Filed 2/26/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER HERNANDEZ, Defendant and Appellant.	C053061 (Super. Ct. No. 01F04045)

APPEAL from a judgment of the Superior Court of Sacramento County, Jack V. Sapunor, Judge. Affirmed as modified.

Barbara Michel, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part II.

The sky is not completely falling in California after *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, __ L.Ed.2d __] (hereafter *Cunningham*) changed life as we knew it under the determinate sentencing law (DSL). *Cunningham* did not address consecutive sentences under the DSL, which, as we will explain, can be imposed based on facts found by the trial court, without violating the Sixth Amendment to the United States Constitution.

BACKGROUND

A jury convicted defendant Francisco Hernandez of conspiring to manufacture methamphetamine (count I), possessing ephedrine with the intent to manufacture methamphetamine (count II), manufacturing methamphetamine (count III), and possessing methamphetamine for sale (count IV). The jury also found to be true the enhancements alleged pursuant to Health and Safety Code sections 11379.8, subdivision (a)(3) and 11370.4, subdivision (b)(2). Defendant was sentenced to an aggregate term of 16 years and four months in state prison.

On appeal, defendant contends that imposition of a consecutive term for count II violated the Sixth Amendment to the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*).

DISCUSSION

I

Apprendi held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant; thus, when a court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. at pp. 302-305 [159 L.Ed.2d at pp. 413-414].)

In *Cunningham, supra,* ___ U.S. ___ [127 S.Ct. at p. 860, ___ L.Ed.2d ___], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," the DSL "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Ibid*., overruling *People v. Black* (2005) 35 Cal.4th 1238 on this point.)

Cunningham did not address the constitutionality of the DSL pertaining to a trial court's decision to impose concurrent or consecutive sentences. It did not mention, let alone expressly overrule, the California Supreme Court's decision that "*Blakely's* underlying rationale is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently." (*People v. Black, supra*, 35 Cal.4th

at p. 1262, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [2007 WL 505809].)

For reasons that follow, we reject defendant's assertion that he was entitled to have a jury determine the facts upon which the trial court relied to impose consecutive sentences.

Penal Code section 669 imposes an affirmative duty on a trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) In most cases, the section leaves this decision to the trial court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Penal Code section 669 provides that when a trial court fails to determine whether multiple sentences shall run concurrently or consecutively, the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra,* 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine

whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid.*) And it does not create a presumption or other entitlement to concurrent sentencing. Under Penal Code section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The trial court is required to state reasons for its sentencing choices, including its decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the court analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing that sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) However, the requirement that reasons for a sentence choice be stated does not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under California's sentencing laws is not precluded by the decisions in *Apprendi*, *Blakely*, and *Cunningham*. In this state, every person who commits multiple crimes knows he or she is risking consecutive sentencing. While such a person has the right to the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely,* "that makes all the difference insofar as judicial impingement upon the

traditional role of the jury is concerned." (*Blakely, supra,* 542 U.S. at p. 309 [159 L.Ed.2d at p. 417].)

Accordingly, the trial court here did not err in sentencing defendant to a consecutive term on count II.

II*

In reviewing defendant's claim of error, we discovered that the trial court purported to sentence defendant to the "upper" term of five years on count III because the great degree of planning involved outweighed the mitigating factors of defendant's age and lack of a prior record. However, five years is the middle term; the upper term for manufacturing methamphetamine is seven years. (Health & Saf. Code, § 11379.6.)[1] Thus, it appears the court meant to say that it was imposing the middle term, not the upper term. In any event, as noted in Part I, *ante*, the Sixth Amendment of the United States Constitution precludes imposition of the upper term based on an aggravating factor that, like here, was not found true by the jury. Accordingly, we shall direct the court to correct the abstract of judgment to reflect that the *middle* term of five years was imposed.

The abstract of judgment also incorrectly reflects defendant was convicted on count II of possessing ephedrine with intent to manufacture methamphetamine in violation of Health and Safety Code section *11382*, subdivision (c)(1). The correct statute was Health

---

[1] The sentencing range is currently three, five and seven years, which is the same range existing at the time defendant committed the crime in 2001. (Stats. 1989, ch. 1024, § 1, p. 3546.)

and Safety Code section *11383*, subdivision (c)(1).[2] We shall direct the trial court to so correct the abstract.

DISPOSITION

The judgment is affirmed. The trial court is directed to (1) amend the abstract of judgment to reflect that on count II, defendant was convicted of violating Health and Safety Code section 11383, subdivision (c)(1) and that on Count III, he was sentenced to the middle term of five years, and (2) send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

SCOTLAND, P.J.

We concur:

HULL, J.

ROBIE, J.

[2] The crime of possessing ephedrine with intent to manufacture methamphetamine used to be covered by Health and Safety Code section 11383, but it is now found in section 11383.5. (Stats. 2006, ch. 646 (Sen. Bill 1299) §§ 2, 3.)