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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

PULLEY GENE CURTIS,

Defendant and Appellant.

B192414

(Los Angeles County
Super. Ct. No. SA058830)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Amy D. Hogue, Judge. Affirmed.

Judith Vitek, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Edmund G. Brown, Jr., Attorneys General, Dane R. Gillette, Mary Jo Graves, Chief Assistant Attorneys General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson, Lawrence M. Daniel and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Pulley Gene Curtis appeals from a judgment entered after a jury convicted him of one count of unlawful driving or taking of a vehicle, in violation of Vehicle Code section 10851, subdivision (a). The trial court sentenced defendant to the upper term of three years in state prison. Defendant urges that his Sixth Amendment right to a jury trial was violated when the trial court imposed the upper term without jury findings to support it. We affirm.¹

FACTS

Viewing the whole record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138–1139), the evidence established the following. Sylvia Stern’s car was stolen on December 14, 2005. Two weeks later, defendant called Ms. Stern, telling her that he worked for a car cleaning service and that a man had hired him to clean her car. However, the man never returned to pick up the car. Defendant said he found Ms. Stern’s identification and phone number in the car and called her. Defendant told Ms. Stern that if she paid him \$5,500, he would bring the car to her. Ms. Stern agreed to pay him, but instead called the police, who arrested defendant as he drove Ms. Stern’s car to the parking structure of her residence.

Defendant was convicted as noted above, and this appeal followed.

DISCUSSION

Defendant contends that, under the dictates of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), the imposition of the upper term violated his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to proof beyond a reasonable doubt of aggravating factors used to support that sentence. Defendant’s contention lacks merit. For the reasons set forth in *People v. Black* (2007)

¹ Defendant filed a petition for writ of habeas corpus on September 7, 2007. We have filed a separate order in connection with the petition for writ of habeas corpus.

41 Cal.4th 799 (*Black*), we find no constitutional violation in the trial court’s imposition of the upper term.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that “[o]ther 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.” (*Id.* at p. 490.) The Supreme Court subsequently held that “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.*” (*Blakely v. Washington* (2004) 542 U.S. 296, 303 (*Blakely*)).) The high court recently made it clear that, “[i]n accord with *Blakely*, . . . the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum.” (*Cunningham, supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 868].) The court therefore concluded that the California determinate sentencing law was unconstitutional to the extent it authorized the trial court to impose an upper term sentence based on facts that were found by the court, rather than by a jury beyond a reasonable doubt. (*Cunningham, supra*, at p. ___ [127 S.Ct. at p. 871].)

However, “as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant’s right to jury trial.” (*Black, supra*, 41 Cal.4th at p. 812.)

As defendant acknowledges, the right to a jury trial does not apply to the fact of a prior conviction. (*Black, supra*, 41 Cal.4th at p. 818; *People v. Sandoval* (2007) 41 Cal.4th 825, 836–837.) Moreover, the “‘prior conviction’ exception” must not be read too narrowly; it includes “not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions.” (*Black, supra*, at p. 819.)

The trial court's determination that defendant served a prior prison term is the type of finding relating to a defendant's recidivism "that may be determined by examining the records of the prior convictions" and is "typically and appropriately undertaken by a court." (*Black, supra*, 41 Cal.4th at pp. 819–820; accord, *People v. Yim* (2007) 152 Cal.App.4th 366, 370–371.) Once the trial court made this determination, defendant was eligible for the upper term, which became the statutory maximum. (*Black, supra*, at p. 816.) The trial court's finding of additional facts that supported its discretionary choice of the upper term—the particular vulnerability of the victim; the professionalism of the crime; and that the crime involved an attempted taking of the car which had a great monetary value and was very important to the victim—thus did not violate defendant's right to trial by jury. (*Id.* at p. 820.)

Defendant challenges the *Black* decision in several regards. We, of course, are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant also urges that the trial court's finding that defendant's prior performance on probation or parole was unsatisfactory is a subjective, factual finding, that cannot be relied upon to impose an upper term. Defendant is incorrect. First, the trial court made that finding in connection with its decision to deny probation, rather than to impose the upper term. In any event, the same facts may be used both to support the denial of probation and to impose the upper term. (*Black, supra*, 41 Cal.4th at p. 817.) The trial court therefore could also have relied for imposition of the upper term upon its determinations that defendant did not perform well on probation previously. This determination, like the finding that defendant was on probation at the time of the current offense, did not require findings by a jury. (*Id.* at pp. 819–820; *People v. Yim, supra*, 152 Cal.App.4th at p. 371.)

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ