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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KACY DUANE LLOYD,)	CASE NO. CV 11-3321-PJW
)	
Petitioner,)	
)	MEMORANDUM OPINION AND ORDER
v.)	DISMISSING PETITION AND DENYING
)	CERTIFICATE OF APPEALABILITY
TERI GONZALEZ, WARDEN,)	
)	
Respondent.)	
_____)	

I.

INTRODUCTION

Petitioner brings this habeas corpus petition pursuant to 28 U.S.C. § 2254, alleging that his sentence is unconstitutional because the trial court imposed an upper-term sentence based on facts that were not proved to a jury beyond a reasonable doubt. For the following reasons, the Court finds that the trial court did not err.

II.

STATEMENT OF FACTS

Petitioner was charged with selling crack cocaine. He faced a 25-years-to-life sentence due to the fact that, if convicted of the charge, it would have been his third strike under California's Three Strikes law. Instead of going to trial, Petitioner entered into a

1 plea agreement with the prosecutor in which Petitioner agreed to plead
2 to the charges and receive a ten-year prison sentence in exchange for
3 the prosecutor dropping one of the strike allegations.

4 Petitioner (and his co-defendants) appeared at a change of plea
5 hearing with counsel and were admonished by the prosecutor on the
6 record:

7 You each have a right to a jury trial. You would have
8 the right to have the charge and the allegations against
9 you, that's including all of the alleged prior convictions
10 and special allegation, decided by a jury of 12 persons.
11 Every charge and allegation would have to be proven by the
12 People beyond a reasonable doubt.

13 (Lodgment No. 8, Report's Transcript from Plea and Sentencing
14 (hereinafter "RT") at 6.)

15 Petitioner acknowledged that he had the right to a jury trial on
16 the substantive charge, the priors, and any special allegations (RT 7)
17 and, thereafter, pleaded no contest to the charge and admitted the
18 special allegation:

19 [The Prosecutor]: Now, as to [Petitioner], to the charge
20 in Count 1, violation of 11352(a),
21 that's a felony, commonly known as sale
22 of a controlled substance, to wit,
23 cocaine base, how do you plead?

24 [Petitioner]: No contest.

25 [The Prosecutor]: As to the special allegation pursuant to
26 Penal Code section 1170.12(a) through (d) and
27 667(b) through (I) that you suffered two
28 felony convictions that were serious or

1 violent felonies in Case No. TA022987,
2 violation 211, May 1, 1997 and NA027795,
3 violation of section 211 on November 1, 1996,
4 do you admit or deny this allegation?

5 [Petitioner]: Admit.

6 (RT 11.)

7 The trial court then sentenced Petitioner to ten years in prison
8 in conformance with the plea. (RT 13.) This sentence was based on
9 the high term of five years on the substantive charge doubled to ten
10 years based on the fact that Petitioner had a prior serious felony
11 conviction. (RT 13.)

12 Petitioner subsequently filed habeas corpus petitions in the
13 state superior court and state supreme court, claiming that his
14 sentence was unconstitutional because he did not receive a jury trial
15 on the sentence enhancement. (Lodgment Nos. 3 and 5.) Both petitions
16 were denied. (Lodgment Nos. 4 and 6.) Petitioner then filed the
17 instant Petition, alleging that the state courts erred in denying his
18 claim.

19 III.

20 STANDARD OF REVIEW

21 The standard of review in this case is set forth in 28 U.S.C.
22 § 2254:

23 An application for a writ of habeas corpus on behalf of
24 a person in custody pursuant to the judgment of a State
25 court shall not be granted with respect to any claim
26 that was adjudicated on the merits in State court
27 proceedings unless the adjudication of the claim-

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1 (1) resulted in a decision that was contrary to, or
2 involved an unreasonable application of, clearly established
3 Federal law, as determined by the Supreme Court of the
4 United States; or

5 (2) resulted in a decision that was based on an
6 unreasonable determination of the facts in light of the
7 evidence presented in the State court proceeding.

8 28 U.S.C. § 2254(d).

9 A state court decision is "contrary to" clearly established
10 federal law if it applies a rule that contradicts Supreme Court case
11 law or if it reaches a conclusion different from the Supreme Court's
12 in a case that involves facts that are materially indistinguishable.
13 *Premo v. Moore*, 131 S. Ct. 733, 743 (2011) (citing *Bell v. Cone*, 535
14 U.S. 685, 694 (2002)). To establish that the state court unreasonably
15 applied federal law, a petitioner must show that the state court's
16 application of Supreme Court precedent to the facts of his case was
17 not only incorrect but objectively unreasonable. *Renico v. Lett*, 130
18 S. Ct. 1855, 1862 (2010). Where no decision of the Supreme Court has
19 squarely decided an issue, a state court's adjudication of that issue
20 cannot result in a decision that is contrary to, or an unreasonable
21 application of, Supreme Court precedent. See *Harrington v. Richter*,
22 131 S. Ct. 770, 786 (2011).

23 Petitioner raised the instant claim in his habeas petitions in
24 the state courts. The state supreme court did not explain its reasons
25 for denying the claim, but the superior court did. This Court
26 presumes that the state supreme court rejected Petitioner's claim for
27 the same reasons the superior court did. The Court, therefore, looks
28 to the superior court's reasoning and will not disturb it unless it

1 concludes that "fairminded jurists" would all agree that the decision
2 was wrong. *Id.*

3 IV.

4 DISCUSSION

5 Petitioner claims that the trial court was not authorized to
6 sentence him to the upper term because no aggravating factors were
7 admitted in court or submitted to the jury and proven beyond a
8 reasonable doubt. (Petition at 9-23.¹) For the following reasons,
9 this claim is rejected.

10 In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme
11 Court held that, "[o]ther than the fact of a prior conviction, any
12 fact that increases the penalty for a crime beyond the prescribed
13 statutory maximum must be submitted to a jury, and proved beyond a
14 reasonable doubt." The "statutory maximum" for *Apprendi* purposes is
15 the maximum sentence a judge could impose based solely on the facts
16 reflected in the jury verdict or admitted by the defendant. See
17 *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004). In *Cunningham v.*
18 *California*, 549 U.S. 270, 293 (2007), the Supreme Court held that the
19 middle term in California's sentencing scheme was the statutory
20 maximum for purposes of analysis under *Apprendi*, and that California
21 courts were barred from imposing a sentence beyond the middle term
22 based on any fact that was not determined by a jury and proven beyond
23 a reasonable doubt.

24 Petitioner alleges that his upper-term sentence is unconstitu-
25 tional under *Apprendi*, *Blakely*, and *Cunningham* because it was not

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27 ¹ Petitioner has appended to his federal Petition the argument
28 section from his state petitions. He has not numbered those pages,
however. The Court has, beginning with page 8 and ending with page
23.

1 based on any facts admitted by him or determined by a jury.

2 Petitioner is wrong.

3 First, Petitioner waived his right to a jury trial on both the
4 substantive charge and the prior conviction allegations and accepted a
5 negotiated sentence of ten years, in lieu of a possible 25-years-to-
6 life sentence. Thus, the upper-term sentence (five years, doubled to
7 ten because of a prior strike) resulted directly from Petitioner's
8 admissions in the plea agreement and not from any facts determined by
9 the judge. The trial court was not required to hold a mini-trial
10 following Petitioner's plea to determine whether there was a factual
11 basis for the aggravated sentence. In this situation, there was no
12 Sixth Amendment violation. See *Graves v. Salazar*, 2011 WL 6942080, at
13 *6 (C.D. Cal. Sept. 30, 2011) (finding no constitutional error in
14 imposing upper term based on terms of the plea agreement); *Bradley v.*
15 *Sullivan*, 2010 WL 1609950, at *7 (C.D. Cal. Mar. 24, 2010) (same); see
16 also *Amezcue v. Almager*, 2009 WL 1513427, at *5 (C.D. Cal. May 25,
17 2009) (holding trial court had "no duty to make independent findings
18 justifying its imposition of the upper term" in a negotiated plea
19 agreement).

20 Second, there is no clearly established Supreme Court law upon
21 which Petitioner can rely for relief. The Supreme Court has not
22 applied the *Apprendi/Blakely/Cunningham* line of cases to "bargained-
23 for sentences," where the defendant has explicitly agreed to the
24 sentence he is now challenging as unconstitutional. See *Oliver v.*
25 *Evans*, 2010 WL 3928752, at *2 (C.D. Cal. Aug. 16, 2010). Thus, the
26 state court's denial of this claim was not an unreasonable application
27 of clearly established Supreme Court law because no such rule has been
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1 "squarely established" by the Supreme Court. See *Knowles v.*
2 *Mirzayance*, 129 S. Ct. 1411, 1419 (2009).

3 Third, though the United States Supreme Court held in January
4 2007 that state judges in California could not sentence a defendant
5 above the middle term without submitting certain enhancements to a
6 jury, see *Cunningham*, 549 U.S. at 293, in March 2007, the state
7 legislature amended the sentencing law to allow judges to sentence
8 defendants to any proscribed term within their "sound discretion."
9 See *Butler v. Curry*, 528 F.3d 624, 652 n. 20 (9th Cir. 2008). Under
10 this new law, which applied to Petitioner in October 2009 (i.e., the
11 date on which he was sentenced), the trial judge was authorized in its
12 discretion to sentence Petitioner to the upper term without any
13 aggravating factors being proven to a jury or admitted by Petitioner.
14 See *Pierce v. Stainer*, 2011 WL 5104092, at *4 (E.D. Cal. Oct. 25,
15 2011) (holding under revised law "neither a jury determination nor an
16 admission by petitioner was required in order to impose an aggravated
17 sentence"); *Juarez v. Allison*, 2011 WL 3654449, at *5 (C.D. Cal. Mar.
18 22, 2011) (finding "the upper term is the statutory maximum" under
19 revised law); *Gomez-Perez v. McDonald*, 2011 WL 285035, at *17 (E.D.
20 Cal. Jan. 25, 2011) (finding under revised law courts could impose
21 upper term based on "traditional sentencing discretion"); Cal. Penal
22 Code § 1170(b) (as amended, effective March 30, 2007). For all these
23 reasons, the Petition is denied and the action is dismissed with
24 prejudice.

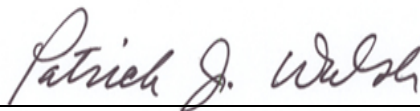
25 Finally, because Petitioner has not made a substantial showing of
26 the denial of a constitutional right, the Court will not issue a
27 certificate of appealability in this action. See 28 U.S.C.

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1 § 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S.
2 322, 336 (2003).

3 It IS SO ORDERED.

4 DATED: January 10, 2012.

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PATRICK J. WALSH
8 UNITED STATES MAGISTRATE JUDGE
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