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Opinion following remand from U.S. Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SHON JONATHON YATES, Defendant and Appellant.	A111310 (Del Norte County Super. Ct. Nos. CRF059049, CRF029924)

I. INTRODUCTION

Defendant and appellant, Shon Yates, (hereafter appellant) appeals from an upper-term sentence imposed on him after a plea agreement by which he pled guilty to one count of lewd and lascivious acts upon a minor under the age of 14. (Pen. Code, § 288, subd. (a).)[1] He contends such a sentence violates the principle enunciated by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakeley*). We disagree and affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2003, and pursuant to a negotiated disposition, appellant pled guilty to one count of spousal abuse (§ 273.5) and was placed on probation on the condition, among

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

others, that he serve 30 days in county jail. Twice thereafter, once in 2003 and again in 2004, he was found to be in violation of the terms of this probation.

In January 2005, appellant was charged with new offenses, i.e., four counts of committing lewd and lascivious acts upon a minor under the age of 14 years. (§ 288, subd. (a).) These charges stemmed from allegations that, in late December 2004, appellant molested his nine-year-old niece who, along with her stepmother, had been visiting family members in Crescent City from Oregon. The niece reported, both via her stepmother and later in person to a Del Norte County Deputy Sheriff, that appellant had placed his penis in her anus and ejaculated. The minor and her mother (the latter lived in California) also reported prior incidents of molestation of the minor by appellant to the authorities.

Pursuant to another negotiated disposition, appellant pled guilty to one section 288, subdivision (a), count and was sentenced to the upper-term of eight years on it, plus a concurrent lower two-year term (the original term imposed in 2003) for the prior spousal abuse conviction. Appellant timely appealed.

On June 27, 2006, we filed an unpublished opinion affirming both the conviction and the sentence, and on the latter point relied on our Supreme Court's 2005 decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). That decision was then substantially abrogated by the United States Supreme Court in *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*). Based on that decision, this case was remanded to us by the United States Supreme Court for reconsideration. While this matter was pending, our Supreme Court issued its opinion in *People v. Black* (2007) 41 Cal.4th 799 (*Black II).* In *Black II*, the court held that any one recidivist factor is sufficient to support the upper term sentence without a jury finding. Because the trial court imposed the upper term in part based on the fact that defendant was on probation when the crime was committed, we affirm the judgment.

III. DISCUSSION

Appellant contends his sentence must be reversed pursuant to *Blakely* and *Cunningham* because the trial court committed constitutional error by imposing an upper term sentence based on aggravating factors that were not supported by jury findings.

The controlling principle in this area was first announced by the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) which states: "Other 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.'"

In *Blakely, supra*, 542 U.S. 296, the Supreme Court held that a Washington State court violated the *Apprendi* rule and denied a criminal defendant his constitutional right to a jury trial by increasing that defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with " 'deliberate cruelty.' " (*Blakely, supra*, 542 U.S. at pp. 303-304.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Ibid*.)

Blakely raised concerns about the constitutionality of California's Determinate Sentencing Law (DSL). Under our DSL, the maximum sentence a judge may impose for a conviction without making any additional findings is the middle term. Penal Code section 1170, subdivision (b), states that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Furthermore, rule 4.420(b), states that "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." If, pursuant to *Blakely*, the statutory maximum sentence under California's DLS is the middle term, then an upper term sentence based on aggravating circumstances, other than the fact of a prior conviction, that are found by the trial court rather than by a jury would violate the *Apprendi* rule.

The California Supreme Court attempted to resolve the constitutional issue in *Black I, supra*, 35 Cal.4th 1238. The *Black* court held that "the judicial fact-finding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.) The court reasoned that, under California's sentencing system, "the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and [*United States v.*] *Booker* [(2005) 543 U.S 220]." (*Black I, supra*, 35 Cal.4th at p. 1254.)

However, and as noted above, in *Cunningham* the United States Supreme Court recently held that California's DSL does violate the constitutional principle embodied in the *Apprendi* rule. *Cunningham* explained that the DSL, "by placing sentence-elevating fact-finding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (127 S.Ct. at p. 860.) The court reasoned that, under the DSL, the middle term not the upper term is the relevant statutory maximum because (1) an upper term sentence can be imposed only if the judge finds aggravating circumstances, and (2) aggravating circumstances "depend on facts found discretely and solely by the judge." Furthermore, the court found, "[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence not beyond a reasonable doubt, . . . the DSL violates *Apprendi's* bright-line rule: Except 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* at p. 868.)[2]

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[2] The *Cunningham* court expressly disagreed with the California Supreme Court's decision in *Black I, supra*, 35 Cal.4th 1238, stating that "[c]ontrary 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

Our Supreme Court then issued its decision in *Black II, supra,* 41 Cal.4th 799. In *Black II,* the court concluded that "if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely,* the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.' " (*Black II* at p. 813.) The court went on to hold that, pursuant to *Apprendi,* the fact of a prior conviction is an aggravating circumstance that may be found by the court, rather than a jury, and used to impose the upper term without offending defendant's federal constitutional rights. (*Black II* at p. 818.)

In the present case, the trial court found there were two aggravating factors and one mitigating factor. The former were that appellant (1) took advantage of a position of trust and (2) was on probation when the offense was committed. The mitigating factor was that appellant admitted wrongdoing early in the process. The trial court, as noted above, selected the upper term of eight years.

First of all, we categorically reject the People's argument that the claim of *Blakeley* error was "forfeited" by appellant's failure to raise it at the sentencing hearing. As of the date of that hearing, *Black* was the operative law and hence any claim of error would have been futile.

Second, pursuant to *Black II, supra,* 41 Cal.4th at page 818, because the trial court relied on at least one recidivist factor in imposing the upper term, namely that defendant was on probation when the offense was committed, defendant's federal constitutional right to a jury trial under the Sixth Amendment and his right to due process under the Fourteenth Amendment as explicated in *Blakely, supra,* 542 U.S. 296 and *Cunningham, supra,* 549 U.S.__ [127 S.Ct. 856] were not violated.

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sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (127 S.Ct. at p. 871.)

IV. DISPOSITION

The judgment is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.