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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT EUGENE ROBINSON,

Defendant and Appellant.

F049300

(Super. Ct. No. BF108170A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Rita Barker, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Sarah J. Farhat, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Gomes, Acting P.J., Dawson, J., and Kane, J.

A jury convicted appellant, Robert Eugene Robinson, on two counts each of attempted voluntary manslaughter (counts 1 & 3/Pen. Code §§ 664/192, subd. (a))<sup>1</sup> and assault with a deadly weapon (counts 2 & 4/§ 245, subd. (a)(1)). The jury also found true allegations in counts 1 and 3 that Robinson personally used a deadly weapon (§ 12022, subd. (b)(1)) and allegations in counts 1 through 4 that he inflicted great bodily injury (§ 12022.7). In a separate proceeding, Robinson admitted a prior prison term enhancement in counts 1 through 4.

On November 29, 2005, the court sentenced Robinson to an aggregate, unstayed term of 12 years 10 months as follows: the upper term of five years six months on count 1, a one-year weapon enhancement in that count, a three-year great bodily injury enhancement in that count, and a one-year prior prison term enhancement, a one-year term on count 3 (one-third the middle term of three years), a four-month weapon enhancement in that count (one-third the enhancement term of one year), and a one-year term on the great bodily injury enhancement in that count (one-third the enhancement term of three years). The court also imposed stayed aggregate terms of eight years each on counts 2 and 4 consisting of the aggravated term of four years on the substantive offense in each count, a three-year term for the great bodily injury enhancement in each count and a one-year prior prison term enhancement in each count. On appeal, Robinson contends: (1) the court committed *Blakely*<sup>2</sup> error; and (2) the court erred in imposing more than one prior prison term enhancement. We will find merit to Robinson's second contention and modify the judgment accordingly. In all other respects, we will affirm.

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 253].

## **FACTS**

On October 30, 2004, Robinson was playing darts in a garage at a party in Kern County when he parked his truck in the driveway and began playing music from the truck loudly. This precipitated a fight between Robinson and another man which was joined in by several partygoers. During the fight, Robinson pulled out a knife and stabbed several people.

## **DISCUSSION**

### ***The Blakely Issue***

Robinson's probation report indicates that as a juvenile, Robinson had two misdemeanor adjudications. As an adult, from 1995 through 2004, Robinson suffered a felony conviction for driving under the influence with priors and 10 misdemeanor convictions, including two convictions for inflicting corporal injury on a spouse and one conviction each for unlawful possession of a firearm, making criminal threats, and false imprisonment. He also served one prior prison term and he violated his probation on at least four occasions and his parole once. Additionally, Robinson was on parole and a grant of misdemeanor probation when he committed the underlying offenses.

In sentencing Robinson, the trial court found as aggravating circumstances that Robinson's prior convictions were numerous and significant because they involved assaultive conduct, alcohol and the use of a weapon, Robinson was on misdemeanor probation and parole when he committed the underlying offenses, his prior performance of probation and parole had been unsatisfactory, and he had engaged in violent conduct which indicated that he was a danger to society. The court also found that there were no mitigating circumstances.

Relying on *United States v. Booker* (2005) 543 U.S. 220, *Blakely v. Washington*, *supra*, 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), Robinson contends the trial court violated his Sixth Amendment right to trial

by jury by imposing the upper term on counts 1, 2 and 4 based on factors not admitted by Robinson or found to be true by the jury beyond a reasonable doubt.

Prior to Robinson's sentencing, the California Supreme Court undertook an extensive analysis of these cases and concluded that the imposition of an upper term sentence, as provided under California law, was constitutional. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261 (*Black*)). Recently, however, the United States Supreme Court overruled *Black* in part and held that California's determinate sentencing law "violates *Apprendi*'s bright line rule: Except for 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.'" (*Cunningham v. California* 549 U.S. \_\_ [127 S.Ct. 856, 868] (*Cunningham*)). The middle term prescribed under California law, not the upper term, is the relevant statutory maximum. (*Ibid.*)

In the present case, however, the probation report revealed that Robinson had suffered numerous prior convictions and he did not challenge the accuracy of this account. Multiplicity of prior convictions comes within the exception contained within *Blakely* and *Apprendi*. This means the upper term was supported by at least one factor that, under those cases, need not be found by a jury beyond a reasonable doubt. (See *Blakely, supra*, 542 U.S. at p. 301; *Apprendi, supra*, 530 U.S. at p. 490.) It follows that reliance on this factor was not error under *Cunningham* (see *Cunningham, supra*, 549 U.S. \_\_ [127 S.Ct. at p. 860]) and hence that imposition of the upper term was constitutionally permissible.

Even assuming consideration of non-prior-conviction-related factors was error, it was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24; furthermore, there was no abuse of discretion under *People v. Watson* (1956) 46 Cal.2d 818, 836. A single factor in aggravation suffices to support imposition of the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 730); in light of the presence of one valid factor in aggravation, and the absence of any mitigation, the record amply

establishes that the trial court would have imposed the upper term even if the factors not related to appellant's prior convictions had been excluded from consideration.

### ***The Prior Prison Term Enhancements***

The amended information charged Robinson with a prior prison term enhancement in each count. Each prior prison term enhancement was based on Robinson's 2001 conviction for driving under the influence with three prior convictions. Although Robinson admitted a prior prison term enhancement in each count, Robinson's abstract of judgment shows that the court imposed one such enhancement and stayed another. Robinson contends that his abstract of judgment should be amended to reflect only one prior prison term enhancement. Respondent concedes and we agree.

Preliminarily, we note that the court does not have the authority to stay prior prison term enhancements and must either impose or strike them. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711.)

Moreover, section 1170.1, subdivision (a) provides:

“Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.”

In *People v. Tassell* (1984) 36 Cal.3d 77, the Supreme Court stated:

“Section 1170.1 refers to two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions - authorized by sections 667.5, 667.6 and 12022.1 - are of the first sort. The second kind of enhancements - those which arise from the circumstances of the crime - are typified by sections 12022.5 and 12022.7: was a firearm used or was great bodily injury inflicted? Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence.

“Section 1170.1, subdivision (a) starts out by stating the basic rule that when a person is convicted of two or more felonies, the total sentence consists of (1) the principal term, (2) the subordinate term, and (3) any enhancements for prior convictions. In so doing, it makes it very clear that enhancements for prior convictions do not attach to particular counts but instead are added just once as the final step in computing the total sentence.” (*People v. Tassell, supra*, 36 Cal.3d at p. 90, fn. omitted.)

Here, Robinson should have admitted only one prior prison term enhancement because all the enhancements alleged in the amended information were based on the same prior conviction. Further, in accord with the above authorities, the court should have added the prior prison term enhancement only once as the final step in calculating the principal term. In view of this, we conclude that the court erred by including a stayed prior prison term enhancement in Robinson’s abstract of judgment.

### **DISPOSITION**

The judgment is modified to strike the stayed prior prison term listed in Robinson’s abstract of judgment. The trial court is directed to prepare an amended abstract of judgment that reflects the imposition of only one prior prison term enhancement and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.