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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK FRANKLIN KING,

Defendant and Appellant.

A106687

(Solano County  
Super. Ct. No. VCR169402)

This case is one of several remanded to us by the United States Supreme Court due to their decision in *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [127 S.Ct. 856] (*Cunningham*), which has significant effects on California's criminal sentencing scheme. As explained below, we vacate the sentence and remand to the trial court for resentencing.

**PROCEDURAL BACKGROUND**

In August 2005, we issued an opinion affirming appellant's convictions for battery with injury against a peace officer (§ 243, subd. (c)(2)) and resisting or deterring an officer with force or violence (§ 69). (See *People v. King* (August 23, 2005) 2005 WL 2010190, 2005 Cal.App. Unpub. Lexis 7586.) Relying on *People v. Black* (2005) 35 Cal.4th 1238, we rejected defendant's argument that his right to jury trial was violated by the court's finding of aggravating factors at sentencing.

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, supra*, 127 S.Ct. 856. Pursuant to its mandate, we have recalled the remittitur. We have reexamined our initial opinion in this case, and incorporate it by reference, and we have received supplemental briefing from the parties.<sup>1</sup>

### ***THE TRIAL COURT'S SENTENCING DECISION***

The trial court sentenced appellant to the upper term of three years on the section 243 conviction for battery with injury on a peace officer, and imposed a concurrent term of one year on the section 69 conviction. The court also imposed a one-year sentence enhancement pursuant to section 667.5, subdivision (b). The trial court imposed the upper term after it found the following factors in aggravation: (1) the defendant engaged in violent conduct indicating a serious danger to the community; (2) defendant's prior convictions are increasing in seriousness; (3) defendant was on probation at the time he committed this crime; and, (4) defendant's prior performance on probation was unsatisfactory.

### **ANALYSIS**

In *Cunningham*, California's determinate sentencing law was held to violate a defendant's right to jury trial because California statutes permitted trial judges to determine facts used to impose an upper term sentence by a preponderance of the evidence. (*Cunningham, supra*, 127 S.Ct. at p. 868.) Under *Cunningham*, the only fact which a trial judge may determine by a preponderance of the evidence and use to increase a sentence is the fact of a prior conviction. (*Ibid.*)

The Attorney Generals argue there was no *Cunningham* error here because the trial court relied for the most part on "recidivist factors," in particular appellant's prior

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<sup>1</sup> In his supplemental brief, appellant reasserts various contentions he states he argued in his opening and reply brief. We reject those claims for the reasons articulated in our earlier unpublished opinion. (See *People v. King*, 2005 Cal.App. Unpub. Lexis 7586.)

convictions are increasing in seriousness, he was on probation at the time he committed this crime, and his prior performance on probation has been unsatisfactory. However, the trial court imposed the upper term in part because it found by a preponderance of the evidence that appellant engaged in violent conduct and posed a danger to the community. Such a finding is not a fact of prior conviction, and, under *Cunningham*, must be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham, supra*, 127 S.Ct. at p. 868.) This was an error of constitutional magnitude under *Cunningham*.<sup>2</sup>

Even if there was *Cunningham* error, the People assert it was harmless because “the trial court’s reasons for imposing the upper term were observations drawn from overwhelming evidence or uncontested facts.” *Cunningham* error is susceptible to *Chapman*<sup>3</sup> harmless error review. (See *Washington v. Recuenco* (2006) 548 U.S. \_\_\_ [126 S.Ct. 2546, 2552-2553] [*Blakely* error not structural and is subject to *Chapman* harmless error review].) Under *Chapman* harmless-error review, reversal is required unless we can say that, beyond a reasonable doubt, the result would not have been more favorable in the absence of the error. (See *People v. Brown* (2003) 31 Cal.4th 518, 538.)

None of the aggravating factors relied on by the trial court were found true beyond a reasonable doubt by a jury, and the record does not reflect the weight the trial court gave to the several aggravating factors it identified. Thus, even if the trial court’s recidivist findings did not violate *Cunningham*, we cannot say beyond a reasonable doubt

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<sup>2</sup> We need not and do not decide whether the trial court’s reliance on the “recidivist” factors referenced by the Attorney General was also a violation of *Cunningham*. Although these factors are *related to* appellant’s prior convictions, none, strictly speaking, are the *fact of* prior conviction alone, a distinction which reflects the current uncertainty regarding the scope and breadth of the so-called “recidivism related” exception in the wake of *Cunningham*. (See *People v. Govan* (2007) 150 Cal.App.4th 1015, 1032 [concluding *Cunningham* held that recidivism relates to the “ ‘commission of the offense itself’ ” and therefore since “none of the recidivism related aggravating factors on which the trial court in this case relied is the mere fact of a prior conviction, . . . the trial court improperly relied on these factors in imposing an upper term sentence”].)

<sup>3</sup> *Chapman v. California* (1967) 386 U.S. 18.

it would have sentenced appellant to the upper term if it had *not* also found the aggravating facts which *Cunningham* requires a jury to find beyond a reasonable doubt. Therefore, we remand for resentencing in accordance with the requirements of *Cunningham*.

**DISPOSITION**

The judgment is vacated only as to defendant’s sentence, and the case is remanded for resentencing. The judgment is otherwise affirmed. We express no opinion whether compliance with *Cunningham* will require a change in the actual sentence imposed in this case.

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Parrilli, Acting P. J.

We concur:

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Pollak, J.

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Siggins, J.