

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GERRY GLENN SCOTT,

Defendant and Appellant.

E039093

(Super.Ct.No. FSB047504)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING
[NO CHANGE IN JUDGMENT]

The petition for rehearing is denied. The opinion filed in this matter on February 14, 2007, is modified as follows:

The last two full paragraphs of part III. B. of the opinion, appearing on page 9, and the final section of the opinion entitled, "IV. DISPOSITION," are hereby stricken in their entirety, and the following is inserted in lieu thereof:

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.110.1, this opinion is certified for publication with the exception of part III. B.

In *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), the United States Supreme Court held that the imposition of an upper term sentence under California's determinate sentencing law (DSL), based on a judge's finding by a preponderance of the evidence that circumstances in aggravation outweighed circumstances in mitigation, violates a defendant's Sixth and Fourteenth Amendment right to a jury trial. The high court also held that the middle term sentence (here, two years), is the maximum sentence a judge may impose under the DSL without the benefit of facts reflected in the jury's verdict -- that is, facts found true by a jury beyond a reasonable doubt -- or admitted by the defendant.

The *Cunningham* court thus extended to the DSL the rule it originally announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*). The *Apprendi* rule states: "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham, supra*, 127 S.Ct. at p. 860.)

But *Cunningham* did not involve or overrule the *Almendarez-Torres*¹

¹ *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350] (*Almendarez-Torres*).

exception to the *Apprendi* rule, which holds that a defendant does not have a federal constitutional right to a jury trial, for sentencing purposes, on whether the defendant has suffered a prior conviction. (See *Apprendi, supra*, at pp. 487-488.) Thus, under the *Almendarez-Torres* exception to the *Apprendi* rule, a sentence in excess of the statutory maximum may be imposed based on a judge's finding that a defendant had a prior conviction. (See *ibid.*)

As interpreted by the California Supreme Court and courts in other jurisdictions, the *Almendarez-Torres* exception extends beyond the mere fact of a prior conviction, and includes facts related to the more broadly framed issue of a defendant's "recidivism." (*People v. McGee* (2006) 38 Cal.4th 682, 700-709 and cases cited.) These include prior prison term allegations (e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222, cited with approval in *People v. McGee, supra*, at pp. 700-703) and may include allegations that a defendant was on parole or probation at the time he committed the current crime. (Cal. Rules of Court, rule 4.421(b)(4).)

Here, the court imposed the upper term sentence of three years based on its finding of circumstances in aggravation related to the present crime of incest, specifically that the victim Doe was vulnerable, defendant threatened the victim, and defendant took advantage of a position of trust and confidence. (Cal Rules of Court, rule 4.421(a)(1), (3), & (11).) None of these factors are necessarily reflected in the jury's verdict, and none are

based on defendant's recidivism. But the court also based its selection of the upper term upon its further findings of circumstances in aggravation related to defendant, specifically that his prior convictions were numerous and of increasing seriousness; he had served two prior prison terms; and his prior performance on probation and parole were unsatisfactory.

At the very least, it is clear that the court's finding that defendant had two prison priors falls within the *Almendarez-Torres* exception as interpreted by the California Supreme Court in *McGee* (*People v. Thomas, supra*, 91 Cal.App.4th at pp. 221-222, cited with approval in *McGee, supra*, 38 Cal.4th at pp. 700-709) and this court is bound by *McGee*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Furthermore, a single factor in aggravation is sufficient to render a defendant *eligible* for the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728-729) and, here, the court found no factors in mitigation.

On this basis, the People argue that the selection of the upper term based *in part* on circumstances in aggravation related to the crime was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466]; see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) We are not, however, convinced beyond a reasonable doubt that the court would have sentenced defendant to the upper term of three years, based solely on its finding that defendant had two prison priors, or absent its findings related to the present

crime. This is so because the record does not clearly reflect the amount of weight the court placed on each of the factors in aggravation.

IV. DISPOSITION

The matter is remanded to the trial court with directions to exercise its discretion in resentencing defendant, consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

Except for this modification, the opinion remains unchanged. This modification does not effect a change in the judgment.

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/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.