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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. ANTHONY HERRERA, Defendant and Appellant.	B194531 (Los Angeles County Super. Ct. No. TA066571)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Affirmed.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Lisa J. Brault, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury trial, Herrera was convicted of one count of attempted murder (Pen. Code,[1] §§ 664, 187, subd. (a)) and one count of second degree robbery (§ 211). The jury found true the special allegations regarding firearm use (§ 12022.53, subds. (b)-(d)). He was sentenced to five years on the robbery count, a consecutive term of life with the possibility of parole on the attempted murder, and a consecutive 25-years-to-life term pursuant to section 12022.53, subdivision (d) on the attempted murder conviction.

In 2006 this court affirmed Herrera's conviction on appeal (B173384), specifically rejecting his claims gang evidence was improperly admitted, the robbery count should have been stayed pursuant to section 654 and imposition of the consecutive sentence violated his Sixth Amendment right to a jury trial. This court also remanded for resentencing, concluding the trial court had imposed an unauthorized sentence when it stayed all of the section 12022.53 enhancements attached to the robbery count and that imposition of a section 12022.53, subdivision (b) enhancement was appropriate because there was use but not discharge of the gun in the robbery.

At the resentencing hearing Herrera asked the trial court to reconsider its prior ruling that section 654 did not apply to the robbery and attempted murder convictions and its order imposing the upper term on the robbery conviction. The court declined his requests and thereafter imposed the 12022.53, subdivision (b) enhancement on the robbery conviction. In this appeal, Herrera claims the imposition of the upper term on the robbery count, consecutive sentences on the robbery and attempted murder and the section 12022.53 enhancements violated his Sixth Amendment right to a jury trial. As explained herein, we disagree and therefore affirm.

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

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[2]

On September 5, 2002, Herrera demanded money at gunpoint from Federico Mendez, who was selling plants out of his parked truck in Compton. Mendez turned over $60 to $70. When Mendez said he had no more money, Herrera struck Mendez in the left ear with his handgun and fired one shot into Mendez's stomach. Mendez struggled for control of the gun, which fired four more stray shots. Herrera then got out of the truck and "took off running." Police chased after him.

Mendez underwent surgery for the gunshot wound in the stomach. At the time of trial, he continued to feel "a lot of pain" in his back. Mendez identified Herrera from photographic and physical lineups.

In addition, Herrera was identified as the shooter in a fatal shooting of a Leonard Jackson which occurred hours before he approached Mr. Mendez. A firearms examiner concluded the two bullets recovered from Jackson's body and the one bullet recovered from Mendez's body were fired from the same firearm.

The information charged Herrera with three counts: in count 1 with murder (§ 187, subd. (a)) as to Jackson; in count 2 with attempted murder (§§ 664, 187, subd. (a)) as to Mendez; and in count 3 with second degree robbery (§ 211) as to Mendez. As to counts 1 and 2, the information alleged firearm use. (§ 12022.53, subds. (b)-(e).) It further alleged that counts 2 and 3 were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).)[3]

The jury acquitted Herrera of Jackson's murder. It convicted him of the attempted murder and second degree robbery of Mendez. The jury found true the special

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[2] The factual Background and Procedural History are taken from this Court's opinion in B173384.

[3] The information was amended during trial to allege section 12022.53, subdivisions (b)-(d), gun use enhancements as to count 3.

allegations regarding firearms use under subdivisions (b)-(d) of section 12022.53, but found the gang allegations not true.

The court sentenced Herrera to the total term of life with possibility of parole, plus 30 years to life. It selected the high term of five years as the base term on count 3, and stayed sentences as to the gun use enhancements as to section 12022.53, subdivisions (b), (c) and (d). The sentence on count 2 was life with the possibility of parole enhanced by a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d); the court stayed enhancements as to section 12022.53, subdivisions (b) and (c).

Herrera appealed. In 2006 this court affirmed his convictions, but remanded for resentencing. We concluded the trial court had imposed an unauthorized sentence when it stayed all of the section 12022.53 enhancements attached to the robbery count and that imposition of a section 12022.53, subdivision (b) enhancement was appropriate.

At the resentencing hearing Herrera asked the trial court to reconsider: (1) its prior ruling that section 654 did not apply as to the robbery and attempted murder convictions; and (2) the order imposing the upper term on the robbery conviction. The trial court declined his requests and thereafter imposed the 12022.53, subdivision (b) enhancement on the robbery conviction.

This appeal followed.

DISCUSSION

I. The Imposition Of The Upper Term On The Robbery Count Did Not Violate Appellant's Right To A Jury Trial.

The trial court originally sentenced Herrera on the robbery count to the upper term of five years. At the hearing where he was to be resentenced, Herrera asked the court to reconsider the upper term sentence on the robbery count and specifically asked the court to sentence to the mid-term. In response the trial court stated:

> "The sentencing transcript [from the original sentencing hearing] indicated that the two factors in [aggravation] were that he was on probation at the time [of the crimes] and that he used a firearm. Obviously, I cannot use the fact that he used the firearm as a circumstance of [aggravation]. [¶] So at the time he was on two counts of probation in BA229762 for it looks like bringing narcotics into the jail, he was also on probation in TA063924. I'm a little unclear as to whether it's attempted extortion or vandalism, Penal Code section 69. He was on two grants of probation. Either of those on their own are circumstances in aggravation, and they clearly outweigh any circumstances in mitigation which there are none. [¶] So I'm going to reimpose the high term of five years.

On appeal, based on *Cunningham v. California* (2007) 127 S.Ct. 856, Herrera contends the imposition of the upper term on count 3, the robbery, violated his right to a jury trial. Specifically Herrera asserts that the trial court erred in relying upon an improper factor in selecting the upper term; he claims the court erred in citing his probation status as a factor in aggravation. Although Herrera concedes the trial court may rely on the fact of a prior conviction, he argues that recidivism exception must be narrowly construed and does not include the probation status of a criminal defendant. We do not agree.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the court concluded: "[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." In *Cunningham*, the court concluded "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham v. California*, *supra*, 127 S.Ct.at p. 860.) Accordingly, the court reasoned California's determinate sentencing law violated a defendant's right to a jury trial because it permitted a judge, rather than the jury, to find facts by a preponderance of the evidence, exposing a

defendant to an elevated upper term because the middle term was the relevant statutory maximum. (*Id*., at pp. 868-871.)

"The prior conviction exception referred to in *Cunningham* derives from the Supreme Court's opinions in *Apprendi v. New Jersey, supra,* 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296 . . . and *Almendarez-Torres v. United States* (1998) 523 U.S. 224 . . . . Courts in California and in other jurisdictions have construed *Apprendi* '"as requiring a jury trial except as to matters relating to 'recidivism.'"'" (*People v. Yim* (2007) 152 Cal.App.4th 366, 370.)

The California Supreme Court recently held that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with requirements of *Apprendi* and its progeny, any additional fact finding 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." (Original italics.) (*People v. Black* (2007) 41 Cal.4th 799, 812, [hereinafter *Black II*].) The court then concluded, "so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistent 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." (*Id.* at p. 813; see also *People v. Sandoval* (2007) 41 Cal.4th 825.)

"Thus, the exception to the jury trial right for prior convictions, 'is not limited simply to the bare *fact* of a defendant's prior conviction, but extends as well to the *nature* of that conviction, thereby permitting sentencing courts to determine whether the prior conviction is the type of conviction (for example, a conviction of a "violent" felony) that renders the defendant subject to an enhanced sentence.'" (Original italics.) (*People v. Yim*, *supra*, 152 Cal.App.4th at p. 370.) The California Supreme Court also noted the recidivism exception applied to "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 II*, *supra*, 41 Cal.4th p. 818.) In *Black II*, the court reasoned the prior conviction exception should not be read too narrowly and ruled it included whether the prior convictions were numerous or of increasing seriousness. (*Ibid*.)

In *Yim*, the defendant argued, among other things, the trial court erred when it relied on his parole status and unsatisfactory performance on parole to impose the upper term. (*People v. Yim*, *supra*, 152 Cal.App.4th at p. 370.) The appellate court rejected defendant's argument, finding the factors supporting imposition of the upper term were recidivism-related. (*People v. Yim*, *supra*, 152 Cal.App.4th at p. 371.) The court reasoned that the mere recitation of the defendant's dates of convictions and release on parole demonstrated, as a matter of law, that he had committed new offenses while on parole, meaning he had performed poorly on parole. (*Ibid*.)

The parole status factor in *Yim* is the same factor present in the case at bar, i.e., appellant's status as a parolee when he committed the robbery and attempted murder in this case. Thus it is similarly sufficient to support the imposition of the upper term on the robbery count.[4] Consequently, we conclude the trial court did not err in imposing the upper term on the robbery conviction.

II. The Court's Imposition of Consecutive Sentences Does not Constitute Constitutional Error Under *Cunningham*.

As he claimed in his first appeal Herrera again asserts that because the trial court rather than the jury found the facts necessary to impose the consecutive sentences on the

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[4] In reaching this conclusion we also reject Herrera's suggestion that the record does not support the trial court's factual finding that he was on probation at the time he committed the robbery and attempted murder. At the resentencing hearing, the trial court indicated that it was relying on the transcript from the prior sentencing hearing, where it had before it (and expressly considered) the probation/sentencing report which contained the relevant dates and details concerning Herrera's parole status in BA229762 and TA063924.

robbery and attempted murder convictions the trial court violated his constitutional rights and his sentences ran afoul of *Cunningham.*

In *Black II* our Supreme Court concluded that nothing in the United States Supreme Court's opinion in *Cunningham* entitled a criminal defendant to have the facts underlying the decision to impose consecutive terms determined by a jury. (*Black II, supra*, 41Cal.4th at p. 821.) In *Black II*, the Court equated consecutive sentences with the maximum sentence for an offense. Therefore, the Court reasoned, the jury's verdict finding the defendant guilty of two or more crimes was enough, by itself, to authorize consecutive sentences for each offense. Whether the defendant actually should serve consecutive sentences is a "'sentencing decision[ ] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense . . . .'" (*Id*. at p. 823, quoting from *People v. Black* (2005) 35 Cal.4th 1238, 1264 *(Black I*).) In view of *Black II*, we reject the claim concerning the imposition of consecutive sentences.

Likewise, we do not accept Herrera's related argument that *Cunningham* undermined this court's reasoning in the majority opinion in *People v. Cleveland* (2001) 97 Cal.App.4th 263. In *Cleveland* a majority of this court held that *Apprendi* did not require a jury to make determinations as to the application of section 654. Though in *Black I* the application of *Apprendi* to section 654 was not at issue, the California Supreme Court in *Black I* implicitly affirmed this court's holding in *Cleveland.* Moreover, although the United States Supreme Court required the California Supreme Court to reassess *Black I*'s holding with respect to consecutive sentences in light of *Cunningham*, *Black II* reaffirmed *Black I* and in so doing effectively left in place *Black I's* tacit endorsement of *Cleveland.* In our view, the holding in *Cleveland* has survived *Cunningham* and Herrera has not otherwise convinced us that it is erroneous.

III. The Court's Imposition of The Section 12022.53 Enhancements Does not Constitute Constitutional Error Under *Cunningham*.

As with Herrera's claim concerning the application of section 654 to the robbery and attempted murder conviction, he also argues that the trial court's imposition of the multiple section 12022.53 enhancements ran afoul of *Cunningham:* "under *Cunningham* . . . a defendant has a constitutional right to a jury trial . . . regarding factual findings necessary to find section 654's multiple punishment proscription inapplicable. [¶] That constitutional right is equally applicable in determining whether section 654 bars imposition of multiple enhancements." We do not agree and reject this argument for the same reasons we expressed above with respect to Herrera's claim concerning section 654.

In any event, as our Supreme Court has concluded, section 654 does not apply to multiple section 12022.53 enhancements in circumstances similar to this case. (See *People v. Palacios* (2007) 41 Cal.4th 720, 726-727 [court found section 654 did not apply where multiple enhancements alleged when each was based on a single act, though in the commission of separate crimes, committed against a single victim].) Thus Herrerra's reliance on section 654 to bolster his claim that he is entitled to a jury trial on these enhancements is without merit.

DISPOSITION

The judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P.J. **ZELON, J.**