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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RAY McKINLEY BOWEN,
Defendant and Appellant.

F044616
Sup. Ct. No. 03CM2526

APPEAL FROM THE SUPERIOR COURT, KINGS COUNTY
THE HONORABLE LOUIS F. BISSIG, JUDGE

SUPPLEMENTAL OPENING BRIEF
ARGUMENT

IMPOSING THE UPPER TERM FOR THE KIDNAP CONVICTION
VIOLATED APPELLANT'S RIGHT TO A JURY TRIAL
UNDER THE SIXTH AMENDMENT
TO THE UNITED STATES CONSTITUTION.

A. Introduction.

The court selected count 1, the violation of Penal Code section 207, subdivision (a) as the principal term and imposed the upper term of eight years, doubled under Penal Code section 1170.12 to 16 years. (CT 236; RT 486-488.) The reasons cited by the trial court for imposing the upper term were not factors found to be true beyond a reasonable doubt by the jury and are therefore impermissible because reliance on those factors deprived appellant of his right to a jury trial under the Sixth Amendment.

B. Blakely v. Washington.

The United States Supreme Court recently decided Blakely v. Washington (2004) 542 U.S. ____ [No. 02-1632, 2004 U.S. LEXIS 4573, 04 DAR 7581, June 24, 2004] (hereafter Blakely). In Blakely the defendant pleaded guilty to kidnaping his estranged wife. Defendant Blakely was subject to an absolute maximum of 10 years. However, the “standard range” for his offense was 49 to 53 months. Washington law provided that a court could impose a sentence greater than the “standard range” (but still within the 10-year maximum) only if it found “substantial and compelling reasons justifying an exceptional sentence.” The statute provided a list of “aggravating factors” which could justify such a “departure” from the “standard range” and described the listed factors as “illustrative rather than exhaustive.” (Blakely, supra, slip opn., at pp. 2-3.) The trial court imposed an “exceptional sentence” of 90 months -- 37 months above the standard range -- based upon the judge's finding that Blakely acted with “deliberate cruelty,” one of the enumerated aggravating factors.

The Supreme Court held that the trial court's use of that aggravating factor violated the rule explained in Apprendi v. New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], entitling a defendant to jury determination of any fact that exposed a defendant to greater punishment than the “maximum” otherwise allowable for the underlying offense.

The Blakely majority (led by Justice Scalia) rejected the state's assertion that the relevant “maximum” was the 10-year cap for the offense involved in the case. Instead, the majority treated the top end of the “standard range” (53 months) as the relevant “statutory maximum,” because that was the

greatest sentence Blakely could receive based solely on the facts admitted by his plea:

Our precedents make clear, however, 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. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority. (Blakely, supra, slip opn. at p. 7, emphasis in original.)

Drawing together the lessons of Apprendi, Ring v. Arizona (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] (which applied Apprendi to death-penalty aggravating factors), and Blakely itself, the majority commented:

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi), one of several specified facts (as in Ring), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [Fn.] (Blakely, supra, at p. 9, emphasis in original.)

Therefore, in essence, the only factors the judge is permitted to use to increase a sentence are those presented to the jury for its consideration and decision. If the jury does not find unanimously and beyond a reasonable doubt that those factors are true, the judge may not use them to increase a sentence.

*C. The Application to California's
Determinate Sentencing Law.*

California statutes, court rules, and case law unequivocally provide that *unless there is a finding of at least one aggravating circumstance, a court cannot impose the upper-term*: “When a judgment of imprisonment is to be imposed, *the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.*” (Penal Code section 1170(b), emphasis added; see also, California Rules of Court, rule 4.420¹; cf., e.g., People v. Piceno (1987) 195 Cal.App.3d 1353, 1360.) As with the “standard range” in Blakely, the mid-term is the presumptive

¹ Rule 4.420 of the California Rules of Court provides in pertinent part:

“(a) . . . The middle term shall be selected *unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation*

(b) Circumstances in aggravation shall be established by a *preponderance of the evidence* . Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. *The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. . . .*

(d) A fact that is an element of the crime shall not be used to impose the upper term. [Emphasis added]”

sentence. And, as with the “exceptional sentence” in Blakely, a California court lacks statutory authority to impose an upper term unless it finds “aggravating circumstances” beyond the elements inherent in the offense itself.

The factors set forth in Penal Code section 1170 and rule 4.420 clearly violate the Apprendi mandate. The term of imprisonment that may be imposed based solely on the jury’s verdict is the *middle* term. The court may not impose the upper term unless it finds that there are additional aggravating factors, and under Apprendi and Blakely, those factors cannot be relied upon unless the jury has found them to be true beyond a reasonable doubt. However, under rule 4.420, subd.(d), the court is prohibited from relying on elements of the crime as factors in aggravation. Thus, the aggravating circumstances authorizing an upper term are almost necessarily facts beyond those determined by the jury’s offense verdicts and enhancement findings (unless the court elects to strike an enhancement and instead use the enhancing facts to impose the upper term. (See rule 4.420, subd. (c).)

The Washington statute suffered the same fatal flaws as California's determinate sentencing law. Specifically, the Blakely court noted that under Washington law,

[a] judge may impose a sentence above the standard range [only] if he finds 'substantial and compelling reasons justifying an exceptional sentence.' §§ 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. §§ 9.94A.390. Nevertheless, 'a reason offered to justify an exceptional sentence can be considered only if it takes into account factors *other* than those which are used in computing the standard range sentence for the offense.' State v. Gore,

143 Wash.2d 288, 315-316, 21 P.3d 262, 277 (2001). When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. §§ 9.94A.120(3). (Blakely at p. 2, emphasis added.)

Thus in all pertinent respects, California's sentencing scheme suffers from the same defects as the Washington scheme that the Supreme Court struck down. In California, as in Washington, the trial court violates a defendant's Sixth Amendment rights when it imposes an aggravated sentence (the upper term) based on facts not found by a jury to be true beyond a reasonable doubt.

D. Appellant Was Deprived of His Sixth Amendments Rights.

Sentencing decisions typically involve two different kinds of determinations: findings of fact and the exercise of discretion or judgment as to the most appropriate sentence, often based on the findings of fact. Apprendi and Blakely appear to focus strictly on the right to *jury determination of facts* which expose a defendant to the possibility of a sentence greater than the maximum allowed by the jury's findings. The Apprendi/Blakely majority has no quarrel with judicial sentencing discretion, *provided* that jurors have made all the purely *factual* findings necessary to authorize a maximum sentence.

In appellant's case, the trial court relied on the criteria under California Rules of Court, rules 4.421 and 4.423, stating the following reasons to support imposition of the upper term:

1. “The circumstances of the offense demonstrate a level of violence, cruelty, and depravity above and beyond what is required for the statutes themselves.” (RT 487.)

2. “The victim was vulnerable because of her relationship to the defendant...” (RT 487.)

3. The crime “had an element of planning and some degree of sophistication in its execution.” (RT 487.)

4. Appellant has a history of “extreme violent crime, a large number of convictions.” The court expressly did not rely on appellant's prior prison terms, but did rely on the belief that he was on parole and has a history of parole and probation violations. (RT 487.)

The court found no circumstances in mitigation. (RT 487.)

None of the factors relied upon by the trial court to impose the upper term was found true beyond a reasonable doubt by the jury in appellant's case. It is not sufficient that the jury convicted of the offense, it must also find the aggravating facts to be true. As the Blakely opinion noted, “Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.” (Blakely, supra, at p. 9 fn. 8, emphasis in original.)

The level of violence above that required for the offense was necessarily not found to be true by the jury; the jury decided only that appellant committed the offense. The facts relied upon by the court were necessarily *not* found by the jury, as the circumstances relied upon by the court were expressly

stated to be beyond what is required for the statutes themselves. Although the jury necessarily found a relationship between appellant and the victim by convicting appellant of violating Penal Code section 273.5, subdivision (a), no finding was made that the victim was vulnerable because of the relationship. There was no jury finding that necessitates a conclusion that the offense “had an element of planning and some degree of sophistication in its execution.” (RT 487.) While appellant admitted his prior convictions alleged under Penal Code sections 667.5, subdivision (b) and 1170.12, the admission does not support the court's conclusion that appellant had a history of “extreme violent crime, a large number of convictions.” Appellant's prior convictions were for receiving stolen property in 1976, possession of an unlawful weapon in 1980, assault with a firearm in 1985, and possession of a controlled substance in 1996. These convictions do not support the court's conclusion that he had a history of “extreme” violent crime or a “large number of convictions.” Only one offense was for a serious or violent felony, and the three offenses were spread over 20 years. The court's reliance on the assertion that he was on parole and has a history of parole and probation violations also is not a fact found true by the jury or admitted by appellant.

Blakely's application to appellant's case is unquestionable. Retroactivity is not an issue. “When a decision of this Court results in a 'new rule,' the rule applies to all criminal cases still pending on direct review.” (Griffith v. Kentucky (1987) 479 U.S. 314, 328 [107 S.Ct. 708, 93 L.Ed.2d 649]; in accord, Schiro v. Summerlin (June 24, 2004; 03-526) 542 U.S. ____, 04 DAR 7569, 2004 WL 1402732 at p. 3.)

Furthermore, no objection was required to preserve the issue for appeal. In several cases over the past decade, the California Supreme Court has held that a failure to object cannot waive “certain fundamental

constitutional rights,” such as double jeopardy *and the right to jury trial*, even though that omission may forfeit appellate review of related state statutory claims. In People v. Saunders (1993) 5 Cal.4th 580, the court applied that distinction to a defendant's failure to object to the discharge of the jury before the adjudication of charged prior convictions. That omission forfeited the right to contest the premature discharge as a violation of the state statutory provisions requiring the same jury to determine both the currently charged crime and any alleged priors (Penal Code sections 1025, 1164) (see id. at pp. 589-592) *but not the right to raise the more fundamental claims of double jeopardy and jury trial*. “Defendant’s failure to object also would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial. [Citations.]” (Id. at p. 589 fn. 5; see also p. 592 [same holding re: double jeopardy claim]; accord People v. Valladolid (1996) 13 Cal.4th 590, 606 [also refusing to find waiver of double jeopardy claim re: post-verdict amendment of an information to add prior convictions].) As the court summarized in a later opinion:

Not all claims of error are prohibited in the absence of a timely objection in the trial court. *A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.* (See Saunders, supra, 5 Cal.4th at p. 592 [plea of once in jeopardy]; People v. Holmes (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial]; cf. People v. Walker [(1991)] 54 Cal.3d [1013,] 1022-1023 [nonconstitutional nature of claim that trial court failed to advise of consequences of guilty plea subjects defendant's claim to rule that error is waived absent timely objection].)

(People v. Vera (1997) 15 Cal.4th 269, 276-277, emphasis added.)

Because a Blakely claim contests the denial of the Sixth Amendment right to a jury trial on the aggravating factors necessary to expose a defendant to an upper term, it comes within the Saunders-Vallodoli-Vera rule: A lack of objection should not forfeit appellate review of a denial of this “fundamental constitutional right.”

Additionally, no objection was required because it would have been futile under the law in effect at the time of sentencing. (See, e.g., O'Connor v. Ohio (1966) 385 U.S. 92, 93 [87 S.Ct. 252, 17 L.Ed.2d 189] [“failure to object in the state courts . . . to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court”]; People v. Chavez (1980) 26 Cal.3d 334, 350, fn. 5 [citing other cases in which no objection was required due to futility]; People v. DeSantiago (1969) 71 Cal.2d 18, 22-23; People v. Birks (1998) 19 Cal.4th 108, 116, fn.6 [no waiver where lower court was bound by higher court on issue].

E. The Judgment Must Be Reversed.

Deprivation of the right to a jury trial is structural error requiring reversal without regard to prejudice. The wrong entity, the judge rather than the jury, has adjudicated the aggravating factor *and* has applied the wrong standard of proof. (Sullivan v Louisiana (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

Appellant acknowledges that the California Supreme Court has interpreted Apprendi error under the standard in Chapman v. California (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See, People v. Sengpadychith (2001) 26 Cal.4th 316, 324.) Even if the error is analogized to the failure to submit an element to the jury for decision (that is, the failure to instruct on an element) rather than structural error, the error here still requires reversal.

In context of instructional error affecting the elements of offenses and enhancements, the United States Supreme Court's cases actually demand a rigorous form of Chapman analysis, focusing on what facts the jurors necessarily found in rendering their verdict. In particular, Neder v. United States (1999) 527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed.2d 35] which applied harmless error review of omission of an element, made clear that *the error cannot be found harmless if the omitted element is susceptible to dispute*:

If, at the end of that examination, the [reviewing] court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary

finding -- it should not find the error harmless. (Id. at p. 19.)

Here the factors relied upon by the trial court *are* susceptible to dispute. Penal Code section 207 requires substantial movement which includes a consideration of whether the movement increased the risk of harm or danger and decreased the likelihood of detection. The fact that there was a relationship between appellant and the victim does not make her more vulnerable than any other victim of the offense. Appellant's criminal record does not support the court's conclusion that it shows "extreme violent crime." The "a large number of convictions" include mostly misdemeanor offenses since 1990. The only felony, other than the current case, was a violation of Penal Code section 1320.5, failure to appear, in 1996, for which he was sent to prison. (CT 197-199.) A jury would not necessarily find this factor supported by the facts.

There is also a reasonable doubt that a jury would necessarily conclude that the crime "had an element of planning and some degree of sophistication in its execution."

Because the factors considered by the court are susceptible to dispute, there is a reasonable doubt that the error was harmless. The judgment must be reversed and the matter remanded for a new sentencing hearing in which the court is limited to matters actually found to be true by the jury if the court intends to impose the upper term.

CONCLUSION

For the foregoing reasons, and those in appellant's opening brief, appellant respectfully requests that the judgment of the Superior Court be reversed.

Respectfully submitted,

A handwritten signature in black ink that reads "Marcia C. Levine". The signature is written in a cursive, flowing style.

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WORD-COUNT CERTIFICATE

I certify that this document contains 3060 words, exclusive of tables, as calculated by WordPerfect8.

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