Supplemental briefing by panel attorney Solomon Wollack in *People v. Joel Henderson* (D043082)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,]	NO. D043082
]	
Plaintiff and Respondent,]	Superior Court No.
]	SCD169260
v.]	(San Diego County)
]	
JOEL B. HENDERSON,]	
]	
Defendant and Appellant.]	
______________________________]	

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

Honorable Gale E. Kaneshiro, Judge Presiding

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	]	NO. D043082
	]	
Plaintiff and Respondent,	]	Superior Court No.
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v.	]	(San Diego County)
	]	
JOEL B. HENDERSON,	]	
	]	
Defendant and Appellant.	]	
	]	

INTRODUCTION

Appellant Joel Henderson recently submitted a supplemental opening brief in which he asked this Court to set aside his upper term sentence under the recent United States Supreme Court decision in *Blakely v. Washington* (June 24, 2004) ___ U.S. ___, 124 S.Ct. 2531. In *Blakely*, the Court reaffirmed its previous decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, which held that, "Other 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." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2536.) However, *Blakely* took this principle one step further, holding that "the 'statutory maximum' for *Apprendi*

purposes 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 v. Washington*, *supra*, 124 S.Ct. at p. 2537.) The Court thus held that a Washington sentencing statute violated the Sixth Amendment right to jury trial because it permitted the court to impose a sentence in excess of the "standard range" based on judicially-determined facts that were neither admitted by the defendant nor found true by the jury. (*Id.*, at pp. 2537-2538.)

In his supplemental opening brief, appellant argued that, under California's Determinate Sentencing Act, upper term sentences violate the principles announced in *Blakely* when based on aggravating factors found true by the trial court but neither adjudicated by the jury nor encompassed in the defendant's guilty plea. Because appellant was sentenced to the upper term based, at least in part, on three judicially-determined aggravating factors, he contended that his sentence ran afoul of *Blakely*.

Appellant's supplemental opening brief did not challenge the validity of his prior strike conviction or his prior serious felony. As it turns out, however, these enhancements are also invalid under the same rationale.

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STATEMENT OF THE CASE AND FACTS

Appellant incorporates by reference both his original statement of the case and statement of facts, as well as those contained in his first supplemental opening brief. He also adds the following additional procedural history and facts, which are relevant to the issues raised herein.

I. Appellant's 1992 conviction

Appellant was charged with both a strike and a serious felony prior as a result of his 1992 conviction under Penal Code section 245, subdivision (a)(1). (CT 3-4.)

On March 17, 2003, appellant waived jury trial on all prior offense enhancements. (CT 171-172; RT 582-584.) A week later, he waived his right to trial and admitted the priors. (CT 180.)

During the change of plea proceedings, appellant initially expressed confusion as to what exactly he was admitting. (RT 631-632.) The court responded that, if there was confusion:

> I would much prefer to go forward with the Court trial, simply because one of the priors is the assault with a deadly weapon or force likely to produce great bodily injury or death, which is used, then, as a serious felony prior, which adds five years to your sentence. It is also a strike, which will double any sentence. (RT 632.)

The court then took a brief recess to allow appellant to consult with counsel. (RT 632.) After the recess, appellant agreed to admit his priors. (RT 633.)

When questioning appellant about his serious felony prior, the court described the offense as "a violation and conviction for Penal Code section 245(a)(1), date of conviction being November 12, 1992 . . ." (RT 636-637.) It then asked appellant if he admitted this allegation as alleged in the information. (RT 637.) Appellant stated that he did. (RT 637.) The court repeated the same description for the prior strike conviction and appellant again admitted the strike. (RT 638-639.)

At no point did the court specify whether or not the 1992 conviction was for assault with a deadly weapon or for assault by means likely to produce great bodily injury. Likewise, nothing in the information sheds light on this issue. Instead, the information simply alleges that, on November 11, 1992, appellant was convicted under section 245, subdivision (a)(1). (CT 3-4.)

ARGUMENT

I. Because the facts reflected in appellant's admission do not indicate that he was convicted of assault with a deadly weapon, the trial court violated the Sixth and Fourteenth Amendments by imposing this enhancement.

Penal Code section 245, subdivision (a)(1) provides that, "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce

great bodily injury" is guilty of a felony and subject to imprisonment. Assault with a deadly weapon constitutes a "serious felony" within the meaning of California's "three strikes" statute (§§ 667, subd. (d)(1), 1192.7, subd. (c)(31))[1], as well as its "habitual criminal" provision. (Pen. Code, §§ 667, subd. (a)(1) & (a)(4), 1192.7, subd. (c)(31).) As such, a prior conviction for assault with a deadly weapon not only doubles the resulting prison sentence (§ 667, subd. (e)(1)), but also adds an additional and consecutive five-year term. (§ 667, subd. (a)(1).) Thus, with a strike and a prior serious felony, a five-year term for robbery turns into a fifteen-year term. A three-year term turns into an eleven-year term.

Unlike assault with a deadly weapon, assault by means of great bodily injury does **not** constitute a serious felony under the three strikes and habitual criminal statutes. (*People v. Haykel* (2002) 96 Cal.App.4th 146, 151.) As Division Three of this Court explained in *Haykel*:

> Section 1192.7, subdivision (c)(31) is unambiguous. It includes most, but not all violations of section 245 as serious felonies. Assault by means of force likely to produce great bodily injury is not a serious felony as defined by section 1192.7, subdivision (c)(31).

(*Ibid.*)

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[1] All statutory references are to the Penal Code unless otherwise stated.

Here, neither the information nor appellant's March 24, 2003 plea reveals whether his 1992 conviction was for assault with a deadly weapon or assault by means of force likely to produce great bodily injury. Rather, during the change of plea proceedings, the court identified the 1992 conviction as simply "a violation and conviction for Penal Code section 245(a)(1)." (RT 636, 638.) Earlier in the same proceedings, the court stated that the prior was for "assault with a deadly weapon or force likely to produce great bodily injury or death." (RT 632.) However, it did not specify which one and the information only identifies the offense as a conviction under section 245, subdivision (a)(1). Thus, there is no way to tell whether the conviction was for assault with a deadly weapon (which triggers both the "three strikes" and the "habitual criminal" enhancements) or assault by means likely to produce great bodily injury (which triggers neither enhancement).

Likewise, it was never alleged in the information (nor admitted by appellant) that any other strike-triggering element was present. For example, the information did not allege that Mr. Henderson personally inflicted great bodily injury on his victim (§ 1192.7, subd. (c)(8)), or that he personally used a dangerous or deadly weapon (§ 1192.7, subd. (c)(23)). Consequently, the facts alleged in the information, and contained in appellant's admission, do not on their face reveal the commission of a serious prior felony. Imposition of the

increased sentences set forth under the "three strikes" and "habitual criminal" statutes therefore ran afoul of the Sixth and Fourteenth Amendment jury trial guarantee, for the reasons discussed in *Blakely*.

II. **After *Blakely*, even prior convictions must be submitted to the jury or encompassed in the defendant's guilty plea.**

For the reasons discussed in his recent supplemental opening brief, appellant submits that *Blakely* overruled the Supreme Court's previous decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 246-247, which held there is no Sixth Amendment right to jury trial on the fact of a prior conviction. (See Supp. AOB, pp. 15-16.) Thus, after *Blakely*, even prior convictions must be submitted to the jury or encompassed in the defendant's guilty plea. Otherwise, they may not be used as the basis for an increased sentence.

III. **Even if *Almendarez-Torres* remains good law, it does not apply to this case.**

Even if *Almendarez-Torres* remains good law, its holding only applies to the fact of a prior conviction. It does not apply to factual inferences that go beyond the least adjudicated elements of that prior conviction.

Here, appellant's 1992 conviction was for a violation of section 245, subdivision (a)(1). However, this fact alone says nothing about whether the conviction was for assault with a deadly weapon or assault by means likely to

produce great bodily injury. To make this secondary determination, the court would have to look to facts beyond the bare elements of his prior conviction and beyond the elements admitted in his change of plea. Yet, this is precisely this approach that the Court repudiated in *Blakely*, making clear that facts which give rise to an increased sentence must be submitted to the jury (or admitted by the defendant) and proved beyond a reasonable doubt. Facts contained only in a probation report may not form the basis for a sentence beyond the maximum, as those facts have neither been admitted by the defendant nor proved beyond a reasonable doubt. (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2542.)

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in appellant's first supplemental opening brief, appellant Joel Henderson respectfully requests that this Court remand this case to the San Diego County Superior Court, with an order to strike the prior "strike" and prior serious felony enhancements.

DATED: July 14, 2004

Respectfully submitted,

SOLOMON WOLLACK
Attorney for Appellant
Joel B. Henderson

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 33(b)

Pursuant to rule 33(b)(1) of the California Rules of Court, I certify that Joel B. Henderson's Appellant's Supplemental Opening Brief contains 1,650 words according to the word count produced by my Wordperfect program.

Dated this 14th day of July, 2004

By: ____________________________
Solomon Wollack

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is P.O. Box 23316, Pleasant Hill, California, 94523. On the date shown below, I served the within:

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

to the parties on the attached service list by:

____ Causing a true copy thereof to be delivered to the office of each party shown below at the address indicated by leaving the same with a person apparently in charge and over the age of 18 years.

_X_ Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasant Hill, California, addressed as follows:

I declare under penalty of perjury the foregoing is true and correct. Executed this 14th day of July, 2004 at Pleasant Hill, California.

____

Solomon Wollack

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