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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY LEE HUGHES,

Defendant and Appellant.

A104380

(Sonoma County
Super. Ct. No. SCR31221)

This case is one of several remanded to us by the United States Supreme Court due to their decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), which has significant effects on California's criminal sentencing scheme. As explained below, we vacate the sentence and remand to the trial court for resentencing.

BACKGROUND

On December 14, 2005, this court issued its opinion affirming the judgment in this case. On February 20, 2007, the United States Supreme Court granted certiorari in the matter, vacated the judgment, and remanded to this court for further consideration in light of its decision in *Cunningham, supra*, 127 S.Ct. 856. Pursuant to this mandate, we recalled the remittitur and invited both parties to file supplemental briefs.

We have reexamined our opinion in this case (*People v. Hughes* (Dec. 14, 2005, A104380 [nonpub. opn.]), and incorporate it here by reference. Relying upon *People v. Black* (2005) 35 Cal.4th 1238, we initially rejected defendant's contention that imposition

of the upper term and consecutive sentences on the basis of facts found by the court deprived him of his right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296. We now reexamine that holding in light of *Cunningham*.

The Trial Court's Sentencing Decision

The trial court explained its sentencing decision as follows: “As to Count One, the Court imposes the aggravated term. The factors in aggravation being the fact that you displayed viciousness, cruelty or callousness; your violent conduct indicates that you’re a serious danger to society. You have numerous prior convictions. You were on a grant of conditional sentence when the crimes were committed. Your performance on probation generally has been unsatisfactory. You—in regards to serious felony counts, in counts—offenses, in Counts One, Two and Four, you bound, confined and gagged the victim within the meaning of Penal Code Section 1170.84. [¶] Therefore, the Court selects the aggravated term and would impose also the aggravated term of all the other counts on which you were found guilty.”

The court ordered the sentences to run consecutively based on its factual finding that there was a different period of criminality as to each crime.

ANALYSIS

In *Cunningham*, California’s determinate sentencing law was held to violate a defendant’s right to jury trial because California statutes permitted trial judges to determine facts used to impose an upper term sentence by a preponderance of the evidence. (*Cunningham, supra*, 127 S.Ct. at p. 868.) That is precisely what happened here.

The People argue that no *Cunningham* error occurred because the court relied in part on factors related to defendant’s prior convictions, as to which he had no right to a jury trial under *Almendarez-Torres v. United States* (1998) 523 U.S. 224. Although three of the five factors considered by the court were within the *Almendarez-Torres* exception, we cannot conclude beyond a reasonable doubt that the court would have imposed the same sentence had it not considered factors required under *Cunningham* to be found by a jury; nor can we conclude that the jury would have found the charged non-recidivist

factors true beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18.) Because the court imposed the aggravated terms in part on the basis of such factors found true by the court upon a preponderance of the evidence, we vacate the sentence and remand to the trial court for resentencing.

Although defendant further contends he was wrongly denied a jury trial on factors used to impose consecutive terms, the California Supreme Court foreclosed such a claim in *People v. Black, supra*, 35 Cal.4th at page 1262: “[A] jury trial is not required on the aggravating factors that justify imposition of consecutive sentences.” That holding was not disturbed by *Cunningham*, which did not discuss the distinct issue of consecutive sentences imposed for separate crimes. *Black* is binding on this court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and dispositive of this aspect of defendant’s challenge to his sentence.

DISPOSITION

The sentence is vacated. In all other respects, the judgment is affirmed for the reasons stated in our prior opinion in this case. The matter is remanded to the trial court for resentencing. We express no opinion whether compliance with *Cunningham* will require a change in the actual sentence imposed in this case.

Siggins, J.

We concur:

Parrilli, Acting P.J.

Pollak, J.