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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.

TIMOTHY HICKS,

Defendant and Appellant.

A131264

**(Alameda County
Super. Ct. No. C155721)**

A jury convicted appellant Timothy Hicks (defendant) of two counts of voluntary manslaughter and one count of being a convicted felon in possession of a firearm. On appeal, defendant raises claims of constitutional and statutory error at sentencing. We reject his contentions and affirm the judgment.

BACKGROUND

On August 28, 2006, defendant shot and killed Corey Keyes and Nicole Tucker in Oakland, while Keyes was sitting in the driver's seat of a car and Tucker sat next to Keyes on the edge of the floorboard on the driver's side of the car. Following his arrest, defendant implicitly admitted killing Keyes and Tucker, explaining to the police officers that they had threatened him earlier in the day and he believed they were about to shoot him.

In June 2007, an information was filed in Alameda Superior Court charging defendant in count 1 with the murder of Tucker (Pen. Code, § 187, subd. (a)),¹ in count 2 with the murder of Keyes, and in count 3 with being a convicted felon in possession of a firearm (§ 12021, subd. (a)(1)). Each murder count contained a multiple murder allegation (§ 190.2, subd. (a)(3)) and an allegation that defendant personally and intentionally discharged a firearm causing great bodily injury and death (§§ 12022.7, subd. (a); 12022.53, subd. (d)). The information also alleged defendant had been convicted of five prior felonies, three of which resulted in prison sentences from which he did not remain free of custody for five years before committing another felony offense (§ 667.5, subd. (b)).

In October 2010, defendant admitted the prior felony convictions and prior prison terms. Following trial, a jury found defendant guilty of voluntary manslaughter in counts 1 and 2 (§ 192, subd. (a)) and guilty of count 3 as charged. As to counts 1 and 2, the jury found true the allegation that defendant personally used a firearm (§ 12022.5, subd. (a)(1)).

In January 2011, the trial court sentenced defendant to state prison for a term of 34 years. The total is based on imposition of the upper term of 11 years on count 1, a consecutive upper term of 11 years on count 2, the upper term enhancement of 10 years for the firearm personal use on count 1, and one-year terms for two of the prior conviction enhancements. The court imposed and stayed the firearm personal use enhancement on count 2 and an eight-month term on count 3. This appeal followed.

DISCUSSION

I. *The Sentence Does Not Violate the Ex Post Facto Clause*

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court 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 v. Washington* (2004) 542 U.S.

¹ All undesignated section references are to the Penal Code.

296, 303, the Supreme Court applied *Apprendi* to invalidate a state court sentence and explained the “ ‘statutory maximum’ ” 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. In *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), the Supreme Court applied *Apprendi* and *Blakely* to California’s then existing determinate sentencing law, which provided “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (Stats. 2004, ch. 747, § 3, p. 5814 (hereafter, former section 1170); *Cunningham*, at p. 277.) The Supreme Court held that by “assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated ‘upper term’ sentence,” California’s determinate sentencing law “violates a defendant’s right to trial by jury safeguarded by the Sixth and Fourteenth Amendments.” (*Cunningham*, at p. 274.)

In response to *Cunningham*, the Legislature remedied the constitutional infirmities by amending former section 1170. (Stats. 2007, ch. 3, § 2, p. 5, eff. Mar. 30, 2007; see *People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2 (*Sandoval*).) The amended version of section 1170, subdivision (b) provides that (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle, or lower term based on reasons he or she states. The section provides in pertinent part: “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).)

Defendant contends that because the revised version of section 1170, subdivision (b) was not in effect when the crimes were committed in 2006, the trial court violated the federal constitutional prohibition against ex post facto laws by sentencing him under the amended statute. (See *Miller v. Florida* (1987) 482 U.S. 423.) However, the California Supreme Court rejected that argument in *Sandoval*, holding that it is constitutionally

permissible to apply the revised sentencing scheme. (*Sandoval*, *supra*, 41 Cal.4th at p. 855; accord, *People v. Jones* (2009) 178 Cal.App.4th 853, 866-867 (*Jones*)). The *Sandoval* court reasoned: “In the present case, the removal of the provision calling for imposition of the middle term in the absence of any aggravating or mitigating circumstance is not intended to—and would not be expected to—have the effect of increasing the sentence for any particular crime. . . . To the extent the removal of the requirement that the middle term be imposed in the absence of aggravating or mitigating circumstances may be viewed as granting the trial court greater discretion to impose the upper term, the revision would afford the court an equally increased discretion to impose the lower term. Moreover, as noted above, the difference in the amount of discretion exercised by the trial court in selecting the upper term under [California’s former determinate sentencing law], as compared to the scheme we adopt for resentencing proceedings, is not substantial.” (*Sandoval*, at p. 855.)²

We follow *Sandoval* and *Jones* and reject defendant’s claim that it was unconstitutional to impose the upper term on the voluntary manslaughter conviction under the amended version of section 1170, subdivision (b). We also reject defendant’s claim that it was unconstitutional to impose the upper term on the firearm enhancement. Defendant has not presented any reasoned argument why the reasoning of *Sandoval* and *Jones* is inapplicable to the imposition of an upper term on an enhancement.³

² The *Sandoval* court was actually considering a constitutional objection to a judicially fashioned resentencing procedure identical to that adopted by the Legislature in amending section 1170, subdivision (b). (*Sandoval*, *supra*, 41 Cal.4th at pp. 845-846, 853.) However, the reasoning quoted herein is equally applicable to defendant’s constitutional challenge to sentencing under the amended statute. The *Jones* court concluded it was bound to follow *Sandoval* in resolving the same issue presented in this case. (*Jones*, *supra*, 178 Cal.App.4th at pp. 866-867.)

³ Section 1170.1, subdivision (d) provides that, in selecting among terms for an enhancement, “the court shall, in its discretion, impose the term that best serves the interest of justice.” (Stats. 2009, ch. 171, §§ 5 & 6.) That provision, which is similar to section 1170, subdivision (b), was effective on January 1, 2011, before sentencing occurred in this case. (Stats. 2009, ch. 171, § 6.)

II. *The Sentence Does Not Violate the Prohibition on Dual Use of Sentencing Factors*

In imposing sentence, the trial court noted several factors in aggravation under California Rules of Court, rule 4.421⁴ to support its imposition of the upper term on each of the voluntary manslaughter counts: the crime involved great violence, great bodily harm, and other acts disclosing a high degree of cruelty, viciousness, and callousness (rule 4.421(a)(1)); the victims were particularly vulnerable (rule 4.421(a)(3)); and the manner in which the crimes were carried out indicated planning, sophistication, or professionalism (rule 4.421(a)(8)). The court also relied on unlisted factors, including that defendant threatened a witness at the scene, and that he fled the scene and was again armed with a deadly weapon upon his arrest some time later (see rule 4.408(a)). As to the personal firearm use enhancement for the shooting of Tucker, the court imposed the upper term of 10 years based on the same aggravating factors it had listed with respect to the manslaughter counts.

Defendant contends the trial court violated the section 1170, subdivision (b) proscription on the dual use of sentencing facts. Under that provision, in selecting a term of imprisonment 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).) Rule 4.420(c) provides, in relevant part, “To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so.”

In the present case, the trial court did *not* base the selection of the upper term for the manslaughter convictions on defendant’s personal use of a firearm. (Cf. *People v. Young* (1983) 146 Cal.App.3d 729, 734 [trial court violated dual use proscription by imposing time on a firearm use enhancement and using the fact of the firearm use as a reason for imposing the upper term].) Nevertheless, defendant contends the trial court violated section 1170, subdivision (b) because it “relied on the same factors to impose the

⁴ All rules references are to the California Rules of Court.

upper term on the voluntary manslaughter charges and to impose the upper term on the firearm use enhancement.” Defendant fails to cite any authority supporting the proposition that the statute applies in that circumstance—where the dual use is the use of the same factors to justify upper terms on both an offense and an enhancement, rather than the clearly prohibited use of the facts underlying the enhancement to justify the upper term on the substantive offense.

In any event, even if it were improper for the trial court to use the same facts to justify imposition of upper terms on the manslaughter convictions and the firearm use enhancement, the error would only necessitate resentencing if it were “ ‘ “reasonably probable that a more favorable sentence would have been imposed in the absence of the error.” ’ ” (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, the trial court identified five facts supporting imposition of upper terms, none of which have been challenged by defendant on appeal. Because “[o]nly a single aggravating factor is required to impose the upper term” and because “the court could have selected disparate facts from among those it recited to justify the imposition of” upper terms on both the underlying offenses and the enhancement, there is no reasonable probability a more favorable sentence would have been imposed absent the alleged error. (*Id.* at pp. 728-729.)

DISPOSITION

The judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.