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Opinion following remand by U.S. Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARTURO TARANGO, Defendant and Appellant.	H027847 (Monterey County Super. Ct. No. SS021775)

Defendant Arturo Tarango was convicted of conspiracy to bring a controlled substance into prison (Pen. Code, §§ 182, subd. (a)(1), 4573; see Pen. Code, § 184).[1] The court found a strike allegation (§ 1170.12) to be true following a court trial in accordance with defendant's jury trial waiver. The court sentenced defendant to a total term of eight years, which consisted of an upper term of four years doubled pursuant to section 1170.12, subdivision (c)(1).

Citing *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348], defendant claims that his constitutional rights to jury trial and due process were violated by imposition of the upper term based upon aggravating factors, including factors related to recidivism, that were not

[1] All further statutory references are to the Penal Code.

found true by a jury beyond a reasonable doubt. He also asserts that, if this court finds his claims were waived, his counsel rendered ineffective assistance of counsel.

We initially evaluated those contentions in light of *People v. Black* (2005) 35 Cal.4th 1238, which now has been abrogated by the United States Supreme Court in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*). The United States Supreme Court granted defendant's petition for a writ of certiorari, vacated our judgment, and remanded the case to us for further consideration in light of *Cunningham*. *Cunningham* held that, "[c]ontrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum." (*Id*. at p. ___ [127 S.Ct. at p. 871].)

A. *Factual and Procedural Background*

During the fall of 2001, Parole Agent Irene Perez was employed as a narcotics investigator by the Investigative Services Unit of the Salinas Valley State Prison. She conducted an investigation of defendant, an inmate at the prison.

In the course of her investigation, Perez reviewed a letter dated November 5, 2001 from defendant's mother to defendant. It contained the following language: "What's going on with Christina? I told her that I would pick up the baby clothes and money if she wasn't planning on talking to you any longer." In November 2001, Perez reviewed a letter from defendant to his mother. The following language in the letter led agent Perez to believe that defendant was discussing a narcotics transaction: "I hope she does not think she is going to do me wrong and just take off like that and make me tell the fellows that I lost it. That will put me in a very difficult position in here. I'm going to need to ask you to make a call to her house and ask her what is going on. Ask her if she has any intentions of coming to see me, and if not, to give you all of the baby's clothes and the funds that have gotten there."

Perez began to monitor calls. During a telephone call between defendant and his mother, his mother indicated she had called Christina. She told defendant, "[S]he had already given me all the baby clothes." Defendant subsequently asked, "Was there three sets of clothes that she gave you for the baby?' His mother replied that she did not know and she did not even look through it. Later in the phone conversation, they made a third party call to Christina and defendant spoke with Christina directly.

On November 24, 2001, defendant's mother attempted to visit defendant. His mother consented to a search and surrendered a blue balloon from her vaginal area. Inside the balloon, there were three bindles containing approximately 60 grams of a substance that tested positive for methamphetamine. A unit of sale in the prison is about a quarter gram, which is approximately the size of a matchstick head. A matchstick head was worth about $45 to $50 in prison.

Perez indicated that inmates use code words when discussing drugs on the telephone and, in this case, "baby clothes" meant narcotics.

At sentencing, the trial court explained its choices as follows: "[I]n looking at the overall situation, the fact of a prior non-strike murder conviction that defendant suffered as a juvenile; his ongoing gang affiliation; the clear indication in this case of in-prison dealing, these drugs were headed for Mr. Tarango, and he clearly was going to distribute them within the institution; the fact that it was a large amount of drugs, $10,000 worth; also, given the fact that he has been a failure on probation in the past; his attitude indicates a clear commitment to gangs and crime, and a deep commitment to those things; for those reasons, the court both denies probation and selects the upper term of four years in State Prison, doubles that to an 8-year State Prison commitment by virtue of the one strike that was found to be true."

B. *No Forfeiture*

The People urge us to find that defendant forfeited his claim of *Blakely* error by failing to object below. "The forfeiture doctrine is a 'well-established procedural

principle that, with certain exceptions, an appellate court will not consider claims of error that could have been--but were not--raised in the trial court. [Citation.]' [Citations.]" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.)

Before *Blakely*, however, the California Supreme Court had understood that *Apprendi* applied to sentence enhancements. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) In *Blakely*, the United States Supreme Court applied *Apprendi* to Washington State's determinate sentencing scheme and declared that the "statutory maximum" is the maximum sentence a judge may impose without finding any additional facts beyond the facts reflected in the jury's verdict. (*Id.* at p. ___ [124 S.Ct. at pp. 2534-2535, 2537].)

We conclude that a claim of *Blakely* error was not forfeited by defendant's failure to object below to upper term sentencing since sentencing occurred before *Blakely* was decided on June 24, 2004. (Cf. *People v. Turner* (1990) 50 Cal.3d 668, 703-704 [unreasonable to expect defense counsel to anticipate change in the law]; cf. also *People v. DeSantiago* (1969) 71 Cal.2d 18, 22-23, 27-28.)

C. *Blakely Error*

In *Cunningham*, the United States Supreme Court reiterated: "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). '[T]he relevant "statutory maximum," ' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' *Blakely*, 542 U.S., at 303-304, 124 S.Ct. 2531 (emphasis in original)." (*Cunningham, supra,* at p. ___ [127 S.Ct. at p. 860].) The court concluded that, under California's determinate sentencing law, "the

middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. 542 U.S., at 303, 124 S.Ct. 2531 . . . ." (*Id*. at p. ___ [127 S.Ct. at p. 868].)

California's sentencing scheme was held defective 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]. . . ." (*Cunningham, supra*, at p. ___ [127 S.Ct. at p. 868].) The court declared that California's determinate sentencing law "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.' 530 U.S., at 490, 120 S.Ct. 2348." (*Ibid*.)

In this case, the trial court relied on a number of factors in aggravation. Most of those aggravating factors were constitutionally impermissible because they concern facts other than a prior conviction that were not found by a jury beyond a reasonable doubt. But the court's use of defendant's prior juvenile adjudication as an aggravating factor did not offend *Apprendi* or *Blakely* since it may be properly characterized as a "prior conviction." (See *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1152 ["in the face of authority that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts' use of Petitioner's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent"]; *U.S. v. Burge* (11th Cir. 2005) 407 F.3d 1183, 1187-1191; *U.S. v. Jones* (3rd Cir. 2003) 332 F.3d 688, 694-696; *United States v. Smalley* (8th Cir. 2002) 294 F.3d 1030, 1031-1033; *People v. Superior Court* (2003) 113 Cal.App.4th 817, 830-834; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1313-1316; *People v. Bowden* (2002) 102 Cal.App.4th 387, 391-394; but see *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194 [juvenile adjudications do not fall within *Apprendi*'s "prior conviction" exception].)

Defendant further argues that *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219], which held that the federal Constitution does not require that a prior conviction be treated as an element of an offense (*id*. at pp. 239-247), should be overturned. He understands, however, that the decision remains controlling authority and is binding on us. (U.S. Const., art.VI, cl. 2 ["laws of the United States . . . shall be the supreme law of the land; and the judges of every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding"]; see *Calderon v. City of Los Angeles* (1971) 4 Cal.3d 251, 258; *People v. Bradley* (1969) 1 Cal.3d 80, 86.)

The probation report indicated there were no factors in mitigation. Imposition of an upper term still may be a proper exercise of discretion under section 1170, subdivision (b), since "[o]nly a single aggravating factor is required to impose the upper term (*People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615 . . .) . . . ." (*People v. Osband* (1996) 13 Cal.4th 622, 728; see Pen.Code, § 1170, subd. (b).) We remand the case for resentencing, however, because the record does not establish that the *Blakely* error was harmless beyond a reasonable doubt (see *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2553] [failure to submit a sentencing factor to the jury is not structural error]; *Neder v. United States* (1999) 527 U.S. 1, 8 [119 S.Ct. 1827]).

The judgment is reversed and the matter remanded for the limited purpose of resentencing in light of *Cunningham*.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.