.

C. Waiver

Based on the discussions of this issue in *Black II*, *supra*, 41 Cal.4th at pages 810-812 and *Sandoval*, *supra*, 41 Cal.4th at page 837, footnote 4, we find that appellant did not forfeit his claim, although he did not object on this basis at the sentencing hearing.

D. The Guilty Plea Did Not Include the Upper Term

The parties dispute whether the plea included the upper term. We have concluded that it did not, for these reasons: The offense is punishable by a state prison sentence of three, six, or eight years. (§ 264, subd. (a).) At the plea hearing, neither side stated that the plea was to the upper term. Before the plea was made, the judge told appellant, "if you re-offend, I'll put you in prison for eight years. [¶] Do you understand?" Taken in context, the judge's words were a warning of the maximum term, rather than an indication that the judge was required to impose the upper term, if probation was later revoked. When the plea was actually made, there was no mention of the upper term or a specific term in prison. Appellant simply pled no contest to violating section 261, subdivision (a)(6). Finally, when probation was eventually revoked, defense counsel argued for the midterm, instead of the upper term, further demonstrating that the parties and court understood that the plea did not include the upper term.

E. Error, Prejudice, and Remedy

Under *Blakely* and *Cunningham*, the right to a jury trial on the aggravating circumstances applies to facts, "[o]ther than a prior conviction," that were not "found by a jury or admitted by the defendant." (*Cunningham*, *supra*, 549 U.S. at p. __ [127 S.Ct. at p. 860].)

As in *Blakely*, appellant's plea admitted the charges, "but no other relevant facts." (*Blakely*, *supra*, 542 U.S. at p. 299.) He waived a jury as to guilt, but not as to the circumstances in aggravation.

On revocation of probation, the sentence had to be based on circumstances that existed at the time probation was granted. (Cal. Rules of Court, rule 4.435(b)(1).)

The trial court first cited the aggravating factor of rule 4.421(a)(1), which we call the viciousness factor. That factor is: "The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." In addition to the viciousness factor, the court specifically found that "the defendant engaged in a pattern of violent conduct, and [his] prior convictions as an adult or adjudications as a juvenile are of increasing seriousness, and he was on probation when he committed this crime, and . . . his prior performance on probation was unsatisfactory, and the probation department and the court found no mitigating factors . . . ."

Our previous opinion in this case held that the trial court's utilization of the viciousness factor violated *Blakely*. *Sandoval*, *supra*, 41 Cal.4th at pages 837-838 and 842-843, validates our conclusion as to that factor, which did not relate to the fact of a prior conviction, and was neither found true by a jury nor admitted by appellant.

Respondent maintains that the jury would necessarily have found that the crime was "very violent," if it had been asked to decide that issue, because rape by threat is classified as a "violent felony" in the list of violent felonies in section 667.5, subdivision (c)(3). The flaw in that argument is that it turns every rape by threat into an upper term offense, even though the Legislature provided three different penalties for the offense. Moreover, as the prosecutor recognized at the plea proceedings, appellant "did not use any force or violence," and "[t]here was no actual injury to the victim besides the sexual

act." We therefore cannot conclude that the jury would necessarily have found that the crime involved "great violence," if it had been presented with that issue. (*Sandoval*, *supra*, 41 Cal.4th at p. 843.)

The remaining factors in aggravation utilized by the trial court were all recidivism factors derived from appellant's prior record. In our previous opinion, we concluded that a reversal for resentencing was necessary, even if we assumed that the record supported those factors and a jury was not required for them, because we could not find the federal constitutional error regarding the viciousness factor to be harmless beyond a reasonable doubt. We reached that conclusion because the propriety of the upper term was a relatively close question, since this was a date-rape case with no actual injury beyond the sexual act itself, appellant had a relatively short criminal record that included no adult felonies, and there were problems with the probation report.

We can no longer rely on the above analysis because, if the trial court's findings on appellant's criminal history are supported by the record, they are sufficient to justify the upper term under *Black II*, *supra*, 41 Cal.4th at pages 818-820. Understandably, that is what respondent argues.

The unusual problem here is that most of the recidivism factors cited by the trial court are not supported by the record. The fact of the prior conviction must be correct, since "the right to a jury trial does not apply to the fact of a prior conviction" under *Black II*, *supra*, 41 Cal.4th at page 818 and the pertinent U.S. Supreme Court decisions.

The actual facts of appellant's prior criminal history, as corrected at the plea proceedings, do not show that he had a "pattern of violent conduct," or that his prior convictions and adjudications were "of increasing seriousness." He had only one prior conviction for disturbing the peace (§ 415), which is a misdemeanor, penalized by up to 90 days in jail or a fine of up to $400. His juvenile history is not usable for this purpose, since there are no juries at

juvenile court proceedings. (*U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194.) He did not have a "pattern of violent conduct," unless the trial court utilized his arrest record from the probation report, which contained numerous errors. We are not convinced that the "fact of a prior conviction" includes arrest records, or that the jury would necessarily have found that appellant's actual crimes were of "increasing seriousness."

There are problems with many of the circumstances in aggravation in this case. However, there is no question that appellant committed the offense in this case while he was on summary probation for disturbing the peace. "As *Black II* interpreted *Cunningham*, only one valid aggravating factor is necessary, and a defendant's prior criminal history is a valid aggravating factor." (*Brock, supra*, 155 Cal.App.4th at p. 913.) Two of the factors in aggravation cited by the trial court are unquestionably valid. One is that appellant "was on probation when he committed this crime." Another is that his "prior performance on probation was unsatisfactory," as shown by his commission of the new offense.

Appellant argues that his unsatisfactory performance on probation can not be utilized, because that fact extends beyond the recidivism exception of *Almendarez-Torres v. United States* (1998) 523 U.S. 224. We rejected a similar argument in *Brock*, explaining: "As *Black II* interpreted *Cunningham*, only one valid aggravating factor is necessary, and a defendant's prior criminal history is a valid aggravating factor. We must follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, imposition of the upper term here complied with appellant's Sixth Amendment right to trial by jury." (*Brock, supra*, 155 Cal.App.4th at p. 913.)

Appellant also argues that (a) *Black II*'s holding about the sufficiency of a single aggravating factor is inconsistent with the holdings in *Blakely* and *Cunningham;* (b) applying *Black II* and *Sandoval* to his case violates his state

and federal constitutional guarantees to equal protection and due process as well as the prohibition against ex post facto laws (U.S. Const., art. I, § 10; 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 9); and (c) this court's prior opinion correctly determined that the *Blakely* error was not harmless beyond a reasonable doubt. We reject the arguments, without further discussion, since we "are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J.

RUBIN, J.