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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. RYLAND GEORGE HILL, JR., Defendant and Appellant.	C052249 (Super. Ct. No. CM017845)

Defendant Ryland George Hill, Jr., who is both a college graduate and a veteran of the criminal justice system, contends he was duped into entering a no contest plea to one count of forgery (Pen. Code, § 470, subd. (d)) in exchange for the dismissal of four other counts of forgery. He claims his lawyer had assured him he would be placed on probation, but instead he was sentenced to the upper term of three years in state prison. Finding no abuse of discretion, we affirm the order denying defendant's request to withdraw his plea. We agree with defendant, however, that his aggravated term must be reversed and the case remanded to the trial court for resentencing

because we cannot say the court's judicial fact-finding in violation of the Sixth Amendment is harmless beyond a reasonable doubt.

FACTS SURROUNDING THE PLEA

The prosecution alleged that defendant was in possession of the victim's stolen checkbook, forged his signature, and cashed several checks in 2002. He was arrested in Michigan and extradited to California in 2005. On multiple occasions, he expressed his dissatisfaction with trial counsel and his desire to get the California case "out of the way" so he could return to Michigan. After his *Marsden*[1] motions were denied, he entered a no contest plea to one count of forgery. The only facts material to the issues before us involve the entry of the plea.

Defendant and his trial lawyer testified at an evidentiary hearing on defendant's motion to withdraw his plea. Defendant testified he graduated from Chico State University, he has no difficulty reading, and he was not under the influence of any drugs or alcohol when he entered his plea. This was not his first plea agreement; he had entered other agreements in the past. But he was hurt, disappointed, and angry when he discussed the prosecution's offer with his lawyer, who "hollered" at him and told him that he, defendant, was "the master of this situation." He explained that he felt coerced and threatened, even though he had expressly assured the trial

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[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

judge that he had read and understood the agreement, he had no questions about it, and he was entering the plea freely and voluntarily. He understood from his lawyer that he was going to be granted probation "and I would be able to get on with my life."

The plea agreement states: "Probation will be granted only if the sentencing judge finds this to be an unusual case (prison presumptive)." There is an X in the box next to this statement. The agreement also provides, "I do understand that the matter of probation and sentence is to be determined solely by the superior court judge." Defendant initialed this statement. At his hearing, he stated he had not had an adequate opportunity to review the form before he signed it, and he was unable to get clarification from his lawyer about the meaning of its provisions.

His lawyer contradicted defendant's recollection of the circumstances surrounding the plea agreement. Although he acknowledged that he had a heated conversation with defendant at another time, he testified that "at the time that Mr. Hill agreed to accept the plea bargain, his response was, 'I prayed about it,' and I got something to the effect of, 'God told me what to do, and I am going to accept the deal'." The lawyer believed defendant understood the nature of the charges against him and he had no concerns about defendant's competency.

The lawyer discussed the term "prison presumptive" with defendant and that he would not get probation unless the court found his case to qualify as "unusual." But he also emphasized,

as was his practice, that he could not guarantee probation because the court alone would ultimately make the sentencing decision.

The court ruled as follows: "The court carefully reviewed the testimony in this case. The motion to withdraw the plea will be denied. The record is clear that there was no offer of probation, that there was no county lid offer, that the defendant was prison presumptive, that is he had suffered two prior felonies which would make him ineligible for probation except in an unusual case.

"Any statements that he might be considered for probation were not promises; they were simply statements of fact based upon the legal context of the case.

"The court, in sentencing the defendant, will regard this as a case where he might be eligible for probation, and I will look carefully at whether there are any unusual circumstances that might justify a grant of probation. The motion being denied will proceed to sentencing."

DISCUSSION

I

Defendant contends the record discloses clear and convincing evidence that he was not properly advised by counsel prior to the entry of his plea, and as a consequence, he was ignorant and mistaken about the possibility that he would receive probation. He understands his burden of proving good cause to withdraw his plea by clear and convincing evidence (*People v. Wharton* (1991) 53 Cal.3d 522, 585), but he ignores

the deferential scope of appellate review and misreads the record.

We must sustain the trial court's assessment of good cause, absent a flagrant abuse of discretion. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) Here the record belies defendant's contention that the trial court abused its discretion since there is ample evidence to support the trial court's factual findings. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) In short, at all times throughout these proceedings, defendant presented himself as intelligent, competent, and able to understand the nature of the charges and the implications of entering into a plea agreement. His lawyer's testimony supports the trial court's conclusion that defendant was never promised probation; rather, his lawyer explained the possibility that a judge might grant probation if he found the case unusual but there were no guarantees because the judge had sentencing discretion. The agreement defendant signed stated expressly that he was "prison presumptive."

A trial court has the discretion to allow a defendant to withdraw a plea to promote justice. (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796-797.) Here the court determined that justice would not be served by allowing defendant to renege on his agreement in the absence of any facts suggesting that he was misled, that because of language or other barriers he did not understand the consequences of his plea, or that his lawyer had failed to adequately represent the law. We can find no abuse of discretion in this record.

II

Defendant contends the court's imposition of the upper term violated his right to a jury trial as guaranteed by the Sixth Amendment to the United States Constitution. (*Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*); *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*); *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*).) Because, as pointed out in *Apprendi*, *Blakely*, and *Cunningham*, the Sixth Amendment jury trial guarantee does not apply to prior convictions that are used to impose greater punishment and defendant concedes the court based its imposition of the upper term in part on his prior convictions, we are presented with the difficult task of determining whether the trial court's reliance on other aggravating factors constitutes harmless error. We conclude that to the extent the court transgressed the Sixth Amendment by relying on the fact that defendant's performance on probation was unsatisfactory, we cannot say the error was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) 548 U.S. ___ [165 L.Ed.2d 466] (*Recuenco*).)

The trial court imposed a three-year upper term based on defendant's numerous prior convictions, which were increasing in seriousness; his being on probation when the offense was committed; and his prior unsatisfactory performance on probation. In *Cunningham*, the United States Supreme Court overruled the California Supreme Court's holding in *People v. Black* (2005) 35 Cal.4th 1238, 1244 that the judicial fact-

finding necessary to impose an upper term does not violate *Blakely*. Yet *Blakely*'s proscription does not apply to the use of prior convictions to increase the penalty for a crime. (*Cunningham*, *supra*, 166 L.Ed.2d at p. 869.) Here the trial court relied on defendant's prior convictions to increase his punishment, and one valid aggravating factor is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.)

Nevertheless, the court erred by relying on defendant's poor performance while on probation, a fact a jury did not find to be true. The United States Supreme Court recently held that *Blakely* error is not structural but is reviewed under a harmless-beyond-a-reasonable-doubt standard. (*Recuenco*, *supra*, 165 L.Ed.2d 466.) While we can say that it is highly unlikely or more probable than not that the court will again impose the upper term on remand based on defendant's prior convictions, we cannot say the record convinces us beyond a reasonable doubt. The record is too murky to withstand constitutional scrutiny.

Defendant urged the court to impose probation based on the unusual nature of his case. He argued that his prior convictions were "substantially less serious than the circumstances typically present in other cases" in which probation was unavailable based on prior convictions. He pointed out to the court that he successfully completed probation for his first felony conviction, which had occurred 14 years earlier. Moreover, he also was placed on probation for

his later driving under the influence and felony possession of a controlled substance convictions.

The court itself bolstered defendant's argument. The court stated: "In reviewing this, and I think I have his entire record here, it appears that in the case of his prior felonies, he was not sentenced to state prison. He received probation. It appears that he's been placed on probation several times, but I don't see too many indications here, if any, that he's violated his probation in the past. He seems to have received an initial grant of probation with some significant jail time in a number of cases; 207 days, 6 months, 90 days, 60 days, 120 days, but I don't see notations that he's been sent to state prison following a violation of probation, or sent to state prison as an initial matter on any of his prior felonies." The court acknowledged that defendant had violated probation in one instance.

Admitting that it was a "close case," the court explained "that this probably is a case where the current offense is less serious than the priors, and because of the age of his initial felony, you could safely say that his priors are less serious than typically present. He didn't go to state prison on either of those priors." The court concluded, however, that defendant's case was not "unusual" under a second requirement that he remain free of serious crime and free of incarceration for a substantial period.

This record puts us in a difficult position. It is true the court's comments were made in the context of determining

whether defendant's case was "unusual" for the purpose of granting probation, and not in the context of determining whether the upper term should be imposed. Nevertheless, the court's comments reflect that it seriously considered granting probation. It acknowledged the case was "close." We therefore are unable to conclude beyond a reasonable doubt that the court would have imposed the aggravated term of three years if it had discounted defendant's performance on probation. Given the age of one of the felonies, the nonviolent nature of the prior crimes, and the court's conclusion that his prior convictions were less serious than prior convictions generally giving rise to the probation limitation, we cannot say with the requisite certainty what the trial court will do on remand. As a consequence, we must reverse the sentence and remand the case to the trial court for resentencing.

DISPOSITION

The sentence is reversed and the case remanded to conduct a new sentencing hearing consistent with the requirements set forth in *Cunningham*, *supra*, 166 L.Ed.2d 856. In all other respects, the judgment is affirmed.

RAYE, J.

We concur:

DAVIS, Acting P.J.

HULL, J.