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Opinion following rehearing

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. OTHA HUNTER, Defendant and Appellant.	D046853 (Super. Ct. No. SCD 183413)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed in part, reversed in part and remanded with instructions.

A jury convicted Otha Hunter of selling and furnishing a controlled substance (Health and Saf. Code, § 11352, subd. (a), count one); possession of cocaine base for sale (Health and Saf. Code, §§ 11351.5 and 11350, subd. (a), counts two and three); and unlawful possession of drug paraphernalia. (Health and Saf. Code, § 11364, count five.) As to count three, the jury found true the allegation that the offense was committed while

he was released from custody on bail. (Pen. Code[1], § 12022.1, subd. (b).) The jury acquitted him of a charge of unlawful failure to appear. (§ 1320.5; count four.)

The court sentenced Hunter to 6 years in prison as follows: the mid term of 4 years for count one; 4 years, stayed pursuant to section 654, for count two; the upper term of 3 years, to run concurrently with count 1, for count three; and 2 years consecutive for the allegation in count three. The court imposed a restitution fine of $1,200.00 under section 1202.4, and imposed but stayed a parole revocation fine of $2,000.00 under section 1202.45. The court ordered Hunter committed to the California Rehabilitation Center under Welfare and Institutions Code section 3051.

Hunter contends: (1) with respect to counts one and two, the court erred by admitting into evidence photocopies of the buy money that was not provided to the defense before trial; (2) with respect to count three, the criminalist's report was testimonial, and therefore its introduction into evidence violated his right to confrontation under the Sixth Amendment of the United States Constitution; (3) the trial court erred by instructing regarding flight in the language of CALJIC No. 2.52; (4) the trial court imposed a parole revocation fine in an unauthorized amount; and, (5) the upper term sentence on count three violated his constitutional rights to a jury trial and due process under the Sixth and Fourteenth Amendments of the federal Constitution. We affirm in part and reverse in part.

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1 All further statutory references are to the Penal Code unless otherwise stated.

FACTUAL AND PROCEDURAL SUMMARY

Counts One and Two

On June 9, 2004, San Diego Police Officer David Hall made copies of the five and ten dollar bills to be used in making a drug purchase as part of an undercover operation the police department was conducting in the 1300 block of Third Avenue in San Diego. Later, Hall, outfitted with a one-way radio transmitter, approached Hunter and asked for $20 worth of a controlled substance. Hunter told Hall to follow him; Hall observed that Hunter had a paper bindle in his hand. During the transaction, Hall saw that the bindle contained four off-white rocks that he believed was cocaine base. Hunter gave him one of the rocks in exchange for the bills that had been photocopied. Hall walked away and gave a pre-arranged signal for Hunter to be arrested.

Detective Vernon Peterson approached Hunter and saw him toss an object. Peterson arrested him and found on his person the bills that were previously photocopied. Police Officer David Lawlor found the tossed object — a small folded piece of brown paper that contained three off-white chunky objects he recognized as a usable quantity of rock cocaine — in the vicinity of Hunter. Detective Hall performed a presumptive test of the rocks, which tested positive for cocaine. Larry Dale, a criminalist, subsequently tested the rocks, and concluded they were cocaine base.

At trial, Hunter objected to the admission into evidence of photocopies of the bills. The trial court ruled the evidence was admissible and Hunter would suffer no undue prejudice because the police report handed over to Hunter in discovery referred to the serial numbers of the bills, which indicated they had been photocopied. The court also

ruled the defense could cross-examine the police officer on this matter to whatever degree necessary.

Counts Three, Four and Five

On August 13, 2004, at 9:00 a.m., Hunter failed to appear as ordered in San Diego Superior Court regarding his arrest on June 9, 2004. The court issued a bench warrant for his arrest. Detective Hall arrested Hunter at approximately 2:30 p.m. that day, and while handcuffing his hands behind his back, noticed, that he held a white napkin. Hall made Hunter sit on the curb while Hall waited for backup assistance, and observed Hunter throw the napkin behind him. Hall retrieved it and found small off-white rock substances inside. The rocks tested positive for cocaine base in a presumptive test Hall performed. Hall searched Hunter and recovered a glass pipe used to smoke cocaine base.

Dale testified he did not personally test the rocks seized on August 13, 2004; rather, they were tested by a coworker in his laboratory, who he had trained. Dale analyzed her laboratory report and concluded that the various tests she performed proved the rocks were .21 grams of cocaine base. Hunter objected to Dale's testimony based on the other criminalist's laboratory report, but the trial court overruled it. Separately, Hall visually inspected the rock during trial and opined it was cocaine base.

DISCUSSION

I.

We reject Hunter's contention that his convictions on counts one and two should be reversed because the trial court violated his due process and statutory rights in

admitting into evidence photocopies of the bills the police used to purchase the cocaine base.

Upon the defense's request, a prosecutor is required to disclose evidence material either to guilt or to punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87; § 1054.1) Here, the evidence was inculpatory, not exculpatory; therefore, the prosecution's failure to give the defense photocopies of the bills as opposed to their serial numbers did not violate *Brady's* holding. (*Gray v. Netherland* (1996) 518 U.S. 152, 168.) Moreover, to establish violations of both *Brady* and section 1054.1, the prosecution's failure to hand over the evidence must have prejudiced the defendant. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282; *People v. Jenkings* (2000) 22 Cal.4th 900, 950.) Here, the defense suffered no prejudice; the defense attorney conceded at trial, "I've always maintained that I've known that there was a statement which indicated that the officer had a *prerecorded* ten-dollar bill, as well as five dollar bills. The serial numbers were included." (Emphasis added.)

II.

Hunter contends his conviction on count three should be reversed because the trial court erred in admitting into evidence testimony from Dale, although he did not perform the laboratory tests on the rocks that were found on Hunter on August 13, 2004. Hunter claims Dale's testimony was hearsay, and he was denied his right under the Sixth Amendment of the United States Constitution to confront the criminalist who prepared the laboratory report that Dale relied on. (*Crawford v. Washington* (2004) 541 U.S. 36.)

The trial court based its decision on *People v. Johnson* (2004) 121 Cal.App.4th

1409, 1412, which applied the analysis in *Crawford* to the question of whether laboratory reports were testimonial, and concluded, "A laboratory report does not 'bear testimony' or function as the equivalent of in-court testimony. If the preparer had appeared to testify at [the hearing] he or she would merely have authenticated the document." (*Johnson,* at p. 1412.) We agree with this conclusion. Here, the laboratory report was not testimonial evidence; therefore, its admission into evidence did not violate the Sixth Amendment. Dale ascertained from the laboratory report both that the criminalist had performed the standard tests according to the protocol he had trained her to follow and her results were peer reviewed. Accordingly, the laboratory report had a high degree of reliability, and it was not reversible error for the trial court to permit testimony from a different criminalist than the one who actually performed the tests.

III.

We reject Hunter's claim the trial court erred by instructing regarding flight in the language of CALJIC No. 2.52 as follows: "The flight of a person after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

Hunter urges reversal of his convictions for sale of a controlled substance and possession of a controlled substance for sale because "Without the consciousness of guilt instruction, a reasonable jury could have reasonably concluded that the bindle was not what [he] threw. But the improper flight instruction permitted the jury to substitute a

non-evidentiary inference for evidence that proved guilt beyond a reasonable doubt." One who expects his guilt to be proved at trial probably has a motivation to absent himself from the hearing; therefore this instruction is appropriate in such circumstances. (*People v. Vargas* (1975) 53 Cal.App.3d 516, 529.) Here, the valid basis for the instruction was Hunter's failure to appear in court as ordered.

At any rate, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) It is not reasonably probable that the jury would have reached a different result without the instruction, because sufficient evidence established Hunter's guilt of both charges. Specifically, Hall positively identified Hunter, who had the buy money when he was apprehended, and evinced consciousness of guilt by throwing it away. Moreover, the laboratory tests proved Hunter had a usable quantity of cocaine base.

IV.

The People concede, and we agree, the trial court erred because it imposed a parole revocation fine for $2000.00, notwithstanding that the restitution fine it imposed was for only $1200.00.[2] Subdivision (b) of section 1202.4 states: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." Section 1202.45 states: "In every case where a person is

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2 The clerk's transcript states the parole revocation fine imposed was for $1,200.00; however, in the reporter's transcript the court stated that this fine was for $2000.00. Given this discrepancy, the court's oral pronouncement is controlling. (*People v. Price* (2004) 120 Cal.App.4th 224, 242.)

convicted of a crime and [the] sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine *in the same amount* as that imposed pursuant to subdivision (b) of Section 1202.4." (Emphasis added.) (*People v. Tillman* (2000) 22 Cal.4th 300, 301-302, fn. 1.) Accordingly, the trial court erred by imposing a parole revocation fine in an amount exceeding the restitution fine.

V.

Hunter claims the trial court erred in imposing the upper term on count 3. In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856], the United States Supreme Court held that California's determinate sentencing law (DSL), by placing sentence-elevating fact finding within the trial judge's province, violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham, supra*, 127 S.Ct. at p. 860.) *Cunningham* explained that because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the DSL violates the bright-line rule in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham, supra*, 127 S.Ct. at p. 868.) Quoting *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 (*Blakely*) for the proposition that " 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the

jury verdict or admitted by the defendant,' " the *Cunningham* court concluded that "[i]n accord with *Blakely*, therefore, the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum." (*Cunningham*, *supra*, 127 S.Ct. at p. 868.)

We first reject the People's claim Hunter waived any sentencing error by failing to object at the sentencing hearing. A defendant is not precluded from asserting on appeal that he was denied his constitutional right to a jury trial, despite a failure to raise the issue in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5; see also Cal. Const. art. I, § 16; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [waiver of the right to a jury trial must be expressed].)

Next, we conclude this case does not require reversal under *Cunningham* because the trial court relied on the jury's finding for its upper term sentence. With respect to count 3, the information charged Hunter with an enhancement under section 12022.1, to wit: Hunter was in possession of a controlled substance "while [he] was released from custody on bail, and on his own recognizance, pending final judgment on an earlier offense." The jury specifically found this enhancement true. At sentencing, the court stated the upper term was imposed on count 3 "because [Hunter] was charged with an offense at the time, had all the benefits that had gone through before." Although the court's words were not artful, in the context in which they were spoken the court could only be referring to the jury's finding that Hunter committed the felony "while [he] was released from custody on bail, and on his own recognizance, pending final judgment on an earlier offense." Therefore, there was no *Cunningham* error.

DISPOSITION

The judgment is affirmed in part and reversed in part. The matter is remanded and the trial court instructed to amend the abstract of judgment to reflect that the fine imposed under Penal Code section 1202.45 shall be for $1200.00, and forward the amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.