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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURICIO PICADO,

Defendant and Appellant.

A102251

**(Alameda County
Super. Ct. No. H-30242)**

The United States Supreme Court remanded this case to us with directions to reconsider our decision in light of *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*). In supplemental briefing, appellant urges that his sentence is unconstitutional under the holding in *Cunningham*. We will remand the matter to the trial court for resentencing.¹

FACTS AND PROCEDURAL HISTORY

In February 2003, a jury found Mauricio Picado guilty of five counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), two counts of simple assault

¹ We address only the issues raised by appellant in his supplemental brief regarding *Cunningham*. In all other respects, our decision filed on November 5, 2004, remains in effect.

(§ 240), two counts of brandishing a weapon (§ 417), and one count of battery (§ 242). The jury also found that the crimes were gang-related activity. (§ 186.22, subd. (b)(1).)

For sentencing purposes, the trial court selected count three—one of the assault with a deadly weapon counts—as the principle term. As to this count, the court imposed the upper term of four years for the assault and an additional four-year upper term for a gang-enhancement, for a base term of eight years. The court justified its imposition of the upper terms on its findings that: the crimes involved substantial violence, actual great bodily injury, and several acts reflecting a high degree of viciousness and callousness; Picado was personally armed with and personally used a weapon; the victims were particularly vulnerable; Picado induced others to participate in the crime and occupied a position of dominance and leadership over the other participants; and the crime indicated pre-planning and sophistication. To this eight-year base term, the court added consecutive terms for the other four felony assault counts and for the gang enhancement on those counts, imposing one-third of the three-year midterm for each of those counts and enhancements (§ 1170.1), for a total additional term of eight years. Picado therefore received an aggregate sentence of 16 years.

Picado appealed. By an opinion filed on November 5, 2004, this court affirmed Picado's conviction and sentence, with certain modifications not at issue here. Among other things, we upheld the imposition of the upper term on count three and the attendant gang enhancement, ruling that the trial court's selection of the upper term pursuant to California's determinate sentencing law did not violate the Sixth Amendment under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

The California Supreme Court granted Picado's petition for review pending its consideration of a related issue in pending cases. In September 2005, our Supreme Court dismissed review in light of its decision in *People v. Black* (2000) 35 Cal.4th 1238, which agreed that California's determinate sentencing law did not violate the Sixth Amendment. (*People v. Picado* (Sept. 7, 2005, S129826).)

Picado filed a petition in the United States Supreme Court for a writ of certiorari. The United States Supreme Court ultimately vacated the judgment and remanded the

cause to this court for further consideration in light of *Cunningham*, which held that *Blakely* applied to California's determinate sentencing law.

Picado and respondent have filed supplemental briefs regarding the effect of *Cunningham* on the issues presented in this appeal.

DISCUSSION

Picado contends that the aggravated term on count three and the aggravated term on the related gang enhancement violate the Sixth Amendment under *Cunningham*, and we should modify his sentence accordingly.

In *Cunningham*, the United States Supreme Court held that California's determinate sentencing law violated a defendant's federal constitutional right to a jury trial by assigning to the trial judge, rather than the jury, the authority to make factual findings that subject a defendant to the possibility of an upper term sentence. (*Cunningham, supra*, 127 S.Ct. at p. 871.) In other words, a factor used to aggravate a sentence (other than a recidivism factor) must be admitted by the defendant or proven to a jury beyond a reasonable doubt.

Here, the aggravated terms for the count three felony assault and gang enhancement were based entirely on factors related to the crime, and not to recidivism. The trial court explained: "On the other side of the coin, the Court is considering and finds [in aggravation the] following factors relating to the criminal act itself pursuant to the provisions of Rule of Court 421(a): [¶] First, the crime involved substantial violence, actual great bodily injury, threatened great bodily injury, and several acts reflecting a high degree of viciousness and callousness. [¶] Second, Mr. Picado was personally armed with and personally used a weapon. [¶] Third, the victims were particularly vulnerable, compared to the victims of similar crimes, because of their tender years. [¶] Fourth, the defendant induced others to participate in the crime and occupied a position of dominance and leadership over other participants in the commission of the crime. [¶] Fifth, the manner in which the crime was carried out indicates pre-planning and the sophistication reflected by any criminal conspiracy. [¶] Each of the aggravating

factors will be considered for every sentencing decision for which reasons are required to be expressed, and as to each and every count.”

None of these factors was necessarily established by the jury verdicts. As to the first factor, there was no express and separate finding by the jury that Picado’s crimes involved substantial violence, actual great bodily injury, or several acts reflecting a high degree of viciousness and callousness. Although the jury found him guilty of assault with a deadly weapon by means likely to produce great bodily injury, elements of the offense cannot be used to impose the upper term. (Cal. Rules of Court, rule 4.420(d).)

As to the second factor—that Picado was armed with or personally used a weapon—respondent points out that the jury found Picado guilty of assaulting Jesus Martinez with a screwdriver in count 3. However, his conviction may have been based on an aiding and abetting theory or other form of vicarious liability, since Picado was not *charged* with personally using the screwdriver on Martinez and the verdict form did not ask whether he was the one who used the dangerous weapon. In fact, the jury acquitted Picado on each count in which the prosecutor alleged he was the one who had personally used a dangerous weapon (counts 1, 4, 8, 9 and 10) and further found that he had not brandished a dangerous weapon with respect to counts 4 and 8. The jury did find him guilty of brandishing a weapon as to counts 1 and 9, but there was no specific finding that Picado was armed with either of these weapons when he committed the offense in count 3, which the court determined for sentencing purposes to constitute a separate violent act and which was perpetrated against a different victim.²

None of the other factors on which the trial court relied was found by a jury beyond a reasonable doubt.

We next consider whether the *Cunningham* error in this matter was harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) 126 S.Ct. 2546, 2553

² Picado also *admitted* as to count 1 that he was armed with a knife. However, this offense occurred months earlier than the offense in count 3 and, as mentioned, was perpetrated against a different victim.

[*Blakely* error subject to review under *Chapman v. California* (1967) 386 U.S. 18, 24].) Under this standard, relying on an unproven aggravating circumstance is harmless if there was overwhelming or uncontradicted evidence of that circumstance, leaving no doubt that the jury would have found the circumstance to be true. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error harmless because no doubt the jury would have found the same conclusion as the trial court].)

Although not deciding the harmless issue in our original opinion, we stated in a footnote: “In convicting Picado under section 245, subdivision (a)(1), the jury necessarily found beyond a reasonable doubt that he committed an assault with a deadly weapon or by means of force likely to produce great bodily injury. We would conclude from this verdict, as well as the evidence in the case, that the jury would have found true beyond a reasonable doubt the following aggravating circumstances: the crime involved substantial violence, actual great bodily injury, and several acts reflecting a high degree of viciousness and callousness; and Picado induced others to participate in the crime and occupied a position of dominance and leadership over the other participants. Despite mitigating circumstances mentioned by the sentencing court, the Attorney General contends that any *Blakely* error was harmless. We need not resolve this issue, since *Blakely* does not apply.”

Nonetheless, and without intending to suggest whether or not we continue to view the evidence in the manner expressed in the footnote, we will remand the case to the trial court for resentencing in light of *Cunningham*.

DISPOSITION

The judgment remains in all respects affirmed, except as to the imposition of the upper term on count three and the imposition of the upper term on the gang enhancement alleged in count three. The matter is remanded to the trial court for resentencing.

NEEDHAM, J.

We concur.

JONES, P. J.

STEVENS, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to art. VI, § 6 of the California Constitution.