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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DORIAN D. WILLIAMS,

Defendant and Appellant.

B191852

(Los Angeles County
Super. Ct. No. NA068956)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed in part and reversed in part with directions.

Robert H. Pourvali, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Dorian D. Williams appeals from the judgment entered after a jury convicted him of selling cocaine base, possessing cocaine base for sale, and of cocaine base possession. For the reasons set forth below, we reverse the judgment insofar as it imposed a concurrent sentence for the cocaine possession charge and modify the judgment to reflect that the sentence is stayed instead. In all other respects, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

At around 10:30 p.m. on January 24, 2006, Long Beach police officers using a confidential informant to conduct a narcotics sting operation arrested Dorian D. Williams after he sold a \$20 rock of cocaine to the informant. After Williams was driven back to the police station, an officer found a bundle of rock cocaine on the floor of the patrol car. Williams was charged with three counts: (1) selling cocaine base (Health & Saf. Code, § 11352, subd. (a)); (2) possession of cocaine base for sale (Health & Saf. Code, § 11351.5); and (3) possession of cocaine base. (Health & Saf. Code, § 11350, subd. (a).) A jury found Williams guilty of all three counts. The court imposed the upper term sentence of five years on count 1, plus an additional three years because Williams had a previous drug-related conviction. (Health & Saf. Code, § 11370.2, subd. (a).) Concurrent sentences of four years on count 2 and two years on count 3 were also imposed.

On appeal, Williams contends the trial court violated Penal Code section 654 by imposing a concurrent sentence on count 2, instead of staying that sentence. He also contends the trial court violated his constitutional right to a jury trial by imposing the high term sentence on count 1 without letting a jury determine whether the aggravating factors to justify such a sentence were true.

DISCUSSION

1. *No Jury Trial Is Required When A High Term Is Based Solely on the Fact of Prior Convictions*

Williams's probation report showed that he had 19 prior convictions and 8 arrests, and recommended imposing the mid-term sentence on the base term count because of his criminal history and because the current offenses showed planning and professionalism that indicated pre-meditation. At the sentencing hearing, however, the court imposed the high term sentence of five years on count 1, citing one aggravating factor only: Williams's "extensive record." Williams contends this violated his constitutional right to a jury trial on the aggravating factors that led to a sentence above the statutory norm.

In *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243, the court held that the fact of a prior conviction may be found by the judge, not a jury, even if it increases the maximum statutory sentence. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the court held that the right to jury trial extended to sentencing schemes that allowed a judge to impose a sentence above the statutory maximum based on facts *other than a prior conviction* not found by a jury or admitted by a defendant. Williams contends that a potential shift in votes by the Supreme Court indicates that *Almendarez-Torres* is no longer good law. At the time the parties submitted their briefs, the United States Supreme Court had not yet issued its decision in *Cunningham v. United States* (2007) 549 U.S. ___, 127 S.Ct. 856. The *Cunningham* court reversed the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238, and invalidated our state's determinate sentencing law because it allowed judges to make factual determinations that could increase a defendant's sentence. However, the *Cunningham* court appears to have left intact the exception for prior convictions, stating: "Other than a prior conviction, see *Almendarez-Torres v. United States*[, 523 U.S. at pp. 239-247], we held in *Apprendi*, '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.'" (*Cunningham, supra*, 549 U.S. ___, 127 S.Ct. at p. 864, citing *Apprendi, supra*,

530 U.S. at p. 490.) The court went on to state that it had reaffirmed the rule of *Apprendi* many times since (*Cunningham, supra*, at p. 864) and to apply the rule from *Apprendi* and other related decisions to strike down California's determinate sentencing scheme.

The record here leaves no doubt that *Cunningham-Apprendi* error did not occur. The only stated basis for the court's decision to impose the high term was Williams's extensive prior convictions, a fact that our trial courts may still determine for themselves without violating a defendant's jury trial rights. Accordingly, we affirm the high term sentence.

2. The Concurrent Sentence on Count 2 Must be Stayed

Williams contends and respondent concedes that the concurrent sentence imposed on count 2 should have been stayed instead under Penal Code section 654. We therefore reverse the judgment only insofar as it imposed a concurrent sentence on that count and will order the judgment modified to stay the sentence on count 2.

DISPOSITION

The judgment is reversed only insofar as it imposed a concurrent four year sentence on count 2. The judgment is modified to stay that sentence instead, pursuant to Penal Code section 654. The clerk of the superior court is directed to modify the abstract of judgment accordingly and forward a corrected copy of the abstract to the Department of Corrections. In all other respects the judgment is affirmed.

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RUBIN, J.

WE CONCUR:

COOPER, P. J.

FLIER, J.