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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E040053
v.	(Super.Ct.No. RIF125191)
PEDRO J. TRUJILLO,	OPINION ON REHEARING
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge. Affirmed with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and David

Delgado-Rucci and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Pedro Trujillo of possession of a weapon by a prisoner in violation of Penal Code section 4502, subdivision (a),[1] and possession of drug paraphernalia by a prisoner in violation of section 4573.8. Defendant admitted five prior prison term allegations within the meaning of section 667.5, subdivision (b).

Defendant was given a four-year upper term sentence on count 1, the violation of section 4502, subdivision (a). On appeal, he contends this upper term sentence violated *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), because the trial court, in reaching its upper term sentencing decision, made factual findings that aggravating factors existed and then weighed them against a mitigating factor.

Defendant was given a consecutive[2] term (one-third the middle term) of eight months for count 2, and one year for each of the five prior prison term enhancements, for a total sentence of nine years eight months.

I. FACTS

Defendant was imprisoned at the California Rehabilitation Center in Norco. A correctional sergeant testified that, on April 7, 2005, he conducted a random search of

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

[2] As discussed below, defendant contends that the trial court actually intended to impose a concurrent sentence on count 2.

defendant's dormitory with other officers. As two officers went past him, defendant reached down and grabbed a paper bag. He was searched and a manufactured syringe was found in the bag. A manufactured weapon was subsequently found in defendant's laundry bag.

II. SENTENCING

Defendant was sentenced on February 27, 2006, almost a year before *Cunningham* was decided. The trial court considered the probation report and a statement in mitigation filed by defendant. The trial court relied on four factors: (1) the manner in which the crime was carried out indicated planning, sophistication, or professionalism (Cal. Rules of Court, rule 4.421(a)(8));[3] (2) defendant had been unsuccessful in every attempt at rehabilitation and probation; (3) defendant was not taking responsibility for his conduct; and (4) defendant's prior performance on probation or parole was unsatisfactory (rule 4.421(b)(5)). It therefore selected an upper term sentence on count 1. Defendant's notice of appeal was filed on February 28, 2006. On appeal, defendant contends the upper term sentence violates *Cunningham.*

III. BACKGROUND

On January 22, 2007, the Supreme Court decided that California's determinate sentencing law (DSL) violates a defendant's right to a trial by jury because it authorizes the trial judge, not the jury, to find facts that expose defendant to an upper term sentence. The court explained: "As this Court's decisions instruct, the Federal Constitution's jury-

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[3] All further references to rules are to the California Rules of Court.

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. [Citations.] 'The 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.' [Citation.] In petitioner's case, the jury's verdict alone limited the permissible sentence to 12 years. Additional factfinding by the trial judge, however, yielded an upper term sentence of 16 years. The California Court of Appeal affirmed the harsher sentence. We reverse that disposition because the four-year elevation based on judicial factfinding denied petitioner his right to a jury trial." (*Cunningham, supra,* 127 S.Ct. at p. 860.)

Cunningham also cites *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). In that case, the court held that the "statutory maximum" is the maximum sentence the court could impose without making any additional factual findings. (*Ibid.*)

Cunningham extended to California's DSL the principles enunciated in *Jones v. United States* (1999) 526 U.S. 227 [119 S.Ct. 1215, 143 L.Ed.2d 311] (*Jones*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*).

In *Jones*, the Supreme Court held that, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be

charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Jones, supra,* 526 U.S. at p. 243, fn. 6.)

Apprendi states: "In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. 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. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' [Citations.]" (*Apprendi, supra,* 530 U.S. at p. 490.)

The prior conviction exception is based on *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350] (*Almendarez-Torres*). *Cunningham* reaffirmed the prior conviction exception but did not directly discuss it. Thus, under the *Almendarez-Torres* exception to the *Apprendi* rule, a sentence in excess of the statutory maximum may be imposed based on a judge's finding that a defendant had a prior conviction.

In *People v. McGee* (2006) 38 Cal.4th 682, our Supreme Court considered "(1) the breadth or scope of the so-called *Almendarez-Torres* exception applicable to an increase in sentence based upon a defendant's recidivism, and (2) the specific nature of the inquiry

that is required to be made under California law in this matter." (*Id.* at p. 702.) The court concluded: "As noted *ante*, the Court of Appeal in the present case narrowly construed the *Almendarez-Torres* exception for recidivist conduct as preserved by *Apprendi*. In so holding, however, we believe the Court of Appeal improperly minimized the distinction between sentence enhancements that require factfinding related to the circumstance of the current offense, such as whether a defendant acted with the intent necessary to establish a 'hate crime'—a task identified by *Apprendi* as one for the *jury*—and the examination of *court records* pertaining to a defendant's *prior conviction* to determine the nature or basis of the conviction—a task to which *Apprendi* did not speak and 'the type of inquiry that judges traditionally perform as part of the sentencing function.' [Citation.]" (*Id.* at pp. 708-709.)

The court in *People v. McGee, supra,* 38 Cal.4th 682 specifically approved cases such as *People v. Thomas* (2001) 91 Cal.App.4th 212, which held that: "In terms of recidivism findings that enhance a sentence and are unrelated to the elements of a crime, *Almendarez-Torres* is the controlling due process authority. *Almendarez-Torres* does not require full due process treatment of an issue of recidivism which enhances a sentence and is unrelated to an element of a crime. *Apprendi* did not overrule *Almendarez-Torres*. The language relied upon by defendant in *Apprendi*, '[o]ther than the fact of a prior conviction,' refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations." (*Id.* at pp. 222-223.)

Cunningham rejected the California Supreme Court's defense of the DSL in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). (*Cunningham, supra,* 127 S.Ct. at pp. 863-871.) It therefore found that California's DSL violates a defendant's right to a jury trial on any fact, other than a prior conviction, which increases the sentence. (*Id.* at p. 860.)

Following its decision in *Cunningham*, the United States Supreme Court remanded *Black I* to the state Supreme Court for reconsideration in light of *Cunningham*. After the parties had fully briefed this appeal, the state Supreme Court decided *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). In *Black II,* the court reviewed *Apprendi* and *Blakely* in light of *Cunningham*, and concluded that, "so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Black II, supra,* at p. 813.)

The court then recognized that, under the former DSL, the presence of a single aggravating factor is sufficient to make the defendant *eligible* for an upper term sentence. (*Black II, supra,* 41 Cal.4th at p. 813, citing *People v. Osband* (1996) 13 Cal.4th 622, 728; see § 1170, subd. (b).) Accordingly, the court reasoned that, if one aggravating factor is established in accordance with Sixth Amendment requirements, "the defendant

is not ‘legally entitled’ to the middle term sentence, and the upper term sentence is the ‘statutory maximum.’” (*Black II, supra,* at p. 813, fn. omitted.) In sum, a trial court’s finding of a single circumstance in aggravation that *independently satisfies the Sixth Amendment requirements* of *Apprendi* and its progeny makes the defendant eligible for the upper term, and does not violate the Sixth Amendment right to jury trial, because that single fact is the only one that is “legally essential” to the defendant’s punishment. (*Black II, supra,* at pp. 812-813.) “[A]ny additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant’s right to jury trial.” (*Id*. at p. 812)

The *Black II* court further explained: “*Cunningham* requires us to recognize that aggravating circumstances serve two analytically distinct functions in California’s current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court’s exercise of its discretion in selecting the appropriate term from among those authorized for the defendant’s offense. Although the DSL does not distinguish between these two functions, in light of *Cunningham* it is now clear that we must view the federal Constitution as treating them differently. Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution to prove its case beyond a reasonable doubt as to factual determinations (other than prior convictions) that serve the first function, but leave the trial court free to make factual determinations that serve the second function. *It follows 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." (*Black II, supra,* 41 Cal.4th at pp. 815-816, italics added.)

IV. ANALYSIS

A. *No Forfeiture*

Preliminarily, the People contend that defendant forfeited his present claim of error by failing to object at sentencing. The People note that *Blakely* was decided on June 24, 2004, and defendant did not make any objection based on *Blakely* at his sentencing in 2006.

After the parties had fully briefed this appeal, the state Supreme Court decided this issue adversely to the People in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). In *Sandoval*, as in the present case, the defendant was sentenced after *Blakely* was decided in June 2004, but also after the state Supreme Court decided *Black I* in June 2005. *Black I* categorically rejected the argument that the DSL was unconstitutional in light of *Blakely*. To the contrary, *Black I* held that an upper term sentence imposed in accordance with the DSL[4] does not violate a defendant's right to a jury trial. (*Black I, supra*, 35 Cal.4th at pp. 1257-1258.)

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[4] In response to *Cunningham*, the California Legislature amended section 1170, subdivision (b) of the DSL to give the trial court discretion to impose the upper, middle, or lower term. (Stats. 2007, ch. 3, § 2 (Sen. Bill No. 40), effective Mar. 30, 2007.) Our references to section 1170 and to the DSL are to the statutes as they read prior to the March 30, 2007, amendments.

[footnote continued on next page]

In view of *Black I*, *Sandoval* recognized that any objection by the defendant to her upper term sentence in light of *Blakely* would have been futile, because the trial court was bound by *Black I* at the time the defendant was sentenced. Thus, the court held, the defendant did not forfeit her claim on appeal by failing to raise it at sentencing. (*Sandoval, supra,* 41 Cal.4th 825; see also *Black II, supra,* 41 Cal.4th at pp. 810-812 [no forfeiture where defendant failed to object to upper term and was sentenced before *Blakely* or *Black I* were decided].) Here, too, defendant was sentenced when the trial court was bound by *Black I*; thus, defendant has not forfeited his claim of sentencing error for failing to raise it at the time of his sentencing.

B. *Cunningham Error*

Defendant contends his upper term sentence must be reversed and reduced to the midterm based on *Cunningham*. The People first point out that defendant's five prior convictions were not in issue because the convictions were admitted by defendant. From this fact, the People argue that the convictions made defendant eligible for an upper term sentence and provided the trial court the authority to impose an upper term sentence.

Following *Black II* and *Sandoval*, we must determine whether at least one of the aggravating factors found by the trial court satisfies the Sixth Amendment requirements as interpreted by *Cunningham*. If so, then defendant was *eligible* for the upper term, and

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[footnote continued from previous page]

Also, in response to the Legislature's amendment of the DSL, the Judicial Council amended the sentencing rules effective May 23, 2007. Our references to the California Rules of Court are as they read prior to these amendments.

that ends our Sixth Amendment analysis. (*Black II, supra*, 41 Cal.4th at p. 813.) But if defendant was *not* eligible for the upper term, then we must consider whether the trial court's *Cunningham* error in sentencing him to the upper term was harmless beyond a reasonable doubt. If the error was not harmless beyond a reasonable doubt, we must remand the matter for resentencing in light of *Cunningham* and *Sandoval*. (*Sandoval, supra,* 41 Cal.4th at pp. 838-843.)

We begin our analysis by considering whether defendant was eligible for the upper term under the prior conviction or recidivism exception to the *Apprendi* rule, which originated in *Almendarez-Torres*. *Black II* recognizes that a judge's finding that qualifies under the recidivism exception, including the fact that the defendant had served a prior prison term, satisfies Sixth Amendment requirements and renders the defendant eligible for the upper term under the former DSL. (*Black II, supra,* 41 Cal.4th at pp. 819, citing *People v. Thomas, supra,* 91 Cal.App.4th at pp. 220-223 [the exception recognized in *Apprendi* for "'the fact of a prior conviction'" permits a trial court to decide whether a defendant has served a prior prison term].)

Here, however, none of defendant's five prison priors (which defendant admitted) made him eligible for the upper term under the former DSL, because he was sentenced to one-year terms for each of his five prison priors under section 667.5, subdivision (b). Former section 1170, subdivision (b), prohibited the dual use of a fact charged and found as an enhancement for both an enhanced sentence and an upper term sentence. The statute provided: "The court may not impose an upper term by using the fact of any

enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b); see also rule 4.420(c).) Had the trial court not sentenced defendant to enhanced terms based on the five prison priors, any one of them would have made defendant eligible for the upper term.

At sentencing , the trial court relied on four factors, not including defendant's five prison priors, in selecting the upper term: (1) the manner in which the crime was carried out indicated planning, sophistication, or professionalism (rule 4.421(a)(8)); (2) defendant had been unsuccessful in every attempt at rehabilitation and probation; (3) defendant is not taking responsibility for his conduct; and (4) defendant's prior performance on parole and probation was unsatisfactory (rule 4.421(b)(5)). Clearly, factors (1) and (3) do not involve recidivism. Whether factors (2) and (4) fall within the *Almendarez-Torres* or recidivism exception to *Apprendi* we need not decide, because even if we were to conclude that a jury verdict was necessary on these findings, we find the error harmless.

In determining whether the trial court's error in imposing the upper term was harmless beyond a reasonable doubt, we must determine, "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.) Stated another way, "if 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; see also *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466].)

In this case, if the jury had been asked to determine whether defendant's prior performance on probation or parole was unsatisfactory (rule 4.421(b)(5)), the jury would have undoubtedly found the aggravating circumstance true beyond a reasonable doubt. It was indisputable that, between 1997 and 2004, defendant violated his probation and parole on numerous occasions, unrelated to his prior prison terms. Accordingly, we uphold the trial court's imposition of the upper term sentence of four years on count 1.

V. CORRECTION OF THE ABSTRACT OF JUDGMENT

In pronouncing sentence, the trial court repeatedly said that it was imposing a concurrent sentence on count 2. However, the clerk's minutes and the abstract of judgment reflect a consecutive eight-month sentence on count 2. Defendant argues that we should correct this error, and the People agree. We will therefore order the abstract of judgment to be modified accordingly.

Originally, the trial court stated that the total term of nine years would run concurrently with defendant's current sentence. But after the prosecutor pointed out that consecutive sentencing was required under section 4502, subdivision (a), the trial court made the sentencing consecutive. However, the abstract of judgment states that the sentence is to be concurrent to any current case the defendant is serving time on. The

People request that this error be corrected, and we will order modification of the abstract of judgment accordingly.

The People also point out that the trial court imposed but stayed a parole restitution fine of $500 pursuant to section 1202.45. However, the abstract of judgment refers to a fine of $200 under section 1202.45. We will also order correction of this clerical error.

VI. DISPOSITION

The trial court is ordered to prepare an amended abstract of judgment as follows: (1) change the sentence on count 2 from a consecutive sentence to a concurrent sentence, thus changing the total term to nine years; (2) change paragraph 11 to show that the sentence in this case will run consecutively to defendant's current sentence; and (3) change the suspended restitution fine under section 1202.45 from $200 to $500. The trial court is ordered to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Miller
J.