

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sutter)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT EARL WAYMIRE,

Defendant and Appellant.

C051736

(Super. Ct. No. CRF041084)

MODIFICATION OF OPINION AND
DENIAL OF PETITION FOR
REHEARING

(NO CHANGE IN JUDGMENT)

APPEAL from a judgment of the Superior Court of Sutter County, Robert Damron, Judge. Affirmed.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Bill Lockyer, Attorneys General, Dane R. Gillette and Robert R. Anderson, Chief Assistant Attorneys General, Michael P. Farrell and Mary Jo Graves, Senior Assistant Attorneys General, Stephen G. Herndon and Wanda Hill Rouzan, Supervising Deputy Attorneys General, Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

THE COURT:

The opinion of this court filed April 20, 2007, in the above entitled case is modified as follows:

On pages 10-14, delete all of the text following the heading "*Probation Issues*" and preceding the heading "DISPOSITION" and insert in its place the following:

The next question is whether the trial court erred in relying on the fact that defendant's prior performance on probation was unsatisfactory and the fact that he was on probation at the time of the offense. We need not decide that issue because even if we assume it was *Blakely* error for the trial court to rely on these circumstances in imposing the upper term, it makes no difference because we find any such error harmless.

First, however, we pause briefly to address another contention defendant raises in his supplemental brief. Defendant contends that under *Cunningham* it is the jury, not the court, that must decide: (1) whether any mitigating factors exist; and (2) whether the aggravating circumstances found to exist outweigh any mitigating factors found to exist. Thus, it appears to be defendant's position that although a trial court may, without the assistance of a jury, properly rely on aggravating factors that fall outside the *Blakely* rule -- specifically, those falling within the prior conviction exception and those admitted by the defendant -- in imposing an upper term sentence, if the defendant even suggests the existence of one or more mitigating factors, a jury must be allowed to decide whether any such factors exist and how they weigh against any applicable aggravating factors.

Defendant offers no authority to support his position, nor are we aware of any. Once a trial court has identified aggravating circumstances that fall outside the scope of the *Blakely* rule, it is constitutionally permissible for the court to impose the upper term sentence, and any decision about whether to impose the middle term or the lower term instead is simply a matter of trial court discretion that is not constrained by the *Blakely* rule. Thus, a defendant has no federal constitutional right to have a jury decide the existence of any mitigating circumstances or to weigh the aggravating circumstances against any mitigating circumstances that may exist.

That brings us back to the question of whether, assuming it was error for the court to rely on the fact that defendant's prior performance on probation was unsatisfactory and the fact that defendant was on probation at the time of the offense as aggravating circumstances, that error was harmless. Recently, the United States Supreme Court held that *Blakely* error is reviewed under a harmless-beyond-a-reasonable-doubt standard. (*Washington v. Recuenco* (2006) 548 U.S. ____ [165 L.Ed.2d 466].) Defendant contends that case is distinguishable because it "involved a sentencing factor actually charged in the information." In his view, "[b]ecause the aggravating factors in the present case were not charged, harmless error analysis is inapplicable." We are not persuaded.

There is nothing in *Recuenco* that suggests the fact that the sentencing factor at issue there was charged in the

information was critical to the court's application of a harmless error analysis. Nor are we persuaded by defendant's suggestion that to sentence him based on an aggravating circumstance not charged in the information was the equivalent of sentencing him on an uncharged "aggravated offense," which is "flatly prohibited."

The limited question before us is this: Where the trial court, in imposing the upper term, properly relied on its own finding that defendant had numerous prior convictions of increasing seriousness, is the trial court's reliance on the additional aggravating circumstances -- which were not admitted by defendant or proven to a jury beyond a reasonable doubt, and which we assume was error for the purposes of this appeal -- subject to harmless error analysis or structural error? We believe the former answer is the correct one. Structural error occurs only in those limited instances where a defendant is deprived of basic protections without which a criminal trial cannot reliably serve as a vehicle for determination of guilt or innocence or punishment, and no criminal punishment may be regarded as fundamentally fair. (*People v. Carter* (2003) 30 Cal.4th 1166, 1221.) That is simply not the case here. Thus, the harmless-beyond-a-reasonable-doubt standard applies.

We are satisfied any error here was harmless beyond a reasonable doubt. According to the supplemental probation report prepared for defendant's sentencing following revocation of his probation, defendant was first placed on summary probation following an arrest in 1998 and thereafter was placed

on summary probation four additional times. The probation report explains that "defendant was unsuccessful in completing any of his grants of summary probation, due to him continuing to sustain new arrests." The probation report from defendant's original sentencing hearing further explains that defendant "was on probation in both Yuba County and Placer County when the instant offense was committed."

Defendant does not dispute this information or suggest there was any evidence to the contrary. Accordingly, we are persuaded beyond a reasonable doubt that if the jury had been instructed on the aggravating circumstances relating to probation on which the trial court relied to impose the upper term, the jury would have found those circumstances to exist, namely, that defendant's prior performance on probation was unsatisfactory and that he was on probation at the time of the offense.

The petition for rehearing is denied. This modification does not affect the judgment.

BY THE COURT:

_____ SIMS _____, Acting P.J.

_____ HULL _____, J.

_____ ROBIE _____, J.