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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RODNEY WAYNE WILLIS, Defendant and Appellant.	D047786 (Super. Ct. No. SCD179844)

APPEAL from a judgment of the Superior Court of San Diego County, Laura P. Hammes, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

After a bifurcated jury trial, Rodney Wayne Willis was convicted of petty theft with a prior theft-related conviction.[1] (Pen. Code,[2] §§ 484, subd. (a), 666.) Willis then admitted as true, allegations he had suffered three separate prior prison term convictions

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1 Before trial, Willis stipulated that he had prior theft-related convictions for grand theft, robbery, and burglary. The jury subsequently found him guilty of petty theft.

2 All statutory references are to the Penal Code unless otherwise specified.

(§ 667.5, subd. (b)) and two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12). After striking one strike conviction, the court sentenced Willis to a total term of nine years, consisting of the upper three-year term for the petty theft with a prior doubled under the Three Strikes law, plus three consecutive one-year terms for the prior prison term enhancements.

Willis appeals, contending the trial court prejudicially erred by failing to instruct the jury on attempted theft and violated his constitutional rights by imposing an upper term sentence contrary to the holding in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). As to this latter issue, the parties have filed supplemental briefing on the recent United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*) that determined California's Determinate Sentencing Law (DSL), which permitted a court to impose an upper term sentence based on aggravating facts not found true by a jury or beyond a reasonable doubt, is unconstitutional and violates the holdings in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely*. Although we find no prejudicial error to reverse Willis's conviction, we reverse his sentence and remand for resentencing in light of *Cunningham*.

FACTUAL BACKGROUND

Willis does not challenge the sufficiency of the evidence presented at trial to support his conviction. The evidence at trial shows that on January 14, 2004, Loss Prevention Officer Geno Kintzele noticed a man, later identified as Willis, in the College Grove Wal-Mart store in San Diego, carrying a blue Wal-Mart bag that contained a

California king bed sheet set with a pink Wal-Mart return sticker on it.[3] Kintzele watched as Willis removed the sheet set from his bag, put it on a shelf, and then take a love seat slipcover from the shelf and put it in his bag after placing the pink return sticker on it. Kintzele then saw Willis walk toward the customer service counter where returns were taken.

Suspicious of Willis's behavior, Kintzele contacted the customer service manager, Cynthia Moreno, and asked her to let him know what Willis was doing at the counter. When Moreno advised Kintzele that Willis was attempting to return the slipcover, Kintzele authorized her to proceed with the return transaction, but asked her to stall the transaction so he would have time to contact Wal-Mart security. After about 10 minutes, Moreno completed the return-refund transaction and gave Willis a Wal-Mart gift card for $75.38, which was the amount for the slipcover plus tax.[4] Wal-Mart security detained Willis at the register with the gift card and escorted him to the store's security office where the police were called.

Responding San Diego Police Officer John William Jillard arrested Willis and talked with him after Willis waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. Willis told Jillard that he had gone into the Wal-Mart store intending to return a sheet set he had received as a gift. At some point, a pink Wal-Mart return sticker was placed on the sheet set and he went to the area of the store where they were kept. When

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3 Customers returning items to the store would obtain a pink return sticker from a store greeter at the entrance to the store.

4 The original sheet set had only been worth about $25.

he saw a loveseat slipcover that was more expensive than the sheet set, he transferred the return sticker from the sheet set to the slipcover and proceeded to the customer service desk to obtain a store credit for the slipcover. Willis said he had gotten the idea to put the return sticker on the slipcover when he was inside the store. Willis confirmed his statement was accurate when Jillard repeated it to him several hours later at the police station when Jillard was writing his report about the incident.

In addition to the above evidence, the receipts from the Wal-Mart cash register where Willis obtained the refund were entered into evidence. The receipts indicated that Willis's initial refund had been cancelled and that two transactions had actually occurred. Although Moreno could not remember that there were two transactions, she testified she immediately cancelled the gift card so it would not be worth anything.

DISCUSSION

I

REFUSAL TO INSTRUCT ON ATTEMPTED THEFT

In limine, the court discussed with the parties the legal issue of whether this case involved "an attempted petty theft, which would not permit the prior and turn it into a felony, or whether it would be, indeed, a petty theft with a prior based on these facts of a refund attempt at the store that was actually completed while under surveillance." In looking at the law, the court noted that in the past this factual situation would only "pass muster as an attempt petty theft," but that the California Supreme Court case of *People v. Davis* (1998) 19 Cal.4th 301 (*Davis*) appeared to be dispositive of the issue, indicating "that this is not a theft of false pretenses but rather a straight larceny that takes place as

soon as an item is taken off the shelf and moved toward the cash register for purposes of an improper refund." The court encouraged counsel to take the afternoon to research the matter and come back the next morning to discuss *Davis* and any other evidentiary matters.

The next day, the trial judge again took up the matter, reviewing the prosecutor's proposed instruction for the crime charged in this case. The judge noted that it was her understanding that "the *Davis* case controls the issues in this case. In fact, it is on all fours with respect to the proposed evidence." The judge explained that she had looked up the matter in Witkin "under the larceny section" and read that portion into the record because she thought "it's really important that we all understand . . . what the law is and what these instructions must clearly convey to the jury, without directing a verdict. . . ." The judge stressed that the instructions should make clear that the "intent to permanently deprive includes an intent to retain the property . . . and return it, only upon certain conditions," using the language of *Davis, supra*, 19 Cal.4th 301.

Although defense counsel had not found any recent law contrary to *Davis, supra,* 19 Cal.4th 301, he argued the situation was different in this case because Willis had come into Wal-Mart and had exchanged property for property belonging to him. Counsel further requested the court to exclude any evidence after Willis picked up the slipcover and did "a bit of traversing" if the court were taking the *Davis* position on larceny that it is completed at the point Willis picked up and carried the merchandise. The court denied such request "because it's circumstantial evidence of what was in his mind at the time that he brought [the merchandise] up to the cash register."

The prosecutor referred the court to the case of *People v. Shannon* (1998) 66 Cal.App.4th 649 (*Shannon*) regarding the asportation or removal element for larceny from a store, noting that because " '[o]ne need only take possession of the property, detaching it from the store shelves or other location, and move it slightly with the intent to deprive the owner of it permanently,' " the instruction should also include similar language. The court agreed, stating that by the end of the case there should be "instructions that will more thoroughly define the intent to deprive and the taking aspect of it and the consent aspect of it . . . in the larceny."

Near the conclusion of the trial, the court again reviewed the jury instructions to be given for petty theft in this case and overruled defense counsel's request that the regular CALJIC instruction for straight larceny be given, noting that the California Supreme Court in *Davis, supra,* 19 Cal.4th 301, had carefully "laid out the [six] elements of theft by larceny" as charged in this case. After further discussion on various modifications to the proposed instructions and denial of the defense claim of right defense for any difference in price between what the sheet set was worth and the amount of the slipcover, defense counsel indicated he would be requesting an instruction on attempted theft "based on the evidence that at some point Mr. Willis may have formed the intent to do it, but it was after the taking of the slipcover." Counsel argued the jury should have the opportunity to consider whether the slipcover was always within Wal-Mart's control and whether Willis might have formed the intent to permanently deprive Wal-Mart of the money, not the slipcover, only after taking the slipcover to the counter.

After the court stated it would allow counsel to argue such factual points to the jury, but would not at that point instruct on attempted theft, the prosecutor commented that he thought such argument was improper based on *Davis, supra,* 19 Cal.4th 301, even if money were the object of the theft because the second element of an attempt, that there be a direct and ineffectual act, could not be shown in this case. The prosecutor explained that even "[i]f we just assume for purposes of this that he formed the intent while standing in line, he did in fact return the item and obtained a refund. So there's no ineffectual act. There's no attempt. He completed it." The trial judge agreed, stating, "I think that's well put. So it would defeat the attempt argument no matter which way you look at it. . . . [¶] I'm going to decline to instruct on the attempt. If we were back to false pretenses, it's a clear attempt. But I think that is all gone now. That's been eradicated by the *Davis* case [and] *Shannon*. . . ."

At the conclusion of the evidence, after the court further reviewed jury instructions with counsel before closing arguments, defense counsel again raised the issue of whether the court would reconsider giving the attempt instruction as it was his "inclination without mentioning larceny by trick or deceit to argue there's no completed theft here." The court acknowledged that defense counsel was in a "very odd position in this case," but as long as the prosecutor was "not going after what might be considered an attempt false pretenses at the register," the court would not instruct on attempt. The court acknowledged, however, that if the prosecutor argued other than there was a "completed larceny prior to the time [Willis takes the slipcover] to the register," then it would have to give the instructions that defense counsel requested.

After closing arguments, the court instructed the jury on theft by larceny as follows:

> "Defendant is accused in Count 1 of having committed petty theft by larceny in violation of Penal Code Section 484[, subd.] (a), a crime. Every person who shall feloniously steal, take, carry, lead or drive away the personal property of another of a value less than $400 is guilty of petty theft by larceny. [¶] In order to be guilty of theft by larceny, the following elements must be met: One, a person must take possession; two, of personal property; three, owned or possessed by another; four, by means of trespass; five, with the intent to steal the property; and six, carry the property away. [¶] The act of taking personal property from the possession of another is a trespass unless the owner consents to the taking freely and voluntarily or the taker has a legal right to take the property. [¶] A retail store impliedly consents to permit customers to take items from shelves and to carry the items from one area of the store to another for the purpose of examination and/or purchase. This consent does not necessarily imply consent to permit customers to take the merchandise from a shelf to carry the merchandise to another area of the store for any other purpose. [¶] The specific intent which is an element of the crime of petty theft is satisfied by either an intent to deprive an owner permanently of his or her property, or to deprive an owner temporarily, but for an unreasonable time, so as to deprive him or her of a major portion of its value or enjoyment, or to deprive the owner of the property and then restore the property to the owner only on the condition of the owner's payment of some reward, refund, or other consideration. [¶] If the taking has begun with the necessary criminal intent to steal, the slightest movement of the property thereafter constitutes a carrying away of the property. To constitute theft of merchandise from a retail store, it is not necessary that the property taken be removed from the premises or retained by the perpetrator."

During deliberations, the jury submitted a note to the court simply stating, "Tempted . . . 'petty theif [sic] law.' " When the court proposed a reply stating, " '[i]f you are asking for the law on attempted petty theft, the Court cannot give this to you because this is not before you,' " defense counsel objected that the court should instruct on attempt

and, that if it was not going to do so, it should stop the response after stating " 'the Court cannot give this to you,' period." Counsel believed that the court's proposed response that the issue was not before them was misleading because he had argued that Willis should be "acquitted because all he did was commit [an attempted] petty theft at best."

In again denying the request to instruct on attempted petty theft, the trial judge explained that she had reconsidered the matter during counsel's argument and could not find any way "to attempted petty theft no matter which way I looked at it, no matter which element I was looking at, because the asportation law is so clear and requires so little movement to be a carrying of the property--the moment the return sticker was placed from one item to the other and the property was moved--and then the defendant confessed to that. [H]e told the officer that's what he did on top of it. . . . [¶] . . . I just don't think there's any evidence to support an attempt under those circumstances." When the court offered to rewrite the response to somehow state that the jury must only decide whether or not the elements of a completed petty theft have been shown because attempted petty theft is not a crime for the jury to consider, defense counsel stated he preferred "the present unacceptable response rather than the proposed one." The court thereafter provided the jury with its originally proposed reply.

On appeal, Willis contends the trial court prejudicially erred in failing to instruct the jury on attempted theft because he did not intend to permanently deprive Wal-Mart of the slipcover. He specifically argues the court was required to instruct on attempted theft because it was a necessarily included lesser offense and the evidence showed he was only

attempting to trick Wal-Mart into consenting to the taking of the property. Willis asserts the failure to give such instruction prejudiced him. Willis's arguments are without merit.

The law is well-established that "[i]n criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) In reviewing a claim that the evidence supports the giving of instructions on such lesser included offenses, we apply the independent or de novo standard of review. (*People v. Cole* (2001) 33 Cal.4th 1158, 1218.) "A trial court must instruct sua sponte on a lesser included offense only if there is substantial evidence, ' "that is, evidence that a reasonable jury could find persuasive" ' [citation], which, if accepted, ' "would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citations]." (*Ibid.*; original italics.)

From our independent review of the record, we conclude there was insufficient evidence to require the trial court to instruct on the lesser offense of petty theft in light of the controlling law. As the trial court correctly found, the elements of the petty theft of retail merchandise with a prior theft-related conviction charged in this case was controlled in the first instance by the California Supreme Court decision in *Davis, supra*, 19 Cal.4th 301, which we are required to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

The Supreme Court in *Davis* explained that it had "granted review to determine what crime is committed in the following circumstances: the defendant enters a store and picks up an item of merchandise displayed for sale, intending to claim that he owns it and to 'return' it for cash or credit; he carries the item to a sales counter and asks the clerk for a 'refund'; without the defendant's knowledge his conduct has been observed by a store security agent, who instructs the clerk to give him credit for the item; the clerk gives the defendant a credit voucher; and the agent detains him as he leaves the counter with the voucher; he is charged with theft of the item. In the case at bar the Court of Appeal held the defendant is guilty of theft by trespassory larceny. We agree." (*Davis, supra*, 19 Cal.4th at p. 303.)

Our high court in *Davis* further concluded that:

> "[T]he defendant's intent to claim ownership of the shirt and to return it to [the department store] only on condition that the store pay him a 'refund' constitutes an intent to permanently deprive [the store] of the shirt within the meaning of the law of larceny, and hence an intent to 'feloniously steal' that property within the meaning of Penal Code section 484, subdivision (a) [citation]. Because [the store] cannot be deemed to have consented to defendant's taking possession of the shirt with the intent to steal it, defendant's conduct also constituted a trespassory taking within the meaning of the law of larceny." (*Davis, supra*, 19 Cal.4th at p. 317.)

Because the facts in this case were similar to those in *Davis, supra*, 19 Cal.4th 301, the trial court instructed the jury in elements fashioned from that opinion for a trespassory taking within the meaning of the law of larceny. Willis does not contend that the given instructions were wrong or that there was insufficient evidence to support his conviction based on those instructions. Nor does he assert the court's response to the jury

was improper. Willis, rather, tries to distinguish the facts of his case from those in *Davis*, by claiming that the removal of the pink return sticker from his sheets and placement on the more expensive slipcover was actually larceny by trick and device because he attempted to trick Wal-Mart into allowing him to take the slipcover to the customer service desk and collect a refund for it instead of the sheet set, or that such conduct was an attempted theft by false pretenses similar to price tag switching observed by store security. His arguments fail.

The mere fact that Willis brought a sheet set into Wal-Mart and then transferred the pink return sticker from that set to the slipcover does not change the pertinent facts that Willis took possession of the slipcover belonging to Wal-Mart with the admitted intent to claim ownership of it for a higher refund and carried it away to the customer service desk where he gave it back to Wal-Mart only on the condition that the store give him a refund credit for it. Under these facts, the court in *Davis* has held that the offense committed is theft by trespassory larceny, not larceny by trick and device, and that the crime was complete at the time the defendant carried away the merchandise with the intent to claim it as his own. (*Davis, supra*, 19 Cal.4th at pp. 303, 305, fn. 3, 317-318.) Just as the defendant in *Davis*, Willis here committed the completed offense of theft by trespassory larceny of merchandise from a retail business.

Moreover, there is no evidence in the record to support Willis's argument that he used false pretenses to induce Wal-Mart to give him the slipcover, which he alone had taken off the shelf and put in his bag before carrying it to the customer service counter. (See *Shannon, supra*, 66 Cal.App.4th at p. 654.) Nor is there any evidence showing that

there was a direct but ineffectual act that prevented Willis from taking the slipcover from the store's shelf and carrying it toward the customer service counter. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387; *Shannon, supra*, 66 Cal.App.4th at pp. 653-654.) Further, "even if [Willis] intended to abandon the [slipcover] if his scheme failed, the theft was complete when he dropped the [slipcover] into his bag intending to defraud the store of [its] monetary value." (*Shannon, supra*, 66 Cal.App.4th at pp. 656-657.)

In sum, Willis has not shown that his case falls outside the law set out in *Davis, supra,* 19 Cal.4th 301 and *Shannon, supra,* 66 Cal.App.4th 649, or that the evidence in the record was substantial enough to merit consideration by the jury of the possibility that he merely attempted to commit theft rather than complete such crime.[5] No instructional error is shown in the court's refusal to give attempted petty theft instructions.

II

BLAKELY/CUNNINGHAM

At a sentencing hearing on October 21, 2005, after noting it had read the probation officer's report in this case, the report in an earlier case in which Willis had been convicted of grand theft, Willis's statement in mitigation and his motion to strike a prior strike conviction, the court indicated it was inclined to follow the 25-year-to-life three

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[5] Willis fails to appreciate that it was only his defense counsel's speculative arguments, which are not evidence, that were offered in support of attempt instructions. As the trial court recognized after hearing closing arguments, defense counsel was in an awkward position because he was arguing against the evidence in light of the controlling law set out in *Davis, supra,* 19 Cal.4th 301, upon which the prosecution had relied and had argued, and Willis's post-arrest statements.

strikes sentence recommended by the probation officer and asked defense counsel for comments.

Concentrating on the motion to strike a prior strike conviction, Willis's counsel stressed that "a life sentence for this petty theft when the strikes are as old as they are . . . is outside of the spirit of the three-strikes law." Counsel opined that such a sentence would constitute "cruel and unusual punishment for shoplifting." Counsel urged the court to reconsider its tentative, pointing out the relatively nonviolent prior acts of theft that constituted Willis's priors and the minimal criminal conduct in the instant case, and to "fashion something in accordance with the statement in mitigation and the [motion to strike] that was previously filed."

Expressing its desire to conduct a closer analysis, the court gave Willis's counsel an opportunity to submit briefing "compar[ing] this case and its factual scenario and the priors to others that [he said] would be persuasive to the court." The court commented that although it thought 25-year-to-life was "an extraordinarily harsh sentence," it thought that a nine-year sentence, if it struck a strike, was not enough. The court asked counsel to submit further briefing on the matter, asked the probation officer for an updated report, and scheduled the matter for further hearing.

At the beginning of the continued sentencing hearing, the court advised the parties that after additional review its tentative was to now strike a strike. Defense counsel agreed with the court's new tentative and argued that Willis at most should be subject to a low end term of two years, which doubled would be four years. After considering the parties' arguments, and noting that this case was "on the edge" and the tenor of recent

decisions and the public had changed from earlier days regarding the spirit of the three strikes law, the trial judge explained her decision, stating:

> "The factors that have turned me around to say this should be an upper term plus the three prison priors, rather than a full 25-to-life, in other words, the factors that have led me to believe it is appropriate in this case to strike one of the strikes are several: [¶] Number one, the defendant's age. He's getting to that point in his life where he's less and less of a risk. [¶] Number two, the age of the prior strikes. [¶] Number three, the fact that he had a very well-established pattern of criminality. And that pattern was that he was doing brazen public . . . necklace chain snatches from women. And in none of the cases except for one was there a reported injury. One reported injury was fairly minor. He never used a weapon. [¶] I do not, in looking at the fullness of his criminal history, believe he poses a risk of serious bodily injury or death to anyone. And I feel that his risk, if any, is going to be even more minimal when he gets out after five years actual time served on a two-strike sentence. [¶] The current offense, of course, is a misdemeanor but for the prior; and the prior is considered in aggravating the sentence otherwise."

The judge then explained that she had had to overcome Willis's obnoxiousness and dirty looks during the court proceedings "in order to look carefully at really what the actions have been as opposed to the look on the face and the rather mean attitude about the whole court process," advising Willis not to project himself as being such a mean, angry "awful guy." That aside, the judge stated, "if I really analyze what the whole criminal aspect has been, how old the priors are, what the criminal history has been--I come down on the side that he is not a high risk to society other than to be a pain. And I think that that is not something that deserves 25-to-life. [¶] And so for those reasons, . . . I'm not worried the public will be at risk. And I think that nine years suffices overall in this case. I think [the] upper term is appropriate, taking into account I've stricken a strike. And so that will be the Court's decision. And I think it's pretty plain what has formed the

basis of my opinion. [¶] So in this case I'm going to strike the strike. I want to be specific about the strike. . . . I'm going to strike the 1986 burglary strike, leaving the [1989] strike. That's the second strike. That doubles the prison term."

The judge then stated that "[o]n the underlying offense of petty theft with a prior, I'm going to impose the upper term of 3 years doubled because of the one remaining strike. That's 6 years. Plus three prison priors for a total of 9 years in state prison."

On appeal, Willis contended that the trial court's imposition of an upper term based on facts not found true by the jury violated his federal constitutional rights to proof beyond a reasonable doubt, a jury trial, and due process under *Blakely, supra*, 542 U.S. 296 and *Apprendi, supra*, 530 U.S. 466, even though he recognized we were bound to follow our Supreme Court's holding in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) that *Blakely* did not invalidate the California DSL sentencing scheme as to the choice of an upper term. (*Black, supra*, at p. 1244.) While Willis's appeal was pending, the high court issued its decision in *Cunningham, supra,* 127 S.Ct. 856, which overruled *Black* and struck down the DSL on precisely the grounds urged by Willis in this appeal. As that court stated, "Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra*, 127 S.Ct. at p. 871, fn. omitted.) In so holding, the high court again reaffirmed *Apprendi's* bright-line rule, that had been reiterated in both *Blakely* and *United States v. Booker* (2005) 543

U.S. 220 (*Booker*), that "[e]xcept for 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.' [Citation.]" (*Cunningham, supra*, 127 S.Ct. at p. 868.)

As noted earlier, Willis filed supplemental briefing regarding the effect of *Cunningham, supra,* 127 S.Ct. 856, on the upper term imposed in this case and claiming the issue was not waived even though he had not objected at the time of sentencing under *Blakely, supra,* 542 U.S. 296 because to do so would have been futile in light of *Black, supra,* 35 Cal.4th 1238 being the binding law in California at that time.

Although the People concede that *Cunningham, supra,* 127 S.Ct. 856, generally precludes a trial court from finding facts to impose an upper term sentence and that the middle term is the statutory maximum for a valid sentence in California in the absence of jury found aggravating facts, they contend Willis forfeited his *Cunningham/Blakely* claim because he failed to object under *Apprendi, supra,* 530 U.S. 466, *Blakely, supra*, 542 U.S. 296, or the right to a jury trial at the time he was sentenced on December 1, 2005, long after *Blakely* had been decided. The People assert that even if the issue is reached, there was no *Cunningham* violation in this case because Willis's nine-year sentence was below the statutory maximum because he was convicted as a third strike defendant based on his admissions to two prior strike convictions and because of the recidivism exception under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*).

Although Willis's counsel failed to object on *Blakely* grounds below, we do not consider the *Cunningham/Blakely* issue forfeited in this case. At the time of Willis's

sentencing hearings, the court and parties were directed to concentrate on the issue of whether the court should strike a strike or whether not to do so would constitute cruel and unusual punishment in light of the minimal retail petty theft involved in the instant case and Willis's somewhat extensive but basically nonviolent criminal history. Moreover, even though *Blakely* had been filed almost a year and a half before Willis's sentencing, *Black* was the current law in California and the Ninth Circuit case in *Cunningham* had not yet been granted certiorari. (*People v. Cunningham* (April 18, 2005, No. A103501 [nonpub. opn.]), cert. granted *sub nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) 126 S.Ct. 1329.) Under these circumstances, we decline to find the issue waived.

Regarding such substantive issue, we shall reverse and remand for resentencing. As Willis correctly points out, because the trial judge struck one of his strikes for sentencing purposes, he faced sentencing as a second strike defendant and thus the "statutory maximum" that he could receive under *Cunningham/Blakely* was the middle term for his petty theft, or two years, which would then be doubled under the three strikes law to four years. Contrary to the People's position that the statutory maximum is based on Willis being an admitted third striker and that the upper term was within the range of that 25-year-to-life term, once the court struck one of Willis's strikes, its legal fact was unconditionally deleted for sentencing purposes in the instant proceeding. (*People v. Garcia* (1999) 20 Cal.4th 490, 496, 502-503; *People v. Barro* (2001) 93 Cal.App.4th 62, 67; *People v. Santana* (1986) 182 Cal.App.3d 185, 190.)

Although Willis admitted below that he had served three prior prison terms, had committed a prior burglary and robbery that were his prior strike convictions and had committed the priors that elevated his current petty theft to a felony, the court stated it was imposing the upper term of six years because it had "stricken a strike" and "because of the one remaining strike." These statements without more specific reasoning, however, are difficult to assess because, as noted above, the result of the court having stricken a strike and there being only one remaining strike merely rendered Willis a second strike defendant for the purposes of sentencing. As such he was facing the doubling of the term chosen for his petty theft in this case. The People would have this court glean the trial court's reasoning for choosing and imposing the upper term from its comments as to why it was striking the strike, arguing such shows the court was relying upon Willis's criminal history which falls under the "*Almendarez-Torres* recidivism exception" to *Blakely/Cunningham* claims. We decline to do so.

Because we cannot ascertain the court's real reasons for imposing the upper term sentence in this case, aside from striking a strike, we find it somewhat counterproductive to speculate as to those reasons. While there are certainly many factors in Willis's criminal history that may support an upper term, and a single aggravating circumstance is sufficient to impose such term (*People v. Osband* (1996) 13 Cal.4th 622, 728-729), the trial court found many others that balanced out or outweighed them. Thus on this record it would be fruitless to guess at each one and then engage in a lengthy harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18 if that factor arguably should have been submitted to the jury. (*Washington v. Recuenco* (2006) ___ U.S. ___, 126

S.Ct. 2546, 2549.) Accordingly, we reverse Willis's sentence and direct the trial court to resentence Willis as a second-strike defendant.

DISPOSITION

The sentence is reversed and the case remanded to the superior court to conduct a new sentencing hearing consistent with the views expressed in *Cunningham, supra*, 127 S.Ct. 856. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.