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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TERRI LYNN CHAFFEE, Defendant and Appellant.	E042070, E043099 (Super.Ct.No. FMB006880) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Bert L. Swift, Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Ronald A. Jakob and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant pled no contest to one count of transportation of methamphetamine. (Health & Saf. Code, § 11379, subd. (a).)[1] In return, the court placed her on 36 months of Proposition 36 probation. After the filing of four subsequent petitions for revocation of probation and other allegations, all of which defendant admitted, the court revoked her probation and sentenced her to the aggravated term of four years in state prison. On appeal, defendant contends the court violated her Sixth Amendment right, via the Fourteenth Amendment, to a jury trial on the facts upon which the court based imposition of the upper term. (*Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).) She also maintains that the court abused its discretion in imposing the upper term based on circumstances occurring after the court's initial grant of probation. The People counter that defendant's first claim requires a certificate of probable cause, the lack of which bars this court from addressing that issue. The People further argue that the court acted within its discretion when it sentenced defendant to the upper term based on circumstances occurring after its initial grant of probation. We agree with the People and, therefore, affirm the judgment below.

I. FACTS AND PROCEDURAL HISTORY

On July 26, 2004, an officer pulled defendant over for a traffic infraction; she exhibited indications of intoxication. She admitted to the use of methamphetamine two days earlier and to possession of drugs. In her purse the officer discovered four baggies

[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

of methamphetamine, two glass methamphetamine pipes, and a pay-owe sheet. The People charged defendant with transportation of methamphetamine (count 1—§ 11379, subd. (a)), possession of methamphetamine for sale (count 2—§ 11378), and being under the influence of methamphetamine (count 3—§ 11550, subd. (a)).

Defendant pled no contest to count 1. In return, the court dismissed counts 2 and 3 and placed her on Proposition 36 probation for a term of three years. The Proposition 36 presentence probation officer's report indicated a number of mitigating factors, but no aggravating factors. A later prepared supplemental probation officer's report indicates that the Proposition 36 presentence probation officer's report indicated that the mitigated term of imprisonment would be appropriate; however, this is nowhere actually reflected in that report. At sentencing, the court made no findings regarding mitigating or aggravating factors. As part of her plea agreement, defendant acknowledged that revocation of her Proposition 36 probation could result in the imposition of a prison sentence of up to four years.

On November 18, 2004, the People filed a petition for revocation of defendant's probation, alleging she had violated the terms of her probation requiring her to not use or possess any controlled substance (term 9) and to enroll in a drug treatment program (term 20). Defendant's outpatient treatment program terminated her when she tested positive for methamphetamine. On November 2, 2004, the People charged defendant in a separate misdemeanor case with possession of a controlled substance (§ 11377, subd. (a)) and possession of drug paraphernalia (§ 11364). The case was assigned Superior Court

case No. MWV094565. It is not at all clear from the record whether these charges related to the grounds alleged in the petition to revoke defendant's probation. Defendant admitted the probation violations.

On January 13, 2005, the People filed a second petition to revoke probation, alleging defendant violated probation when she left the court-ordered residential treatment program. On April 8, 2005, the People filed an amended second petition to revoke defendant's probation. The People alleged in the latter petition that defendant had violated term 9 of her probation conditions when she tested positive for methamphetamine on March 30, 2005, and admitted to using it three days earlier. Defendant admitted the allegations in both petitions. The court revoked defendant's probation and reinstated it, noting that "the next one is on your way to state prison."

On May 26, 2005, defendant pled guilty to both misdemeanor counts in case No. MWV094565. That court granted defendant 24 months of probation.

On September 1, 2005, the People filed a third petition to revoke defendant's probation. Defendant's residential drug treatment program terminated her on August 16, 2005, when she failed to spend several nights there and tested positive for methamphetamine. Defendant also failed to report to her probation officer after being evicted. Defendant appears to have picked up a least one additional misdemeanor charge (case No. MMB009959); however, the record lacks any information regarding this other than the case number. Defendant admitted the violations of probation. On September 22, 2005, the court extended defendant's probation on modified terms and conditions.

Defendant tested positive for methamphetamine on September 2, 2005, and September 21, 2005. On December 29, 2005, a bench warrant was issued for defendant's arrest. On July 24, 2006, a 24-hour in-custody sanction was imposed upon defendant, though the record fails to specify why. On December 4, 2006, defendant was found to be in noncompliance with her probation conditions in case No. MWV094565 and was ordered to serve 30 days in county jail.

On November 4, 2006, officers witnessed defendant at a local bar, which constituted a violation of term 12 of her probation conditions requiring that she neither possess nor consume alcoholic beverages, nor enter places in which such beverages are the principal item of sale. On December 11, 2006, defendant's court-ordered drug treatment program terminated her for twice testing positive for methamphetamine, failing to complete her community service hours, and admitting to the consumption of alcohol. The probation officer's report reflects that the presentence report indicated that the mitigated prison term would be appropriate, but recommended imposition of an aggravated term based on her subsequent conduct. The drug court determined that defendant was no longer amenable to its treatment program. The trial court, over defendant's objection, followed the probation officer's recommendation; it revoked probation, imposed the upper term of four years in the felony case, and sentenced her to 180 days concurrent on the misdemeanor case. Its sole basis for doing so was the fact defendant had three prior violations of probation.

On December 20, 2006, defendant filed separate notices of appeal in both cases, Nos. FMB006880 and MWV094565, checking the boxes indicating she was challenging "[a] contested violation of probation." In neither case did she request a certificate of probable cause; although, in case No. FMB006880, she indicated an additional basis for the appeal: "Imposition of aggravated sentence. Original probation report stated mitigating factors outweighed aggravating." Recognizing that this court had jurisdiction over the felony case, the Appellate Division of the Superior Court certified case No. MWV094565 for transfer to this court in order to secure "uniformity of decision." (Cal. Rules of Court, rules 8.1002, 8.1005, 8.1008.) This court assigned that case appellate case No. E043099, ordered it transferred here, and consolidated it with the felony appeal in case No. E042070, designating the latter as the master file.

II. DISCUSSION

A. *Defendant's Cunningham Contention Is Not Cognizable on Appeal Because She Failed to Acquire a Certificate of Probable Cause*

Defendant claims the trial court erred in imposing the upper term on count 1 and that the matter must be remanded for resentencing in light of the United States Supreme Court's recent decision in *Cunningham, supra,* 127 S.Ct. 856 (imposition of upper term sentence based on facts found by judge under California's determinate sentencing law (DSL) violates Sixth and Fourteenth Amendment right to jury trial).

"[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, supra,* 127 S.Ct. at p. 860.) In *Cunningham*, the United States Supreme Court held that by placing sentence-elevating factfinding within the trial judge's province, California's DSL violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham, supra,* at p. 860.) The *Cunningham* court explained that because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the California DSL violates the bright-line rule in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*) that any fact, other than the fact of a prior conviction, 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,* at p. 868.) Quoting *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) for the proposition that "'[t]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*'" the *Cunningham* court concluded that "[i]n accord with *Blakely*, therefore, the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum." (*Cunningham, supra,* at p. 868.)

It is readily apparent here that the trial court imposed the upper term based on facts not found by a jury and not amounting to prior convictions. Indeed, the trial court's

only stated reason for imposing the aggravated term was defendant's "three violations of probation." Nonetheless, the People counter that defendant's failure to obtain a certificate of probable cause renders the issue noncognizable on appeal.

Penal Code section 1237.5 provides, in relevant part, that "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

In *People v. Shelton* (2006) 37 Cal.4th 759, the defendant maintained on appeal that the trial court lacked authority to impose the aggravated term contained in his plea agreement pursuant to Penal Code section 654. (*People v. Shelton, supra,* at p. 765.) The California Supreme Court granted review to answer the question of whether "the appellate court ha[d] jurisdiction to address the merits of appellant's appeal where he failed to obtain a certificate of probable cause and in his appeal challenged the imposition of the sentence lid to which he had agreed pursuant to his plea bargain?" (*Ibid.*) The court concluded that defendant's right to urge the court to exercise its discretionary power in imposing a lesser sentence than the maximum contained in his agreement did not establish his right to argue that the court lacked *authority* to sentence him to the lid. (*Id*. at p. 770.) Thus, "defendant's challenge to the trial court's sentencing authority is in

substance a challenge to the validity of the negotiated plea. Therefore, defendant's failure to secure a certificate of probable cause bars consideration of this challenge and requires dismissal of his appeal." (*Id*. at p. 771.)

In *People v. Panizzon* (1996) 13 Cal.4th 68, the defendant challenged his negotiated sentence on the grounds that it was violative of the state and federal prohibitions against cruel and unusual punishment. (*Id*. at p. 74.) He did not acquire a certificate of probable cause. (*Ibid*.) The court determined that where "the sentencing decisions were clearly separate and distinct from the defendants' pleas, in substance as well as temporally, any challenges to the sentencing did not implicate the validity of the pleas and therefore did not require compliance with [Penal Code] section 1237.5." (*Id*. at p. 78.) Notwithstanding, it concluded that in the case before it, the defendant was not challenging the court's exercise of its discretion, but the constitutionality of the negotiated sentence: "Here, by contesting the constitutionality of the very sentence he negotiated as part of the plea bargain, defendant is, in substance, attacking the validity of the plea. For that reason . . . we hold that the certificate requirement of [Penal Code] section 1237.5 applies." (*Id*. at p. 78.) The "critical inquiry" is whether the contention on appeal "is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of [Penal Code] section 1237.5." (*Id*. at p. 76.) More recently, the Third District Court of Appeal determined that the trial court's constitutional authority to impose an upper term sentence pursuant to a plea bargain "is not cognizable

on appeal [when a] defendant [does] not obtain a certificate of probable cause." (*People v. Bobbit* (2006) 138 Cal.App.4th 445, 447.)

In the instant case, defendant clearly agreed that the trial court had the constitutional authority to impose the aggravated sentence should she violate the conditions of her probation. Her plea agreement contained repeated warnings that *any* violation of the terms of her probation could result in the imposition of a prison sentence. It specified precisely what that sentence could be: "0 – 4 [years]." Defendant received the benefit of her bargain: The court dismissed the remaining two counts and she was permitted more than two years' time in which to straighten herself out in various drug treatment programs.

Defendant's attempt to distinguish *People v. Bobbit*, *supra*, 138 Cal.App.4th 445 on the basis that that case contained a plea "lid" while this case does not, is unavailing. We believe the difference is immaterial. Having gained the benefit of her bargain, it would be unfair now to prohibit the People from benefiting from its. Equally unconvincing is defendant's contention that no certificate of probable cause is required because *Blakely* itself involved a plea and did not require one. *Blakely* reached the United States Supreme Court from the Washington state courts. Defendant makes no showing that Washington state has similar procedural requirements to California's Penal Code section 1237.5's prerequisite that a defendant who has pled guilty must obtain a certificate of probable cause prior to an appellate challenge to the validity of a sentence entered pursuant to that agreement.

B. *The Trial Court Did Not Abuse Its Discretion in Imposing the Upper Term Based on Circumstances Occurring After Its Initial Grant of Probation*

California Rules of Court, rule 4.435(b)(1) provides that when a trial court imposes sentence after revoking probation, "[t]he length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found." "Rule 435(b)(1) of the California Rules of Court clearly prohibits the superior court from considering events subsequent to the grant of probation when determining the length of a prison term upon revocation of probation." (*People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163, fn. 2.)

Nonetheless, the court in *People v. Harris* (1990) 226 Cal.App.3d 141, "conclude[d] that the rule allows consideration of circumstances preceding a *reinstatement* of probation. The rule bars considering events subsequent to 'the time probation was granted . . . .' It does not specifically address a situation where, as here, probation is granted, revoked and then, as part of a negotiated disposition, reinstated on modified terms. However, reinstating probation on modified terms appears to be a new *grant* of probation within the meaning of the rules. . . . Thus, nothing in the language of the rules bars considering events predating a reinstatement of probation." (*Id*. at pp. 145-146.)

In the instant case, the trial court revoked and reinstated defendant's probation on April 8, 2005, based on her admission of the allegations in the first, second, and amended

second petitions for revocation of probation. The allegations in those three petitions included a total number of four violations of defendant's probation conditions. Thus, to the extent the trial court imposed the upper term based on defendant's conduct, which provided the basis for the first, second, and amended second petitions for revocation of probation, the trial court acted well within its discretion.[2]

Defendant notes that while the reporter's transcript indicates that the trial court revoked and reinstated probation, the minute order for that hearing reflects that the court found defendant's probation "violated" and "continued." Thus, defendant maintains her probation was not revoked and reinstated. Hence, the court committed error in relying on defendant's conduct between the time of the initial grant of probation and the court's "continu[ance]" of it. Contrary to defendant's contention, the word "continued" does not appear in the minute order for the April 8, 2005, hearing. Rather, the minute order reads "continue with fast track requirements." It in no way directly or contextually reflects action regarding defendant's *status* on probation; rather, it appears to implicate the *terms* of her probation. Regardless, "[t]he record of the oral pronouncement of the court controls over the clerk's minute order . . . ." (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) Thus, to the extent that the court relied on the circumstances of defendant's conduct subsequent to its initial grant of probation and prior to its revocation and reinstatement of probation, the court committed no error.

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[2] The record is not crystal clear as to which three violations the court was using for purposes of imposing the aggravated term.

Nonetheless, defendant maintains that the trial court's reference to defendant's three violations of probation necessarily included the third petition for revocation filed on September 1, 2005. Thus, the court's reliance on defendant's conduct between the initial revocation of probation on April 8, 2005, and the filing of the third petition for revocation of probation on September 1, 2005, constituted an abuse of discretion. This is because the court did not revoke defendant's probation at the hearing on the third petition for revocation of probation; rather, it merely extended her probation on modified terms and conditions. The *People v. Harris, supra,* court did make a distinction between revocation of probation and continuance or extension of probation on modified terms when considering the propriety of a trial court's reliance upon circumstances occurring after the initial grant of probation. (*People v. Harris, supra,* 226 Cal.App.3d at pp. 145-146.) Nevertheless, we find any such error to be harmless. (*People v. Downey* (2000) 82 Cal.App.4th 899, 917.) Defendant's conduct between the date of the initial grant of probation and the court's revocation and reinstatement of her probation on April 8, 2005, constituted a sufficient basis for imposing the upper term. This behavior included two positive drug tests, possession of a controlled substance, possession of drug paraphernalia, and leaving her court-ordered residential treatment program without permission. It is not reasonably probable that a more favorable result would have obtained if the trial court did not consider the circumstances which occurred between April 8, 2005, and September 1, 2005, to the extent that it even did so. (*Id.* at p. 917.)

III. DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.