

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL F. TEWOLDE,

Defendant and Appellant.

A106273

(Sonoma County
Super. Ct. No. MCR-426478)

MEMORANDUM OPINION

On February 20, 2007, the United States Supreme Court issued an order in this case granting certiorari, vacating the judgment, and remanding to this court for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).

Pursuant to this mandate, we have recalled the remittitur. We have re-examined our initial opinion in this case (*People v. Tewolde* (Mar. 21, 2005, A106273) [nonpub. opn.]), which remains on file with this court, and which we hereby incorporate by reference into this order.

In our prior opinion, we held that the imposition of the upper term violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We noted that the sentencing court found three aggravating factors:

- (1) The crime involved a high degree of cruelty, viciousness, and callousness;
- (2) The victim was particularly vulnerable; and

(3) Defendant had suffered numerous prior juvenile adjudications.

We noted that factor (3) is based on recidivism, and thus was not invalid under *Blakely*. But factors (1) and (2) involved issues of fact which were not admitted by defendant or determined by a jury. Thus, we held that it was error under *Blakely* for the court to rely on factors (1) and (2) to impose the upper term.

We further held that, under the circumstances of this case, the error was not harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).)¹ We acknowledged that one valid aggravating factor is generally sufficient to expose a defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) But even in the context of general, nonconstitutional sentencing error, a reviewing court will set aside a sentence “if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.” (*People v. Price* (1991) 1 Cal.4th 324, 492.)

We concluded that it was not clear beyond a reasonable doubt that the trial court would have imposed the upper term had it known factors (1) and (2) were invalid—i.e., if the court was faced only with one valid aggravating factor, factor (3). Factors (1) and (2) were by far the more severe of the three. Factor (1) involved cruelty, viciousness, and callousness, based on the kicking of the victim when he was lying unconscious. Factor (2) involved the victim’s vulnerability. In contrast, factor (3) involved a relatively brief juvenile history of less than serious offenses. Given the factor in mitigation found by the trial court, as well as the numerous letters in defendant’s favor, we could not conclude beyond a reasonable doubt that the trial court would have imposed the upper term based solely on factor (3).

We have reconsidered our prior opinion in light of *Cunningham*, which simply applies *Blakely* to California sentencing law. *Cunningham* only confirms the validity of our initial holding. “Because we deem it unnecessary to modify our prior opinion, we

¹ It is clear from recent decisions that the *Chapman* standard applies to *Cunningham/Blakely* error. (*Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2550-2553]; *People v. Govan* (2007) 150 Cal.App.4th 1015, 1034-1035 (*Govan*).)

reiterate that opinion in its entirety.” (*City of Long Beach v. Bozek* (1983) 33 Cal.3d 727, 728.)²

We briefly address the arguments made by the Attorney General in his postremand supplemental brief.

The Attorney General contends that there is no *Cunningham* error here, because the recidivist-based aggravating factor operated to make the upper term the statutory maximum—which the trial court is empowered to impose without the defendant’s admissions or a jury’s findings of fact. The Attorney General relies on a passage from Justice Kennard’s separate opinion in *People v. Black* (2005) 35 Cal.4th 1238, 1264, 1270 (conc. & dis. opn. of Kennard, J.). That reasoning, however, has not survived the subsequent *Cunningham* decision. Under California sentencing law, the middle term is *always* the statutory maximum. (*Cunningham, supra*, 127 S.Ct. at p. 868; *Govan, supra*, 150 Cal.App.4th at pp. 1033-1034.)

The Attorney General also contends that any *Cunningham* error is harmless beyond a reasonable doubt because a jury would have found true either factor (1) or factor (2). But this is not a case where evidence was presented to a jury, subjected to cross-examination, and preserved in a record for judicial review. Defendant pleaded no contest before the case proceeded to a preliminary hearing and the only facts are found in the probation report. We cannot indulge in speculation as to what a hypothetical jury may or may not have found if the probation officer’s factual essay was transmuted into actual, admissible evidence. Rather, we must focus on the sentencing calculus of the trial judge.³

This matter is hereby remanded to the trial court for resentencing.⁴

² We recognize that a Court of Appeal decision cited in our prior *Blakely* harmless error analysis has been the subject of a grant of review since we filed our initial opinion. That does not change the disposition of the present case.

³ Virtually all of the authorities cited by the Attorney General in support of this argument involve jury trials, but not guilty or nolo pleas, and are thus inapposite.

⁴ We are not suggesting what sentence the trial court in its discretion should impose in this case.

Marchiano, P.J.

We concur:

Swager, J.

Margulies, J.