



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

### NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

### OPINION

#### I. INTRODUCTION

A jury found defendant guilty of two counts of robbery (Pen. Code, § 211;<sup>1</sup> counts 3 & 4) and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 5), and found he personally used a firearm in the commission of the robberies (§ 12022.53, subd. (b)). The evidence supporting counts 3, 4, and 5 was based on an incident that occurred on November 21, 2005.

Defendant was also charged with robbery and being a felon in possession of a firearm based on a separate incident that occurred on November 18, 2005 (counts 1 & 2, respectively). It was further alleged that defendant personally used a firearm in count 1. A mistrial was declared on counts 1 and 2 after the jury was unable to reach a verdict on those counts.

After defendant was sentenced on counts 3, 4, and 5, he pled guilty to counts 1 and 2 and admitted a personal use allegation in count 1. On all five counts, defendant was sentenced to an aggregate term of 15 years in prison.<sup>2</sup> This appeal followed.

#### II. SUMMARY OF CLAIMS AND CONCLUSIONS

Defendant raises two claims of federal constitutional error based on *Apprendi*<sup>3</sup> and its progeny, including *Blakely*<sup>4</sup> and *Cunningham*.<sup>5</sup> He first claims the trial court violated his right to a jury trial in imposing upper terms on count 3, 4, and 5, based on facts or factors the trial court found true by a preponderance of the evidence, rather than on facts the jury found true beyond a reasonable doubt. We reject this claim because defendant was sentenced in April 2007 in accordance with the determinate sentencing law (DSL) as amended effective March 30, 2007. Under the amended DSL, the upper term, not the middle term, is the maximum sentence a defendant may receive. Thus, defendant did not have a right to a jury trial on any of the factors the trial court relied on in selecting the upper terms, including recidivism-based factors.



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

Second, defendant claims the trial court erroneously imposed concurrent, unstayed terms on counts 2 and 5. He does not challenge the sufficiency of the evidence supporting the trial court's conclusion that section 654 did not apply to counts 2 and 5, or require that his sentences on those counts be stayed. Rather, he claims he had a right to a jury trial on whether he harbored separate intents and objectives in committing counts 2 and 5. We reject this claim. The Apprendi rule does not apply to factual findings by a trial court under section 654, because the statute is a sentence reduction statute, not a sentence enhancement statute.

Third and finally, defendant claims insufficient evidence supports his conviction in count 5 for being a felon in possession of a firearm and the true findings on the personal use enhancements in counts 3 and 4, because there was no evidence that the gun he possessed and used on November 21, 2005, was a "real" firearm. We disagree. Substantial evidence supports the conviction and true findings, because although the gun defendant possessed and used was never found, witness descriptions of it were sufficient to support a reasonable inference that it was a "real" firearm.

Accordingly, we affirm the judgment.

### III. BACKGROUND

#### A. The Evidence Concerning Counts 3, 4, and 5 (The Thrifty Store Robbery)

The following facts are stated in the light most favorable to the judgment. On the afternoon of November 21, 2005, defendant and a male cohort walked into a Thrifty gas station store in Moreno Valley, approached the clerk, who was standing behind the cash register, and said, "Give me the cash." As defendant demanded money, he pulled up his shirt, revealing a handgun in his waistband. The clerk gave defendant the money in the cash register and also complied with his demand to obtain a roll of \$5 bills from a vending safe. After obtaining the money, defendant and his cohort walked out of the store.

Jaime Chavez had driven defendant and his cohort to the store and was waiting for them in a car in a nearby alley. Defendant had told Chavez he wanted a ride to the store to "get a beer." When defendant and his cohort came running down the alley toward Chavez's car, she was surprised to see that defendant had "a gun in his hand" and his cohort was carrying a bank pouch. Chavez drove away without the two men.

#### B. Defendant's Guilty Pleas in Counts 1 and 2

After the jury was unable to reach a verdict on the robbery and felon in possession charges in counts 1 and 2, defendant pled guilty to both counts and admitted he personally used a firearm in the commission of the robbery. At his change of plea hearing, defendant admitted that, on November 18, 2005, he took personal property from a person by means of force and fear and possessed a handgun



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

following a prior 2002 conviction of felony battery on a public officer. (§ 243, subd. (c).)

### IV. DISCUSSION

#### A. The Trial Court's Imposition of Upper Term Sentences on Counts 3, 4, and 5 Did Not Violate Defendant's Right to a Jury Trial

Defendant contends the trial court's imposition of upper term sentences on counts 3, 4, and 5 violated his federal constitutional rights to a jury trial and proof beyond a reasonable doubt of any fact used to increase his sentence beyond the "prescribed statutory maximum." (Apprendi, supra, 530 U.S. at p. 490.) He argues he was entitled to a jury trial and proof beyond a reasonable doubt on "the vast majority" of the aggravating factors the trial court relied on in imposing the upper terms on counts 3, 4, and 5, including two prior juvenile adjudications.

We find no Sixth Amendment or other federal constitutional error in the court's selection of the upper terms. Defendant was sentenced on counts 3, 4, and 5 on April 27, 2007, after the high court issued its decision in *Cunningham* on January 22, 2007, and after the Legislature amended the DSL (§ 1170 et seq.) by urgency legislation effective March 30, 2007 (Stats. 2007, ch. 3, § 2, pp. 4-6).<sup>6</sup> For the reasons we explain, the amended DSL remedied the constitutional infirmities of the former DSL found in *Cunningham*. And, because defendant was sentenced under and in accordance with the requirements of the amended DSL, he was not entitled to a jury trial on any of the factors the trial court relied on in imposing the upper terms on counts 3, 4, and 5.

We begin by observing that the high court in *Apprendi*, supra, 530 U.S. at page 490, held that, "[o]ther 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." In *Blakely*, the high court clarified that, for *Apprendi* purposes, the "prescribed statutory maximum" is not necessarily the maximum penalty provided by statute for the crime; rather, it is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, supra, 542 U.S. at p. 303.)

In *Cunningham*, the high court overruled the decision in *People v. Black* (2005) 35 Cal.4th 1238 (Black I), which had upheld the former DSL against a Sixth Amendment challenge. (*Cunningham*, supra, 549 U.S. at p. \_\_\_\_ [127 S.Ct. at p. 870].) The Black I court held that, under the former DSL, the statutory maximum for *Apprendi* purposes was the upper term sentence. (*Cunningham*, supra, at p. \_\_\_\_ [127 S.Ct. at p. 868]; Black I, supra, at p. 1254.) The *Cunningham* court disagreed, reasoning that the former DSL violated a defendant's Sixth Amendment right to a jury trial 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 . . . ." (*Cunningham*, supra, at p. \_\_\_\_ [127 S.Ct. at p. 868].)<sup>7</sup> Thus, the high court concluded that the middle term prescribed in the former DSL, not the upper term, was the relevant statutory maximum for *Apprendi* purposes. (*Cunningham*, supra, at p. \_\_\_\_



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

[127 S.Ct. at pp. 868, 871].)

As noted, in response to Cunningham the Legislature amended the former DSL by urgency legislation effective March 30, 2007. (Stats. 2007, ch. 3, § 2, pp. 4-6; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2.) The amended DSL remedied the constitutional infirmities in the former DSL by eliminating the middle term as the presumptive term and by allowing the trial court to exercise broad discretion in selecting the lower, middle or upper term based on reasons stated on the record. As amended, section 1170 now provides: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (§ 1170, subd. (b).)

These amendments were suggested by the Cunningham court itself as a means of remedying the constitutional infirmities in the DSL. As the Cunningham court observed, a system which permits judges to exercise broad discretion within a statutory range "encounters no Sixth Amendment shoal." (Cunningham, *supra*, 549 U.S. at p. \_\_\_ [127 S.Ct. at p. 871].) Or as the Third District Court of Appeal in *People v. Wilson* recently put it, the Cunningham court suggested that ". . . California could comply with [Sixth Amendment] jury-trial constitutional guarantee while still retaining determinate sentencing, by allowing trial judges broad discretion in selecting a term within a statutory range, thereby eliminating the requirement of a judge-found factual finding to impose an upper term." (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992, citing Cunningham, *supra*, at p. \_\_\_ [127 S.Ct. at p. 871].)

At the time of defendant's April 27, 2007, sentencing hearing on counts 3, 4, and 5, the trial court was well aware of the high court's decision in Cunningham and the amendments to the DSL that the Legislature had enacted in response to Cunningham. The trial court observed that the DSL, as amended, gave it "full power and authority to sentence any defendant to any of the three terms set forth in the Penal Code" if "appropriate and warranted," and that nothing in Apprendi, Blakely, or Cunningham prohibited the court from relying on a defendant's "criminal history or prior convictions" to aggravate his sentence.<sup>8</sup>

In sentencing defendant to the upper terms, the trial court relied on defendant's lengthy criminal history, both as a juvenile and an adult, and his failure to reform. The court said, "Mr. Coleman is only 25 years old, but he's been involved in the criminal justice system now for over 10 years, dating back to 1996 [when he was 14 years old and] allegations were found true that he committed . . . a robbery, the same charge as in this case, as well as a violation of Penal Code Section 496." The record supports the trial court's observation that defendant had an extensive criminal history, particularly for a person of his age.

As indicated in his probation report, defendant had two juvenile adjudications for committing



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

robbery and violating section 496, in 1996 when he was only 14 years old. In 1999, when he was 17 years old, he was adjudicated to be a felon in possession of a firearm. His prior convictions as an adult included misdemeanor petty theft in 2001 when he was 19 years old; felony battery in violation of section 243, subdivision (c)(1) in March 2002 when he was 20 years old; and second degree burglary in September 2002 when he was still 20 years old. The offenses in counts 3, 4, and 5—two robberies and felon in possession of a firearm—were committed in November 2005 when defendant was 23 years old.

The court also relied on the fact that defendant's prior performance on probation, both as a juvenile and adult, had been unsatisfactory. As indicated in his probation report, defendant either admitted or was found in violation of his probation three times, the first time following his 1996 juvenile adjudications, a second time following his March 2002 conviction for felony battery, and a third time following his September 2002 conviction for second degree burglary. Finally, the court relied on the fact that defendant was on probation when he committed the offenses in counts 3, 4, and 5 in November 2005.

Because defendant was sentenced in accordance with the requirements of section 1170, subdivision (b), as amended effective March 30, 2007, his upper term sentences did not violate his right to a jury trial or proof beyond a reasonable doubt under *Apprendi*, *Blakely*, or *Cunningham*. (*People v. Wilson*, supra, 164 Cal.App.4th at p. 992.)

Defendant was not entitled to a jury trial on any of the factors the trial court relied on in selecting the upper terms because, at the time he was sentenced, the middle terms were no longer the presumptive terms under the DSL. Nor was the trial court required to begin with the middle terms and move to the upper terms only if it found factors in aggravation beyond the elements of the charged offense. (*Cunningham*, supra, 549 U.S. at p. \_\_\_\_ [127 S.Ct. at p. 868].) Instead, the trial court exercised the broad discretion it had pursuant to section 1170, subdivision (b), as amended, in selecting the upper terms, and stated its reasons for doing so on the record. (§ 1170, subd. (b).)<sup>9</sup> There was therefore no *Cunningham* error in the trial court's selection of the upper terms.

But even if *Cunningham* applied to defendant's sentencing, there was no federal constitutional error because defendant was eligible for the upper terms based on factors that were established in accordance with Sixth Amendment principles. Even under the former DSL, "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." (*People v. Black* (2007) 41 Cal.4th 799, 813 (Black II).)

Here, at least two "aggravating circumstances" satisfied Sixth Amendment requirements under the



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

former DSL at the time defendant was sentenced. First, his prior convictions as an adult were numerous or of increasing seriousness. (Former rule 4.421(b)(2); Black II, *supra*, 41 Cal.4th at pp. 818-820 [the right to jury trial does not apply to determination that defendant's prior convictions are numerous or of increasing seriousness].) Second, he was on probation at the time he committed the offenses in counts 3, 4, and 5. (Former rule 4.421(b)(4); *People v. Towne* (2008) 44 Cal.4th 63, 82 (*Towne*) [right to a jury trial does not apply to determination that prior performance on probation or parole was unsatisfactory when that determination is based on the defendant's conviction for a new offense while on probation or parole].) Either of these circumstances in aggravation, standing alone, was sufficient to render defendant eligible for the upper terms on all three counts under the former DSL.

In addition, defendant claims that, to the extent the trial court selected the upper terms based on his record of prior convictions or his recidivism, the prior conviction or recidivism exception to the Apprendi rule is no longer valid in light of Apprendi, Blakely, and Cunningham, and Black II was wrongly decided to the extent it presumed the continued validity of the recidivism exception. The prior conviction or recidivism exception is also known as the "Almandarez-Torres exception" because it is based on the high court's decision in *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224 (*AlmendarezTorres*). (*Towne*, *supra*, 44 Cal.4th at pp. 75-76.) This argument was most recently raised and rejected in *Towne*, *supra*, at pages 77 through 79, a decision issued after defendant filed his opening brief.

As the *Towne* court explained, the high court in Apprendi, Blakely, Cunningham, and in *U.S. v. Booker* (2005) 543 U.S. 220, 245 "has continued to exempt 'the fact of a prior conviction' from the Sixth Amendment's requirement that a fact exposing a defendant to a higher sentence be proved to a jury beyond a reasonable doubt." (*Towne*, *supra*, 44 Cal.4th at p. 77.) As the *Towne* court also observed, most federal appellate courts and a majority of state appellate courts that have addressed the issue "have declined to limit the 'prior convictions' exception to the mere fact of a prior conviction" and have agreed that "a judge may make factual findings on a variety of issues that are related to a defendant's recidivism." (*Id.* at pp. 77-78; see also Black II, *supra*, 41 Cal.4th at p. 819 & fn. 8; *People v. McGee* (2006) 38 Cal.4th 682, 700-708 (*McGee*).)<sup>10</sup>

For the reasons explained in *Towne*, Black II, and *McGee*, we reject defendant's claim that the prior conviction or recidivism exception to the Apprendi rule is no longer valid in light of Apprendi, Blakely, and Cunningham.<sup>11</sup>

In addition, defendant's argument that the prior conviction or recidivism exception is no longer valid fails to acknowledge that defendant was sentenced in accordance with the March 30, 2007, amendments to the DSL, not the former DSL. As indicated, the trial court did not impose the upper terms based on the prior conviction or recidivism exception to the Apprendi rule. Instead, it exercised its broad discretion under the amended DSL in imposing the upper terms. (§ 1170, subd. (b); rule 4.421(b)(2).) Indeed, Apprendi and its progeny, including Cunningham, did not apply to





## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

defendant's sentence because, under the amended DSL, the upper term is the "prescribed statutory maximum" for Apprendi purposes. (Apprendi, supra, 530 U.S. at p. 490.)

Lastly, defendant argues that the trial court's reliance on his juvenile adjudications in imposing the upper terms violated his rights to a jury trial and due process, because a finding of guilt by one or fewer than a panel of six "is not sufficiently reliable to satisfy due process with regard to an adult sentencing decision."<sup>12</sup> It is unnecessary for us to address this claim, because even if the trial court erred in relying on defendant's juvenile adjudications in imposing the upper terms, the error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.) Defendant's prior convictions as an adult were numerous and of increasing seriousness-notwithstanding his juvenile adjudications-and he was on probation when he committed his current offenses in counts 3, 4, and 5. We are convinced beyond a reasonable doubt that the trial court would have imposed the upper terms based solely on the facts that (1) defendant's prior convictions as an adult were numerous and of increasing seriousness and (2) he was on probation when he committed his current offenses, regardless of defendant's juvenile adjudications. (Neder v. U.S. (1999) 527 U.S. 1, 19 [reversal for constitutional error not required when reviewing court can say the result would have been the same absent the error].)

### B. Defendant Was Not Entitled to a Jury Trial on Facts Relevant to Whether His Sentences on Counts 2 and 5 Should Have Been Stayed Pursuant to Section 654

In the second argument based on his first, defendant claims the trial court's imposition of separate, unstayed sentences on counts 2 and 5 violated his right to a jury trial and proof beyond a reasonable doubt. He maintains that, under Apprendi and its progeny, he had a right to a jury trial on whether he possessed the firearms in counts 2 and 5 at a time other than the time of the robberies in counts 1, 3, and 4, and harbored separate intents in possessing the firearms. Defendant acknowledges that existing case law allows multiple punishment or the imposition of separate, unstayed sentences for being a felon in possession of a firearm and another crime involving the same firearm, "where the evidence shows that the defendant possessed the firearm before the [other] crime, with an independent intent." (People v. Jones (2002) 103 Cal.App.4th 1139, 1144 (Jones).) He argues, however, that Jones and other cases following its reasoning must be revisited in light of Apprendi and its progeny.

Specifically, defendant argues that, under section 654, the "prescribed statutory maximum" penalty, for Apprendi purposes, for a series of offenses committed pursuant to a single intent and objective is the penalty provision prescribing the greatest punishment. He further reasons that, when a trial court imposes multiple punishment for two or more offenses based on the trial court's factual finding that the defendant harbored separate intents or multiple objectives in committing the offenses, the defendant's sentence is "elevated" above the sentence which is authorized based solely on the facts found true by the jury beyond a reasonable doubt, or admitted by the defendant.<sup>13</sup>



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

Defendant's argument misconstrues section 654. As the court in *People v. Cleveland* (2001) 87 Cal.App.4th 263, 270, explained: "Unlike in the 'hate crime' provision in *Apprendi*, section 654 is not a sentencing 'enhancement.' On the contrary it is a sentencing 'reduction' statute. Section 654 is not a mandate of constitutional law. Instead, it is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively 'reduces' the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the non-jury factual determination increases the maximum penalty beyond the statutory range authorized by the jury's verdict."

Here, the jury's verdicts on counts 3, 4, and 5, and defendant's guilty pleas on counts 1 and 2, authorized the trial court to impose separate punishment for each crime, absent a finding by the trial court that separate punishment on counts 2 or 5 was improper under section 654. Thus, the trial court's imposition of separate punishment on counts 2 and 5 based on its findings that section 654 did not apply to reduce or stay those terms did not violate defendant's jury trial rights under *Apprendi*.<sup>14</sup>

### C. Substantial Evidence Supports Defendant's Conviction in Count 5 and the Personal Use Findings on Counts 3 and 4

Lastly, defendant claims insufficient evidence supports his conviction in count 5 for being a felon in possession of a firearm and the personal use findings on his robbery convictions in counts 3 and 4. (§§ 12021, subd. (a), 12022.53, subd. (b).) He maintains there was no evidence that the "device" he displayed during the robberies and possessed prior to the robberies was a "real" handgun or firearm. We disagree.

We apply the same standard of review in determining whether sufficient evidence supports a conviction and an enhancement. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058.) We review the entire record in the light most favorable to the judgment in order to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the disputed element of the crime or the enhancement true beyond a reasonable doubt. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572.) The same standard of review applies when the People rely mainly on circumstantial evidence. (*Ibid.*; *People v. Snow* (2003) 30 Cal.4th 43, 66.)

Section 12021, subdivision (a) provides it is a felony to be a felon in possession of a "firearm." Section 12022.53, subdivision (b) provides for a 10-year enhancement for the personal use of a "firearm" during the commission of a robbery. (§ 12022.53, subds. (a)(4), (b).) For purposes of these statutes, a "firearm" is defined as "any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion." (§ 12001, subd. (b).)<sup>15</sup>





## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

Defendant argues that none of the witnesses to the Thrifty store robbery and firearm possession charge in count 5 "gave any testimony indicating that the item they saw was designed to expel a projectile through a barrel by the force of any explosion or other form of combustion. They may certainly have believed that it was a firearm, but that belief was not supported by any evidence. The device could easily have been one of many items that are designed to look like a firearm as opposed to being designed to function as a firearm."

This argument disregards the principle that facts may be proven circumstantially as well as by more direct evidence. Like other questions of fact, "[t]he character of the weapon may be shown by circumstantial evidence. [Citation.]" (People v. Hayden (1973) 30 Cal.App.3d 446, 451-452, disapproved on other grounds in People v. Rist (1976) 16 Cal.3d 211, 223; CALCRIM No. 223.)<sup>16</sup> The "device" or weapon in question was not introduced into evidence because it was never found. Instead, its character as a firearm was proven circumstantially, specifically by Lopez's and Chavez's descriptions of its physical appearance and by their testimony concerning defendant's actions.

Defendant indicated to Lopez that he had a real gun when he displayed it to her and demanded money. Lopez saw the handle of the gun in defendant's pants and believed it was a real gun. Chavez saw the gun in defendant's hand as he was running toward her car, and she also believed it was a real gun. Lopez and Chavez both believed the gun was made of metal. This evidence reasonably indicated to the jury that the weapon in question was a "real" firearm. Accordingly, there was no need for any additional or more direct proof that the weapon in question was a "firearm" as that term is defined in section 12001, subdivision (b).

## V. DISPOSITION

The judgment is affirmed.

We concur: Gaut, Acting P.J., Miller, J.

1. All further statutory references are to the Penal Code unless otherwise indicated.
2. Defendant's sentence consisted of the upper term of five years on count 3 plus 10 years for the personal use enhancement on count 3. Concurrent terms were imposed on counts 4 and 5, namely, the upper term of five years on count 4, 10 years for the personal use enhancement on count 4, and the upper term of three years on count 5. Concurrent terms were also imposed on counts 1 and 2, consisting of the middle term of three years on count 1, 10 years for the personal use enhancement on count 1, and the middle term of two years on count 2.
3. Apprendi v. New Jersey (2000) 530 U.S. 466 (Apprendi).
4. Blakely v. Washington (2004) 542 U.S. 296 (Blakeley)



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

5. *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

6. All further references to section 1170 or to the DSL are to the statutes as they read following the March 30, 2007, amendments unless otherwise noted. In response to the amendments to the DSL, the Judicial Council amended the sentencing rules of the California Rules of Court effective May 23, 2007. Unless otherwise noted, all references to rules are to the California Rules of Court as they read prior to the May 23, 2007, amendments.

7. The former DSL specified that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Former § 1170, subd. (b).) The facts relevant to this sentencing choice were to be determined by the court and proved by a preponderance of the evidence. (*Ibid.*; former rule 4.420(b).) As summarized in *Cunningham*, "... California's [former] DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts-whether related to the offense or the offender-beyond the elements of the charged offense." (*Cunningham*, *supra*, 549 U.S. at p. \_\_\_\_ [127 S.Ct. at p. 863].)

8. The sentencing hearing occurred before the Judicial Council amended the sentencing rules of the California Rules of Court, effective May 23, 2007, to reflect the March 23, 2007, amendments to the DSL. (See fn. 7, *ante*.)

9. Defendant does not argue that the trial court abused its discretion in imposing the upper terms.

10. In *Black II* and *Towne*, our state Supreme Court expanded the prior conviction or recidivism exception to the Apprendi rule to include trial court findings that: (1) the defendant served a prior prison term; (2) the defendant's prior convictions are numerous or of increasing seriousness; and (3) the defendant reoffended while on probation or parole. (*Black II*, *supra*, 41 Cal.4th at pp. 818-820; *Towne*, *supra*, 44 Cal.4th at pp. 75-76, 79.) A trial court's finding that a defendant's prior performance on probation or parole was unsatisfactory may fall within the recidivism exception, depending upon "the evidence by which that circumstance is established in a particular case." (*Towne*, *supra*, at p. 82.)

11. In a subsidiary argument, defendant maintains that *Black II* was wrongly decided to the extent it held that the imposition of an upper term sentence based on a trial court's determination that the defendant's prior convictions were numerous or of increasing seriousness did not implicate or violate the defendant's Sixth Amendment right to a jury trial. (Former rule 4.421(b)(2); *Black II*, *supra*, 41 Cal.4th at pp. 818-820.) More specifically, defendant argues that *Black II* erroneously "presume[d] the continuing vitality" of the *Almendarez-Torres* or recidivism exception to the Apprendi rule, "by holding that the imposition of an aggravated sentence based on a defendant's criminal history does not implicate the Sixth Amendment right to jury trial." By implication, defendant also suggests that *Towne* was also wrongly decided, because it, too, presumed that the recidivism exception to the Apprendi rule was still valid following *Apprendi*, *Blakely*, and *Cunningham*. We reject this claim because we are bound by the decision in *Black II* and *Towne*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

12. As defendant points out, the question whether a juvenile adjudication may serve as a strike prior is currently pending before the California Supreme Court in *People v. Nguyen* (2007) 152 Cal.App.4th 1205 (review granted Oct. 10, 2007, S154847).



## People v. Coleman

2009 | Cited 0 times | California Court of Appeal | January 13, 2009

13. As noted, the high court in *Apprendi*, supra, 530 U.S. at page 490, held that "[o]ther 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." The "prescribed statutory maximum" is not necessarily the maximum penalty provided by statute for the crime; rather, it is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, supra, 542 U.S. at p. 303.)

14. In light of our conclusions that (1) the imposition of the upper terms on counts 3, 4, and 5 did not violate defendant's right to a jury trial; (2) any error in imposing the upper terms was harmless beyond a reasonable doubt; and (3) defendant did not have a right to a jury trial on whether he harbored separate intents and objectives in committing counts 2 and 5, we do not address defendant's contingent claim that the appropriate remedy for the trial court's alleged constitutional errors is to impose the middle term on counts 3, 4, and 5 and stay his sentences on counts 2 and 5.

15. For purposes of the personal use allegations in counts 3 and 4, the jury was instructed, "A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting. A firearm does not need to be loaded." (Judicial Council of Cal. Crim. Jury Instns., CALCRIM No. 3146 (Personally Used Firearm).) The same definition of a firearm applied for purposes of the charge in count 5 that defendant was a felon in possession of a firearm. (See CALCRIM No. 2511.)

16. CALCRIM No. 223 (Direct and Circumstantial Evidence: Defined) instructed the jury, in part, that, "Facts may be proved by direct or circumstantial evidence or by a combination of both. . . . Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may conclude the truth of the fact in question. . . . [¶] Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge . . . . You must decide whether a fact in issue has been proved based on all the evidence."

