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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.

RICKY TITH,

Defendant and Appellant.

A114094

**(Sonoma County
Super. Ct. No. SCR481092)**

Ricky Tith (Tith) appeals from a judgment entered after he pled guilty to felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).¹ He contends that his constitutional rights were violated by the imposition of the upper term of sentence, which was based on one or more aggravating factors neither found by a jury nor admitted by his plea. (See *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*)). We remand for resentencing.

I. FACTS AND PROCEDURAL BACKGROUND

A first amended complaint (complaint) charged Tith with felony attempted murder (§§ 664/187, subd. (a)), attempted carjacking (§§ 664/215, subd. (a)), and assault with a deadly weapon and with force likely to produce great bodily injury (§ 245, subd. (a)(1)). As to the attempted murder charge, the complaint alleged the personal use of a deadly and dangerous weapon (§ 12022, subd. (b)(1)). As to the charge of assault with a deadly

¹ All statutory references are to the Penal Code.

weapon, the complaint alleged the personal infliction of great bodily injury (§ 12022.7, subd. (a)).

A. FACTS

We summarize the facts as described in the felony presentence report prepared by the Sonoma County probation office.

On January 29, 2006, victim Luciano drove his truck to the Days Inn Motel where his girlfriend worked. As he got out of the truck, Luciano noticed a person (whom he later identified as appellant Tith) approaching. Tith instructed Luciano, "Give me your keys." Luciano refused, and Tith repeated his demand. When Luciano again refused, Tith pulled out a black-handled pocket knife and stabbed Luciano in the chest. Luciano's girlfriend called 911.

When police arrived, Luciano's girlfriend pointed toward a group of men wearing blue clothing. As the officers attempted to detain the group, two of the men ran into room 129 of the motel. Police saw a one-inch laceration under Luciano's left breast area, which was bleeding.

Police officers knocked on the door to room 129. Tith opened the door and asked, "What did we do?" Police ordered Tith and his brother Sithorn Tith (Sithorn) out of the room and handcuffed them. Officers found a blue flannel jacket and a white hooded sweatshirt with red stains, which were possibly bloodstains, under the mattress in room 129. A small folding pocketknife, with a two-and-a-half-inch locking blade, was on top of the television.

Police showed Luciano photographs of several of the people detained at the motel. Luciano said that the photograph of Tith most resembled the person who stabbed him.

Tith told officers that he had arrived drunk at a party at the motel with Sithorn and did not remember much about it. An officer told Tith that police had found his knife, and asked Tith what the victim had said that caused Tith to stab him. Tith replied, "Who did I stab?" After telling Tith that the victim had identified his photograph, the officer left the interview room and returned with a blank videotape marked "Days Inn. Sunday 01-29-06." The officer left the room again, and Tith picked up the videotape, removed it from

the box, opened the protective flap, and broke the tape. When the officer returned, he observed Tith putting the videotape back in the box and asked him why he broke the tape. Tith claimed he did not know. Asked why he stabbed the victim, Tith again claimed he did not know. Tith did not deny stabbing Luciano, but asserted merely that he was too drunk to remember.

Medical records described Luciano's wound as "a stab wound with isolated skin and minimal superficial soft tissue injury."

B. GUILTY PLEA AND SENTENCE

Tith was arraigned, waived his right to a preliminary hearing, and entered a plea of guilty to the charge of assault with a deadly weapon (§ 245, subd. (a)), in exchange for dismissal of the remaining charges and allegations. Before entering his guilty plea, Tith initialed and signed a written waiver of his constitutional rights, and confirmed to the court that he understood and waived the rights set forth in the written waiver form, and understood that the charge to which he was pleading constituted a felony strike.

The court subsequently denied probation and, after considering the circumstances in aggravation and mitigation, sentenced Tith to the upper term of four years in state prison. The remaining charges and allegations were dismissed pursuant to the plea agreement.

Tith appealed.

C. APPELLATE PROCEEDINGS

On January 10, 2007, we initially affirmed Tith's sentence on the ground that we were obliged to follow *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), vacated by *Black v. California* (2007) 127 S.Ct. 1210, in which the California Supreme Court held that *Blakely* did not apply to California's determinate sentencing law.

After the decision in *Cunningham v. California* (2007) 127 S.Ct. 856 (*Cunningham*), Tith filed a timely petition for rehearing, which we granted. We also ordered supplemental briefing from Tith and respondent, which they provided. On March 20, 2007, we issued a new opinion, concluding that the trial court imposed the four-year upper term based on aggravating factors neither admitted by Tith nor found true

beyond a reasonable doubt. We ruled that the upper term of sentence imposed against Tith was unconstitutional under *Cunningham*, vacated the judgment, and remanded for resentencing.

The Attorney General filed a petition for review with the California Supreme Court. The petition was granted. After the California Supreme Court decided *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), it transferred the matter to this court with directions to vacate the decision and reconsider the cause in light of *Black II* and *Sandoval*. (Cal. Rules of Court, rule 8.528(d).)

II. DISCUSSION

Tith contends that the court violated *Blakely*, *supra*, 542 U.S. 296, by imposing the upper term of sentence based on its own findings of aggravating factors, which had neither been established by a jury beyond a reasonable doubt nor admitted by his plea.

The United States Supreme Court held that *Blakely* applies to California's determinate sentencing law. (*Cunningham*, *supra*, 127 S.Ct. 856.) In particular, the court ruled that California's procedure for imposing upper terms violates the defendant's Sixth and Fourteenth Amendment right to a jury trial "[b]ecause 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." (*Cunningham*, *supra*, at p. 868.) Under *Cunningham*, the imposition of an upper term in California is unconstitutional if based on facts neither admitted by the defendant nor found true by a jury beyond a reasonable doubt.

In *Black II*, our Supreme Court clarified the application of *Blakely* and *Cunningham* to California law. Among other things, the court ruled that the upper term may be imposed as long as there is one aggravating factor established consistent with *Blakely*. The court explained: "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.” (*Black II, supra*, 41 Cal.4th at p. 813, italics in original.) The court added that “[t]he facts upon which the trial court relies in exercising discretion to select among the terms available for a particular offense ‘do not pertain to whether the defendant has a legal right to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.’” (*Ibid.*, italics omitted.) Because “the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term” under California’s determinate sentencing law, “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’” for Sixth Amendment purposes. (*Ibid.*)

In the matter before us, the sentencing judge explained his refusal to grant probation and the reason for his selection of the upper term, as follows: “The one thing I am convinced of is the defendant is now remorseful. The source of that remorse, though, I’m not too sure. It looked like he used every angle possible to this very knowledgeable, streetwise 18-year-old with peripheral gang indications to weasel out of this thing. But for an inch either way, he’d be here on a first degree murder case. [¶] He approaches a man in a parking lot, a Latin man, who is there to pick up his girlfriend or help her out; demands his car and his car keys, and then thrusts a knife into his body. Now that is criminal, and that does not deserve probation. [¶] This is an 18-year-old conducting himself like a very mature adult criminal person. And I’ve analyzed this case from top to bottom, and I show no sympathy whatsoever. I don’t feel that he deserves any mercy because of his youth. [¶] I’ve analyzed the criteria affecting probation and feel that he is not an apt candidate for probation. The nature of the offense leads me to conclude that the criteria -- or excuse me, the circumstances in aggravation and mitigation warrant that this Court sentence this defendant to serve four years in the State Prison.”

Although not entirely clear, the court’s reference to the “nature of the offense” as the basis for imposing the four-year upper term may refer to the aggravating factors set

forth in rule 4.421(a) of the California Rules of Court, which pertain to aspects of the crime such as the degree of violence and the manner in which the offense was committed.² None of these aggravating factors was admitted by Tith or found true beyond a reasonable doubt by a jury (or by the court).

The People urge that Tith's sentence should nonetheless be upheld, based on (1) principles of waiver and forfeiture; (2) Tith's admission that he used a knife; and (3) the doctrine of harmless error. Respondent's contentions lack merit.

The People first assert that Tith waived or forfeited the right to assert *Blakely* error by stating in his written waiver form that he waived a jury trial "as to all charges, allegations and prior convictions" and by failing to object on *Blakely* grounds at the sentencing hearing. However, Tith's attorney argued at sentencing that "there is nothing that has been proved beyond a reasonable doubt as aggravating factors," which may be construed as a reference to the *Blakely* standard. Moreover, any objection on *Blakely* grounds was futile at the time of Tith's sentencing. Tith was sentenced in May 2006, after the California Supreme Court held in *Black I* that *Blakely* did *not* apply. Under these circumstances, Tith is not barred from challenging his sentence under *Blakely* and *Cunningham*. (*Sandoval, supra*, 41 Cal.4th at p. 837, fn. 4; see *People v. Hill* (1998) 17 Cal.4th 800, 820 [a defendant is excused from failing to timely object if the objection would have been futile].)

² Rule 4.421 of the California Rules of Court sets forth the circumstances in aggravation that may be considered in determining whether to impose an upper term of sentence. Subdivision (a) of the rule describes circumstances relating to the nature of the crime: "(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that: [¶] (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime; [¶] (3) The victim was particularly vulnerable; [¶] . . . [¶] (9) The crime involved an attempted or actual taking or damage of great monetary value" By contrast, subdivision (b) pertains to facts relating to the defendant, and subdivision (c) refers to facts declared by statute to be aggravating circumstances.

The People next argue that Tith's sentence was based on an aggravating factor admitted by the defendant, because he admitted his use of a knife in perpetrating the crime. (See Cal. Rules of Court, rule 4.421(a)(2) [fact that the "defendant was armed with or used a weapon at the time of the commission of the crime" is an aggravating factor].) The People assert that when Tith pleaded guilty, he admitted not only that the force he used in committing the assault was likely to produce great bodily injury, but also specifically that he used a knife, which is not a required element of aggravated assault. The People further contend that the court relied on Tith's use of a knife in imposing sentence, because the court mentioned how Tith "thrust[] a knife into his [victim's] body." Because a single aggravating circumstance is sufficient to render a defendant eligible for the upper term, the People contend there was no *Cunningham* violation.

We disagree. The record on appeal does not indicate that Tith's admission of his use of the knife was anything more than his acknowledgement that he committed the elements of the crime. The exchange at the sentencing hearing was as follows: "THE COURT: Very well. You are accused in this Complaint, in the third count of the Complaint, with willfully and unlawfully, on the 29th of January, committing assault on one Luciano Guzman Gonzalez (phonetically spelled) with a deadly weapon, it being a knife, and that this force was likely to produce great bodily injury. [¶] How do you plead to that, sir? [¶] THE DEFENDANT: Guilty." Tith was pleading guilty to a charge. There was no pronouncement that he was admitting his use of the knife as an aggravating factor or for the purpose of subjecting himself to an upper term of sentence. Nor could this have been the purpose of the verbal exchange at the sentencing hearing, since it was then California law that *Blakely* did not apply, and there was thus no need to obtain a defendant's admission to an aggravating factor.

Lastly, the People argue that any *Cunningham* error in this matter was harmless beyond a reasonable doubt. (See *Sandoval*, *supra*, 41 Cal.4th at p. 839; *Washington v. Recuenco* (2006) 126 S.Ct. 2546, 2551-2553 [*Blakely* error is not structural, but subject to harmless error analysis for constitutional questions]; *Chapman v. California* (1967) 386 U.S. 18, 24.) As the California Supreme Court stated in *Sandoval*, in which the

charges were tried to a jury, the sentencing court’s reliance on an unproven aggravating circumstance in violation of the Sixth Amendment is harmless “if 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” (*Sandoval, supra*, 41 Cal.4th at p. 839.)

Here, the People argue, there is no dispute that Tith stabbed his victim in the chest with a knife: he acknowledged his use of the knife when entering his guilty plea and admitted to the probation officer that he stabbed the victim while attempting to push him away.³ The People also contend that a trier of fact would have found all or most of the other aggravating circumstances true, based on the sentencing judge’s observation that Tith “used every angle possible to this very knowledgeable, streetwise 18-year-old with peripheral gang indications to weasel out of this thing,” “[b]ut for an inch either way, he’d be here on a first degree murder case,” “I’ve analyzed this case from top to bottom, and I show no sympathy whatsoever,” and “[t]his is an 18-year-old conducting himself like a very mature adult criminal person.”

As to the assertion that Tith used a knife, the People’s argument is unpersuasive in light of the nature of the evidence and the context in which it arose. First of all, as we discussed previously, Tith’s statement at the plea hearing constituted a plea to an

³ The probation department’s post-plea interview of Tith led to this description of the incident in the presentence report: “Looking in the victim’s truck, Tith saw a stereo, and tried to take it out. He was using the knife as a tool to help with the stereo extraction. The owner of the vehicle then saw Tith in the truck, and grabbed hold of the defendant. The victim started screaming at Tith, and the defendant then tried to push the victim off of him. Tith was still holding the knife in his hand, with which he accidentally stabbed the victim. Tith then ran away. He stated, ‘I was so drunk, I don’t even know what I was doing . . . walking around so drunk I don’t know what I was doing . . . I had no control . . . now I got a felony . . . [sic] I hurt someone bad, I didn’t mean to do it . . . I stabbed him . . . I didn’t mean to hurt him. . . .’” The presentence report also indicates that Tith told police he did not remember stabbing anyone and that he was too drunk to remember why he stabbed the victim.

aggravated assault charge, not an admission that he used a knife. His purported statement to the probation officer was also not an admission to the *court* that he used a knife, but an out-of-court statement to a third party after entry of his plea. While his statement to the probation officer may constitute *evidence* of his use of a knife, the court in *Sandoval* admonished that we “cannot necessarily assume that the record reflects all of the evidence that would have been presented had aggravating circumstances been submitted to the jury,” even where the case was tried to a jury, because the aggravating circumstances “were not part of the charge and were not directly at issue in the trial.” (*Sandoval, supra*, 41 Cal.4th at p. 839.) No less caution is warranted where, as here, the defendant entered a plea of guilty, and there was thus no trial and no evidence presented to a trier of fact at all.

Second, in recommending the upper term of sentence, the presentence report did not even mention Tith’s use of a knife as an aggravating factor under California Rules of Court, rule 4.421(a)(2). Instead, the recommendation of an aggravated term was based on the assertions that Tith engaged in violent conduct indicating a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1)), had numerous sustained petitions as a juvenile (Cal. Rules of Court, rule 4.421(b)(2)), was on juvenile probation at the time of the offense (Cal. Rules of Court, rule 4.421(b)(4)), and performed unsatisfactorily on juvenile probation (Cal. Rules of Court, rule 4.421(b)(5)). The presentence report specifically stated that there were no California Rules of Court, rule 4.421(a) aggravating factors.

Nor is it clear that the court relied upon Tith’s use of a knife as an aggravating factor. Although the court mentioned the knife in explaining why probation was inappropriate, the court never indicated that it was considering imposing an aggravated sentence based on Tith’s use of a weapon under California Rules of Court, rule 4.421(a)(2). Rather, the court indicated it was imposing the aggravated term due to the “nature of the offense,” a general phrase that would also include the court’s additional observations that Tith had gang affiliations and his victim was of a different race.

As a result, Tith and his counsel had little opportunity or incentive to argue the significance of the evidence that Tith had used a knife during the assault, particularly as to whether the aggravating factor of California Rules of Court, rule 4.421(a)(2) had been established. Indeed, counsel merely stated in response to the presentence report: “Defense counsel disagrees that the victim was particularly vulnerable pursuant to Rule 4.421(a)(3). Defense counsel disagrees that the defendant was engaged in a ‘pattern of violent conduct.’” There was no discussion at the sentencing hearing about Tith’s use of a weapon in connection with whether he should receive the upper term of sentence.

In sum, the record does not show that the prosecutor, the probation department, Tith, defense counsel, or the sentencing court ever actually considered whether Tith’s possession or use of a knife constituted an aggravating factor warranting an upper term of sentence. Even where a defendant “*did* have an incentive and opportunity at the sentencing hearing to contest any aggravating circumstances mentioned in the probation report or in the prosecutor’s statement in aggravation, that incentive and opportunity were not necessarily the same as they would have been had the aggravating circumstances been tried to a jury.” (*Sandoval, supra*, 41 Cal.4th at p. 839, italics added.) Here, without California Rules of Court, rule 4.421(a)(2) mentioned as a potential aggravating factor, in the totality of the circumstances we cannot conclude that the error was harmless beyond a reasonable doubt.

As to the other circumstances of the crime, the question is not whether the sentencing judge was firm in his conclusions as to the nature of the offense; the question is whether there was *evidence* from which a jury would have reached the same conclusion. The prosecution provided no competent evidence in this regard. Furthermore, we must be mindful of our Supreme Court’s admonishment that, “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.) Of the aggravating factors asserted in the presentence report, the

circumstances of the crime might be germane to whether Tith had engaged in violent conduct indicating a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1)). This is a subjective factor, and we are not confident that a jury would have found beyond a reasonable doubt on this record that Tith's conduct was such that it indicated a serious danger to society.

The People have failed to establish that the violation of Tith's constitutional rights was harmless beyond a reasonable doubt.

III. DISPOSITION

The judgment is vacated, and the matter is remanded for resentencing.

MILLER, J.*

We concur.

JONES, P. J.

SIMONS, J.

* Judge of the Superior Court of San Francisco County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.