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Opinion on remand from United States Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT S. HUGHES, Defendant and Appellant.	A105756 (Sonoma County Super. Ct. No. MCR429522)

Defendant appealed from a judgment following pleas of guilty and imposition of a ten-year state prison term: the upper term of eight years on count one, and a two-year consecutive term on count two. His counsel raised no issues and asked this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to appellant, result in reversal or modification of the judgment. (*People v. Wende* (1979) 25 Cal.3d 436; see *Smith v. Robbins* (2000) 528 U.S. 259.) Upon review of the record we found no arguable issues, although we ordered an amendment of the abstract of judgment to require AIDS testing. We subsequently granted defendant's petition for rehearing to consider the impact of the decision in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), upon defendant's sentence. We concluded that under *Blakely* the upper term imposed upon defendant must be vacated, but otherwise affirmed the judgment as amended. The California Supreme Court then transferred the case back to this Court for reconsideration in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). In accordance with the opinion in *Black* we found no error in the imposition of upper and consecutive terms under the California Determinate

Sentencing Law (DSL), and therefore vacated our prior opinion and affirmed the judgment of the trial court.

Then came *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856, 127 S.Ct. 856] (*Cunningham*), in which the United States Supreme Court reversed the *Black* decision, and concluded, "Contrary to the *Black* court's holding, our decisions from *Apprendi*[1] to *Booker*[2] point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra,* 166 L.Ed.2d 856, 876.) This case has now been remanded to us again for further consideration in light of *Cunningham*.

DISCUSSION

In accordance with the decision in *Cunningham*, we revert to our (pre-*Black*) conclusion that imposition of an upper term upon defendant was error, and turn to the issue of prejudice. We conclude that any sentencing error under *Blakely* is not a structural defect that demands automatic reversal. (See *People v. Epps* (2001) 25 Cal.4th 19, 29; *People v. Vera* (1997) 15 Cal.4th 269, 278; *People v. Marshall* (1996) 13 Cal.4th 799, 851–852.) Rather, we follow the federal standard of review of constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the judgment. (*People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Carter* (2003) 30 Cal.4th 1166, 1221–1222; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

All of the sentencing factors relied upon by the trial court to impose the upper term relate to the current offenses: a threat of great bodily harm, actions indicative of sophisticated planning, isolation of the victim, escalating seriousness of the sexual abuse over time, and a high degree of callousness. The upper term was not based upon any

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1 *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

2 *United States v. Booker* (2005) 543 U.S. 220 (*Booker*).

aggravating circumstances that fall within the recognized exception from the right to a jury trial articulated in *Apprendi* for an increase in penalty due to the defendant's prior convictions or other associated recidivist conduct. (*Apprendi, supra,* 530 U.S. 466, 490; *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Taylor* (2004) 118 Cal.App.4th 11, 28; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 831; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1314; *People v. Belmares* (2003) 106 Cal.App.4th 19, 27; *People v. Thomas* (2001) 91 Cal.App.4th 212, 222–223; *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 154.) Thus, we cannot find that the *Blakely* error did not contribute to the judgment. The denial of the right to a jury trial and findings on the aggravating circumstances which resulted in the imposition of the upper term on count one must be considered prejudicial to defendant.

The imposition of a consecutive term on count two, however, did not violate *Blakely* or *Cunningham*. We find nothing in the trial court's exercise of sentencing discretion to select a consecutive subordinate term of imprisonment that violates the precepts of *Blakely*. *Cunningham* dealt only with the imposition of upper terms under the DSL, and expressed no opinion on the validity of the California sentencing scheme for selection of consecutive terms. The critical factor that differentiates the imposition of consecutive terms from upper terms in the DSL is the absence of any presumptive statutory maximum for the former. The more lenient concurrent term is not the specified presumptive or standard maximum sentence. Penal Code section 669[3] provides that when a defendant "is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts," the sentencing court "shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." (See also *People v. Downey* (2000) 82 Cal.App.4th 899, 912–913.) Section 669 thus imposes a duty upon the trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively, but the choice of a consecutive or concurrent term is entirely discretionary

[3] All further statutory references are to the Penal Code.

with the trial court based upon consideration of the sentencing criteria set forth as guidelines in California Rules of Court, rule 4.425.[4] (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000; *People v. Jenkins* (1995) 10 Cal.4th 234, 255–256; *In re Calhoun* (1976) 17 Cal.3d 75, 80–81; *People v. Bradford* (1976) 17 Cal.3d 8, 20; *People v. Shaw* (2004) 122 Cal.App.4th 453, 458; *People v. Coelho* (2001) 89 Cal.App.4th 861, 886; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 194; *People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350.) "[T]he provisions of rule [4.425] are merely '[c]riteria affecting the decision to impose consecutive rather than concurrent sentences . . . .' They are guidelines, not rigid rules courts are bound to apply in every case . . . ." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86–87.)

"While there is a statutory presumption in favor of the middle term as the sentence for an offense (§ 1170, subd. (b)), 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. (§§ 669, 1170.1, subd. (a); rule [4.]433(c)(3).)" (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) The sentencing rules create a statutory presumption in favor of the middle term, but no comparable statutory presumption exists in favor of either concurrent or consecutive sentences for multiple offenses. (*Id.* at p. 923.) Therefore, a consecutive term does not represent a departure from any standard or presumptive sentencing range. Either a consecutive or concurrent term is within the trial court's discretion and the permissible statutory range of punishment if the defendant has been found guilty of multiple crimes by the jury.

The sentencing court is also not required to make an additional finding of fact as a prerequisite to selecting the more severe punishment of a consecutive sentence. The jury verdict, not any additional necessary finding of fact by the trial court, justifies the imposition of either a concurrent or consecutive term at the trial court's discretion.

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[4] All further references to rules are to the California Rules of Court.

(*People v. Shaw*, *supra*, 122 Cal.App.4th 453, 459.) The decision to select a consecutive sentence is only made once the accused has been found beyond a reasonable doubt by the jury to have committed two or more offenses in compliance with the Sixth Amendment right to a jury trial under *Blakely*, *supra*, 542 U.S. 296. A consecutive term imposed under California law is a discretionary sentence choice that does not increase the penalty beyond the prescribed statutory maximum, and is not tantamount to an *Apprendi* enhancement or a *Blakely* exceptional sentence. (See *People v. McPherson* (2001) 86 Cal.App.4th 527, 531–532; *People v. Farr* (1997) 54 Cal.App.4th 835, 843.) The court in *Cunningham* reinforced the notion previously expressed in *Booker* that to remedy constitutionally flawed sentencing systems states may choose to "permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal. *Booker*, 543 U.S., at 233." (*Cunningham*, *supra*, 166 L.Ed.2d 856, 876–877, fn. omitted.) The DSL scheme for imposition of consecutive terms provides the sentencing courts with the kind of genuine discretion to select a term within a relevant statutory range that was given constitutional endorsement in *Booker* and *Cunningham.* The consecutive sentence imposed upon defendant does not violate *Blakely* or *Cunningham*.

DISPOSITION

Accordingly, the upper term sentence of eight years imposed upon count one is vacated and the case is remanded to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely* and *Cunningham.* In all other respects the judgment, as previously amended, is affirmed.

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Swager, J.

We concur:

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Marchiano, P. J.

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Margulies, J.