Filed 3/9/07 P. v. Silla CA2/8

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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 in part, reversed in part and remanded.

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.

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In 2001, appellant Musa Silla, Jr., pled no contest to one count of rape by threat, pursuant to a plea bargain. He was placed on five years of probation, with numerous conditions. In 2006, just before the five-year period ended, probation was revoked. He was then sentenced to prison for the upper term of eight years. On appeal, his sole contention is that under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), imposition of the upper term violated his rights to jury trial and due process, safeguarded by the Sixth and Fourteenth Amendments of the United States Constitution. After reviewing the record, we requested supplemental briefing on these issues:

(1) Did appellant's guilty plea include a plea to the upper term?

(2) Did the trial court violate appellant's Sixth Amendment right to a jury trial, as interpreted in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856], by imposing an upper term sentence based on aggravating factors that were not found true by a jury? If so, what is the proper remedy?

After considering the supplemental briefing, we have concluded that this case must be remanded for resentencing under *Blakely*, *supra*, 542 U.S. 296 and *Cunningham v. California*, *supra*, 127 S.Ct. 856 (*Cunningham*).[1]

A. Blakely *and* Cunningham

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*, *supra*, 542 U.S. at pp. 301-305.) In doing so, it applied this

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[1] The California Supreme Court is currently considering the effect of *Cunningham* in numerous cases.

rule from *Apprendi v. New Jersey* (2000) 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. 301, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. 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.*" (*Blakely*, *supra*, at p. 303, original italics.)

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*, 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*, 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*, 127 S.Ct. at p. 871.)

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 terrorist threats (§ 422). At the preliminary hearing, a police officer described what the victim told him. The victim 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. At 3:30 a.m. on the night of the crime, he telephoned her from a party to say

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

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.[3] He ordered her to give him a condom. She gave him one and he put it on. She did not want to have sex with him, but she did. He made her change positions twice, and achieved penetration twice.[4] 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 specified multiple reasons why the People were willing to offer a plea. One was that there were credibility issues regarding consent, as this was a "date-rape" situation in which the victim had willingly allowed appellant into her home, in the middle of the night. Other reasons given by the prosecutor 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 of retaliation in the future (§ 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.

As to the court's later sentencing choice, it is significant that, at the plea proceedings, the judge and counsel for both sides recognized that there were problems

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

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

with the probation report as it overstated appellant's prior adult criminal history. Indeed, the court stated, "It's not a great report." As corrected by counsel, appellant's adult criminal history consisted of: (1) a 1995 arrest for forgery, which apparently was not pursued; (2) a 1998 arrest for rape by force or fear, which the People did not pursue, for lack of evidence; and (3) a 1999 arrest for sexual battery. The probation report indicated that the 1999 arrest involved forcing the victim to masturbate, and resulted in a conviction for disturbing the peace. The sentence was a fine and summary probation for two years.

The misdemeanor conviction for disturbing the peace was appellant's only adult conviction. He previously had been in the camp program twice as a juvenile, following two sustained petitions for receiving stolen property.

Two weeks after the plea, on January 31, 2001, the court suspended imposition of sentence, placed appellant on five years of probation with the specified conditions, and dismissed the remaining charges.

Almost five years later, on January 11, 2006, appellant was back in court for probation violation proceedings. A contested hearing occurred the following May. The court heard extensive testimony, which we need not detail here. The violations did not involve another sex offense. They essentially concerned failing to register his current address, taking numerous trips out of the country without permission, and using another person's credit card to purchase an airplane ticket.

After finding appellant in 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 stated at the sentencing hearing that he was not familiar with the underlying facts of the case.

The court 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 engaged in 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 the probation department found no mitigating factors.

C. Waiver

A preliminary issue is waiver. Respondent argues that appellant's *Blakely* claim is procedurally barred, as *Blakely* was decided in 2004, appellant was sentenced in 2006, and there was no *Blakely* objection at the sentencing hearing. (See *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.)

A "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) "If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." (*Blakely*, *supra*, 542 U.S. at p. 310.) Here, however, there was no "appropriate waiver" of the right to a jury trial. Appellant was not advised of his right to a jury trial on the circumstances in aggravation, either when he entered the plea in 2001, or when he was sentenced in 2006. Indeed, *Blakely* did not exist at the time of the plea. *Black* was decided in 2005, so a request for a jury on the aggravating circumstances at the sentencing hearing in 2006 would have been futile. We therefore conclude that the circumstances do not justify a finding of a knowing and intelligent waiver of the right to jury.

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. Violation of the Right to Jury

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*, 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).)

There is a clear problem with one of the aggravating factors used by the trial court, "that the crime involved was very violent with great bodily harm, and the threat of bodily harm; other acts disclosing a high degree of cruelty, viciousness and[]callousness." That factor is apparently derived from rule 4.421(a)(1) of the California Rules of Court (rule 4.421(a)(1)), which states: "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."

The rule 4.421(a)(1) factor did not relate to the fact of "a prior conviction," and was not "found by a jury or admitted by the defendant." The plea admitted the elements of the crime of rape by threat. It was not an admission to the rule 4.421(a)(1) aggravating factor, any more than the plea of the defendant in *Blakely* was an admission to the aggravating factor of "deliberate cruelty."

F. Prejudice

The trial court also found aggravating factors derived from appellant's criminal history (recidivism factors), such as that he engaged in a pattern of violent conduct, his prior convictions were of increasing seriousness, he was on probation when he

committed the crime, and his prior performance on probation was unsatisfactory. As respondent points out, the upper term can be based on a single aggravating factor. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

Assuming arguendo that appellant's record supported the recidivism factors, and that a jury trial was not required for them, due to the "fact of the prior conviction" exception of *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 257, a reversal for resentencing would still be necessary, because we cannot find that the federal constitutional error regarding the rule 4.421(a)(1) aggravating factor was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) __ U.S. __ [126 S.Ct. 2546, 2551-2553]; *Chapman v. California* (1967) 386 U.S. 18, 24.) As the prosecutor recognized at the plea proceedings, this was "a date-rape case" in which "[t]here was no actual injury to the victim besides the sexual act." Appellant's prior criminal record was short, and included no adult felonies. His only adult conviction was for disturbing the peace. There were problems with the probation report, on which the aggravating factors were based. The propriety of the upper term on the facts of this case is a relatively close question. We therefore conclude that there was prejudice from the violation of *Blakely* and *Cunningham*.

G. Remedy

Appellant maintains that the appropriate remedy is a reduction of the sentence to the middle term, rather than a remand for resentencing. He argues that the trial court lacks the inherent power and the statutory authority to impanel a jury or to instruct on the aggravating factors. (See *State v. Pillatos* (2007) 2007 WL 178188 [Washington courts lacked power to empanel sentencing juries, until the state Legislature specified the procedures in a new statute]; *State v. Kessler* (2003) 276 Kan. 202, 215-217 [trial court lacked power to devise a procedure under which the jury determined the fact that increased the sentence].) He also contends that the notice requirements of the Sixth and Fourteenth Amendments would be violated if the upper term was based on aggravating factors that were not alleged in the information.

Pending further guidance from our Supreme Court, we choose to utilize the remedy of a remand for resentencing, as that is the usual remedy for erroneous imposition of the upper term. (See, e.g., *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159-1160; *People v. Young* (1983) 146 Cal.App.3d 729, 737.) We therefore reverse as to sentencing alone, for reconsideration of the appropriate base term, consistent with the requirements of *Cunningham*.

DISPOSITION

Reversed in part and remanded for resentencing, under *Cunningham v. California, supra*, 127 S. Ct. 856. In all other respects, the judgment is affirmed.

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FLIER, J.

We concur:

COOPER, P. J.

RUBIN, J.