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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.

JONATHAN RAY HYLTON,

Defendant and Appellant.

A112207

**(Humboldt County
Super. Ct. No. CR046628)**

Jonathan Ray Hylton appeals from a four-year sentence imposed by the trial court following his guilty plea. In our original unpublished opinion, filed on May 26, 2006, we affirmed the judgment. Subsequently, the United States Supreme Court granted a petition for writ of certiorari filed by defendant, vacated the judgment, and remanded the matter to this court for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*).¹ *Cunningham* concluded that California's determinate sentencing law violates the Sixth Amendment because it "allocates to judges sole authority to find facts permitting the imposition of an upper term sentence." (*Id.* 127 S.Ct. at p. 870.) We requested and received further briefing from the parties on the effect of *Cunningham* and two recent California Supreme Court decisions interpreting that case, *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), and *People v. Sandoval* (2007) 41

¹ *Hylton v. California* (Feb. 20, 2007) U.S. Sup. Ct. No. 06-7453.

Cal.4th 825 (*Sandoval*). In light of those cases, we will vacate defendant's sentence and remand to the trial court for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2004, defendant set fire to an upstairs apartment he was renting in a two-story house. Defendant was charged by information with arson of an inhabited structure (Pen. Code, § 451, subd. (b)). The information was amended to charge defendant with unlawfully causing a fire of an inhabited structure (Pen. Code, § 452, subd. (b)). Defendant pled guilty to that charge; the arson charge was dismissed. The trial court imposed a sentence of four years in prison, which is the upper term.

On appeal, relying on *People v. Black* (2005) 35 Cal.4th 1238, certiorari granted and judgment vacated by *Black v. California* (2007) 549 U.S. ____ [127 S.Ct. 1210], we rejected defendant's argument that his right to jury trial was violated by the imposition of the upper term based on the aggravating factors found by the trial court.

Pursuant to the United States Supreme Court's mandate, we recalled our May 2006 remittitur. We have reexamined our initial opinion and have received supplemental briefing from the parties.

DISCUSSION

In imposing the upper term of four years, the trial court acknowledged as a factor in mitigation that defendant "has [a] relatively insignificant record of criminal conduct." But it found that "in aggravation we have several factors. We have Rule 4.421(a)(1). This crime did involve the threat of great bodily harm or other acts [disclosing] a high degree of cruelty, viciousness or callousness. We have Rule 4.4f21(a)(9), the crime did involve damage, great monetary value. And we have Rule 4.421(b)(1), [defendant] has engaged in violent conduct which indicates a serious danger to society. [¶] All things considered, the Court finds that the aggravated term is the appropriate one."

Defendant claims that imposition of the upper term violated his Sixth Amendment right to a jury trial because it was based on facts that were neither admitted nor found by the jury to be true. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United

States Supreme Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. In *Cunningham*, the 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*, 549 U.S. at p. ____ [127 S.Ct. at p. 860].)

In *Black II*, our Supreme Court interpreted *Cunningham* to mean that the imposition of an upper term sentence "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." (*Black II, supra*, 41 Cal.4th at p. 816.) Under California law, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for imposition of the upper term. (*Id.* at p. 813; *People v. Osband* (1996) 13 Cal.4th 622, 728.) Therefore, "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 among the three available options does not violate the defendant's right to jury trial." (*Black II, supra*, 41 Cal.4th at p. 812.) In other words, "so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Id.* at p. 813.)

Here, the trial court imposed the upper term because it believed that the crime involved the threat of great bodily harm or other acts displaying a high degree of cruelty, viciousness or callousness; that defendant engaged in violent conduct indicating a serious

danger to society; and that the crime involved great monetary damage. While these are circumstances that validly can be used to impose an upper term sentence, the factors were not found true by a jury, were not admitted by defendant, and were not related to defendant's criminal record. Accordingly, the trial court could not validly rely on those factors to impose the upper term sentence. (*Black II, supra*, 41 Cal.4th at p. 816.)

The People argue the trial court could validly rely on the cited aggravating factors based on defendant's admissions regarding the offense pursuant to his guilty plea. Defendant did admit to setting fire to his apartment following discovery that his downstairs neighbors and their friends had broken into his apartment and scattered his mother's ashes.² However, he did not admit that the crime involved the threat of great bodily harm; that the crime displayed a high degree of cruelty, viciousness, or callousness; that he had engaged in violent conduct indicating a serious danger to society; or that the crime involved damage of great monetary value. To the contrary, defendant emphasized the extreme nature of the provocation. He claimed the scattering of his mother's ashes followed a number of other break-ins and threats to his family by the downstairs neighbors and their friends; he also claimed that he had tried to get assistance from the police to no avail. Also, defendant's admissions do not indicate whether the fire posed a threat of harm to others or describe the extent of the damage from the fire. The trial court could not rely on defendant's admissions to support the upper term.

The denial of the right to a jury trial on aggravating circumstances is not structural error that invariably requires reversal. (*Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546, 2556].; *Sandoval, supra*, 41 Cal.4th at p. 838) “[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

² In his sentencing memorandum below, defendant adopted for sentencing purposes the factual summary in a June 2005 psychiatric evaluation, his statement in a July 2005 probation report, his written statement attached to a November 2005 probation report, and an August 2005 letter written by his wife. Only the first two documents are in the record before this court. Defendant also stipulated to a factual basis for the plea.

circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.” (*Sandoval*, at p. 839.)

We are unable to conclude beyond a reasonable doubt that a jury would have found any of the three aggravating circumstances to be true beyond a reasonable doubt based on defendant’s admissions. There was nothing in defendant’s admissions to support a finding that the fire caused great monetary damage. We cannot conclude beyond a reasonable doubt that a jury would have found to the requisite degree of certainty that the fire involved the threat of great bodily harm. Finally, we can only speculate what weight the jury would have placed on the provocation described by the defendant in determining whether he had displayed a high degree of cruelty, viciousness, or callousness, or whether he had engaged in violent conduct indicating a serious danger to society. As *Sandoval* cautioned, “to the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court.” (*Sandoval, supra*, 41 Cal.4th at p. 840.)

Because defendant’s upper term sentence was based on aggravating factors that were neither admitted nor found true by a jury, and the error was not harmless, the imposition of the upper term must be reversed and the case remanded to the trial court for resentencing in a manner consistent with the Sixth Amendment as interpreted in *Sandoval, supra*, 41 Cal.4th at pp. 846-847.

DISPOSITION

The judgment is reversed and the matter is remanded for resentencing.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.