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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAMIRO GONZALES, Defendant and Appellant.	H031003 (Santa Clara County Super. Ct. No. CC624228)

Defendant Ramiro Gonzales pleaded guilty to two misdemeanor counts of driving with a suspended or revoked license (Veh. Code, §§ 14601.2, subd. (a), 14601.5, subd. (a)),[1] and admitted that he had a prior conviction for driving on a suspended or revoked license. A jury found defendant guilty of two counts of driving under the influence of alcohol (§ 23152, subds. (a) & (b)). Defendant stipulated that, based on the jury's findings, he was guilty of four counts of driving under the influence. The trial court found true allegations that defendant had three prior convictions for driving under the influence, all within 10 years of the current offenses, that he had a prior gross vehicular manslaughter conviction that qualified as a strike (Pen. Code, § 1170.12), and that he had

[1] Further statutory references are to the Vehicle Code unless otherwise specified.

served a prior prison term (Pen. Code, § 667.5, subd. (b)). The court denied defendant's *Romero*[2] motion and sentenced him to seven years in state prison.

On appeal defendant contends that the court's imposition of the upper term of three years, which was doubled under the Three Strikes law, violated his constitutional rights to a jury trial and due process. We find no prejudicial error and, therefore, affirm.

BACKGROUND

Defendant was charged by first amended information with two counts of driving under the influence of alcohol with a prior specified felony (§§ 23152, subds. (a) & (b), 23550.5, subd. (a); counts 1 & 2), two counts of driving under the influence of alcohol with three or more specified priors (§§ 23152, subds. (a) & (b), 23550, subd. (a); counts 3 & 4), misdemeanor driving with a license suspended or revoked due to a driving under the influence conviction (§ 14601.2, subd. (a); count 5), and misdemeanor driving with a license suspended or revoked for refusing to take an intoxication test (§ 14601.5, subd. (a); count 6). The information further alleged that defendant had two prior misdemeanor and one prior felony driving under the influence convictions under section 23152, a prior driving with a suspended license conviction under section 14601.1, and a prior felony conviction that qualified as a strike (Pen. Code, § 1170.12), and that he had served a prior prison term for a felony driving under the influence conviction under section 23152 (Pen. Code, § 667.5, subd. (b)). The court granted defendant's request to bifurcate trial on the priors.

On the first day of trial, prior to impaneling a jury, the parties stipulated that "if the defendant is found guilty of driving a vehicle under the influence of an alcoholic beverage, then he be [*sic*] found guilty of counts 1 and 3 and if he is found guilty of driving a vehicle while having .08 percent and more, then he's guilty of counts 2 and 4."

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

In addition, defendant pleaded guilty to counts 5 and 6, the two misdemeanor driving with a suspended license counts, and admitted the prior section 14601.1 conviction allegation.

The Prosecution's Case

Around 9:30 p.m. on March 19, 2006, San Jose Police Officer Aaron Offenberg was patrolling on Winchester Boulevard when he saw a Cadillac straddling, and swerving back and forth between, two southbound lanes. He activated his patrol car's red and blue lights, and the Cadillac slowly pulled to the right side of the road. Its right front tire "rolled up to the curb in a jerky motion," and the car stopped suddenly with the tire on the curb. Defendant was the driver and sole occupant of the Cadillac.

Defendant's speech was slurred, his eyes were bloodshot, and Officer Offenberg smelled an odor of alcohol coming from the Cadillac. He asked defendant to step out of the car. Defendant stumbled as he did so. Offenberg escorted defendant to the curb and asked him whether he had been drinking. Defendant did not respond. Offenberg did not ask defendant to perform any field sobriety tests because defendant could not stand on his own, and Offenberg felt that defendant was too intoxicated to perform the tests. He arrested defendant for driving under the influence and drove him to the police station. At 10:26 p.m., a certified phlebotomist drew two vials of defendant's blood.

Krina Patel, a criminalist at the county crime lab, tested defendant's blood sample on March 20, 2006, and found that it had a 0.12 percent blood alcohol content. When the blood sample was retested on August 8, 2006, it was found to have a 0.11 percent blood alcohol content.

The Defense Case

Sergeant Jason Woodall was dispatched to defendant's car stop on March 19, 2006. Defendant was leaning on the patrol car. Woodall asked defendant where he was coming from and where he was going. Defendant said that he was coming from work and that he was going home.

The Verdicts, Findings on the Priors, and Sentencing

On October 12, 2006, outside the presence of the jury, defendant waived his right to a jury trial on the alleged priors. The jury found defendant guilty of driving under the influence of alcohol as charged in count 1 (§ 23152, subd. (a)), and guilty of driving under the influence with a blood alcohol content of .08 percent or more as charged in count 2 (§ 23152, subd. (b)). As previously stipulated, defendant was also found guilty of driving under the influence as charged in counts 3 and 4. Following a court trial, the court found beyond a reasonable doubt that defendant had suffered a section 23152 conviction in August 1998, a section 23152 conviction in June 1998, and a section 23152 conviction in November 1999, all within 10 years of the current offense. The court further found that defendant had a gross vehicular manslaughter conviction that qualified as a strike (Pen. Code, § 1170.12), and that he had served a prior prison term for a section 23152 conviction within the meaning of Penal Code section 667.5, subdivision (b).

On December 5, 2006, the court denied defendant's written *Romero* motion and sentenced him to seven years in state prison. The sentence consists of the doubled upper term of six years for count 1 with a consecutive one-year term for the prison prior. The court stayed the terms for the remaining counts under Penal Code section 654. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that the imposition of the upper term violated his constitutional rights as stated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*). He argues that the court relied on factors not found true beyond a reasonable doubt by a jury, and that his sentence must be reduced to the middle term.

In *Apprendi*, 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." (*Apprendi*, *supra*, 530 U.S. at p. 490.) In *Blakely*, the court defined the " 'statutory maximum' " to mean "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*, *supra*, 542 U.S. at p. 303.) In *Cunningham*, the court held that because aggravating circumstances depend on facts found "discretely and solely" by the judge, "the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum." (*Cunningham*, *supra*, 127 S.Ct. at p. 868.) The court reiterated that "[o]ther than a prior conviction, . . . 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.' " (*Id*. at p. 864.)

The California Supreme Court subsequently held that, "[s]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*People v. Black* (2007) 41 Cal.4th 799, 813 (*Black II*).)

The question before this court is, therefore, whether any one of the circumstances cited by the trial court when it imposed the upper term was properly established consistently with Sixth Amendment principles. In choosing the upper term on count 1, the court stated: "The court takes the upper term of 6 years based upon the defendant *serving a prison term previously*. The defendant's prior performance on probation and parole is unsatisfactory and the seriousness of the current offense." (Italics added.) After the court imposed various fines and fees, it asked the probation officer if there was

"[a]nything else." The probation officer responded: "Yes, Your Honor. I do have one concern. I believe that the Court used the defendant's prior commitment to CDC to aggravate the case, however because we [*sic*] imposed that time we cannot use it to aggravate." The court replied: "That's correct, so I will strike that reason and give the other reason[s]."

It is true that the prison term defendant served for a prior driving under the influence conviction, which was the basis for the one-year prison prior, could not also be used as a circumstance supporting imposition of the upper term. (Cal. Rules of Court, rule 4.420(c) [dual use of facts prohibited].) However, in imposing the upper term the trial court could properly rely on the fact that defendant had also served a prison term for his 1984 vehicular manslaughter conviction. The fact that the vehicular manslaughter conviction was being utilized under the Three Strikes law to qualify defendant for sentencing under that alternative sentencing scheme did not preclude the use of the prison term served for the conviction as an aggravating circumstance. (*People v. Cressy* (1996) 47 Cal.App.4th 981, 992.)

The probation officer correctly advised the court that defendant's commitment to CDC for his prior driving under the influence conviction was used to impose a consecutive one-year term and could not be used to aggravate the sentence for the current driving under the influence conviction. However, the probation officer failed to correctly advise the court that defendant had another CDC commitment that *could* be used to aggravate the sentence. The fact that the probation officer failed to so advise the court did not preclude the court's consideration of this fact to impose the upper term. The record indicates that defendant had served another prison term for his vehicular manslaughter conviction upon which the court could properly rely in imposing the upper term.

Prior to *Cunningham*, in *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), our Supreme Court interpreted *Apprendi* to permit judicial factfinding on a defendant's

recidivism. "The [United States Supreme Court] . . . explained in *Apprendi* that recidivism was distinguishable from other matters employed to enhance punishment, because (1) recidivism traditionally has been used by sentencing courts to increase the length of an offender's sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial protections. [Citations.]" (*McGee*, *supra*, 38 Cal.4th at p. 698.) Following *Cunningham*, our Supreme Court revisited the issue in *Black II*, where the defendant argued that he was entitled to a jury finding on the " 'numerous or of increasing seriousness' " aggravating circumstance the trial court used to impose an upper term. The Supreme Court, citing *McGee*, rejected the defendant's argument. (*Black II*, *supra*, 41 Cal.4th at pp. 819-820.)

"The United States Supreme Court consistently has stated that the right to a jury trial does not apply to the fact of a prior conviction. (*Cunningham*, *supra*, ___ U.S. at p. ___ [127 S.Ct. at p. 868]; *Blakely*, *supra*, 542 U.S. at p. 301; *Apprendi*, *supra*, 530 U.S. at p. 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*).) 'Recidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.' (*Almendarez-Torres*, *supra*, 523 U.S. at p. 243.)" (*Black II*, *supra*, 41 Cal.4th at p. 818.)

"Defendant . . . reads the 'prior conviction' exception too narrowly. (See *People v. McGee*[, *supra*,] 38 Cal.4th 682 (*McGee*) [defendant not entitled to have a jury determine whether his prior conviction in Nevada qualified as a serious felony for the purpose of imposing a sentence enhancement]; see also *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223 [the exception recognized in *Apprendi* for ' "the fact of a prior conviction" ' permits a trial court to decide whether a defendant has served a prior prison term].) As we recognized in *McGee*, numerous decisions from other jurisdictions have interpreted the *Almendarez-Torres* exception to include 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. (See cases cited in *McGee*, *supra*, 38 Cal.4th at

pp. 703-706; see also *United States v. Smith* (6th Cir. 2007) 474 F.3d 888, 892 [no right to a jury trial concerning the circumstance whether defendant's criminal history was ' "extensive and egregious" '].)

"The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' (Cal. Rules of Court, rule 4.421(b)(2)), require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.' " (*Black II*, *supra*, 41 Cal.4th at pp. 819-820, fns. omitted.)

Under *Thomas*, *McGee*, and *Black II*, it is clear that the question of whether defendant served a prior prison term falls within the *Almendarez-Torres* exception. Since the trial court properly cited defendant's prior prison term as a basis for imposing the upper term on count 1, and the prison term defendant served for his prior vehicular manslaughter conviction made defendant eligible for the upper term, defendant's Sixth Amendment rights were not violated when the court exercised its discretion to impose the upper term. No prejudicial error has been shown.

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MCADAMS, J.