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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.

HENRY LOPEZ GAMBOA, JR.

Defendant and Appellant.

E040858

(Super.Ct.No. FVI019977)

OPINION

APPEAL from the Superior Court of San Bernardino County. Erik M. Nakata,
Judge. Affirmed.

Carmela F. Simoncini, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves,
Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General,
Rhonda Cartwright-Ladendorf, Supervising Deputy Attorney General, and Robert M.
Foster, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Henry Gamboa pled guilty to grand theft of personal property (Pen. Code, § 487, subd. (a))¹ in exchange for a grant of probation. He later violated his probation. The trial court revoked defendant's probation and sentenced him to the upper term of three years. Defendant's sole claim on appeal is that the trial court abused its discretion in imposing the upper term. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant admitted to the police that he stole a door from a store. The door was valued at \$800.

Defendant was charged with grand theft of personal property. (§ 487, subd. (a).) He entered a plea agreement and pled guilty to the charge, in exchange for a grant of probation for a period of three years, subject to various terms and conditions. On February 9, 2005, the court withheld pronouncement of judgment and granted defendant probation in accordance with the plea agreement.

On April 11, 2005, defendant requested, and the court ordered, a modification of the terms of his probation. The court modified the condition that he serve 180 days in county jail and ordered that he report to Glen Helen Rehabilitation Center instead. Defendant was ordered to report to Glen Helen on April 25, 2005, but he failed to do so. Thus, the court revoked his probation and issued an arrest warrant for this violation of probation.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On April 10, 2006, defendant appeared in court, having been charged for driving under the influence of alcohol. (Veh. Code, § 23152, subs. (a) & (b).) He pled no contest to that charge. The court questioned defendant about his violation of probation. Defendant provided proof that he had completed the jail time term of probation, so the court reinstated his probation.

On May 19, 2006, the probation officer filed a petition for revocation of probation, alleging that defendant violated the conditions that he report to the probation officer, cooperate with the probation officer in a rehabilitation plan and follow all reasonable directives, and keep the probation officer informed of his place of residence.

A hearing was held on June 30, 2006. After hearing testimony from the probation officer and from defendant, the court found that defendant had violated his probation. The court sentenced defendant to the upper term of three years in state prison.

ANALYSIS

The Trial Court Properly Imposed the Aggravated Term

Defendant claims that the court improperly imposed the upper term relying on factors that arose *after* the initial grant of probation, in violation of California Rules of Court, rule 4.435(b). We find no error.

We begin by noting that a single valid factor in aggravation is sufficient to justify the imposition of the upper term. (*People v. Castellano* (1983) 140 Cal.App.3d 608, 615 (*Castellano*).)

Here, the court cited four reasons for imposing the upper term: 1) defendant's history on probation was poor; 2) defendant had three felony convictions; 3) his pattern

of crime was becoming increasingly violent; and 4) he lied on the witness stand at the probation revocation hearing. Three of these reasons existed at the time of the original grant of probation.

The probation report that was presented to the court at the time it granted probation listed four aggravating factors. One of the factors was that defendant's prior convictions were numerous and of increasing seriousness. Defendant's prior convictions included possession of a controlled substance, taking a vehicle without the owner's consent, embezzlement, and battery. Thus, at sentencing, the court properly cited that defendant's pattern of crime was becoming increasingly violent and that defendant had three felony convictions. Another aggravating factor cited was that defendant's prior performance on parole was unsatisfactory. Defendant concedes this factor.

In sum, the record belies defendant's claim that the court improperly relied on factors that did not exist at the time of the grant of probation. Even if it was improper for the court to rely on its belief that defendant lied on the witness stand at the probation revocation hearing (e.g., postprobation conduct), the court properly relied on the other factors. As stated earlier, a single valid factor in aggravation is sufficient to justify an upper term. (*Castellano, supra*, 140 Cal.App.3d at p. 615.)

In addition, defendant filed a petition for rehearing following the Supreme Court's decision in *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*). He now contends that the trial court violated his Sixth Amendment right to have a jury determine the facts upon which the court relied to sentence him to the aggravated term, citing *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and

Cunningham, supra, 127 S.Ct. 856. We disagree.

At the outset, the People assert that defendant forfeited his *Blakely* claim by failing to raise it at the sentencing hearing. We disagree. At the time of defendant's sentencing and subsequent appeal, the decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) was the controlling precedent. *Black* held that *Blakely* did not apply to California's determinate sentencing law. (*Black, supra*, at p. 1244.) In light of that holding, it would have been futile for defendant to raise a *Blakely* objection at sentencing. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.) Thus, defendant did not waive his claim of *Blakely* error by failing to object in the trial court. Nonetheless, defendant's contention fails.

The United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) 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, emphasis added.) In *Cunningham, supra*, 127 S.Ct. 856, the United States Supreme Court overruled *Black* in part and held that California's determinate sentencing law violates *Apprendi*'s bright-line rule. (*Cunningham, supra*, at p. 868.) However, *Cunningham* has no effect on the instant case. As we have pointed out, an exception to the *Apprendi* rule is that the trial court may increase the penalty for a crime based upon the defendant's prior convictions, without having this aggravating factor submitted to the jury and proved beyond a

reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490.) That is what occurred in this case. The court cited the fact that defendant had three prior felony convictions as a basis for imposing the upper term. Consequently, the court’s consideration of other aggravating factors that were not submitted to the jury was harmless because one valid aggravating factor was sufficient to expose defendant to the upper term. (*Castellano, supra*, 140 Cal.App.3d at p. 615.) Thus, the court properly imposed the upper term.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

RICHLI
J.