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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE MAGANA,

Defendant and Appellant.

A109854

(San Mateo County
Super. Ct. No. SC057911)

Defendant Jorge Magana was sentenced to the aggravated term of three years in state prison after he entered a plea of no contest to the single charge of being an accessory after the fact to murder (Pen. Code, § 32). Before the plea, and before sentence was imposed, defendant's counsel expressly objected to any sentence greater than the midterm of two years on the ground that it would violate *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

By the time defendant's timely appeal was briefed, our Supreme Court had held in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) that imposition of aggravated terms under California's determinate sentencing law (DSL) did not violate *Blakely*. On January 18, 2006, we filed an opinion affirming imposition of the aggravated term because *Black I* was binding on us as an intermediate appellate court (*People v. Magana* (Jan. 18, 2006, A109854) [nonpub. opn.] (*Magana I*).

In *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*), the United States Supreme Court held that *Black I* was wrongly decided. The court

summarized California’s DSL, and how it fit within the right-to-jury decisions that began with *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and culminated with *Blakely*: “Under California’s DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. . . . [A]ggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum. [Citation.] Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL 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.’ [Citation.]” (*Cunningham, supra*, 549 U.S. at p. ____ [127 S.Ct. at p. 868].) “Contrary to the *Black* court’s holding, our decisions from *Apprendi* . . . point to the middle term specified in California’s statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.” (*Id.* at p. ____ [127 S.Ct at p. 871].)

Our judgment in *Magana I* was summarily vacated, and the cause was returned to us for reconsideration in light of *Cunningham*. (*Magana v. California* (2006) ____ U.S. ____ [167 L.Ed.2d 46, 127 S.Ct. 1224].)

On July 19, 2007, our Supreme Court issued decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), responding to *Cunningham*. We have received supplemental briefing, and now reverse imposition of the aggravated sentence.

As *Black II* summarized: “[U]nder the line of high court decisions beginning with *Apprendi* . . . and culminating in *Cunningham*, . . . the constitutional requirement of a jury trial and proof beyond a reasonable doubt applies only to a fact that is ‘legally essential to the punishment’ (*Blakely, supra*, 542 U.S. at p. 313), that is, to ‘any fact that

exposes a defendant to a greater potential sentence' than is authorized by the jury's verdict alone (*Cunningham, supra*, 549 U.S. at p. ____ [127 S.Ct. at p. 863]). . . . For this reason, we agree with the Attorney General's contention that as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence . . . does not violate the defendant's right to jury trial," "regardless of whether the facts underlying those circumstances have been found to be true by a jury." "Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.' " (*Black II, supra*, 41 Cal.4th at pp. 812-813.)

In *Sandoval*, the court held: "The United States Supreme Court has recognized two exceptions to a defendant's Sixth Amendment right to a jury trial on an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. First, a fact admitted by the defendant may be used to increase his or her sentence beyond the maximum authorized by the jury's verdict. (*Blakely, supra*, 542 U.S. at p. 303.) Second, the right to jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction. ([*Blakely*,] at p. 301; see *Apprendi, supra*, 530 U.S. at p. 490)" (*Sandoval, supra*, 41 Cal.4th at pp. 836-837.)

Neither of these exceptions applies here. No prior felony conviction, or other fact amounting to an aggravating factor, was either alleged by the prosecution or admitted by defendant. Thus, imposition of the aggravated term was error under *Apprendi, Blakely, Cunningham* and *Black II*.

Sandoval held that error of this nature is subject to the harmless error test of *Chapman v. California* (1967) 386 U.S. 18. Within the context of *Sandoval*, where there had been a jury trial, the court framed the appropriate analysis as follows: "[W]e must determine whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized

the upper term sentence. . . . [I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.” (*Sandoval*, *supra*, 41 Cal.4th at pp. 838-839.)

Of course, our task is complicated by the fact that this case never went before a jury at all. An additional difficulty here is the extremely scanty nature of the factual record, due to the fact that defendant entered his pleas of guilty after waiving his right to a preliminary examination. Thus, the “record” before us is: (1) a rather brief probation report; (2) the prosecutor’s sentencing memorandum; and (3) the probation officer’s dispositional report for defendant’s final adjudication as a minor, which resulted in a commitment to the then California Youth Authority (CYA).¹

The prosecutor’s sentencing memorandum appears to have played the most significant role. The court noted that, as a juvenile, defendant was found to have committed several second-degree robberies, and then “a sustained petition for being in possession of a weapon, which was a bat.” The court also noted that “at the time of the commission of this offense Mr. Magana was a CYA parolee at large, and had been performing poorly on probation at the time of his release from custody at the [CYA].”

However, although the court noted these matters, it is far from clear whether it relied on any of them as factors supporting imposition of the aggravated term. As previously mentioned, *Blakely* had been decided before defendant was sentenced. Precisely what that decision meant in terms of impact on California’s DSL was very much an open question, one that the court and counsel wrestled with throughout the reported proceedings. The prosecutor took the position in his sentencing memorandum that “Defendant’s juvenile convictions are *not* being used to increase the Defendant’s

¹ As of July 1, 2005, the California Youth Authority is now known as the Department of Corrections and Rehabilitation, Juvenile Justice. (Gov. Code, §§ 12838, subd. (a), 12838.5, 12838.13.) However, for the purposes of clarity, we refer to it as CYA.

sentence beyond the statutory maximum sentencing term. Rather his convictions are being used to impose the upper term within the statutory range of sentences. Since the juvenile adjudications are *not* being used to aggravate the sentence beyond the statutory maximum, . . . this Court should[] use Defendant[']s prior convictions to impose the upper term sentence.” (Italics added.)

The trial court stated that “I do accept the position that is set forth in [the prosecutor’s] trial brief,” and then simply stated “[Defendant] is going to be sentenced to the upper or aggravated term of three years in the California Department of Corrections, which does constitute the maximum term prescribed by law.” It thus appears that the trial court was proceeding on a legal misapprehension of its power to impose the aggravated term, namely, the approach adopted by our Supreme Court in *Black I* and repudiated in *Cunningham*. As a reviewing court, we are loath to deny a court the opportunity to exercise its informed discretion on a matter intrinsically within the province of its sentencing authority. We will therefore remand the matter to the trial court in order that it may impose sentence in accordance with *Blakely*, *Cunningham* and *Black II*.

Our opinion in *Magana I* is vacated. The cause is remanded to the trial court for resentencing in accordance with this opinion. The judgment of conviction is affirmed in all other respects.

Richman, J.

We concur:

Kline P. J.

Lambden, J.