

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN JOE WHITE,

Defendant and Appellant.

F050184

(Super. Ct. No. F05908615-8)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Deanna F. Lamb, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Adrian Joe White was convicted of several sex crimes. Additional findings included that he was convicted of a prior serious felony within the meaning of the Three Strikes law, that he served four prior prison terms, and that he suffered a prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a).<sup>1</sup>

He was sentenced to prison for 69 years. He appeals, claiming the upper and consecutive terms were imposed based on facts not found by the jury, there was a dual use of facts in imposing full consecutive sentences, and the court erroneously imposed a security fee for offenses committed before the effective date of the statute. Most significantly, we are called upon to apply the recent United States Supreme Court case of *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [127 S.Ct. 856] to determine if defendant's sentence was properly imposed. We remand the matter to the trial court for further proceedings.

### **FACTS AND PROCEEDINGS**

In the early morning hours of January 4, 1996, 14-year-old Elizabeth was asleep in the living area of an apartment she shared with her mother, her 16-year-old brother, her four-year-old sister, and her 46-year-old grandfather. Her brother and grandfather were asleep in the bedroom. Her mother and sister were sleeping nearby. She awoke when she felt someone rubbing her vagina underneath her panties. She was told by defendant, an intruder, that if she did not cooperate he would kill her. He told her he had a gun; if she did not remain quiet, he would kill her sister. She was raped (count 1) and orally copulated (count 4), and defendant sexually penetrated her vagina and anus by force with a finger (counts 2 & 3). Elizabeth's mother woke up when defendant dropped something. Defendant told the mother not to move, that he had a gun. Defendant left.

---

<sup>1</sup> All future code references are to the Penal Code unless otherwise noted.

The mother called the police. Elizabeth was examined at the hospital and swabs were taken from her. In addition, the sleeping bag she was using at the time was kept as evidence. In September of 2003, DNA from the sperm gathered from Elizabeth and from the sleeping bag was identified as belonging to defendant. Neither Elizabeth nor her mother was able to identify defendant at trial. Because of the passage of time, Elizabeth was not able to recall all the details of the assault at trial. The officer who took her statement testified about the statement Elizabeth gave shortly after the attack.

Defendant did not challenge that a sexual assault on Elizabeth had occurred. His defense was that the DNA wrongly identified him as the perpetrator.

Defendant was convicted of forcible rape (§ 261, subd. (a)(2)), forcible oral copulation (§ 288a, subd. (c)(2)), and two counts of sexual penetration by force (§ 289, subd. (a)(1)). In addition, defendant admitted he suffered a prior serious felony (burglary) within the meaning of the Three Strikes law (§ 667, subs. (b)-(i)), suffered a prior serious felony within the meaning of section 667, subdivision (a)(1) and suffered four prior prison terms (§ 667.5).

The court sentenced defendant to the aggravated term of eight years for each of his convictions. These terms were doubled to 16 years based on the strike. The trial court gave the following reasons for imposing the aggravated terms: “[F]irst of all, given the circumstances of these crimes, the manner in which they were committed, the fact that they were committed at night in the victim’s own home with her family present, and that there were threats made to her and her family, her age at the time of the commission of this crime, and her particular vulnerability with her mother and baby sister in the room when this occurred and the threats to them, first of all, I find that the circumstances in aggravation for those reasons alone greatly outweigh any in mitigation that may apply in this case. And I can’t think of any, frankly, that apply to the circumstances of this case. And for that reason I’m going to apply the aggravated term as to each of these four counts.”

The court then discretionarily ordered that these terms run fully consecutive pursuant to section 667.6, subdivision (c). The court's reasons were as follows: "I also find in light of your criminal history and the four prison priors, which counsel has referred to here, which were found true or admitted by the--by you during the course of this case, and the circumstances of the crime itself, that fully consecutive sentencing is not only appropriate but demanded, really, in the court's view under the circumstances of this case."

The court added five years for the section 667, subdivision (a) enhancement. The court imposed and then struck the four one-year prior prison terms pursuant to section 1385. Defendant was sentenced to prison for a total term of 69 years.

## **DISCUSSION**

### **I. Imposition of the Upper Term**

In *Cunningham v. California, supra*, 549 U.S. \_\_\_[127 S.Ct. 856] the United States Supreme Court held that Cunningham's right to trial by jury was denied under California's determinate sentencing law (DSL) because the judge, not the jury, found the facts that resulted in an upper term sentence. Petitioner Cunningham was convicted of continuous sexual abuse of a child. Under California's DSL, Cunningham faced the lower term of six years, the mid term of 12 years, or the upper term of 16 years. In order to impose the upper term, the judge had to find one or more facts in aggravation. The trial judge found six aggravating factors, including victim vulnerability and that Cunningham was a serious danger to the community based on his violent conduct. Cunningham's lack of a prior record was found as the sole factor in mitigation. The trial court found that the aggravating factors outweighed the one mitigating factor and sentenced Cunningham to the upper term. The appellate court upheld his sentence. The California Supreme Court denied Cunningham's petition for review, having recently decided in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence ... under

California law does not implicate a defendant's Sixth Amendment right to a jury trial.” (*Id.* at p. 1244.)

The United States Supreme Court granted review and disagreed with the California Supreme Court's decision in *Black*. “[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (*Cunningham v. California, supra*, 549 U.S. at p. \_\_\_\_ [127 S.Ct. at p. 860].)

As previously set forth, the trial court here sentenced defendant to the aggravated term for each of his four convictions. The aggravated terms were based solely on facts not found by the jury or admitted by the defendant. Thus, error under *Cunningham* occurred in the imposition of the aggravated terms.

## **II. Imposition of Full Consecutive Terms**

The trial court imposed full consecutive terms for all counts. It did so under the discretionary provision of section 667.6, subdivision (c). Full consecutive sentences are mandatory for certain sex crimes under section 667.6, subdivision (d) when the crimes involve separate victims or involve the same victim on separate occasions. The imposition of full consecutive sentences for the same enumerated sex crimes is discretionary “whether or not the crimes were committed during a single transaction.” (§ 667.6, subd. (c).)

Defendant contends the trial court could not properly impose full upper term consecutive sentences because the findings made to authorize the full upper terms were not found by the jury beyond a reasonable doubt. In particular, defendant argues that the question of whether the convictions were committed on the same occasion and arose from the same set of operative facts or, alternatively, were committed so closely in time to indicate a single transaction were issues that should have been submitted to the jury for determination beyond a reasonable doubt.

We begin by finding that *Cunningham* does not apply to the imposition of consecutive sentences. In doing so we agree with the analysis in *People v. Hernandez* (2007) 147 Cal.App.4th 1266. *Cunningham* did not address consecutive sentences and did not expressly overrule *People v. Black, supra*, 35 Cal.4th at page 1262 which held that consecutive sentencing decisions are not affected by the United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296.

In addition, unlike the statutory presumption in favor of a middle term, there is no statutory presumption in favor of concurrent rather than consecutive sentences. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) The trial court has an affirmative duty to determine if concurrent or consecutive sentences will be imposed for multiple offenses. (Pen. Code, § 669.) The provision in Penal Code section 669 that imposes concurrent rather than consecutive sentences if the trial court fails to perform its affirmative duty of choosing is a policy of “speedy dispatch and certainty.” (*In re Calhoun* (1976) 17 Cal.3d 75, 82.)

Although the trial court is required to state reasons for its decision to impose consecutive sentences, this requirement does not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.) “[E]very person who commits multiple crimes knows he or she is risking consecutive sentencing. While such a person has the right to the exercise of the court’s discretion, the person does not have a legal right to concurrent sentencing.” (*People v. Hernandez, supra*, 147 Cal.App.4th at p. 1271.) The *Cunningham* line of cases does not apply to consecutive sentences.

As previously set forth under section 667.6, when a defendant commits a number of enumerated sex crimes he is subject to either mandatory full consecutive sentences if the crimes involve separate victims or involve the same victim on separate occasions or discretionary full consecutive sentences whether or not the crimes were committed during a single transaction. Here defendant was sentenced under the discretionary provision.

He was subject to this provision because he was convicted by a jury beyond a reasonable doubt of several of the enumerated sex offenses. A finding that the crimes were committed so closely in time to indicate a single transaction is not a criterion for inclusion within subdivision (c); inclusion occurs *whether or not* the crimes were committed during a single transaction. Although defendant states that a finding of separate occasions was required to subject him to the full, separate, consecutive sentencing provision, this finding is required for mandatory sentencing under subdivision (d), not subdivision (c).

To the extent that defendant may be arguing that there must be a separate factual finding by a jury beyond a reasonable doubt to exclude his sentence from the benefits of the application of section 654, this argument fails.<sup>2</sup> The line of cases beginning with *Apprendi* does not apply to a determination under section 654 because “when section 654 is found to apply, it effectively ‘reduces’ the total sentence otherwise authorized by the jury’s verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the maximum penalty beyond the statutory range authorized by the jury’s verdict.” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 270, italics in original; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1022.)

Next, defendant argues the trial court could not rely on the fact he had served four prior prison terms to impose full consecutive sentences because when he admitted the prior prison terms he was advised that each prior term would add one additional year to

---

<sup>2</sup> Section 654 provides: “(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.” [¶] (b) Notwithstanding subdivision (a), a defendant sentenced pursuant to subdivision (a) shall not be granted probation if any of the provisions that would otherwise apply to the defendant prohibits the granting of probation.”

his sentence; he was not advised that the prior prison terms could be used to impose full consecutive sentences in lieu of the one additional year for each prison term.

“[A]dvisement as to the consequences of a plea is not constitutionally mandated.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1022.) An admission must only be set aside if the failure to advise the accused of the consequences of his admission is prejudicial. The defendant must demonstrate that he would not have entered his admission if he had been told about the omitted consequence. (*Id.* at pp. 1022-1023.)

While it is unlikely that defendant could have demonstrated that he would not have entered his admission if he had been told about the omitted consequence (use as a sentencing factor), we need not determine this question because, as shall be explained, the matter must be remanded to the trial court for a resentencing hearing. If defendant wishes to withdraw his admission of the prior prison terms, he may make a motion to do so at his resentencing hearing. If defendant’s motion to withdraw his admission of the prior prison terms is granted, the People must be given an opportunity to retry defendant on the prior prison terms.

The sentencing hearing here occurred prior to *Cunningham*, thus the trial court was bound by *Black* and was not aware of the requirements regarding proper aggravating factors and factors that can be used to impose consecutive sentences. The trial court must be given the opportunity to resentence the defendant guided by the knowledge that it may not use facts not found beyond a reasonable doubt to impose aggravated terms but may use these factors to discretionarily impose full consecutive sentences. The court may use defendant’s prior convictions and any other facts found beyond a reasonable doubt (for example prior prison terms) to impose aggravated sentences.

### **III. Dual Use of Facts**

Defendant attacks the imposition of full consecutive sentences, claiming there was a dual use of facts because the court used the circumstances of the crime to both impose the aggravated term and the full consecutive term. Because the matter must be remanded



for resentencing, this issue is no longer viable and may be raised in the trial court if it should occur again. We note that a trial court may not use the same fact to impose a full consecutive sentence under section 667.6 and to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

Defendant repeats his argument regarding the use of his prior prison terms, arguing that the imposition of full consecutive terms is a far greater consequence than he agreed to and a far greater consequence than allowed by the rules. In particular, he states that prison priors may be used to impose an upper term, but may not be used as a fact to impose a full consecutive sentence.

As previously discussed, defendant may make a motion to withdraw his admissions of the prior prison terms at resentencing, if he so desires. Assuming that facts of the prior prison terms remain as true findings at the time of sentencing (because defendant does not withdraw his admissions or the People prove the prior prison terms beyond a reasonable doubt), the court may utilize the prior prison terms as a factor in aggravation, as a factor to impose consecutive sentences, or as prior prison term enhancements.

#### **IV. Imposition of a Security Fee**

The offenses in this case occurred in January of 1996. Defendant was sentenced in April of 2006. The court imposed a \$20 court security assessment fee pursuant to section 1465.8, subdivision (a)(1). This statute was enacted and effective in 2003.

Defendant contends this statute does not apply to offenses committed before the effective date of the statute authorizing such fees and imposition of the fee was unauthorized.

The California Supreme Court has granted review in two cases to determine if the security fee may be imposed retroactively. (*People v. Carmichael* (rev. granted May 10, 2006, S141415) and *People v. Alford* (rev. granted May 10, 2006, S142508.) We agree with the analysis in *People v. Wallace* (2004) 120 Cal.App.4th 867 finding that the court

security fee mandated by section 1465.8 may be imposed retroactively on a defendant who committed his crime before the effective date of the statute.

**DISPOSITION**

The matter is remanded to the trial court for further proceedings as previously set forth. In all other respects the judgment is affirmed.

---

VARTABEDIAN, Acting P. J.

WE CONCUR:

---

WISEMAN, J.

---

CORNELL, J.