



People v. Mejia

2007 | Cited 0 times | California Court of Appeal | June 27, 2007

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Richard Michael Mejia appeals the judgment entered following his conviction by jury of possession of a firearm by a felon and carrying a loaded firearm on his person and while Mejia was an active participant in a criminal street gang. (Pen. Code, §§ 12021, subd. (a)(1), 12031, subds. (a)(1), (a)(2)(C).)¹ The jury found Mejia committed each offense for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A).

Mejia contends the trial court committed sentencing error in imposing the upper term of three years for possession of a firearm by a felon and the upper term of four years for the criminal street gang enhancement. We reject these claims, finding the trial court properly relied on factors related to Mejia's recidivism to impose the upper terms and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. The People's Evidence

a. The Current Offense

On February 3, 2006, at approximately 2:30 a.m., patrolling City of Los Angeles police officers noticed Mejia speaking with two males at Sixth Street and Brooks Avenue in the Oakwood section of Venice. Mejia looked in the direction of the patrol vehicle then dropped a loaded pistol. The officers detained Mejia and recovered the weapon.

b. Prior Offenses

On July 11, 2003, California Highway Patrol officers stopped Mejia for a traffic violation and found a loaded Uzi assault rifle and a .380 caliber pistol in Mejia's car.

On August 30, 2004, City of Los Angeles police officers attempted to stop a vehicle in which Mejia was a passenger to check Mejia's parole status. The vehicle, which was being driven by an active



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member of a criminal street gang, refused to yield and, during a brief chase, a nine-millimeter pistol was discarded from the passenger side of the vehicle. Mejia was arrested for possession of the weapon, he pleaded guilty to the offense and was sentenced to two years in prison.

For the purpose of the charged offense of possession of a firearm by a felon, the parties stipulated Mejia had a prior felony conviction.

c. Expert Testimony

A gang expert testified, inter alia, Mejia was a leader of a criminal street gang based in Venice and that Mejia possessed the weapon in issue for the benefit of the gang. After Mejia's release from prison in September of 2005, Mejia was found in gang territory in the company of Juan Bernal, a known member of Mejia's gang who was Mejia's brother-in-law.

2. Defense Evidence

Mejia's parole agent testified that after Mejia's release from prison, Mejia lived in Riverside with his wife, children and brother-in-law. Mejia was in compliance with the terms of his parole until his arrest in this case.

3. Verdicts and Sentencing

The jury convicted Mejia as charged and found a criminal street gang enhancement true.

Mejia admitted two prior prison terms within the meaning of section 667.5, subdivision (b), one related to a conviction of possession of a controlled substance (Health & Saf. Code, § 11352) in 2001, and one for a conviction of possession of a firearm by a felon in 2004.

The prosecutor asked the trial court to impose the maximum sentence because Mejia had avoided conviction in numerous gang cases including: (1) a 1998 case involving the murder of multiple members of a rival gang; (2) in 2003 Mejia was arrested in possession of an Uzi that had been used one month earlier to commit a gang murder in which Mejia tentatively was identified as one of the suspects; and, (3) approximately two years ago Mejia was arrested in possession of a gun that had fired casings found at a crime scene where one individual was murdered and another shot in the leg. The prosecutor noted there were at least five circumstances in aggravation under California Rules of Court, rule 4.421(b), including, Mejia was a serious danger to society because he was detained in this case in possession of a loaded firearm with live rounds in the chamber.²

The trial court agreed the possession of a loaded firearm indicates a danger to society but indicated the current case did not involve violence within the meaning of rule 4.421(b)(1).



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The prosecutor next observed Mejia's record of crime was increasing in seriousness in that Mejia had been arrested or imprisoned every year since the age of 17 years. Specifically, in 1997 Mejia was arrested for possession of a controlled substance and for possession for sale of marijuana. In 1999 he was convicted of possession of a controlled substance and was granted probation. However, in February of 2001, probation was revoked and he was sentenced to prison. In July of 2003, Mejia was arrested for a violation of section 12025, subdivision (b)(1), possession of a concealed firearm by a felon, his parole was violated and he was returned to prison. In 2004, Mejia was convicted of unlawful possession of a firearm and was sent to prison for two years. Mejia was paroled in September of 2005 and he was arrested in this matter while he was on parole.

The prosecutor noted that under rule 4.421(b)(3) Mejia has served multiple prior prison terms, under rule 4.421(b)(4) Mejia committed the current case while he was on parole, and under rule 4.421(b)(5) Mejia's performance on probation or parole has been unsatisfactory, as shown by the fact he was on parole at the time he committed the current offense and he previously had been sent to prison upon revocation of probation.

The trial court indicated it agreed with these four factors in aggravation, found no factors in mitigation and found in aggravation the factor listed in rule 4.414(a)(2), i.e., the defendant was armed or used a weapon.

Mejia personally addressed the trial court to state he was innocent of the current charges and he had been trying to avoid gang contact. The trial court agreed the defense evidence showed Mejia was trying to make positive changes in his life. However, Mejia was on parole at the time of the current offense and the trial court found it "very troubling" that Mejia previously was convicted of the same offense he committed in this case.

The trial court found no factors in mitigation and selected the upper term on the substantive offense and the criminal street gang enhancement, plus two years for the prior prison terms, for a total term of nine years in state prison. In response to the prosecutor's request for clarification, the trial court indicated it had imposed the upper term based on the factors found in rule 4.421(b)(2), (3), (4) and (5), and rule 4.414(a)(2), and (b)(1), (2), (3) and (4), and found no factors in mitigation.

CONTENTIONS

Mejia contends imposition of the upper term on the substantive offense and the enhancement violated his Sixth Amendment right to a jury trial as set forth in *Cunningham v. California* (2007) 549 U.S. ---- [127 S.Ct. 856, 166 L.Ed.2d 856] (Cunningham). Mejia also claims sentencing error based on the assertedly improper dual use of his prior prison terms to impose both the upper term and prior prison term enhancements under section 667.5, subdivision (b).

The People respond Mejia forfeited these claims by failing to raise them in the trial court, the upper



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terms are supported by Mejia's recidivism, Cunningham does not apply to the upper term imposed for the criminal street gang enhancement, and any error was harmless.

DISCUSSION

1. Relevant Principles

a. Apprendi and Its Progeny

Apprendi v. New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], held: "Other than the fact of 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." (Id. at p. 490.) *Blakely v. Washington* (2004) 542 U.S. 296, 301 [124 S.Ct. 2531, 159 L.Ed.2d 403], reiterated this rule and applied it to invalidate enhanced punishment imposed under a sentencing scheme that bore some similarity to the upper, middle, and lower term system used in the California's Determinate Sentencing Law (DSL).

In *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court held the provision in section 1170, subdivision (b), that the middle term be imposed "unless there are circumstances in aggravation or mitigation of the crime," did not trigger the right to jury trial under *Apprendi* and *Blakely*.³ However, in *Cunningham*, supra, 549 U.S. at p. ---- [127 S.Ct. at p. 877], the United States Supreme Court concluded the middle term is the statutory maximum sentence under the DSL, overruling *People v. Black*, supra, 35 Cal.4th 1238. *Cunningham* held that "[b]ecause 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." (*Cunningham*, supra, 127 S.Ct. at p. 871.)

b. The Prior Conviction Exception

Apprendi recognized a "prior conviction" exception to the rule a trial court may not increase the penalty for a crime based on aggravating factors that were not submitted to the jury or proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, supra, 530 U.S., at p. 490.) This exception derives from *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [140 L.Ed.2d 350], which recognized the special role of a defendant's recidivism in a trial court's authority to sentence a criminal defendant.

The prior conviction exception has been interpreted broadly to encompass other facts relating to a defendant's recidivism. (See *People v. McGee* (2006) 38 Cal.4th 682, 706-709; *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-223 [prior prison terms used to increase defendant's sentence is a recidivism factor falling within the exception to *Apprendi*].) In *McGee*, the California Supreme Court specifically rejected attempts to narrow this exception "in advance of such a decision by the [United



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States Supreme Court]." (People v. McGee, supra, at p. 709.) Thus, California courts repeatedly have held the prior conviction exception " `is not limited simply to the bare fact of a defendant's prior conviction' [citation], but applies to `matters involving the more broadly framed issue of "recidivism." ' ' " (People v. Banks (2007) 149 Cal.App.4th 969, 973.)

One published case has suggested this broad view of the prior conviction exception cannot be sustained after Cunningham. People v. Govan (2007) 150 Cal.App.4th 1015, 1030-1032, noted Cunningham rejected a expansive construction of Almendarez-Torres by rejecting dissenting Justice Kennedy's suggestion the court distinguish between aggravating factors related to the nature of the offense and aggravating factors related to the nature of the offender. However, Justice Haller, dissenting in Govan, noted Cunningham did not involve the prior conviction exception and the footnote relied upon by the Govan majority merely rejected Justice Kennedy's view Apprendi should be limited to enhancements based on the nature of the offense. (Cunningham, supra, 549 U.S. at p. ---- [127 S.Ct. at pp. 864, 872-873 (dis. opn. of Kennedy, J.).)

The scope of the prior conviction exception presently is pending before the California Supreme Court in People v. Towne, S125677. After Cunningham was decided, the Supreme Court requested additional briefing in Towne on the following issues: (1) " `Do Cunningham v. California, supra, and Almendarez-Torres v. United States [, supra,] 523 U.S. 224, 239-247, permit the trial judge to sentence defendant to the upper term based on any or all of the following aggravating factors, without submitting them to a jury: the defendant's prior convictions as an adult are numerous and of increasing seriousness; the defendant has served a prior prison term; the defendant was on parole when the crime was committed; the defendant's prior performance on probation or parole was unsatisfactory ([Cal.] Rules of Court, [r]ule 4.421[(b)(2)- (b)(5))?]; [¶] [(2)] Is there any violation of the defendant's Sixth Amendment rights under Cunningham v. California, supra, if the defendant is eligible for the upper term based upon a single aggravating factor that has been established by means that satisfy the governing Sixth Amendment authorities-by, for example, a jury finding, the defendant's criminal history, or the defendant's admission-even if the trial judge relies on other aggravating factors (not established by such means) in exercising his or her discretion to select among the three sentences for which the defendant is eligible?" ⁴ (People v. Towne, supra, Cal. S.Ct. dock. entry (2/7/07); see also, People v. Hernandez, review granted Feb. 7, 2007, S148974; People v. Pardo, review granted Feb. 7, 2007, S148914.)

Thus, the law as to various aspects of the prior conviction exception is unclear pending issuance of an opinion in Towne. Obviously, if the broad interpretation of the prior conviction exception is continued in Towne, or if Towne concludes a single factor in aggravation renders a defendant eligible for the upper term, Mejia's case is easily affirmed. In the discussion that follows, we avoid these issues and determine no violation of Mejia's jury trial rights occurred and, to whatever extent there was error, it must be seen as harmless in light of Mejia's admissions and the jury's findings.

2. Effect of Mejia's Failure to Raise These Issues Below



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a. Mejia's Cunningham Claims

The People argue Mejia forfeited his claims of error arising under Cunningham because he failed to raise them at sentencing, which occurred in Mejia's case two years after Blakely was decided.

However, at the time Mejia was sentenced, *People v. Black*, supra, 35 Cal.4th 1238 was the prevailing law in California. *Black*, which held Blakely was inapplicable to the selection of the upper term, was reversed on this point in *Cunningham*. (*Cunningham*, supra, 549 U.S. at p. ---- [127 S.Ct. at p. 871].) Thus, Mejia's objection under Blakely to the upper term would have been futile. (Cf. *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 [defendant sentenced after Blakely but before *Black*].) Accordingly, Mejia's failure to object did not forfeit the claims he raises under *Cunningham*.

b. Mejia has Forfeited His Dual Use Argument

A different result obtains with respect to Mejia's assertion the trial court made an improper dual use of his prior prison terms to impose the upper term and to impose the prior prison term enhancements. It was well settled at the time of Mejia's sentencing that a trial court "may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b); *People v. Bowen* (1992) 11 Cal.App.4th 102, 105; rule 4.420(b).)

Because Mejia failed to raise the dual use issue below, he has forfeited this claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355.) Nonetheless, in order to forestall a claim of ineffective assistance of counsel, we address the merits of this claim in turn below.

3. The Upper Terms did not Violate Cunningham

In response to the prosecutor's request for clarification of the reasons for the sentence imposed, the trial court commingled the factors found in rule 4.414 (criteria affecting the decision to grant or deny probation) with factors found in rule 4.421 (criteria relating to the defendant that may be considered aggravating), and stated it found the factors stated at rule 4.414(a)(2) [the defendant was armed with or used a weapon], and the factors listed at rule 4.414(b)(1), 2, 3 and 4, which address, respectively, the defendant's prior record of criminal conduct, prior performance on probation or parole and present probation or parole status, and the defendant's willingness and ability to comply with the terms of probation.

The trial court also found the aggravating factors relating to the defendant set forth in rule 4.421(b)(2), (3), (4) and (5). These factors address, respectively, whether the defendant's prior convictions are numerous or of increasing seriousness, whether the defendant has served a prior prison term, whether the defendant was on probation or parole when the crime was committed and whether the defendant's prior performance on probation or parole was unsatisfactory.



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We address the propriety of each of these findings below.

a. Mejia was Armed in the Commission of the Current Offense

Mejia contends the trial court's use of rule 4.421(a)(2) (defendant was armed with a weapon in the commission of the offense) was erroneous in that he was not "armed" within the meaning of the rule, rather he merely possessed a weapon and mere possession of a weapon is not an aggravating factor. (People v. Garfield (1979) 92 Cal.App.3d 475, 480.)

This claim is not persuasive. With respect to count one, the jury found Mejia possessed a loaded firearm and that he did so while he was an active participant in a criminal street gang. This finding constitutes more than mere possession of a firearm and supports the trial court's finding that Mejia went beyond mere possession of a firearm in the commission of the charged offense.

b. Recidivism Related Factors

Mejia contends all of the remaining factors related to his recidivism, i.e., his numerous prior convictions, his prior prison terms, the fact Mejia was on parole at the time of the current offense and his failure on probation and parole. Mejia asserts the trial court did not rely on "the fact of a prior conviction" but on recidivist behavior supported only by the trial court's subjective conclusions. Mejia argues the scope of the prior conviction exception has been narrowly construed. (Shepard v. U.S. (2005) 544 U.S. 13 [161 L.Ed.2d 205].) Mejia also claims his convictions were not increasing in seriousness because his last two convictions both involved unlawful possession of a firearm. However, under any reasonable construction of the prior conviction exception, Mejia's claims fail.

With respect to Mejia's numerous prior convictions and his service of a prior prison term, the jury found Mejia had a prior felony conviction because a prior felony conviction is an element of possession of a firearm by a felon. Additionally, Mejia admitted he had served two prior prison terms. The conclusion Mejia had numerous prior convictions necessary followed from these admissions and jury finding. Because the trial court properly could find Mejia had numerous prior convictions and that he had been sentenced to prison based on the jury's verdict and Mejia's admissions, no violation of the right to jury trial appears.

Mejia's claim his convictions were not increasing in seriousness because his last two convictions both involved unlawful possession of a firearm does not alter this result. The aggravating factor in issue may be based on numerous prior convictions or prior convictions that are increasing in seriousness. As noted, there was uncontroverted evidence in this case that Mejia had suffered numerous prior convictions.

c. No Improper Dual Use of Facts



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Mejia contends the trial court's finding Mejia had served a prior prison term to support imposition of the upper term constituted an inappropriate dual use of facts in that the trial court relied upon Mejia's prior prison terms to impose two, one year enhancements under section 667.5, subdivision (b). As previously noted, Mejia failed to preserve this issue. However, the claim also fails on the merits.

Section 1170 provides the trial court "may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b); see rule 4.420(c); *People v. Bowen*, supra, 11 Cal.App.4th at p. 105.) Here, although Mejia had only two prior prison terms within the meaning of section 667.5, subdivision (b), he had been sentenced to prison on three different occasions. The report of the probation officer indicates Mejia was sentenced to prison in 2001 when he violated probation in his 1999 conviction. He was returned to prison on a violation of parole on that same conviction in 2003. In 2004, Mejia again was sentenced to prison on a new offense. Thus, a dual use objection in the trial court would have failed in that Mejia had served prison terms on three prior occasions. The additional prison term supports the trial court's finding Mejia served a prior prison term independent of the two prior prison terms for which Mejia was punished under section 667.5, subdivision (b).

d. The Upper Term on the Criminal Street Gang Enhancement

The People assert the trial court was not required to state aggravating factors in order to impose the upper term on the criminal street gang enhancement because section 186.22, subdivision (b)(1)(A) gives the trial court discretion to select the lower, middle or upper term without making any additional findings. Section 186.22, subdivision (b)(1)(A) states, "Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three or four years at the court's discretion."

The People note the Supreme Court has referred to subdivision (d) of section 186.22, which also provides for a lower, middle and upper term, as an "alternate penalty provision." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899.) Thus, the trial court committed no Cunningham error with respect to the criminal street gang enhancement.

The People's argument is persuasive in that the United States Supreme Court has affirmatively indicated a trial court's exercise of sentencing discretion does not raise a federal constitutional question. In reviewing the Federal Sentencing Guidelines, the court stated: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." (*U.S. v. Booker* (2005) 543 U.S. 220, 233 [160 L.Ed.2d 621]; see also *Apprendi v. New Jersey*, supra, 530 U.S. 466 at p. 481.) It therefore appears imposition of the upper term sentence under the criminal street gang enhancement is



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unfettered by the jury trial right. Thus, imposition of the upper term on the criminal street gang enhancement does not constitute a violation of the Sixth Amendment. For this additional reason, no error appears in the trial court's imposition of the upper term on the criminal street gang enhancement.

e. Harmless Error Analysis

Even if the California Supreme Court rules in *Towne* to narrow the prior conviction exception and rejects the People's argument that one valid factor in aggravation renders a defendant eligible for the upper term, any error the trial court made in imposing the upper term sentence in this case was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) 548 U.S. ---- [126 S.Ct. 2546, 165 L.Ed.2d 466] [Apprendi/Blakely error not "structural error" requiring automatic reversal]; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [Apprendi error reviewable under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

As has been discussed, the jury found Mejia had a prior felony conviction and that he possessed a loaded firearm while he was an active participant in a criminal street gang. Further, Mejia admitted two prior prison terms. Additionally, the report of the probation officer prepared in this case detailed Mejia's criminal history and the prosecutor recited that history into the record at the time of sentencing. Mejia did not object to the probation officer's report or the prosecutor's summary of the facts it contained.

On this record, we confidently conclude the jury would necessarily have found, beyond a reasonable doubt, the existence of the aggravating factors identified by the trial court. Mejia asserts there is no guarantee the jury would have found his performance on parole was unsatisfactory because the evidence adduced at trial indicated Mejia was married, he had moved from gang territory, he had been doing well on parole and his only parole violation was based on association with his brother-in-law, a known gang member. However, the defense evidence Mejia relied upon to show he was performing satisfactorily on parole was presented through the testimony of Mejia's parole agent. Thus, the jury could not have found Mejia was not on parole at the time of the incident. Further, given that the jury convicted Mejia as charged, the jury could not have found that his performance on parole had been satisfactory.

f. Conclusion

The record makes clear the trial court's decision to impose the upper terms based on Mejia's recidivism which in this case was shown by Mejia's admissions and the jury's verdict. The absence of any mitigating factors demonstrates that, regardless of the result in *Towne*, no different result would obtain in this case. Consequently, we affirm the judgment.

DISPOSITION



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The judgment is affirmed.

We concur: CROSKEY, J., ALDRICH, J.

1. Subsequent unspecified statutory references are to the Penal Code.
2. Subsequent unspecified rule references are to the California Rules of Court.
3. The Legislature amended the DSL in response to Cunningham. (Stats. 2007, ch. 3, § 2, eff. Mar. 30, 2007.) All references to the DSL are to that statute as it read prior to this amendment.
4. The People raise a variation of the issue presented in the second question in this case. That is, People argue that, because a single factor in aggravation is sufficient to support an upper term (People v. Osband (1996) 13 Cal.4th 622, 728-729), Mejia's prior conviction, standing alone, constitutes a factor in aggravation which renders Mejia eligible for the upper term. Thus, the trial court had the authority to impose the upper term and properly could find other aggravating factors in determining whether to impose the upper term. In making this argument, the People rely on Cunningham's focus on the trial court's "authority to impose an enhanced sentence." This reasoning overlooks Cunningham's holding the middle term is the statutory maximum under the DSL. (Cunningham, supra, 549 U.S. at p. - - - [127 S.Ct. at p. 868].) The existence of a prior conviction does not increase the statutory maximum. Rather, it permits the trial court to sentence a defendant beyond the statutory maximum. (Cunningham, supra, [127 S.Ct. at p. 868].) We therefore disagree with the People's suggestion the upper term is the statutory maximum whenever the record reflects the existence of a single constitutionally permissible aggravating factor. However, we need not resolve this issue in order to reject Mejia's claims on appeal.

