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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WAYNE TUCEK,

Defendant and Appellant.

F049306

(Super. Ct. No. SCR005088)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Charles A. Wieland, Judge.

Ross Thomas, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Stanley Cross, Acting Assistant Attorney General, and Stephen G. Herndon and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, Michael Wayne Tucek, was convicted of assault with the infliction of great bodily injury on a person who was at least 70 years of age. (Pen. Code,¹ §§ 245, subd. (a)(1) and 12022.7, subd. (c).) He was sentenced to an aggregate term of nine years' imprisonment, calculated as the four-year upper term for the assault plus a consecutive five-year term for the great bodily injury enhancement. As a circumstance in aggravation, the court found that appellant engaged in violent conduct involving a serious danger to society. (Cal. Rules of Court, rule 4.421(b)(1.)

On appeal, he argued that the photo lineup procedure was impermissibly suggestive and therefore he was denied due process by the admission of the victim's extrajudicial and in-court identifications. Appellant also argued that the sentencing court infringed his federal constitutional jury trial right as interpreted in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) by imposing an upper term based on findings of aggravated facts that were not admitted or found true by the jury's verdict.

In our initial opinion we rejected appellant's claim that the photo lineup procedure was unduly suggestive. Following and applying *Cunningham v. California* (2007) 127 S.Ct. 856 (*Cunningham*), we determined that under the facts presented in this case, imposition of the upper term infringed appellant's jury trial right; we vacated the sentence and ordered the matter remanded for resentencing.

Respondent petitioned the California Supreme Court for review, which was granted on May 16, 2007. On September 12, 2007, the Supreme Court transferred the case back to the court with directions to vacate our decision and reconsider the constitutionality of appellant's sentence in light of *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*).

Having reviewed the case in light of *Black II* and *Sandoval*, we conclude that imposition of the upper term did not infringe appellant's jury trial right.

¹ All further statutory references are to the Penal Code.

FACTS

On December 4, 2004, 74-year-old William Merryfield confronted 13-year-old Ashley after she and two friends took the key to William's tractor. According to Ashley, William slapped her face.

Ashley returned home and told appellant, a family friend, what had happened. Appellant left shortly thereafter.

That afternoon William and his wife were working on their property when a red car drove up and parked. A man, whom William later identified as appellant, stepped out of the car, quickly approached William, and punched him in the eye. The first blow knocked William to the ground. Appellant then continued to punch and kick William.

William spent nine days in the hospital as a result of the assault. On December 9, while William was hospitalized, Sheriff's Detective Jack Wayman showed him a photo lineup. This array consisted of photographs of six men, including a six- or eight-year-old photograph of appellant. William looked at this photograph array for 30 to 40 seconds but made no identification. William testified that he was hardly awake at the time because he was heavily sedated with pain medication.

On December 14, after William's release from the hospital, Detective Wayman showed him another array of six photographs. This time William identified appellant as his assailant. He testified that he identified appellant "almost instantly."

The second photograph of appellant was a recent booking photo and looked considerably different from the first one. In the first photograph appellant has a much fuller face, wavy and curly dark hair almost to his shoulders, a dark mustache, and a salt and pepper beard. In the second photograph appellant's hair is gray, short cropped and receding, and he has a very trimmed gray mustache and goatee. Appellant's photograph was in a different position in each array. However, to keep the backgrounds neutral on the second array, appellant's head had been cut out and pasted onto another man's neck.

Appellant moved to suppress William's identification. The trial court denied the request. The court stated "I don't think that that lineup, either one of them, is suggestive any more so than any other lineup, much less unduly suggestive."

William made an in-court identification of appellant at trial. He testified that his recollection of appellant was from the "scene of the crime," not from the photo lineup.

DISCUSSION

1. *Appellant did not demonstrate the existence of an unreliable identification procedure.*

Appellant contends that William's extrajudicial and in-court identifications of him as the assailant were tainted by an unduly suggestive process. According to appellant, this position is supported by several factors. Appellant notes that William saw his attacker only momentarily before suffering a severe blow to the head, appellant's image was the only one included in both arrays, William was heavily drugged when he viewed the first lineup, and appellant's picture in the second array was the only one that was altered. Thus, appellant argues, the trial court erred in refusing to exclude that identification evidence.

In order to determine whether identification evidence violates a defendant's right to due process, the court considers (1) whether the identification procedure was unduly suggestive and unnecessary and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) In ruling on the reliability of the identification, the court takes into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. (*Ibid.*)

The defendant bears the burden of showing unfairness as a demonstrable reality, not just speculation. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) On appeal, the claim that an identification procedure was unduly suggestive is subject to the independent standard of review. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

Appellant notes that his image was the only one included in both arrays. Appellant argues that, by repeatedly displaying his picture, the police implicitly advised William that they believed appellant to be the assailant.

However, the fact that appellant was the only person common to both lineups did not per se violate his due process rights. (Cf. *People v. DeSantis, supra*, 2 Cal.4th at p. 1224.) Furthermore, appellant looked very different in the two photographs. The first one was at least six years old and was taken when appellant was heavier, had long dark hair as opposed to short-cropped gray hair, and a dark mustache and salt and pepper beard as opposed to a very trimmed gray mustache and goatee. Since the two photographs were not obviously of the same person, the presence of appellant's photograph in both arrays was not unduly suggestive.

Appellant also points out that William was heavily sedated when he viewed the first lineup. According to appellant, this medicated state may have impacted the way William mentally processed the photographs and thus, William may have identified appellant in the second lineup simply because he had seen appellant's photograph earlier while in a drugged state.

Appellant provides no factual or legal basis for this claim. Rather, it is pure speculation. Thus, the fact that William was sedated when he viewed the first lineup does not assist appellant in establishing unfairness.

Appellant further objects to appellant's photo having been the only one in the second array that was altered. As noted above, appellant's head was pasted on another man's neck to provide a neutral background. Otherwise, appellant's photo would have stood out as the only booking photo. However, William testified that he did not notice

anything “abnormal” about any of the photos. In fact, appellant admits that the alteration by itself was not necessarily suggestive.

Thus, even under the independent standard of review, it must be concluded that appellant did not meet his burden of establishing that the photo lineup was unduly suggestive. Accordingly, it is not necessary to consider other factors indicating reliability, such as the victim’s opportunity to view the criminal at the time of the crime. That analysis comes into play only if the court first decides in favor of the defendant on the first part of the test.

2. *Imposition of the aggravated term did not infringe appellant’s federal constitutional jury right.*

The probation report recommended imposition of the upper four-year term for the substantive offense plus a consecutive five-year term for the enhancement.² The probation report stated that appellant suffered one prior criminal conviction: a misdemeanor conviction for making criminal threats. Appellant was placed on probation for that offense and he was on probation when he committed the current crime. Appellant’s probation officer, Ryan Oliphant, was interviewed by the officer who prepared the probation report. Oliphant “indicated the defendant had performed very poorly while on probation and is facing a further violation of probation.” The probation report listed three aggravating circumstances: (1) appellant engaged in violent conduct indicating a serious danger to society; (2) he was on probation in Mariposa Superior Court case No. 1750 when he committed the current offense; and (3) his performance on probation has been unsatisfactory, as evidenced by probation violations and commission of a new criminal offense. Also, the probation report states in the section entitled “ANALYSIS” that appellant “was on probation in Mariposa County for a misdemeanor

² On our own motion, the record is augmented with the probation report that was filed in the superior court on October 19, 2005.

conviction of terrorist threats when he committed [the current] offense.” No mitigating circumstances were found.

At the sentencing hearing, defense counsel argued that appellant had been a satisfactory probationer and that his criminal record is insignificant. The prosecutor argued that appellant’s performance on parole was unsatisfactory because the record includes three separate violations of probation in addition to his commission of the current offense.

The trial court imposed the upper term of four years’ imprisonment on the section 245, subdivision (a)(1), conviction and imposed a consecutive five-year term for the section 12022.7, subdivision (c), enhancement. The trial court stated that it had read the probation report and that it was adopting the report’s recommendations. The court found that the circumstances in aggravation outweighed those in mitigation. The court specifically mentioned one of the aggravating circumstances listed in the probation report -- that appellant engaged in violent conduct involving a serious danger to society. (Cal. Rules of Court, rule 4.421(b)(1).) The court noted that, even if William unlawfully touched Ashley, appellant’s actions were clearly not sanctioned by a lawful society and were not excused.

Appellant argues that the sentence must be reversed because he was denied his federal constitutional right to a jury trial on the factors supporting imposition of the aggravated term. We disagree. As will be explained, appellant’s recidivism rendered him constitutionally eligible for imposition of the upper term and the trial court’s reliance on an additional offense based aggravating factor did not infringe appellant’s jury trial right.

In *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) our Supreme Court determined that the presence of one valid aggravating factor, such as a defendant’s prior criminal history, that is established in a manner satisfying Sixth Amendment requirements renders a defendant constitutionally eligible for imposition of an upper term sentence and that

“any 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.) *Black II* states:

“... [A]s long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any 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.” (*Ibid.*)

Black II also determined that the trial judge may decide whether a defendant has suffered prior convictions and whether those convictions are numerous or of increasing seriousness. (*Black II, supra*, 41 Cal.4th at pp. 819-820.) In making these determinations, the trial judge may rely on the probation report. (*Id.* at pp. 818-819, fn. 7.) Thus, in this case the trial court was permitted to consider appellant’s prior criminal threat conviction as an aggravating circumstance.

Also, the court was permitted to consider appellant’s status as a probationer when he committed the current offenses. Although the question of whether a defendant’s probation status falls within the prior conviction exception was not directly presented in *Black II*, the California Supreme Court’s construction of the prior conviction exception leads us to conclude that our Supreme Court would consider a defendant’s status on probation to be a “fact that increases the penalty for a crime beyond the prescribed statutory maximum” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [*Apprendi*]), but that need not be submitted to a jury. (See *U.S. v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820 [prior conviction exception extends to subsidiary findings such as probation status]; *People v. Yim* (2007) 152 Cal.App.4th 366, 371 [parole status falls within prior conviction exception].) The court was free to accept the probation officer’s determination that appellant’s prior performance on probation was unsatisfactory over appellant’s argument to the contrary.

The trial court’s reference during the sentencing hearing to an additional offense based aggravating factor (that appellant engaged in violent conduct involving a serious danger to society) did not infringe appellant’s jury trial right. *Black II* explains:

“... [S]o long as a defendant is *eligible* for the upper term by 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*, 41 Cal.4th at p. 813.)

Appellant quarrels with *Black II*’s holding, arguing that its “narrow reading of *Apprendi* and its progeny cannot withstand scrutiny.” We summarily reject this contention because we are bound to follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We do not find a Sixth Amendment violation on the facts presented in this case. Imposition of the upper term did not infringe any of appellant’s constitutional rights and protections.

DISPOSITION

The judgment is affirmed.

Levy, Acting P.J.

WE CONCUR:

Gomes, J.

Hill, J.