

From opening brief by ADI staff attorney Lynelle Hee in *People v. Cynthia Jackson* (E034909)

V.

PURSUANT TO THE UNITED STATES SUPREME COURT'S RECENTLY ISSUED OPINION IN *BLAKELY V. WASHINGTON*, SUPRA, 542 U.S. ____ [2004 U.S.LEXIS 4573], APPELLANT WAS DENIED HER CONSTITUTIONAL RIGHT TO HAVE A JURY DETERMINE BEYOND A REASONABLE DOUBT ALL FACTS LEGALLY ESSENTIAL TO SENTENCE WHEN THE TRIAL COURT SENTENCED HER TO 4 YEARS, 8 MONTHS MORE THAN THE STATUTORY MAXIMUM SENTENCE.

A. Introduction

On June 24, 2004, the Supreme Court of the United States decided *Blakely v. Washington* (June 24, 2004, No. 02-1632) 542 U.S. ____, [2004 U.S.LEXIS 4573]. The court's decision in *Blakely* renders unconstitutional portions of California's determinate sentencing scheme, including (1) the provision of section 1170, subdivision (b) which authorizes judges, not juries to make factual findings in connection with aggravating factors used to impose the upper term, (2) California Rules of Court,¹ rule 4.420(b) providing that circumstances in aggravation be proved by a preponderance of the

¹ All future rule references are to the California Rules of Court unless otherwise specified.

evidence rather than beyond a reasonable doubt, and (3) section 669 and rule 4.425 permitting judges, not juries to make factual findings in connection with aggravating factors to impose consecutive sentences.

In the present case, appellant was sentenced to the upper term on count 3 and consecutive terms on counts 6 and 8 based upon factors not found true by a jury or admitted by appellant. (3 R.T. pp. 725-728.) In sentencing appellant, the court stated,

In any event, with respect to Kenneth Shoemaker [count 3], the victim was particularly vulnerable. All of these victims, I believe, were under the age of two, if my recollection serves me right, and that makes a child completely vulnerable to the foster care system. [¶] In addition to that, as to Brandon Shoemaker [count 4], I could impose a six-month sentence to be served in local custody. I am not going to do that. I am going to make it servable concurrent in any penal institution. [¶] So in the court's view, the aggravating factors as to Kenneth Shoemaker [count 3], who was vulnerable, and Brandon Shoemaker's sentence [count 4], which I am not going to impose, does call for the upper term of six years.

As to Michael M. [[count 5], who I am not going to impose the 180 days that I could impose, but I will impose one year and four months for Andrew H. [count 6], who also was particularly vulnerable, and I do find

the circumstances in aggravation outweigh the circumstances in mitigation, although the defendant's depression, possible schizophrenia, and unsuitability for foster care, which went unrecognized for too long by Child Protective Services, do militate in her favor.

The two victims, Michael M. [count 5] and Andrew H. [count 6], do mandate the upper term. So I will impose -- well, consecutive term. One year and four months consecutive to the six years imposed on Count 3.

As to count 7, again, I'm not going to impose the six months that I could impose for the starvation and mistreatment of Jimmy Shaw [count 7]. I think he was also locked in a stroller along with one of the other children for a good part of the day. But instead, I will use that as a circumstance in aggravation as to Count 8, Tyler Doty, who had a fractured femur, among other symptoms, and I will impose the one-third of the mid term of one year and four months consecutive to the sentence already pronounced, finding the circumstances in aggravation outweigh those in mitigation. Tyler Doty also was particularly vulnerable. All of these children were, individually and separately.

(3 R.T. pp. 727-729.)

The sentencing court further erred in applying the incorrect standard of proof to determine the truth of the aggravating factors. Here, the court applied the preponderance standard rather than requiring proof beyond a reasonable doubt. (See Evid. Code, § 664 ["[i]t is presumed that official duty has been regularly performed"]; rule 4.420 ["[c]ircumstances in aggravation and mitigation shall be established by a preponderance of the evidence".]) Because these factual findings were not determined by a jury and proved beyond a reasonable doubt, and because they resulted in a sentence greater than the statutory maximum under *Apprendi*,² appellant's Fifth, Sixth, and Fourteenth Amendment rights to have a jury determine, beyond a reasonable doubt, all the facts which are essential to her punishment was violated. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., Art. I, §§ 7 & 16; *Blakely v. Washington*, *supra*, 542 U.S. ____ [2004 U.S.Lexis 4573]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.)

B. Appellant had a federal constitutional right to have a jury determine beyond a reasonable doubt any aggravating factors used to impose the upper term or a consecutive sentence.

An accused is entitled to a have a jury determine beyond a reasonable doubt

² *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].

whether he or she is guilty of every element of the crime with which he or she is charged. (*United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) In the seminal case of *Apprendi v. New Jersey, supra*, 530 U.S. 466, the Supreme Court of the United States held that there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt "for any fact (other than prior conviction) that increases the maximum penalty for a crime." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 476 quoting *Jones v. United States* (1999) 526 U.S. 227, 243 fn. 6., internal quotation marks omitted.) In light of *Blakely*, it is now clear that there is a federal constitutional right to a jury trial and proof beyond a reasonable doubt, on non-recidivist aggravating factors used to impose the upper term or a consecutive term under the Determinate Sentencing Law.

1. *The right to a jury trial and proof beyond a reasonable doubt applies to facts used to impose a sentence above the statutory maximum.*

Apprendi involved a New Jersey hate-crime statute which authorized the court to impose a 10 to 20 year sentence, rather than a five to 10 year sentence, if the judge found by a preponderance of the evidence that the crime was committed "with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity." (*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 468-469 quoting N. J. Stat.

Ann. § 2C:44-3(e) (West Supp. 2000). Apprendi pled guilty to three separate counts (counts 3, 18, and 22), and it was agreed that the third count (count 22) would run concurrent to the sentence on the first two counts. (*Id.* at p. 471.) Thus, Apprendi's plea subjected him to a maximum of 10 years on each of the first two counts (counts 3 and 18), for a total aggregate sentence of 20 years. (*Ibid.*) If, however, the court enhanced the sentence on count 18 under the hate-crime statute, then the maximum on that count would be 20 years, and the maximum for the two counts in aggregate would be 30 years. (*Ibid.*) At the sentencing hearing, the court found that Apprendi's actions fell within the hate-crime statute and applied the enhancement to count 18. (*Id.* at p. 471.) Apprendi was sentenced to 12 years imprisonment on count 18, and to shorter concurrent sentences on the remaining counts. (*Ibid.*) The United States Supreme Court reversed, finding that imposition of a sentence greater than the 10 year term based upon facts not proven to a jury beyond a reasonable doubt violated Apprendi's constitutional right to have a jury determine every element of the offense. (*Id.* at pp. 476-479, 491-492,497.)

On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington, supra*, further explaining the application of *Apprendi* to our traditional determinate sentencing laws. The court summarized its ruling in the following manner,

By reversing the judgment below, we are not, as the State would have it, 'finding determinate sentencing schemes unconstitutional.' . . . This case is not about whether determinate sentencing is constitutional, only about how

it can be implemented in a way that respects the *Sixth Amendment*.

(*Blakely v. Washington, supra*, at p. *22, italics original.)

In *Blakely*, the defendant pled guilty to second degree kidnaping, as well as the domestic violence and firearm allegations. (*Blakely v. Washington, supra*, 542 U.S. ____ [2004 U.S.Lexis 4573, *5]. Under Washington law, the maximum sentence for second degree kidnaping was 10 years imprisonment. (Wash. Rev. Code Ann.³ §§ 9A.40.030, subd. (3), & 9A.20.021, subd. (1)(b); *Blakely v. Washington, supra*, at p. *6.) However, the Washington Sentencing Reform Act specified a standard range of 49 to 53 months for second degree kidnaping with a firearm. (Wash. Rev. Code Ann. §§ 9.94A.320, 9.94A.360, 9.94A.310, subd. (1), 9.94A.310, subd. (3)(b); *Blakely v. Washington, supra*, at p. *6.) A judge is only authorized to impose a sentence greater than the standard range if it finds “substantial and compelling reasons for justifying the exceptional sentence.” (Wash. Rev. Code Ann. § 9.94A.20, subd. (2); *Blakely v. Washington, supra*, at p. *6.) The act lists numerous aggravating factors which are illustrative, not exhaustive factors. (Wash. Rev. Code Ann. § 9.94A.390; *Blakely v. Washington, supra*, at p. *6.) “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

³ Parts of Washington’s criminal code have been recodified and amended. Citations to the Washington’s criminal code are to provisions in effect at the time of sentencing.

offense.” (*Id.* at pp. *6-7 quoting *State v. Gore* (2001) 143 Wn.2d 288, 315-316; 2 P.3d 262, 277, internal quotation marks omitted.) Further, when a trial court imposes a sentence greater than the standard range, it must set forth findings of fact and conclusions of law. (*Id.* at p. *7.) An appellate court will reverse if it finds under a “clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence.” (*Ibid.*)

The trial court imposed a sentence of 90 months, three years more than the statutory maximum of the standard range, based upon its finding that the defendant had acted with “deliberate cruelty.” (*Blakely v. Washington, supra*, 542 U.S. ____ [2004 U.S.Lexis at p. *7].) Facts supporting this finding were not admitted by the defendant, nor found true by a jury. (*Id.* at p. *13.) The United States Supreme Court reversed the sentence, finding that sentence violated the defendant’s Sixth Amendment right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. (*Id.* at p. *17.) Rejecting the government’s argument that the sentence did not violate the rule announced in *Apprendi* because the sentence did not exceed the statutory maximum of 10 years, the high court stated,

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*. . . . 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.

(*Id.* at pp. *13-14, italics original.)

Under Washington law, the trial court had no authority to impose the 90 month sentence solely on the basis of the facts admitted in the guilty plea. (*Blakely v. Washington, supra*, 542 U.S. ____ [2004 U.S.Lexis at p. *14].) Rather, imposition of a sentence greater than the standard sentencing range required additional reasons outside of those used in computing the standard range sentence for the offense. (*Id.* at pp. *14-15.) Thus, the court concluded,

The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

(*Id.* at p. *15.)

2. *Under California's Determinate Sentencing Law, the statutory maximum*

under Apprendi is the middle term because imposition of a sentence greater than the middle term requires that the court find additional aggravating facts.

Under California's Determinate Sentencing Law, section 1170, subdivision (b) provides, with emphasis added, that "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall* order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§§ 1170, subd. (b), & 1170.1, subd. (d); *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785; rule 4.420(a).) Section 669 provides, "When any person is convicted of two or more crimes, . . . the second or other subsequent judgment upon which sentence is order to be executed shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively." Where no such order is made, the term of imprisonment on the second or any subsequent judgment **shall** run concurrently. (§ 669.) In determining whether to impose concurrent or consecutive sentences, rule 4.425 sets out three criteria to be considered in addition to any other aggravating or mitigating factors.

The court is required to set forth reasons on the record for imposing an aggravated term or consecutive term. (§§ 1170, subd. (c) [court must state reasons for "sentencing choice"], & 1170.1, subd. (d); *People v. Walker* (1978) 83 Cal.App.3d 619, 622 [court must state reasons for imposing consecutive sentences]; rules 4.405(f), 4.420(e), &

4.433(c).) The court may not impose an upper term or a consecutive term by using the fact of any enhancement upon which sentence is imposed under any provision of law. (§ 1170, subd. (c); rule 4.425(b).) Further, “[a] fact that is an element of the offense cannot be used to impose the upper term” or a consecutive term. (rules 4.420(d) & 4.425(b).) Finally, circumstances in aggravation and in mitigation must be established by a preponderance of the evidence. (*People v. Scott* (1994) 9 Cal.4th 331,349; rule 4.420(b).)

California’s determinate sentencing law is analogous to the Washington sentencing statutes utilized in *Blakely*. Under California law, the presumption is in favor of the middle term and concurrent sentences; the trial court need not state reasons for imposing the middle term or a concurrent sentence. (*People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350 [no reasons required for imposing a concurrent term]; *People v. Lobaugh, supra*, 188 Cal.App.3d at p. 786 [no reasons required for imposing the middle term].) The middle term and concurrent sentencing under California sentencing law is the equivalent of the statutory standard range specified in the Washington statute. Similarly, the upper term and consecutive sentencing in California’s sentencing scheme is like the 10 year maximum for class B felonies under Washington law. They cannot be imposed unless the trial court makes *additional* findings of fact which must go *beyond* those found true by a jury because they cannot involve elements of the offense or the fact of any enhancement. Consequently, under the Fifth, Sixth, and Fourteenth Amendment reasoning of *Blakely*

and *Apprendi*, a defendant is entitled to jury determination of any such aggravating circumstance used to impose an upper term or consecutive term. Further, *Blakely* and *Apprendi* make clear that these additional facts must be proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 476; *Blakely v. Washington, supra*, at p. *17.)

3. *The trial court violated appellant's constitutional rights under Apprendi and Blakely when it imposed 4 years, 8 months more than the statutory maximum sentence based upon findings which were not found true by a jury or admitted by appellant and not proven beyond a reasonable doubt.*

A violation of section 273a is punishable by 2, 4, or 6 years in state prison. (§ 273a.) Under *Apprendi*, the “statutory maximum” in this case is the middle term of 4 years for the section 273a violation with concurrent sentencing on the remaining counts, the term which could have been imposed by the trial court based solely upon the jury verdict. (*Blakely v. Washington, supra*, 542 U.S. ____ [2004 U.S.Lexis at pp. *13-14].) Here, the court sentenced appellant to the upper term of 6 years, 2 years more than the middle term based upon its findings that the children were particularly vulnerable. (3 R.T. pp. 727-728.) Further, the court imposed a consecutive sentence on counts 6 and 8, which resulted in a sentence that was 2 years, 8 months more than a concurrent sentence, based upon finding that the children were particularly vulnerable. (3 R.T. pp. 728-729.) Reliance on these facts was improper as they were not found true by the jury nor admitted

by appellant. Appellant did not receive a jury trial on the aggravating factors, nor did she admit that the aggravating factors were true.

Further, the trial court erred in applying the wrong burden of proof. Under California law at the time the sentencing hearing was conducted, factors in aggravation and mitigation had to be proven by a preponderance of the evidence. (*People v. Scott* (1994) 9 Cal.4th 331,349; rule 4.420(b).) Although the sentencing court did not expressly state what standard of proof it was applying, from its silence this court must presume that it applied the standard in effect at the time the sentencing hearing occurred. (Evid. Code, § 664.) The trial court's application of the preponderance standard to factors used to enhance appellant's sentence beyond the statutory maximum under *Apprendi* violated appellant's constitutional right to have each fact essential to her punishment proved beyond a reasonable doubt.

C. Sentencing appellant to the upper term and consecutive sentencing based upon facts not found true by a jury beyond a reasonable doubt resulted in structural error.

Because appellant was denied her right to have a jury determine the truth of the aggravating facts and because the incorrect standard of proof was applied, the error was a “structural defect,” not amenable to harmless error review. (Cf. *Sullivan v Louisiana*, *supra*, 508 U.S. 275.) In *Sullivan*, the United States Supreme Court concluded that the

trial court's erroneous reasonable doubt instruction, which resulted in application of a lower standard of proof, was structural error because the jury verdict was not based upon proof beyond a reasonable doubt. (*Id.* at p. 280.) Similarly, in the present case, there is no court or jury verdict on the aggravating factors used to enhance appellant's sentence based upon proof beyond a reasonable doubt.

Further, the *Apprendi-Blakley* majority has made abundantly clear that a *jury* determination is necessary, and that the failure to present the determining fact to the jury for a finding is structural error. Justice Scalia wrote: "Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to *the right of jury trial*. That right is no mere procedural formality, but *a fundamental reservation of power in our constitutional structure*." (*Blakely, supra*, at p. *18, emphasis added.) Justice Scalia continued, "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives *wholly* from the jury's verdict." (*Blakely, supra*, at p. *19, emphasis added.) In the present case, there was no jury trial on the aggravating factors, and appellant did not admit the aggravating factors. Because appellant was denied a jury verdict on multiple aggravating facts, and because the incorrect standard of proof was applied, the error is structural and automatically reversible. Therefore, the sentence should be vacated, and the case remanded to the trial court.