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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANDREW ALEXANDER CORRALES, Defendant and Appellant.	B192817 (Los Angeles County Super. Ct. No. VA094498)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed.

Catherine Campbell, under appointment by the Court of Appeal, for the Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

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Andrew Alexander Corrales appeals from the judgment entered following his conviction by a jury of second degree burglary with a special finding, based on his admission in a bifurcated bench proceeding, that he had previously been convicted of robbery, a serious felony within the meaning of the "Three Strikes" law. The trial court sentenced Corrales to six years in state prison, the upper term of three years for burglary doubled under the Three Strikes law. On appeal Corrales argues imposition of an upper term sentence based on the trial court's factual findings concerning aggravating circumstances violated his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Burglary*

On the morning of March 10, 2006 Deloise Alvarez discovered a stereo system worth approximately $700 had been taken from her Honda Accord, which she had parked and locked the night before in the gated parking area of her condominium complex. The driver's side window had been lifted completely out of its frame. According to testimony at trial, windows in certain Honda automobiles can be pulled from their frames from the top.

Two fingerprints obtained from the top of the interior side of the driver's side window matched Corrales's left middle and left ring fingers. When sheriff deputies went to Corrales's home, he was found hiding inside a clothes dryer with the door closed. Alvarez testified she did not know Corrales and had not given him permission to enter her car.

2. *Information, Verdict and Sentencing*

Corrales was charged by information with second degree burglary (Pen. Code, § 459).[1] The information also alleged he had previously been convicted of robbery (§ 211), a serious felony conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12, subd. (a)-(d)), and had two other prior felony convictions for

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[1] Statutory references are to the Penal Code unless otherwise indicated.

purposes of section 1203, subdivision (e)(4), restricting the court's ability to grant probation.

Following a jury trial, at which Corrales presented no evidence, Corrales was found guilty of second degree burglary as charged. Corrales waived his right to a jury trial on the prior conviction allegations and admitted the prior robbery conviction.

At the sentencing hearing, held at Corrales's request immediately after the completion of the jury trial and his admission of the prior robbery conviction, the trial court observed that Corrales was on felony probation for two offenses at the time of the burglary of Alvarez's automobile: the 2005 conviction for robbery Corrales had admitted as a prior strike and a felony conviction for receipt of stolen property (§ 496, subd. (a)), also in 2005. The court further noted a 2004 conviction for possession of a syringe without a permit (Bus. & Prof. Code, § 4140), 1999 convictions for false impersonation of another (§ 529) and for felony hit and run with property damage (Veh. Code, § 20002, subd. (a)), as well a sustained juvenile petition for burglary and robbery and one for burglary. In light of this past criminal history, the court imposed the upper term of three years for burglary, doubled pursuant to the Three Strikes law,[2] explaining, "I don't think there's anything I can do but give him high term doubled. To me it's an abuse of discretion to give him anything other than that."

Corrales's trial counsel immediately objected that imposition of the upper term sentence violated Corrales's right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) (defendant is entitled under the Sixth Amendment to the United States Constitution to a jury trial on any fact that increases the maximum sentence to which the defendant is exposed for a particular offense unless that fact has been admitted by the defendant or is based on the defendant's prior convictions). Counsel acknowledged the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) had held the trial court's identification of

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[2] The trial court also imposed the previously suspended three-year sentences on the two prior felony convictions for which Corrales had been on probation, but ordered those terms be served concurrently with the six-year term imposed for the current offense.

aggravating factors and imposition of an upper-term sentence under California's determinate sentencing law do not violate a defendant's constitutional right to a jury trial, but asserted the *Black* decision was still under review by the United States Supreme Court and "stands a good chance of being overturned." The trial court overruled the objection, recognizing it was obligated to follow *Black*: "I have to go with what the law is, not what we hope it is."

DISCUSSION

Imposition of the Upper Term Sentence for Burglary Based on Findings Not Made by a Jury Did Not Constitute Prejudicial Error in Violation of Corrales's Sixth Amendment Jury-trial Right as Articulated by the United States Supreme Court in Cunningham v. California

In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), decided after Johnson had filed his opening appellate brief in this case, the United States Supreme Court reaffirmed *Blakely, supra,* 542 U.S. 296, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2438, 147 L.Ed.2d 435] (*Apprendi*), and *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 556] (*Booker*), overruled *Black, supra,* 35 Cal.4th 1238,[3] and held California's determinate sentencing law (DSL) violates a defendant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution to the extent it authorizes the trial judge to find facts (other than a prior conviction) that expose a defendant to an upper term sentence by a preponderance of the evidence. "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt,

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[3] On February 20, 2007 the United States Supreme Court vacated the judgment in *Black, supra*, 35 Cal.4th 1238, and remanded the case to the California Supreme Court for further consideration in light of *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856]. On February 21, 2007 the California Supreme Court directed the parties on remand to submit additional briefs addressing the effect of *Cunningham* on the issues in the case. (*People v. Black*, order on remand Feb. 21, 2007, S126182.)

not merely by a preponderance of the evidence." (*Cunningham*, 127 S.Ct. at pp. 863-864.)

"Under California's DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. . . . [A]ggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [*Blakely, supra*,] 542 U.S. at page 303 ('The "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.'. . . Because 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 [citation], 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, supra*, 127 S.Ct. at p. 868.)

Although *Cunningham* invalidated a significant part of the DSL and generally precludes the trial judge from finding facts or circumstances in aggravation that expose a defendant to an elevated or upper term sentence, the Supreme Court also reaffirmed its prior holdings that the trial court may increase the penalty for a crime based upon the defendant's prior convictions without submitting that question to a jury. (*Cunningham, supra*, 127 S.Ct. at p. 868; see *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350]; *Blakely, supra,* 542 U.S. at p. 301; *Apprendi, supra,* 530 U.S. at pp. 488, 490.) Prior to the decision in *Cunningham* (and before the California Supreme Court's decision in *Black, supra*, 35 Cal.4th 1238), this prior conviction exception to *Apprendi* and *Blakely* was construed broadly by California appellate courts to apply not only to the fact of the prior convictions but also to other issues relating to the defendant's recidivism, including the defendant's status as a probationer or parolee at the time the current offense was committed and the existence of "numerous" or increasingly serious prior convictions. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222

[“courts have held that no jury trial right exists on matters involving the more broadly framed issue of ‘recidivism’”]; see also *People v. McGee* (2006) 38 Cal.4th 682, 706-707 [“numerous state and federal court decisions have interpreted the *Almendarez-Torres* exception more broadly than defendant urges here, and have concluded that *Apprendi* does not preclude a court from making sentencing determinations related to a defendant’s recidivism”].)[4]

In this case, Corrales admitted his 2005 conviction for robbery, alleged in the information to establish his sentencing status under the Three Strikes law. The Attorney General has argued in this case and others raising *Blakely/Cunningham* challenges to the imposition of upper term sentences that this prior conviction alone, established by means that satisfy the governing Sixth Amendment authorities, exposed Corrales to an upper term sentence under the DSL and, as a result, even though the trial judge relied more broadly on Corrales’s extensive criminal history as an aggravating factor in exercising his discretion to impose the upper term, Corrales’s Sixth and Fourteenth Amendment rights under *Cunningham* were not violated. Indeed, Justice Kennard in her concurring and dissenting opinion in *Black*, *supra*, 35 Cal.4th 1238, made just that argument: “Under California law, the existence of a single aggravating circumstance is sufficient to support imposition of an upper term. [Citation.] In this case, the jury’s findings pertaining to

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[4] The question whether this is a proper interpretation of the prior conviction exception of *Almendarez-Torres v. United States*, *supra*, 523 U.S. 224, as set forth in *Cunningham,* is currently pending before the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677, supp. briefing ordered, Feb. 7, 2007 [parties to address the following issue, among others, “Do *Cunningham v. California, supra*, and *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239-247, permit the trial judge to sentence defendant to the upper term based on any or all of the following aggravating factors, without submitting them to a jury: the defendant’s prior convictions as an adult are numerous and of increasing seriousness; the defendant has served a prior prison term; the defendant was on parole when the crime was committed; the defendant’s prior performance on probation or parole was unsatisfactory (California Rules of Court, Rule 4.421, subds. (b)(2) - (b)(5))?”]; *People v. Hernandez,* review granted Feb. 7, 2007, S148974; *People v. Pardo*, review granted Feb. 7, 2007, S148914.)

defendant's probation eligibility, and the trial court's findings pertaining to defendant's criminal record, were each sufficient to satisfy this statutory requirement, thereby making the upper term the statutory maximum for the offenses. [Citation.] Once the upper term became the statutory maximum in this manner, defendant's right to jury trial under the federal Constitution's Sixth Amendment was satisfied, and the trial court on its own properly could -- and did -- make additional findings of offense-based aggravating circumstances in support of its discretionary sentence choice to impose the upper term." (*Black*, at pp. 1269-1270 (conc. & dis. opn. of Kennard, J.).)[5]

Even if the presence of a single aggravating factor, established by constitutionally permissible means, does not necessarily end the *Cunningham* inquiry, in this case the trial court's sentencing decision was based entirely on factors related directly to Corrales's recidivism -- that he was on probation at the time of the current offense (Cal. Rules of Court, rule 4.421(b)(4)) and had a large number of prior adult convictions and sustained petitions in juvenile delinquency proceedings (Cal. Rules of Court, rule 4.421(b)(2)). If the broad construction of the prior conviction exception adopted by California appellate courts before *Black* and *Cunningham* remains good law, Corrales's Sixth Amendment challenge to his sentence would similarly lack merit.

We need not resolve these significant constitutional issues, however; even if the trial court erred in making the factual findings upon which it based its decision to impose the upper term sentence, any such error in this case was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) 548 U.S. __ [126 S.Ct. 2546, 165 L.Ed.2d 466] [*Apprendi/Blakely* error not "structural error" requiring automatic reversal]; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error reviewable under the harmless

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[5] The question whether there is a violation of the defendant's rights under *Cunningham* if the defendant is eligible for the upper term based on a single aggravating factor established by means that satisfy the governing Sixth Amendment authorities even if the trial judge relies on other aggravating factors not established by such means in exercising his or her discretion to impose an upper term sentence is also currently pending before the California Supreme Court. (E.g., *People v. Black, supra,* S126182; *People v. Towne*, *supra,* S125677.)

error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*).) As discussed, Corrales admitted the 2005 robbery conviction. His then-current probation status and a full description, including identifying information, of his other adult convictions and sustained juvenile petitions are contained in the predisposition probation report prepared by the Los Angeles County Probation Office. Corrales did not dispute the accuracy of the trial court's recitation of his criminal history -- either in the court below or in his appellate briefs. Applying *Chapman*'s heightened beyond-a-reasonable-doubt standard for assessing harmless error in cases involving violation of a defendant's federal constitutional rights, from this record we are confident the jury would necessarily have found, beyond a reasonable doubt, the existence of the aggravating factors identified by the trial court. Any sentencing error, therefore, is harmless.

DISPOSITION

The judgment is affirmed.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.