Filed 3/27/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RAIF LEE MATYE,

Defendant and Appellant.

C050332

(Super. Ct. No. 05F00241)

ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed in this case on March 7, 2007, be modified to add part V to the unpublished parts of the opinion as follows:

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II, III, IV and V.

V*

In his petition for rehearing, defendant claims we have decided the issue raised in part III, *ante*, based on a point that was not briefed by the parties. (See Gov. Code, § 68081.) In his view, our remedy of remanding the matter to the trial court to decide whether to impose the upper term on count one based solely on the aggravating factor of his prior convictions was unforeseen by him in that it was not relied upon by the prosecution or by the trial court; thus, he did not have the opportunity to brief three issues pertaining to that aggravating factor.

First, he argues that the trial court cannot use this factor to impose the upper term on remand because the prosecutor did not charge the prior convictions in the information or refer to them in the People's statement in aggravation. In his view, this deprived him of his constitutional due process right to notice. However, only facts *other than a prior conviction* that increase the maximum penalty for a crime must be charged in the accusatory pleading, submitted to a jury, and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at pp. 476, 494, fn. 19 [147 L.Ed.2d at pp. 446, 457, fn. 19; *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6 [143 L.Ed.2d 311, 326, fn. 6].) Defendant received all the notice required when the probation officer listed the fact of defendant's prior convictions as an aggravating factor in the probation report.

Defendant also contends this factor may not be used because it was considered but discounted by the trial court. He relies on the proposition that where the court has stated it read and considered a probation report that enumerates *mitigating factors*, they are presumed to be rejected if the court imposes the upper term. (*People v. Reyes* (1987) 195 Cal.App.3d 957, 961.) But his claim of presumed rejection of an *aggravating factor* fails because it would logically apply only if the court imposed the lower term.

We also reject defendant's argument that the exception to the jury trial requirement noted in *Apprendi* is limited to the "fact" of a prior conviction, while under California Rules of Court, rule 4.421(b)(2), a sentence may be aggravated only when the defendant's prior convictions are numerous or of increasing seriousness, a determination that involves additional factual assessments. However, the prior conviction exception applies not only to the fact of a prior conviction, but also to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) Here, the probation report discloses defendant has one prior felony conviction and four prior misdemeanor convictions. Five prior convictions are numerous as a matter of law. This factor supports imposition of the upper term because it involves an objective fact provable from court records, whose ascertainment is traditionally performed by judges as part of the sentencing function. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244 [140 L.Ed.2d 350, 367-369]; *People v. McGee* (2006) 38 Cal.4th 682, 709.)

According to defendant, if the trial court does not find that the fact of his prior convictions is sufficient to impose the upper term, then the People may not seek a jury trial on the other sentencing factors because (1) this would impermissibly expand the prosecution's limited right to appeal; (2) the prosecution waived the right to a trial of the aggravating factors; and (3) double jeopardy precludes a trial on the sentencing factors following conviction. The first contention fails because it was raised for the first time in the petition for rehearing. (*People v. Whitson* (1998) 17 Cal.4th 229, 244, fn. 4; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1013.) The second contention is premised upon the fact the prosecutor filed notice that the People would try the aggravating factors to the jury but then failed to do so. Defendant glosses over the fact that *People v. Black, supra*, 35 Cal.4th 1238, which was decided 12 days after the prosecutor filed the aforementioned notice, held a jury trial of aggravating factors was not required. Under the circumstances, the prosecutor's decision to forgo a jury trial of aggravating factors cannot be construed as a waiver of the right to do so if *People v. Black,* vacated in *Black v. California* (Feb. 20. 2007) __ U.S. __ [2007 WL 505809], ultimately was reversed. Also without merit is defendant's claim that a trial of aggravating factors would violate the double jeopardy clause of the United States Constitution, which protects against further prosecution for the same offense after acquittal or conviction, and further prosecution for a greater offense after conviction on a lesser offense. (*Brown v. Ohio* (1977) 432 U.S. 161, 165-166 [53 L.Ed.2d 187, 193-194].) Where, as here, governing

California Supreme Court precedent has been overruled following trial, remand for trial of aggravating factors is not a prosecution of the same offense or a greater offense following conviction. Indeed, jeopardy from the first prosecution has not yet terminated since defendant has kept the matter “alive” by pursuing an appeal. The jury did not acquit him of an offense, there was no finding that the aggravating factors are not supported by the evidence, and there is sufficient evidence to support the aggravating factors. Thus, defendant has not demonstrated a violation of the double jeopardy clause. (See *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108-109, 113 [154 L.Ed.2d 588, 597, 600]; *Burks v. United States* (1978) 437 U.S. 1, 14-17 [57 L.Ed.2d 1, 11-13].)

This modification does not change the judgment.

The petition for rehearing is denied.

FOR THE COURT:

SCOTLAND, P.J.

SIMS, J.

NICHOLSON, J.