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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE LUIS LUNA,

Defendant and Appellant.

F050749

(Super. Ct. No. BF113927A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Jerold L. Turner, Judge.

Patricia A. Andreoni, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Wiseman, Acting P.J., Cornell, J. and Dawson, J.

### **PROCEDURAL HISTORY**

Appellant Jorge Luis Luna was convicted by jury trial of two counts of driving under the influence of alcohol (Veh. Code, § 23152, subds. (a) & (b) & § 23550), and driving with a suspended or revoked drivers' license (Veh. Code, § 14601.5, subd. (a)). In a bifurcated proceeding, the trial court found true allegations that the driving-under-the-influence offenses had occurred within 10 years of three or more separate violations of Vehicle Code sections 21352, 23153, or 23103 and that Luna had suffered two prior convictions within the meaning of Vehicle Code section 14601.5, subdivision (d)(2). The trial court also found that Luna had a prior strike conviction (Pen. Code,<sup>1</sup> § 288, subd (b)) within the meaning of section 667, subdivisions (c)-(j), and section 1170.12, subdivisions (a)-(e), and had served a prior prison term within the meaning of section 667.5, subd. (b)).

Luna was sentenced to the upper term of six years on count 1, plus an additional year for the prior-prison-term allegation, for a total term of seven years. On count 2, the trial court imposed and then stayed a six-year term and on count 3 imposed a concurrent 90-day jail sentence. In addition, the court ordered that Luna's driver's license be suspended for four years.

### **FACTUAL HISTORY**

The underlying facts are not relevant to the issue raised on appeal. In sum, on March 12, 2006, a Kern County deputy sheriff initiated a traffic stop on a white, older model work truck driving out of a motel parking lot. Luna was the driver. The deputy called for assistance from the California Highway Patrol. Both the deputy and the CHP officer believed, based on their observations of Luna, that Luna was under the influence of alcohol. Luna was arrested. After transporting Luna to jail, a breathalyzer test was

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<sup>1</sup>All further references are to the Penal Code unless otherwise noted.

administered and showed that Luna had a blood alcohol level of .15 percent, a level well over the legal driving limit of .08 percent. The criminologist testified that Luna's blood alcohol level would have been approximately .18 percent at the time of the traffic stop.

### **DISCUSSION**

On appeal, Luna contends that he was denied his constitutional right to trial by jury and due process of law because the court imposed the upper term on counts 1 and 2 based on aggravating factors that were not found by a jury beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); *Cunningham v. California* (2007) \_\_\_ U.S. \_\_\_ [127 S.Ct. 856] (*Cunningham*)). In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), a five-justice majority of the United States Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Id.* at p. 490.) *Blakely* held 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. [Citations.]” (*Blakely, supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California’s determinate sentencing scheme, the upper term can only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham, supra*, \_\_\_ U.S. \_\_\_ [127 S.Ct. 856].) The imposition of an upper term under California law is thus unconstitutional unless it is based on prior convictions, facts found by the jury, or facts admitted by the defendant. (*Blakely, supra*, 542 U.S. at pp. 301-303.)

Luna argues that many of the factors looked at by the trial court in imposing the upper term went beyond those allowed under *Blakely*. We need not decide whether the imposition of the upper term ran afoul of the Supreme Court’s precedents in this case because any error in considering factors other than those allowed under *Blakely* was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

The court, in choosing the upper term, gave the following reasons: (1) Luna's prior offenses as an adult are numerous; (2) his prior performance on probation and parole has been unsatisfactory; (3) he has continued to reoffend and fail to abide by the conditions and terms of his probation and parole; (4) he has served a prior prison term; (5) he was on parole when the current crime was committed; and (6) he was statutorily ineligible for probation pursuant to section 667, subdivision (c)(2). The court found no mitigating factors. It also commented that Luna's numerous convictions for drunk driving suggested that this was a reoccurring pattern in Luna's life that made him a danger to the public.

We agree that the prior section 288 conviction could not be used to aggravate the sentence; it was already being used as an enhancement. (See Cal. Rules of Court, rule 4.420 (c).) However, even without the section 288 conviction, the number of Luna's prior convictions is daunting. He has two petty theft convictions; 11 driving-under-the-influence convictions, including one causing bodily injury; a Texas drug offense; five convictions for driving without a license or with a suspended license; a conviction for failure to provide proof of insurance; a conviction for falsely identifying himself to a peace officer; a conviction for an escape from custody; and a domestic-violence conviction. While many of these offenses may be considered relatively minor in the overall scheme of criminal behavior, their number and nature establish a serious history of recidivist behavior. The court's comments at sentencing make it certain that if we were to remand and instruct the court to consider only those factors permitted by *Blakely*, it would again impose the upper term. Reliance on an extensive criminal record cannot be meaningfully distinguished from *Blakely*'s approval of using "the fact" of a single prior conviction as justification for imposing the upper term. If the trial court can constitutionally rely on one prior conviction, it can certainly rely on several. Luna's criminal recidivism was the dominant factor in the court's reasoning when selecting the

upper term. There is no likelihood that the court would have imposed a different sentence on remand.

**DISPOSITION**

The judgment is affirmed.