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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.

LEONARD C. JONES,

Defendant and Appellant.

A106916

(San Francisco County
Super. Ct. No. 180997)

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 August 29, 2006, 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. Jones* (Aug. 29, 2006, A106916 [nonpub. opn.]), which we incorporate here by reference. There, relying upon *People v. Black* (2005) 35 Cal.4th 1238, we 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 (*Blakely*). We now reexamine that determination in light of *Cunningham*.

The Trial Court's Sentencing Decision

The trial court sentenced defendant to a term of 40 years to life in prison for the murder and 13 years consecutive for assault, including firearm enhancements. The total sentence included a consecutive mid-term sentence of three years for assault with a deadly weapon and aggravated 10-year enhancement, for personal use of a firearm.

The trial court gave as reasons for the aggravated sentence that defendant “was convicted of other crimes for which consecutive sentences could have been imposed but for which this Court intends to sentence concurrently,” and his behavior in this case showed he “is a serious danger to society.” It ordered the terms to run consecutively based on its finding that the crimes and objectives were predominantly independent of one another.

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.)

The People argue that no *Cunningham* error occurred because the court relied in part on the fact that defendant was convicted of other crimes for which the court could have but did not impose consecutive sentences. But, on this record, we cannot conclude beyond a reasonable doubt that the court would have imposed the same sentence had it considered only the other convictions and not that defendant posed a serious risk to society. Nor can we say that were the question presented to it, the jury would have concluded defendant posed a serious risk to society 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 defendant's risk to society as determined by the court on a

preponderance of the evidence, we vacate the sentence and remand to the trial court for resentencing.

The People maintain defendant forfeited his *Blakely* claim by failing to raise it at his August 15, 2005, sentencing hearing. We disagree. In *Black*, our Supreme Court analyzed California's sentencing scheme in light of *Blakely* and held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*People v. Black, supra*, 35 Cal.4th at p. 1244.) In light of that holding, and before *Cunningham*, it would have been futile for defendant to raise a *Blakely* objection at sentencing. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.) We thus conclude defendant did not waive his claim of *Blakely* error by failing to object in the trial court.

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 judgment is vacated as to sentencing only. 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.