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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAY WEATHERSPOON, Defendant and Appellant.	B190915 (Los Angeles County Super. Ct. No. BA282894)

APPEAL from a judgment of the Superior Court of Los Angeles County, David M. Mintz, Judge. Affirmed.

Lori E. Kantor, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Marc E. Turchin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Ray Weatherspoon of second degree burglary and petty theft. After a court trial, the court found true 11 prior prison term allegations under Penal Code[1] section 667.5, subdivision (b). The trial court imposed five one-year terms under section 667.5, subdivision (b), but struck the remaining six. Citing the stricken prior prison terms and that Weatherspoon was on parole at the time he committed the current offenses, the trial court imposed the upper terms on both counts. Weatherspoon's sole contention on appeal is the imposition of the upper terms violates *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*). We disagree, and we therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.[2]

On May 2, 2005, Mario Buendia saw someone in his family's detached guest house, which was used as a storage area. Buendia saw defendant leaving with two bicycles. When Buendia yelled at him, defendant tripped and fell to the ground. Buendia cautioned defendant not to move. Buendia's father joined him outside, and together they stood watch over defendant until the police arrived.

II. Procedural background.

An amended information charged Weatherspoon with count 1 for second degree burglary (§ 459) and count 2 for petty theft with a prior (§ 666). He was also charged with two prior convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and with 12 prior prison terms (§ 667.5, subd. (b)).

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[1] All further undesignated statutory references are to the Penal Code.

[2] Because the underlying facts are not relevant to the issue on appeal, we briefly state them.

A jury convicted Weatherspoon as charged, namely, of second degree burglary and of petty theft. The trial court sentenced him on May 8, 2006.[3] The court found true 11 of defendant's 12 section 667.5, subdivision (b), prior prison terms. The trial court sentenced Weatherspoon to the upper term of three years on count 1, doubled based on the strike to six years, and to the upper term of three years on count 2, also doubled based on the strike. The court stayed the sentence on count 2 under section 654. In addition, the trial court sentenced Weatherspoon to five one-year terms for the prior prison terms, and struck the remaining six one-year prior prison terms. Weatherspoon's total sentence therefore was 11 years.

The court then stated its reasons for imposing the upper terms: "[T]he defendant was on parole at the time of the commission of this offense. He was recently released. Additionally, the court intends to exercise its discretion under Penal Code section 1385, subdivision (c)(1) to strike the additional punishment for some of the priors under 667.5, subdivision (b). Specifically, I am going to strike the additional punishment for all of the prison priors that are over 20 years old. . . . [¶] With respect to the reason for the imposition of the upper term on counts 1 and 2, I find the following factors in aggravation: First of all, the defendant was on parole at the time of the commission of the offense. Secondly, under California Rules of Court 4.420 subdivision (c), a fact charged and found to be an enhancement may be used as a reason for imposing the upper term if the court has discretion to strike the punishment for the enhancement and does so. The use of the fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect of the total term. So I am using it as a factor in aggravation to impose the upper term. . . . [T]he ones that I am striking under 1385, those cases are an additional circumstance in aggravation justifying the imposition of the upper term."

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3 Previously, defendant had waived his right to a jury trial on his priors, and the trial court struck defendant's 1969 juvenile conviction for robbery under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The trial court denied a second *Romero* motion to strike defendant's remaining prior conviction.

DISCUSSION

Weatherspoon contends that the imposition of the upper terms violated his constitutional right to a jury. We disagree.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held that "[o]ther 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." The court later defined the "statutory maximum": The statutory maximum is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely v. Washington* (2004) 542 U.S. 296, 303.) Under California's Determinate Sentencing law, the "statutory maximum" is the middle term. (*Cunningham, supra,* 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856], overruling *People v. Black* (2005) 35 Cal.4th 1238.) Therefore, any aggravating factors that are used to impose the upper term under that law must be found by a jury or be reflected in the jury's verdict.

An exception, as stated in *Apprendi*, is where the fact of a defendant's "prior conviction" is used to aggravate the sentence. What is a "prior conviction" has been broadly defined. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221 ["courts have construed *Apprendi* as requiring a jury trial except as to matters relating to 'recidivism.' Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' (Citations.)"], relying on *Almendarez-Torres v. United States* (1998) 523 U.S. 224.) *Thomas* concluded that *Apprendi*'s statement, " '[o]ther than the fact of a prior conviction,' refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations." (*Thomas,* at p. 223.) Our California Supreme Court cited *Thomas* with approval in *People v. McGee* (2006) 38 Cal.4th 682, 700-703.

Nothing in *Blakely* or *Cunningham* impacts *Thomas*'s analysis. We therefore conclude that the trial court could properly impose the upper terms based on the facts of Weatherspoon's six prior prison terms, for which the trial court did not impose one-year terms.

Moreover, that the trial court relied on a second factor in imposing the upper terms—Weatherspoon was on parole at the time he committed the current offenses—does not change our conclusion. Under the same rationale underlying *Thomas*, a defendant's parole status may fall under a general "recidivism" exception. In the event it does not, we still need not reverse the upper-term sentences because any *Cunningham* error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. Weatherspoon had 11 prior prison terms. The trial court imposed only five and struck the remaining six. The trial court repeatedly stated that it was using those stricken prior prison terms to impose the upper terms. Therefore, even in the absence of the second factor, the trial court would have, beyond a reasonable doubt, imposed the upper terms based on Weatherspoon's six prior prison terms.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.