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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MICHAEL THOMAS ANDERSON,  
  
Defendant and Appellant.

C052270

(Super. Ct. No.  
CRF05708)

ORDER MODIFYING  
OPINION AND DENYING  
REHEARING

[NO CHANGE IN  
JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on June 5, 2007, be modified as follows:

On page 10, the following part III is inserted immediately after the last paragraph of part II:

**III. The Upper Term Sentence**

Defendant contends that the imposition of the upper term violated his right to a jury trial on the aggravating factors used to enhance his sentence. We do not agree and find any error harmless.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), the Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [159 L.Ed.2d 403] (*Blakely*).)

In *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [166 L.Ed.2d 856] (*Cunningham*), the Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham*, at p. \_\_\_\_ [166 L.Ed.2d at p. 864], overruling *People v. Black* (2005) 35 Cal.4th 1238 on this point, vacated in *Black v. California* (Feb. 20, 2007) \_\_\_\_ U.S. \_\_\_\_ [167 L.Ed.2d 36].)

The trial court based its decision to impose the upper term on four factors -- defendant's "numerous prior convictions," prior prison terms, unsatisfactory performance on parole and probation, and that he was on probation at the time of his crime. As pointed out in *Apprendi*, *Blakely*, and *Cunningham*, the Sixth Amendment jury-trial guarantee does not apply to the use of prior convictions to impose greater punishment. (E.g., *Cunningham*, *supra*, 549 U.S. at p. \_\_\_\_ [166 L.Ed.2d at p. 864].) Defendant contends we should read this exception narrowly, limiting it to the bare fact of a prior criminal conviction. We disagree.

The reasons for the exemption of prior convictions from the scope of the jury trial requirement for increased sentences are (1) the fact

of a prior conviction "does not relate to the commission of the offense" for which the defendant is being sentenced (*Apprendi, supra*, 530 U.S. at p. 496), and (2) "the certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigate[s] the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Id.* at p. 488, fn. omitted.) It follows that the prior conviction exception applies not only to the fact of a prior conviction, but also to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) Therefore, "the fact of a prior conviction,' and related facts . . . may be judicially found at sentencing." (*U.S. v. Cordero* (5th Cir. 2006) 465 F.3d 626, 632-633, fns. omitted.) For example, the trial court may determine and rely on the defendant's probation or parole status to impose the upper term. (Cf. *U.S. v. Fagans* (2d Cir. 2005) 406 F.3d 138, 141-42; *U.S. v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820 ["the 'prior conviction' exception extends to 'subsidiary findings' such as whether a defendant was under court supervision when he or she committed a subsequent crime"].)

Defendant's prior prison terms and his being on probation at the time of the offenses are clearly recidivism issues unrelated to the facts of the crime and thus do not run afoul of *Apprendi, Blakely, and Cunningham*. Defendant's poor performance on probation and parole is less clearly related to this exception, as it may involve facts unrelated to recidivism. To the extent that reliance on this factor was error, it was harmless.

The trial court relied on three valid factors when imposing the upper terms: defendant's prior convictions, his prior prison term, and being on probation at the time of his crime. We are satisfied beyond a reasonable doubt that the trial court would have imposed the upper term based on these factors alone. Therefore, any error in considering defendant's poor performance on probation and parole is harmless. (See *Washington v. Recuenco* (2006) 548 U.S. \_\_\_, \_\_\_ [165 L.Ed.2d 466, 473, 476-477].)

There is no change in the judgment.

Plaintiff's petition for rehearing is denied.

BY THE COURT:

BLEASE , Acting P.J.

RAYE , J.

CANTIL-SAKAUYE , J.