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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAAC LOU RAMIREZ,

Defendant and Appellant.

2d Crim. No. B188379
(Super. Ct. No. 1191457)
(Santa Barbara County)

Isaac Lou Ramirez appeals from his conviction after jury trial of petty theft with a prior (count 1) (Pen. Code, §§ 484, subd. (a), 666)¹ and misdemeanor vandalism (count 2) (§ 594, subd. (b)(2)(A)). The court found that appellant had served two prior prison terms. (§ 667.5, subd. (b).) The court sentenced appellant to serve a total of five years in state prison: a three-year upper term for petty theft with a prior, one year for each of the two prior prison terms, to be served consecutively, and a six-month concurrent sentence for the vandalism offense. Appellant argues that his sentence should be set aside because (1) *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) invalidates the trial court's imposition of an upper term based on facts concerning the current offense that were not determined to be true by a jury; and (2) he had a constitutional right to have a jury examine the record of his prior conviction. We reject both arguments and affirm.

¹ All statutory references are to this code unless otherwise stated.

As appellant acknowledges, our state Supreme Court has rejected the arguments he now raises. In *People v. Black* (2005) 35 Cal.4th 1238, 1246, 1257-1261, the court held that *Blakely* does not invalidate California's upper term sentencing procedure. The constitutionality of California's sentencing scheme is before the United States Supreme Court in *Cunningham v. California* (cert. granted Feb. 21, 2006, No. 05-6551) __ U.S. __ [126 S.Ct. 1329], and a certiorari petition is pending in *Black*. We remain bound by the holding in *Black* unless and until the United States Supreme Court declares it to be an incorrect statement of federal law. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We find no error in the imposition of the upper term. (*Black*, at pp. 1246, 1257-1261.)

Appellant also argues that he had a constitutional right to have a jury rather than the judge examine the record of his prior convictions. We disagree. In *People v. McGee* (2006) 38 Cal.4th 682, 709, our state Supreme Court held that a defendant does not have a federal constitutional right to have a jury, rather than the sentencing judge, examine the record of conviction to determine the nature of, and not just the fact of, prior out-of-state convictions. Although each of appellant's convictions involve California cases, it would be unreasonable to conclude that the analysis in *McGee* applies only to out-of-state prior convictions. (See *ibid.*)

The judgment is affirmed.

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COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

James F. Rigali, Judge
Superior Court County of Santa Barbara

Dushkes Law Corporation, Larry S. Dushkes for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.