



People v. Herrera

2007 | Cited 0 times | California Court of Appeal | October 3, 2007

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Appellant Samuel Herrera was sentenced to 20 years eight months in prison, for crimes that occurred on two different occasions. On counts 1, 3 and 6, he was convicted of kidnaping, assault with a firearm and unlawful sexual intercourse, for an incident that involved his 17-year- old girlfriend. On counts 4 and 5, he was convicted of two assaults with a firearm, for shooting at two men during an argument outside a bar.

Appellant contends that under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), his Sixth Amendment right to trial by jury was violated by (1) imposition of the upper term on count 4 and (2) imposition of consecutive terms on counts 1 and 3.

The meaning of *Blakely*, supra, 542 U.S. 296, and *Cunningham*, supra, 127 S.Ct. 856 was recently explained in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). Under *Black II*, there was no sentencing error in this case.

DISCUSSION

1. The Upper Term on Count 4

Forfeiture is a preliminary issue. That question was resolved by *Black II*'s holding that "a claim of sentencing error premised upon the principles established in *Blakely* and *Cunningham* is not forfeited on appeal by counsel's failure to object at trial." (*Black II*, supra, 41 Cal.4th at p. 812.) We proceed to the merits.

Under *Black II*, "imposition of the upper term 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.)



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Here, as in Black II, the defendant's criminal history was a legally sufficient aggravating circumstance, for the purpose of the upper term.

The probation report lists a long series of crimes, including juvenile crimes between 1986 and 1989, and adult crimes beginning in 1993. The adult convictions resulted in multiple incarcerations in jail and prison, for such crimes as possession of narcotics and grand theft from the person. The probation report named eight factors in aggravation, including three that related to appellant's criminal record: prior convictions that were numerous or of increasing seriousness, prior prison terms, and unsatisfactory prior performance on probation or parole.

At the sentencing hearing, the trial court summarized the facts in the probation report regarding counts 4 and 5, as appellant pled guilty to those counts prior to his trial on the other counts. The facts were that, after a dispute involving a woman inside the bar, the victims were subsequently "accosted by the defendant outside and [he] ultimately fir[ed] shots toward the ground, obviously hitting one of the victims in the foot." As to the other counts, the court recalled the victim's testimony that the defendant struck her in the head with a gun, while they were arguing in a car. The court then discussed appellant's criminal history in detail, before denying probation and imposing the upper term on count 4.¹

As appellant points out, the court's specific reason for imposing the upper term was that the crime was "aggravated" in nature (fn. 1, ante). That specific reason is not significant, because the court utilized appellant's prior record as a reason for denying probation, and "the same fact may be used both to deny probation and to support imposition of an upper term sentence." (Black II, supra, 41 Cal.4th at p. 817.)

In the reply brief, appellant argues that the recidivism exception of *Almendarez-Torres v. United States* (1998) 523 U.S. 224 does not permit findings that involve more than the "fact" of a prior conviction. Black II, supra, 41 Cal.4th at pages 819-820 rejected that very argument. We must follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We therefore conclude that imposition of the upper term here complied with appellant's Sixth Amendment right to trial by jury. 2. Consecutive Terms on Counts 1 and 3

Under Black II, supra, 41 Cal.4th 799, 820-823, imposition of consecutive terms does not implicate a defendant's Sixth Amendment rights. We therefore reject appellant's argument about the consecutive sentence on counts 1 and 3.

DISPOSITION

The judgment is affirmed.

We concur: COOPER, P. J., RUBIN, J.



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1. "THE COURT: Okay. I am going to deny probation, obviously, based on the seriousness of these offenses, the two specific incidents, both regarding the use of firearm in different ways, discharging it in one situation, using it to beat the victim in another, and I thought that the injury to her was extremely serious. "Also the prior record is one indicating from as long ago as 1986. Mr. Herrera doesn't seem to want to obey any of the rules. We've got a lot of juvenile incidents involving three in '86, two in '87, two in '88, '89 two more incidents. Not always showing a disposition, but constant contacts with law enforcements, which is not a good result in the first place. "And then as an adult starting out in 1993 again with drug cases, but showing a total lack of cooperation with law enforcement to the extent of continuing to commit felony offenses. "Received jail in the first incident in 1993 but three years state prison in '97 with violations of parole, it looks like three violations. He was received by C.D.C. in 1999, 2000 and 2001, and then the final felony conviction in 2000, which would have been tied I think to one of the parole violations. That was also possession, but again an additional 16 months in state prison. "So for those two reasons, probation is denied, and the defendant is then sentenced to state prison using count 1 [soon corrected to be count 4] as the primary term, I would impose the high term. The incident was an aggravated one. This is not one in which defendant's personal integrity was challenged. "As is recorded by the probation department, a woman requested and was denied a drink by somebody. She created the circumstance in which the victims left the bar and then Mr. Herrera challenged them outside and ultimately discharged the firearm."

