

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CALVIN LOVELLE MOORE,

Defendant and Appellant.

H029699

(Santa Clara County

Super. Ct. Nos. CC459684; CC586869)

In case number CC459684, defendant Calvin Lovelle Moore pleaded guilty to possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), being under the influence of cocaine (Health & Saf. Code, § 11550, subd (a)), possession of drug paraphernalia (Health & Saf. Code, § 11364) and resisting a peace officer (Pen. Code, § 148, subd. (a)(1)). Defendant also admitted one prior “strike” conviction (Pen. Code, §§ 667, subds. (b)-(i) & 1170.12) and one prior prison term (Pen. Code § 667.5, subd. (b)). In case number CC586869, based on a separate incident, defendant pleaded no contest to petty theft with a prior (Pen. Code, § 666) and second degree burglary (Pen. Code, §§ 459-460, subd. (b)). Defendant again admitted to a prior “strike” conviction and prior prison term, and further admitted the allegation that he was out of custody on bail at the time he committed the burglary (Pen. Code, § 12022.1).

On November 15, 2005, the trial court granted defendant’s motion to strike the strike allegations in both cases and sentenced defendant to four years in prison in the first

case and to an additional two-year and eight-month term for the second case. Defendant contends that the trial court relied on improper aggravating factors in selecting the upper term and that imposition of the upper term sentence violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and defendant's constitutional rights. In our original opinion, we held that the trial court did not commit *Blakely* error. (*People v. Moore* (Nov. 3, 2006, No. H029699) [nonpub. opn.].) The United States Supreme Court remanded to this court for further consideration in light of *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856] (*Cunningham*). After receiving supplemental briefing from the parties regarding the impact of the California Supreme Court's decision in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), we again affirm.

I. Factual Background

A. Drug Case: Case Number CC459684

On July 13, 2004, police officers stopped defendant for a traffic violation. The officers asked defendant to exit the car. As defendant exited the car, he appeared to put a "green leafy substance" in his mouth. Defendant refused the officers' commands to remove the substance and also refused to take his left hand out of his jacket pocket. The officers forcibly removed defendant's hand from his pocket and he dropped to the ground, feigning illness. He then jumped up, throwing his hands in the air, and the officers saw two small plastic bags leave his left hand. The bags contained 7.6 grams of cocaine. After an exchange of words, defendant was detained. A subsequent search of defendant revealed a glass smoking pipe. Defendant admitted possession and use of cocaine to the police and to the probation officer. A blood sample confirmed the presence of cocaine.

B. Theft Case: Case Number CC586869

On March 26, 2005, defendant entered Kohl's Department Store and concealed several items on his person, including jewelry, clothing and perfume (valued at \$166.50). He left the store without paying for the items and was stopped by a loss prevention officer. Defendant admitted to police he entered the store with the intent to steal the items.

II. Discussion

Defendant contends that the trial court committed sentencing error by relying on the fact of a prior conviction both to impose an upper term and as the basis for an enhancement in regard to the drug case, which the court chose as the principal case during sentencing. The People argue that defendant forfeited this claim by failing to object below.

In *People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*), the California Supreme Court considered whether “complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons can[] be raised for the first time on appeal.” Reasoning that “[r]outine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention[,]” the court found that “the waiver doctrine should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices.” (*Id.* at p. 353.) This rule applies to claims regarding the trial court’s dual use of a fact in sentencing. (See *ibid.*; see also *People v. de Soto* (1997) 54 Cal.App.4th 1, 7-8 [applying *Scott* forfeiture rule to claim of improper dual use of facts to impose an upper term sentence].)

The *Scott* court further noted, however, that the forfeiture rule applies only if there was a “meaningful opportunity to object” to the trial court’s statements. (*Scott, supra*, 9 Cal.4th at p. 356.) “This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised

of the sentence the court intends to impose and the reasons that support any discretionary choices.” (*Ibid.*)

Defendant contends that he did not have a meaningful opportunity to object because he did not know of the court’s ruling prior to the pronouncement of sentence. Although the probation report includes the prior prison term as a potential aggravating factor, the probation department did not recommend the aggravated term. The trial court did not issue a preliminary or tentative ruling prior to pronouncing the sentence and did not seek or entertain objection from counsel after stating the sentence and its reasons for imposing the upper term.

The Supreme Court elaborated on the requirement that the defendant have a “meaningful opportunity to object” in *People v. Gonzalez* (2003) 31 Cal.4th 745 (*Gonzalez*). As here, the defendants in *Gonzalez* argued that the court impermissibly relied on a single fact to impose the upper term and an enhancement. (See *id.* at p. 750.) Also as here, the probation report recommendation in *Gonzalez* did not align with the trial court’s actual sentence and the trial court imposed sentence at the same time it first apprised the parties of the sentence and statement of reasons. (See *id.* at pp. 750, 754.) The *Gonzalez* court stated: “Because the court had not previously notified the parties that it intended to rely on defendants’ firearm use as a reason for its sentence, it should have more clearly given the parties a meaningful opportunity to object by saying it was announcing proposed sentences for each defendant and its reasons for the sentences, that the prosecutor and defendants were entitled to object, and that if the objections were meritorious it would alter the sentences appropriately.” (*Id.* at p. 755.) The court nevertheless concluded that on the specific facts before it the defendants had been given a “meaningful opportunity to object” because defense counsel actually objected to the sentence on other grounds and the court considered the objection on the merits. (*Ibid.*)

The approach outlined in *Gonzalez* was not taken in this case and the record lacks similar facts showing that defendant had an opportunity to object or actually objected.

After pronouncing the sentence, the trial court advised defendant of his appellate rights, thanked him and wished him luck. Defense counsel's only comment after being apprised of the sentence was to note the applicability of Penal Code section 654 to count 2 in the theft case. The proceedings were effectively closed at the time this comment was made, the court did not acknowledge counsel's statement, and there is no indication that an objection would have been heard or considered. We find defendant had no "meaningful opportunity to object" and that the *Scott* forfeiture rule does not apply in this case. We therefore proceed to the merits of defendant's claim.¹

At the time of sentencing, Penal Code section 1170 directed that "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Former Pen. Code, § 1170, subd. (b); see also Cal. Rules of Court, rule 4.420, subds. (a)-(b).)² Rules 4.421 and 4.423 list the possible circumstances in aggravation and mitigation. Any fact that is an element of the crime or the basis for a sentence enhancement cannot be used to justify imposition of the upper term. (Pen. Code, § 1170, subd. (b); rule 4.420, subds. (c) & (d).)

The court must state its reasons for imposing the upper term (rule 4.420(e)), and those reasons must be supported by substantial evidence on appeal (*People v. Searle* (1989) 213 Cal.App.3d 1091, 1096). "Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if it is not reasonably probable that a more favorable sentence would have

¹ Because we conclude that defendant has not forfeited his claim, we need not address defendant's alternative argument that defense counsel provided ineffective assistance by failing to object below.

² All further rule references are to the California Rules of Court.

been imposed in the absence of the error.” (*People v. Osband* (1996) 13 Cal.4th 622, 728 (*Osband*), internal quotation marks omitted.)

The court imposed the upper term for the principal offense in the drug case (count 1—possession of a controlled substance) and imposed a one-year consecutive term for defendant’s prior conviction pursuant to Penal Code section 667.5, subdivision (b). In imposing the upper term, the trial court stated: “And I’ve selected the aggravated terms [*sic*] because the defendant has a number of circumstances in aggravation. And he’s served a prior prison term, and, let’s see, he was on probation or parole when the crime was committed and his prior performance on probation or parole was unsatisfactory. And these outweigh any factors in mitigation.” The court thus improperly relied on defendant’s prior prison term as the basis for a sentencing enhancement and as a factor in aggravation. However, because “the finding of even one factor in aggravation is sufficient to justify the upper term” (*People v. Steele* (2000) 83 Cal.App.4th 212, 226; see also *Osband, supra*, 13 Cal.4th at pp. 728-729), we must consider the other factors cited by the trial court to determine whether the court’s error was harmless.

In addition to the prior prison term, the trial court cited defendant’s probationary or parolee status at the time the crimes were committed (rule 4.421(b)(4)) and prior unsatisfactory performance on probation and/or parole (rule 4.421(b)(5)) as factors supporting the upper term. Relying on *Blakely, supra*, 542 U.S. 296, defendant argues that the trial court’s imposition of the aggravated term based on these factors violated his right to a jury trial.³

³ Defendant also contends that the court relied improperly on hearsay evidence to determine the “character” of his prior convictions (i.e., whether the prior convictions were numerous or of increasing seriousness), and in finding that his prior performance on probation was unsatisfactory. We note, however, that in imposing the upper term the trial court did not cite a finding that defendant’s prior convictions were numerous and/or of increasing seriousness.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), 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.” (Italics added.) The *Blakely* court considered the issue further, and determined 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.” (*Blakely, supra*, 542 U.S. at p. 303, italics omitted.) Recently, the United States Supreme Court concluded that under California’s determinate sentencing law, the middle term is the relevant “statutory maximum.” (*Cunningham, supra*, ___ U.S. at p. ___ [127 S.Ct. at p. 868].) By allowing imposition of an upper term sentence based on aggravating circumstances found solely by the judge, California’s law “violates *Apprendi*’s bright-line rule[.]” (*Ibid.*) Pursuant to *Cunningham*, the upper term may be imposed only if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (See *id.* at p. ___ [127 S.Ct. at p. 871].)

Defendant argues that even though the two remaining factors cited by the trial court in this case arguably are related to “recidivism,” they do not fall within the “prior conviction” exception to *Apprendi*’s bright-line rule. In *Apprendi*, the United States Supreme Court described the “prior conviction” exception, which originated with the court’s decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*), as “a narrow exception to the general rule.” (*Apprendi, supra*, 530 U.S. at p. 490.) Although the United States Supreme Court has not yet delineated the precise contours of this “narrow exception,” the court affirmed in *Cunningham* that *Apprendi* encompasses any “facts concerning the offender,” other than the fact of a prior conviction. (See *Cunningham, supra*, ___ at p. ___ & fn. 14 [127 S.Ct. at pp. 868-869 & fn. 14].)

The California Supreme Court’s post-*Cunningham* decision, *Black II, supra*, 41 Cal.4th 799, provides additional guidance regarding the breadth of the *Almendarez-Torres* exception. In *Black II*, the court addressed the applicability of the exception to another of the recidivism-related aggravating factors—“defendant’s prior convictions . . . are numerous or of increasing seriousness.” (*Black II*, at p. 818.) Our high court determined that this factor falls within the “prior conviction” exception: “As we recognized in [*People v. McGee* (2006) 38 Cal.4th 682], numerous decisions from other jurisdictions have interpreted the *Almendarez-Torres* exception to include not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions. [Citations.] [¶] The determinations whether a defendant has suffered prior convictions, and whether those convictions are ‘numerous or of increasing seriousness’ [citation] require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense.” (*Black II*, at pp. 819-820, footnote omitted.)⁴

In this case, the trial court imposed the upper term based, in part, on the finding that defendant was on probation or parole at the time the instant offenses were committed (rule 4.421(b)(4)). If, as here, the defendant has admitted the date of the current offense,⁵ the only additional facts required to support this aggravating factor are the effective date of the defendant’s probation or parole and the length of the term imposed. These bare

⁴ California cases involving other recidivism-related factors, including those at issue in this case, are still pending before the California Supreme Court. (See *People v. Hernandez*, review granted Feb. 7, 2007, S148974; *People v. Pardo*, review granted Feb. 7, 2007, S148914; *People v. Towne*, review granted July 14, 2004 & supp. briefing ordered Feb. 7, 2007, S125677.)

⁵ Defendant admitted the approximate date of the current offenses—“on July 13th, [20]04” for the drug incident and “on or about March 26, 2005” for the petty theft—in pleading guilty and no contest, respectively, to the charged crimes.

facts are akin to the date of the prior conviction and the offense committed, and may be resolved by reference to the records of conviction.⁶ The factual determination that the defendant was on probation or parole at the time of the new offense is, in other words, a determination “related” to the fact of the defendant’s prior convictions. It also is the type of determination “more typically and appropriately undertaken by a court[,]” than by a jury. (See *Black II, supra*, 41 Cal.4th at p. 820.) We therefore conclude that the “on probation or parole” factor falls within the California Supreme Court’s construction of the *Almendarez-Torres* exception.

As stated in *Black II*, “the presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence[,]” and any “judicial fact finding on [] additional aggravating circumstances is not unconstitutional.”⁷ (*Black II, supra*, 41 Cal.4th at p. 815.) Accordingly, based on the presence of this single valid aggravating factor, we are compelled to affirm the judgment.

⁶ The record in this case supports the court’s finding that defendant was on probation at the time of the current offenses. On December 26, 2002, he was placed on three years of formal probation for misdemeanor violations. Defendant remained on probation after modification on February 7, 2005.

⁷ We therefore do not reach defendant’s additional argument that the trial court’s finding regarding defendant’s “prior performance on probation or parole” does not fall within the *Almendarez-Torres* exception. Nor do we consider the assertion that the trial court relied improperly on hearsay evidence in determining that defendant’s prior performance on probation was unsatisfactory.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.