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Opinion Following Rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS MICHAEL SILVA, Defendant and Appellant.	A113363 (Lake County Super. Ct. Nos. CR904165-B, CR903928, CR905789)

This appeal arises from three criminal cases against defendant Thomas Michael Silva, who pleaded guilty to charges of receiving stolen property, attempting to pass a forged check, and failure to appear on a felony charge, and was sentenced to four years, four months in state prison and ordered to pay certain amounts in restitution, including $420 to Woody's Chevron. Defendant asserts two arguments on appeal: (1) that the imposition of the upper term of three years on the principal term violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); and (2) that the order that he pay restitution in the amount of $420 to Woody's Chevron was improper since defendant was not charged with passing the forged checks that lead to Woody's loss. We conclude that neither *Blakely* nor the recent decision in *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856] (*Cunningham*), supports defendant's first contention. As to his second contention, we agree, as the People concede, that restitution to Woody's Chevron was

improperly ordered. The abstract of judgment shall be amended to strike the $420 restitution order and affirmed in all other regards.

I. Factual and Procedural Background[1]

A. Case No. CR904165-B

On June 7 and 8, 2004, an individual cashed two $200 checks (nos. 1012 and 1015) at Woody's Chevron[2] in Upper Lake. The checks were drawn on an account purportedly belonging to "Scott Wienke" and made out to "Woody's." On June 9, 2004, Woodrow Flud, the proprietor of Woody's, received a call from his bank informing him that the checks were forgeries.

Later in the day on June 9, 2004, defendant went into Woody's Chevron and presented a check for $250.00 (check no. 1014) which was payable to "cash" and again drawn on the "Scott Wienke" account. Flud informed defendant, who gave his name as "Mike Wheber," that the check was not valid and asked him to stay at the gas station until deputies could arrive to sort things out. Defendant agreed, indicating that he was staying with Sarita Clark and that he first needed to tell "the girls" that he was waiting for a deputy. Defendant walked outside and got into a vehicle, which then drove off. Flud noted the vehicle's license plate number, which he provided to the authorities.

Sheriff Deputy Mike Pascoe traced the license plate to Sarita Clark in Upper Lake. That afternoon, Pascoe went to Clark's residence and inquired into the location of her vehicle. Clark responded that it was with her daughter, Amanda Dupler, who had a friend named Mike visiting from Sacramento.

Pascoe returned to the Clark residence the following day and spoke with Dupler and her friend, Jessica Pritchett. Dupler and Pritchett confirmed that on the preceding day, the two of them plus Dupler's cousin and her friend, Mike, had gone to Woody's,

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[1] Because defendant entered a guilty plea prior to a preliminary hearing, we derive these facts from the police reports and the probation officer's report and recommendation.

[2] Woody's Chevron was also referred to the in record as "Woody's Upper Lake Tire & Brake," and "Woody's Gas and Tire."

where Mike went inside for a few minutes. After he returned to the car, they all drove to Sacramento where they dropped Mike off.

On June 16, 2004, sheriff's deputy Jerry Pfann contacted Toni Clark, who admitted cashing the two $200 checks at Woody's. She also admitted to being in the car when defendant, her boyfriend whom she initially identified as Mike Weber, but later admitted was defendant, attempted to cash the $250 check. According to Clark, she received the checks from her mother because her mother owed her money. Her mother had been arrested for cashing fraudulent checks, and Clark acknowledged that the checks were from the same account her mother used. She initially denied that either she or defendant knew there was anything wrong with the checks, but she later admitted knowing that the checks were forged. Somewhat inconsistently, Clark stated that defendant must have known that the check was bad before he entered the store, but also claimed she did not tell him the truth about the check until he returned to the car. In reviewing the surveillance tape, Flud recognized Clark as the individual who cashed the two checks.

On September 14, 2004, Pfann contacted defendant, who acknowledged that he attempted to cash the check at Woody's Chevron but denied any knowledge that the check was forged before he entered the store. He claimed that the check was already made out to cash when Clark gave it to him and told him he could cash it at Woody's. Defendant was later identified as the individual on the surveillance tape who attempted to cash the third check.

In a complaint filed on March 28, 2005, defendant was charged with felony passing or attempting to pass the $250 fraudulent check in violation of Penal Code section 470, subdivision (d)[3] (count II) and felony possession of the $250 check with intent to defraud in violation of section 475, subdivision (c) (count III). The complaint also alleged that defendant had four prior felony convictions within the meaning of section 1203, subdivision (e)(4) and three circumstances in aggravation within the

[3] All statutory references are to the Penal Code unless otherwise noted.

meaning of California Rules of Court, Rule 4.421. Clark was charged with felony passing or attempting to pass three forged checks in violation of Penal Code section 470, subdivision (d) (count I) and felony possession of the $250 check with the intent to defraud in violation of section 475, subdivision (c) (count III).[4]

B. Case No. CR903928

On February 11, 2005, defendant, who was driving on a suspended license, was stopped by a sheriff's deputy for a routine traffic violation. During a search of the car, the deputy found a driver's license and a bank card belonging to Antonio Vallejo of Ukiah. In August 2004, Vallejo had reported that his wallet, which contained the driver's license and bank card, had been lost or stolen. He suspected someone stole the wallet out of his delivery truck while he was making a delivery at the Fast and Easy Market in Upper Lake. Defendant claimed that he found the wallet on the counter at the market, but was unable to explain why he did not report the found items to the police, other than claiming that he forgot to do so.

On April 18, 2005, defendant was charged with felony receiving stolen property in violation of section 496, subdivision (a) (count I) and misdemeanor driving on a suspended license in violation of Vehicle Code section 14601.1, subdivision (a) (count II). The complaint also alleged four prior felonies within the meaning of section 1203, subdivision (e)(4) and three prior convictions of Vehicle Code section 14601.1.

C. Case No. CR905789

On June 20, 2005, defendant was arraigned in case no. CR904165-B (the fraudulent check case). The court appointed counsel and the matter was continued to June 24, 2005, for appearance of counsel and entry of plea. The court ordered defendant to appear at the June 24 hearing. Defendant failed to appear "without justification," however, and the court issued a bench warrant and ordered bail revoked and forfeited.

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[4] Clark ultimately pleaded guilty to misdemeanor passing of forged checks and was granted probation.

On July 27, 2005, defendant was charged with one felony count of failing to appear on felony charges.

D. Plea Agreement And Sentencing

On August 12, 2005, the parties agreed to a negotiated disposition in all three cases**.** The terms were that defendant would plead guilty to receiving stolen property (count I in case no. CR903928), attempting to pass a forged check (count II in case no. CR904165), and failure to appear on felony charges (count I in case no. CR905789). In exchange, the prosecution would move to dismiss all remaining charges and special allegations without a *Harvey* waiver.[5]

Prior to changing his pleas to guilty, defendant was queried by the court as follows: "Now, if you plead to the charges as I've outlined them, each of those carries a maximum sentence of three years in the state prison. But because of the specific sentencing laws, you would only receive three years maximum on the first and eight months of the next case and eight months of the case after that. So the total aggregate period of four years and four months; do you understand that, sir? [¶] THE DEFENDANT: Yes, sir."

After hearing the prosecutor recite the underlying circumstances that furnished the factual basis for the change of pleas, the court inquired: "Now, in this particular case, apparently, according to what the [district attorney] earlier represented, you have as least two prior felony convictions and that would cause a limitation on the Court's ability to give you probation—and under [section] 1203 [subdivision] (e)(4) of the Penal Code, so do you understand that? [¶] THE DEFENDANT: Yes, sir."

On January 20, 2006, the trial count denied probation and sentenced defendant to the three-year upper term for receiving stolen property**.** The court found one factor in mitigation, that defendant admitted guilt at an early stage of the criminal proceedings. However, the court found that one factor decisively outweighed ("not just by number but in the weight to be given them") by three factors in aggravation—"The defendant's prior

[5] *People v. Harvey* (1979) 25 Cal.3d 754.

convictions as an adult are numerous [i.e., 4], the defendant was on felony probation when this crime was committed, and the defendant's prior performance on felony probation has been unsatisfactory." The court further sentenced defendant to eight months on each of the remaining two charges, both to run consecutively, for an aggregate term of four years, four months in state prison. The court also ordered defendant to pay restitution in the amount of $420 to Woody's Chevron and $50 to Antonio Vallejo, and imposed various fines.

Defendant filed a timely notice of appeal.

II. Discussion

A. The Trial Court's Imposition Of The Upper Term On The Receiving Stolen Property Count Did Not Violate *Blakely v. Washington*

In *Blakely*, *supra*, 542 U.S. 296, the United States Supreme Court held that a Washington State court denied a criminal defendant his constitutional rights to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with " 'deliberate cruelty.' " (*Blakely*, *supra*, 542 U.S. at pp. 303-304.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, " '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.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose, *without* any additional findings." (*Id.* at pp. 303-304.)

Defendant contends his sentence must be reversed because, pursuant to *Blakely*, *supra*, 542 U.S. 296, the trial court committed constitutional error by imposing an upper term sentence on the count of receiving stolen property based on aggravating factors that were not supported by jury findings.

As defendant concedes, the California Supreme Court expressly rejected his argument in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), in which the court held that "the judicial fact finding 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." (*Id.* at p. 1244.) In reaching this conclusion, the *Black* court expressly stated that, under California's sentencing system, "the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*[, *supra*, 530 U.S. 466], *Blakely*[, *supra*, 542 U.S. 296], and [*United States v.*] *Booker* [(2005) 543 U.S. 220]." (*Black*, *supra*, 35 Cal.4th at p. 1254.)

Prior to January 22, 2007, we would have rejected defendant's argument solely on the basis that the issue had been authoritatively decided in *Black*, *supra*, 35 Cal.4th 1238, which we would be bound to apply under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. On that date, however, the United States Supreme Court in *Cunningham*, *supra*, ___ U.S. ___ [128 S.Ct. 856], held that *Black* was a misapplication of *Blakely*, *supra*, 542 U.S. 296. Defendant and the People submitted letter briefs on the impact of *Cunningham*. After consideration of the letter briefs, we conclude that imposition of the aggravated term for defendant's violation of Penal Code section 496 (count I in case no. CR903928) did not contravene *Blakely* or *Cunningham*.

Neither *Blakely* nor *Cunningham* preclude imposition of an aggravated term of imprisonment so long as the sentence is within the range to which the defendant was exposed by reason of his own admissions at the time of pleading guilty. (*Cunningham*, *supra*, __ U.S. __ [127 S.Ct. 856, 864-865, 868]; *Blakely*, *supra*, 542 U.S. at pp. 303, 311.) That is the case here. Prior to changing his pleas to guilty, defendant was queried by the court as follows: "Now, if you plead to the charges as I've outlined them, each of those carries a maximum sentence of three years in the state prison. But because of the specific sentencing laws, you would only receive three years maximum on the first and eight months of the next case and eight months of the case after that. So the total

aggregate period of four years and four months; do you understand that, sir? [¶] THE DEFENDANT: Yes, sir."

Defendant thus in effect admitted the existence of facts necessary to impose the aggravated term on any of the three offenses to which he was pleading guilty. A sentence within the maximum justified by the facts admitted by a defendant does not violate *Blakely, supra*, 542 U.S. 296. (E.g., *State v. Leake* (Minn. 2005) 699 N.W.2d 312, 324-325; *U.S. v. Monsalve* (2d. Cir. 2004) 388 F.3d 71, 73; *U.S. v. Saldivar-Trujillo* (6th Cir. 2004) 380 F.3d 274, 279; *U.S. v. Lucca* (8th Cir. 2004) 377 F.3d 927, 934; cf. *U.S. v. Silva* (9th Cir. 2001) 247 1051, 1060 [no *Apprendi* error when sentence is within range under facts admitted by defendant in guilty pleas].)

There is a second, related ground on which the aggravated term may be upheld. *Apprendi*, *Blakely*, and *Cunningham* all exempted prior convictions from the category of facts that must be found by a jury in order to increase a defendant's sentence beyond the statutory maximum. (*Apprendi*, *supra*, 530 U.S. at pp. 488, 490; *Blakely*, *supra*, 542 U.S. at p. 301; *Cunningham*, *supra*, ___ U.S. ___ [127 S.Ct. at p. 860].) It is undisputed that defendant had four prior felony convictions; as shown by the excerpt quoted above, defendant admitted as much prior to changing his pleas to guilty. This factor would have supported imposition of the upper term without violating *Blakely or Cunningham* because it involves an objective fact provable from court records, whose ascertainment is traditionally performed by judges as part of the sentencing function. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244; *People v. McGee* (2006) 38 Cal.4th 682, 709.)

The same logic also applies to the objective fact that defendant was on probation when he committed the offenses. As our Supreme Court recently concluded: "Notably, the high court's framing of the issue in *Apprendi* was confined to the elements of the *charged offense*—not, as here, to the adjudication of aspects of the defendant's criminal *past*." (*People v. McGee*, *supra*, 38 Cal.4th at p. 697.) That past would be reflected by judicial records not different in kind from those the court would examine in determining the number and nature of an accused's prior convictions. (See *id.*, at p. 691; accord,

People v. Trujillo (2006) 40 Cal.4th 165, 182-183.) The objective fact that defendant was on probation on a specific date could easily be ascertained from an examination of those records.

For each and all of these reasons, imposition of the aggravated term was proper, and defendant's claim of *Blakely-Cunningham* error fails accordingly.

B. The Trial Court Improperly Ordered Defendant To Pay Restitution To Woody's Chevron

In the second challenge to his sentence, defendant contends that the "imposition of $420 in restitution to Woody's Chevron for checks previously passed by co-defendant Clark was unauthorized because [defendant] was not charged with any role in passing those checks." The People concede that defendant "was not charged with, or shown to have participated in, the forgeries resulting in the losses to Woody's." This concession is well taken, as the loss suffered by Woody's Chevron resulted solely from the $200 checks cashed by Toni Clark. Accordingly, the order that defendant make restitution in the amount of $420 to Woody's Chevron must be stricken.

III. Disposition

The abstract of judgment shall be amended to strike the $420 restitution payment to Woody's Chevron. In all other respects, the judgment is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.