Filed 10/15/07 P. v. Viera CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JUAN VIERA, Defendant and Appellant.	A115546 (San Francisco County Super. Ct. No. 2106243)

Defendant Juan Viera pleaded guilty to felony stalking (Pen. Code, § 646.9, subd. (b).).[1] The trial court placed him on probation. After two successive probation violations, the trial court revoked probation and sentenced defendant to the upper term of four years. Defendant argues that the imposition of the upper term violates *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*) because the three aggravating factors were neither admitted by defendant nor submitted to a jury. We disagree because at least two of the aggravating factors are based on recidivism, and thus fall outside the rule of *Cunningham*, and those two factors are sufficient to justify the upper term.

Defendant also challenges the imposition of a second restitution fine under section 1202.4, and a $20 court security fee under section 1465.8. The People concede that the second restitution fine is improper. We reject defendant's challenge to the court security

[1] Statutory references are to the Penal Code. Rule references are to the California Rules of Court.

fee. We modify the abstract of judgment to strike the second restitution fine, and otherwise affirm.

I. PROCEDURAL BACKGROUND & FACTS

Original Offense

Because of the guilty plea, we take the facts from the probation report.

On April 29, 2003, San Francisco Police officers responded to a Bush Street address to take a report from a woman who said she was a stalking victim. The victim, Jenny L., told the officers that defendant, her ex-boyfriend, had been making harassing phone calls to her during the previous week. She also told the officers that defendant had committed domestic violence during their two-year dating relationship. Court records show that defendant was the subject of a protective restraining order and was on criminal probation since 2002 for offenses against Jenny which included making criminal threats.

The officers listened to a recorded phone message from defendant in which he said, "I'm going to kill you bitch." Jenny told the officer she thought the defendant would kill her. The officers also heard live statements from defendant, because he called Jenny at least 20 times while the police were in her apartment. The officers heard defendant say, "I'm gonna kill you bitch," and hang up. He called again and said, "I know the cops are there, I'm closer than you think." An officer left the apartment and waited in a doorway across the street. He watched while defendant walked in front of the apartment, screamed "Fuck you," and held up both middle fingers in the direction of the apartment. Defendant saw the officer, fled, and was apprehended. He punched the officer in the mouth in an unsuccessful attempt to avoid being handcuffed.

On May 2, 2003, the People filed a felony complaint charging defendant with two counts of making a criminal threat (§ 422) with serious felony enhancements (§ 1192.7, subd. (c)(38)), counts 1 and 2; two counts of felony stalking (§ 646.9, subds. (a) & (b)), counts 3 and 4; two counts of misdemeanor resisting arrest (§ 148, subd. (a)(1)), counts 5 and 6; one count of misdemeanor use of force and violence on a peace officer (§ 243, subd. (b)), count 7; and one count of misdemeanor making of annoying or harassing telephone calls (§ 653m, subd. (c)), count 8.

On June 30, 2003, defendant pleaded guilty to count 3, felony stalking while a restraining order was in effect (§ 646.9, subd. (b)), in exchange for dismissal of the remaining seven charges and the two serious felony enhancements. Pursuant to a plea bargain, the court placed defendant on three years probation. The probation conditions included nine months in county jail and the standard condition that defendant obey all laws. The court also imposed a $200 victim restitution fine pursuant to section 1202.4.

First Probation Violation

On June 10, 2005, defendant got into an argument with his girlfriend, Nicole F. He told her to move out of his house, and she packed and left to move in with her parents. On June 12, a dispute arose over whether defendant should continue to drive his brother's car, which his brother, Elias, had entrusted to Nicole while he was incarcerated. Elias did not want defendant to drive the car. A friend of Elias' picked up Nicole and one of her friends and drove them to meet defendant. The friend retrieved the car keys from defendant.

Nicole and her friend then took Elias' car to run some errands. While they were driving, defendant called Nicole and said, "I'm going to beat your ass bitch, I'm going to shoot someone, I'm going to shoot you, you turned my brother against me." Defendant kept yelling and told Nicole, "I'm going to burn your house down, I'm going to kill you."

When police arrested defendant, they found a gun hidden in his bedroom cabinet and quantities of crystal substances suspected to be illegal drugs.

As a result of this incident, defendant was arrested for numerous offenses including making a criminal threat (§ 422).

On June 15, 2005, the People moved to revoke defendant's probation. On November 22, 2005, defendant admitted a probation violation and stipulated that the police report of the incident supplied a factual basis for his admission. The trial court modified probation to require defendant to serve one year in the county jail, and extended the probation period.

Second Probation Violation

On June 18, 2006, defendant was riding in a car with Nicole F., who was holding her baby. Defendant struck Nicole at least twice. He punched Nicole so hard she hit her head on the inside of the car door. Defendant threatened to kill Nicole, saying he was "going to have the car blasted with you and the baby in the car."

On July 3, 2006, the People moved to revoke defendant's probation. On October 16, 2006, after a revocation hearing, the court found that defendant had violated his probation.[2] The court found that defendant was not amenable to further probation supervision, and stated its belief that defendant was "a danger to women."

The court revoked probation and sentenced defendant to the upper term of four years for the original 2003 section 646.9, subdivision (b) conviction. The court relied on three aggravating factors:

(1) The crime involved a threat of great bodily harm. (Rule 4.421(a)(1).) The court observed: "[A]t the time [defendant] was placed on probation, a year earlier [i.e., in 2002], he was put on probation for a similar type offense, threatening, [section] 422. . . . It's threats. And the matter for which he was put on probation involved threats to the same victim and stalking incidents. [¶] The Court notes that these were threats to kill her [Jenny L.], and multiple times. The crime therefore involved a threat of great bodily harm, as delineated in [Rule] 4.421(a)(1)."

(2) Defendant was on probation at the time of the original 2003 stalking offense. (Rule 4.421(b)(4).)

(3) Defendant's prior performance on probation was unsatisfactory. (Rule 4.421(b)(5).)

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[2] There is some evidentiary confusion regarding this violation, which defendant does not raise as an issue on appeal. The supplemental probation report states the facts based on the police report. At the revocation hearing Nicole F. took the Fifth amendment, but the reporting officer testified about the contents of his report and another witness provided corroborating information. Given the nature of the issues on appeal, we state the facts as set forth in the probation report, which defendant does not appear to dispute.

The court found one factor in mitigation, that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process. (Rule 4.423(b)(3).) But the court found the circumstances in aggravation outweighed the single circumstance in mitigation.

The court imposed a second restitution fine pursuant to section 1202.4. The court also imposed a $20 court security fee under section 1465.8.

II. DISCUSSION

Defendant contends that the upper term violates *Cunningham* because the three aggravating factors were neither admitted by defendant nor submitted to a jury. Defendant is incorrect with regard to factors (2) and (3), because those factors relate to recidivism. Those two factors are sufficient to justify the upper term.

An upper term may not be imposed based on facts unrelated to recidivism which were neither admitted by the defendant nor found true by the jury. (*Cunningham, supra,* 127 S.Ct. at p. 860; see *People v. Yim* (2007) 152 Cal.App.4th 366, 370-371 (*Yim*).) Defendant argues that the exception of recidivism from the purview of *Cunningham* is limited only to the fact of a prior conviction, not the facts that he was on probation at the time of the offense, and had performed poorly on probation. We disagree.

The recidivism exception has been interpreted broadly by many courts to encompass other facts relating to a defendant's recidivism. (See *People v. McGee* (2006) 38 Cal.4th 682, 706-709 (*McGee*); *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.)

In *Yim*, the court held that the recidivism exception included the facts that the defendant was on parole, and had performed poorly on parole. The court reasoned that these facts related to the fact of a prior conviction, were easily determined by record review in the type of inquiry traditionally associated with judicial sentencing, and did not relate to the commission of the offense, but only to punishment. (*Yim, supra*, 152 Cal.App.4th at pp. 370-371.) Under this reasoning, the fact that defendant was on *probation* at the time of the offense clearly falls within the recidivism exception to *Cunningham*.

In our view, the factor of poor probation performance is self-evident from the undisputed (and admitted) fact that defendant committed a new offense—the 2003 stalking offense—while he was undisputedly on probation since 2002 for threatening the same victim. Here, too, this aggravating factor is related to recidivism and falls outside of *Cunningham*.

Factors (2) and (3) relate to recidivism. They are based on undisputed, objective facts readily determined by a trial court from official records of prior convictions. They are not subjective, qualitative factors such as callousness, dangerousness, or vulnerability of the victim. The two factors are sufficient to support the upper term. (See *People v. Cruz* (1995) 38 Cal.App.4th 427, 433.)[3]

Factor (1) involves a threat of great bodily harm. Normally, this would be a fact that should be submitted to a jury under *Cunningham*. In this case, however, that fact derives from an element of the statute under which defendant was convicted: section 422 requires that the defendant threaten to commit a crime "which will result in death or great bodily injury to another person . . . ." Although we do not decide the issue, it would seem that the sentencing judge can objectively determine the factor of bodily harm from the court's records, and nothing need be submitted to a jury, especially where defendant has admitted a factual basis for his guilty plea to the charge.

In any case, even assuming *Cunningham* error regarding factor (1), any error is harmless beyond a reasonable doubt. We have no doubt that any jury would have found that defendant repeatedly threatened Jenny with great bodily harm.

Furthermore, defendant was on probation for threatening Jenny when he stalked and threatened her again, resulting in the present offense. He was given a chance to avoid prison by proper performance on probation, but he squandered that chance by making a criminal threat to Nicole F. He was given yet another chance, which he again squandered by assaulting Nicole while she held her baby, and by threatening to "blast"

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[3] For reasons we need not discuss, defendant's reliance on the plurality opinion in *Shepherd v. United States* (2005) 544 U.S. 13, 25-26, is misplaced. (See discussion in *McGee, supra*, 38 Cal.4th at pp. 706-709.)

the car in which Nicole and her baby were riding. To say that defendant is a danger to women is an understatement.

The severity of defendant's poor performance on probation is manifest. The trial court was justified in removing defendant from society for the maximum term permitted by law. The upper term does not violate *Cunningham*.[4]

Defendant also argues that the second restitution fine imposed under section 1202.4 was improper. The People rightly concede the issue. (See *People v. Chambers* (1998) 65 Cal.App.4th 819, 821-823.)

Finally, defendant contends the $20 court security fee imposed under section 1465.8 was improper because that statute was enacted after he committed his 2003 offense. Defendant claims the fee amounts to an ex post facto punishment. This argument has been rejected on the ground that the fee is imposed for the nonpunitive purpose of maintaining adequate court security, and is not a fine. (*People v. Wallace* (2004) 120 Cal.App.4th 867, 874-879.)[5]

[4] This conclusion moots the claim that defendant waived the *Cunningham* issue by failing to object below, and defendant's contention that his trial counsel was ineffective for failing to object.

[5] We note this issue is currently pending before the California Supreme Court. (*People v. Alford* (2006) 137 Cal.App.4th 612, review granted May 10, 2006, S142508; *People v. Carmichael* (2006) 135 Cal.App.4th 937, review granted May 10, 2006, S141415.)

III. DISPOSITION

We modify the abstract of judgment to strike the second restitution fine imposed under section 1202.4. As modified, the judgment of conviction and sentence are affirmed.

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Marchiano, P.J.

We concur:

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Stein, J.

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Swager, J.