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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. FRANK JASON UHLER, Defendant and Appellant.	C053367 (Super. Ct. No. 03F08089)

Citing *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*), defendant Frank Jason Uhler contends that the trial court violated his right to a jury trial by imposing the upper term on his conviction for assault on a police officer with a semi-automatic firearm. (Pen. Code, § 245, subd. (d)(2)). We disagree and affirm the judgment.

FACTS AND PROCEEDINGS

While the facts underlying defendant's conviction are not relevant to this appeal, we note that this is the second time defendant's case has been before us. When defendant previously

appealed his conviction, we found sentencing error and remanded the matter to the trial court. (*People v. Uhler* (Feb. 28, 2006, C048915 [nonpub. opn.].) The claims in this appeal stem from the resentencing hearing.

At that proceeding, the trial court acknowledged our decision that defendant's prior Nevada conviction did not constitute a strike under California law. In resentencing defendant, the trial court imposed the upper term of nine years for count 4, assault on a peace officer with a semi-automatic weapon. (Pen. Code, § 245., subd. (d)(2).) Because this particular sentence is the sole basis for defendant's appeal, we outline the court's reasoning in detail.

The trial court first reviewed defendant's extensive criminal history:

"In this matter, not only did we have an extremely serious charge that came before the trial Court, in review of [defendant's] record, unfortunately, it showed a long prior record starting in '92 with a vehicle theft, '93 with an 11378 felony. He did have the robbery conviction out of Nevada, which, although is not going to go down as a strike in California law, it still was an attempted robbery for which he received a suspended prison sentence.

"He had a DUI after that, and we have the 246 incident where he picked up the other matter, which is a California strike. He picked up the 10851, a high speed chase, and got four years, four months of prison. After that in '97, he had a

possession for sale of marijuana, and I guess that was a consecutive sentence to the 246.

"As the Court commented at the time of the sentencing, this whole thing was quite unfortunate, in that [defendant] had people that cared about him that urged him to go back into custody on the parole violation, which would have been probably a year's length. Instead, we have this incident, which luckily, there was no great bodily injury but certainly was not as dangerous as it could be. As I recall, they unloaded the whole gun at the officer, about ten shots."

The court continued: "So the Court, although it started with the middle term last time, I did make the comment that because it was a life case, I didn't want to get into any *Blakely* issues [*Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, hereafter *Blakely*], but a review of his record and consideration of the prior that is not a strike but is certainly a serious felony in his background causes the Court to have to indicate this is an upper-term case.

"He was on parole. He has a robbery charge for which the Court is not going to be adding any additional time. He was in violation using drugs, carrying weapons; and rather than submit to a parole violation or submit to a vehicle stop, he got in an extremely dangerous high-speed chase and threatened great bodily harm on the peace officer who was just engaged in the performance of his duties.

"So I will find that this is an aggravated case, and the upper term of nine years will be imposed. That is doubled

because of the California strike that remains, for a total of 18 years. That is Count Four."

The court then imposed sentences for the additional charges on which defendant had been convicted, with a resulting aggregate prison term of 47 years.

DISCUSSION

Defendant contends that the imposition of the upper term violated his right to jury trial on the aggravating factors used to enhance his sentence. We do not agree.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), the Supreme Court held 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 tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. at pp. 303-305 [159 L.Ed.2d at pp. 413-414].)

In *Cunningham*, the Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's

right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (549 U.S. at p. ____ [166 L.Ed.2d at p. 864], overruling *People v. Black* (2005) 35 Cal.4th 1238 on this point, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [167 L.Ed.2d 36].)

Here, however, the trial court based its decision to impose the upper term solely on defendant's lengthy criminal history, including prior offenses and parole violations. The imposition of the upper term based on these facts did not violate the rule of *Apprendi*, *Blakely* and *Cunningham* because the rule does not apply to an aggravated sentence based on a defendant's prior convictions and recidivism. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455]; accord, *United States v. Booker* (2005) 543 U.S. 220, 231 [160 L.Ed.2d 621, 641-642]; see also *People v. Thomas* (2001) 91 Cal.App.4th 212, 223.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.