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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD DOMINIC ZUNIGA,

Defendant and Appellant.

C053605

(Super. Ct. No.
CM021865)

The trial court terminated probation and sentenced defendant Edward Dominic Zuniga to state prison for the upper term of three years after he admitted his second violation on his 2005 grant of probation for possession of a short-barreled shotgun.

On appeal, defendant contends (1) the court's imposition of the upper term without a jury finding of aggravating factors beyond a reasonable doubt violated his Sixth and Fourteenth Amendment rights under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *Cunningham v.*

California (2007) 549 U.S. ____ [127 S.Ct. 856; 166 L.Ed.2d 856] (*Cunningham*), (2) the court erred in failing to state the reasons for imposing the upper term, (3) any failure to object at sentencing to the court's failure to state such reasons was the result of ineffective assistance of counsel, and (4) trial counsel's failure to argue for the low or middle term constituted ineffective assistance of counsel. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

A. *The Short-Barreled Shotgun Offense*

On October 6, 2004, police responded to a report of a struggle between defendant and his girlfriend over a gun that resulted in an accidental shooting injury. Several guns, including a short-barreled shotgun were discovered; defendant admitted the items found were his.

Defendant was charged with possession of a short-barreled shotgun, a felony, in violation of Penal Code section 12020, subdivision (a)(1)² (count 1) and possession of property with the serial number removed, a misdemeanor, in violation of section 537e, subdivision (a)(1) (count 2).

¹ Given defendant's plea and stipulation to a factual basis, the facts are briefly summarized from the probation report.

² Hereafter, undesignated statutory references are to the Penal Code.

On January 18, 2005, defendant entered a negotiated plea of no contest to count 1 in exchange for dismissal of count 2 with a *Harvey*³ waiver and no immediate state prison.

On March 28, 2005, noting defendant's suitability for probation was "marginal," the court suspended imposition of sentence, placed defendant on three years formal probation with specified terms and conditions, ordered that he serve 120 days in jail (minus custody credits) and assessed various fees and fines.

B. *The Probation Violations*

On August 25, 2005, the probation department filed a petition alleging defendant violated the terms and conditions of his probation by failing to report as required.

On December 7, 2005, the probation department filed a first amended petition adding an allegation that defendant was found to be under the influence of alcohol in violation of probation.

On December 19, 2005, defendant admitted he violated probation as alleged. Pursuant to the court's order, sentencing was suspended and defendant was temporarily placed in a diagnostic facility for a substance abuse and psychological evaluation.

On May 4, 2006, the court reinstated probation and ordered defendant to immediately contact Alcohol and Drug Services (ADS).

³ *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

On June 2, 2006, the probation department filed a second petition alleging defendant again violated probation by failing to report as required.⁴

On July 27, 2006, defendant admitted the alleged probation violation.

On August 24, 2006, after reading and considering "the probation report in this case . . . and the supplemental report after the violation of probation," and entertaining argument from counsel, the court ruled as follows: "[A]s to Count [1], probation is terminated unsuccessfully. [¶] [Defendant] is sentenced to the three-year upper term. Circumstances in aggravation outweigh those in mitigation." The court imposed a concurrent sentence of six months in jail as to count 2.

Defendant filed a timely notice of appeal.

DISCUSSION

Relying on *Blakely* and *Cunningham*, defendant contends the court's imposition of the upper term violated his constitutional right to a jury trial because the court "did not identify the aggravating factors on which it relied" and, even if it had, no aggravating factor was tried by a jury and proven beyond a reasonable doubt. We disagree.

The United States Supreme Court held in *Cunningham* that, under California's Determinate Sentencing Law, the middle term

⁴ As a result of defendant's failure to appear at the June 15, 2006 hearing on the petition, the court revoked probation and issued a bench warrant for his arrest.

is the statutory maximum which a judge may impose solely based on the facts reflected in the jury verdict or admitted by the defendant. Thus, except for a prior conviction, any fact that increases the penalty for a crime beyond the middle term must be tried to the jury and proved beyond a reasonable doubt.

(*Cunningham, supra*, 549 U.S. ___, at p. ___ [127 S.Ct. 856, 862; 166 L.Ed.2d 856, 862].)

Applying *Cunningham*, in *People v. Black* (July 19, 2007, S126182) ___ Cal.4th ___, ___ [2007 Cal. Lexis 7604, *29] (*Black II*), our Supreme Court recently held that "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions."

The People first assert that defendant forfeited the issue because he failed to raise it in the trial court. The People are wrong. Defendant was sentenced on August 24, 2006, well after our Supreme Court had already decided *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), which held that a defendant does not have a right to have a jury determine aggravating factors used to impose the upper term. (*Id.* at p. 1244.) *Black* was controlling law at the time of defendant's sentencing. Defendant was not required to make a futile objection. It is pointless to require a defendant to ask a trial court to overrule a decision of the California Supreme Court. (*Moradi-*

Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287, 292, fn. 1.)

We turn next to the merits of defendant's claim. The People argue the trial court found defendant's prior unsatisfactory performance on probation to be an aggravating factor, and defendant's admission of the alleged probation violation established that fact, thus alleviating the need for a jury trial as to that factor. Because the record enables us to draw the inference that the court relied on defendant's prior unsatisfactory performance on probation as the overriding aggravating factor in imposing the upper term, we agree there was no error.

Where there has been no reliance by the sentencing court on a fact not found by a jury or admitted by the defendant, there is no *Blakely* error. (*Blakely, supra*, 542 U.S. at p. 303 [159 L.Ed.2d at p. 413].)

Here, in sentencing defendant to the upper term, the trial court relied on both the original probation report and the most recent supplemental probation report dated August 24, 2006. The original report speaks generally about aggravating and mitigating factors as follows: "The seriousness of the instant offense cannot be ignored. Despite his young age and lack of criminal history, [defendant] engaged in violent conduct by combining the illegal firearms with his drug use, thereby presenting himself as a danger to society when he is ingesting controlled substances. Additionally, [defendant's] prior

performance on probation was unsatisfactory. In light of the foregoing, it appears circumstances in aggravation outweigh those in mitigation." The original probation report also reflects defendant's juvenile criminal record, including two violations of probation, the second of which was "terminated as unsuccessful."

The August 24, 2006 supplemental report focuses entirely on the fact that defendant "has been tried and failed on probation," including the fact that defendant's "previous grant of juvenile probation resulted in an unsuccessful termination."⁵

Defendant's two separate admissions on December 19, 2005 and July 27, 2006, that he violated probation established the fact of his prior unsatisfactory performance on probation as an aggravating factor. We infer, from the supplemental report's discussion of defendant's prior unsatisfactory performance on probation that the court relied on that factor in imposing the upper term.⁶ We note that when the court originally ordered

⁵ The first supplemental probation report, dated May 4, 2006, speaks generally about defendant's unsatisfactory performance on both juvenile and adult probation, notes the seriousness of the crime, and defendant's substance abuse problem, his "youthfulness" and his lack of criminal history, and concludes that "circumstances in aggravation outweigh those in mitigation"

⁶ Acknowledging the prohibition against increasing a defendant's sentence based solely on conduct that occurred *after* the grant of probation or a reinstatement thereof (*People v. Harris* (1990) 226 Cal.App.3d 141, 145-146, *People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163 and fn. 2 [consideration of post-

defendant released on probation it said to defendant if "you mess up you go for three years. Do you understand?" The fact that the trial court may also have had in mind the additional aggravating factor identified in the original probation report, i.e., the seriousness of the offense due to defendant's use of an illegal firearm while under the influence of controlled substances, is of no consequence given its reliance on one aggravating circumstance that was established by means that satisfy the requirements of the Sixth Amendment. (*Black II, supra*, ___ Cal.4th at p. ___ [2007 Cal. Lexis 7604, at p. *29].) Because defendant's admitted unsatisfactory prior performance on probation renders him eligible for the upper term, he "was not legally entitled to the middle term, and his Sixth Amendment right to jury trial was not violated by imposition of the upper term sentence." (*Id.* at p. 41, italics omitted.)

Defendant contends the trial court erred by failing to state its reasons for imposing the upper term. We disagree. At the outset, the court indicated it intended to "follow the

probation-grant conduct forbidden when imposing sentence after revocation of probation]), we note that defendant's unsatisfactory performance on probation was an aggravating factor in both the original probation report and the May 4, 2006 supplemental report, he admitted violating probation on December 19, 2005, the court reinstated probation on May 4, 2006. Because defendant's failure on probation was a circumstance that existed *at the time probation was originally granted and when it was reinstated*, that aggravating factor could properly influence the trial court's imposition of the upper term when probation was later revoked. (*Harris, supra*, 226 Cal.App.3d at pp. 145, 147.)

recommendation" in the supplemental report. After hearing argument from counsel and the defendant himself, the court indeed followed that recommendation, pronouncing that probation was "terminated unsuccessfully" and, finding the aggravating factors outweighed those in mitigation, imposed the upper term. In stating that the "circumstances in aggravation outweigh those in mitigation," we infer the court was referring to the original presentence report and the supplemental report as prefaced by his statement before sentencing that he read and considered those reports. Given those findings, in conjunction with the evaluation of defendant's behavior on probation in the supplemental report, there can be little doubt the upper term was imposed based on defendant's history of admitted juvenile and adult violations of probation.

Defendant contends his failure to object to any perceived failure by the court to state its reasons for imposing the upper term was the result of ineffective assistance of counsel. The People argue defendant "waived"⁷ his claim because he did not object at trial and, even if he had, his claim fails on the merits. The People are correct on both counts.

Defendant made no objection when the court pronounced the upper term sentence. His failure to object on the grounds that

⁷ The correct legal term for loss of right based on failure to assert it in a timely fashion is forfeiture, not waiver. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590; cf. *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

the court failed to state any reasons for the upper term forfeits his claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [forfeiture applies to claims the trial court "misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons" for its sentencing choices].)

In any event, even if the contention had been preserved for appeal, it lacks merit. To establish ineffective assistance, defendant bears the burden of showing (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and (2) absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him. (*Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674] (*Strickland*); *People v. Hawkins* (1995) 10 Cal.4th 920, 940, disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

In order to show trial counsel's performance was deficient, defendant must show that counsel "failed to act in a manner to be expected of [a] reasonably competent attorney[] acting as [a] diligent advocate[]." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) If the record fails to show why counsel acted or failed to act as he did, the contention fails unless counsel failed to provide an explanation upon request or there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268; *People v. Pope, supra*, at p. 425.)

Here, the court adequately articulated its reason for imposing the upper term. Consequently, there was no need for an objection by counsel. We note further that, in response to the court's statement that it intended to follow the recommendation in the supplemental probation report, counsel requested that defendant be reinstated on probation, telling the court defendant was prepared to "comply with probation and change his life" with the help of people who had recently come into his life. We infer from his argument to the trial court that counsel understood the aggravating circumstance at issue was defendant's prior unsatisfactory performance on probation and the fact that the court's tentative ruling was based on that factor. Thus, when the court issued a final ruling consistent with its tentative decision, we also infer that counsel understood that the basis for the ruling was defendant's prior unsatisfactory performance on probation. Under those circumstances, we defer to counsel's reasonable decision not to request further explanation from the court. (*People v. Weaver* (2001) 26 Cal.4th 876, 925; see also *People v. Freeman* (1994) 8 Cal.4th 450, 484.)

We similarly reject defendant's claim of failure of his counsel to argue for the low or middle term. The court already had before it the mitigating circumstances set forth in the earlier probation reports. Given that, and defendant's admitted violation of probation (as well as his previously admitted probation violations) establishing the aggravating circumstance,

there was little left for counsel to add for the court's consideration.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.