

From opening brief by panel attorney Doris Browning in *People v. Bruce Brown* (E034638)

APPELLANT’S RIGHTS TO A JURY TRIAL AND TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE TRIAL COURT IMPOSED THE UPPER TERM OF IMPRISONMENT BASED IN SUBSTANTIAL PART ON FACTS NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

A. *Background.*

The trial court sentenced appellant to the upper term in state prison on count 1, doubled under the Three Strikes Law, plus five years for the prior serious felony conviction. The sentence on count 3 was stayed pursuant to Penal Code section 654. (RT 1866-1867.)

The factors in aggravation articulated by the court were that the crime involved great bodily injury, that the victim was particularly vulnerable, that appellant took advantage of a position of trust; and that appellant’s crimes are of increasing seriousness, he was on probation when the current crime was committed, and his prior performance on probation was unsatisfactory. (RT 1863-1864.)

B. *Blakely v. Washington and the California Determinate Sentencing Law.*

In *Apprendi v. United States* (2000) 530 U.S. 466, 490, the United States Supreme Court held: “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.” Two years later, in *Ring v. Arizona* (2002) 536 U.S. 584, 602, the Court explained (emphasis in the original):

If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt. [Citation.] A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

On June 24, 2004, the Court decided *Blakely v. Washington* (June 24, 2004, No. 02-1632) 542 U.S. ____ [2004 DJDAR 7581]. In *Blakely*, the Court further explained 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.*” (*Id.* at p. 7582, emphasis in the original.)

Penal Code section 1170, subdivision (b) states, in pertinent part:

“When 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. ... The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.”

The California Rules of Court restate the foregoing principle (rule 4.420(a)), and also provide that factors in aggravation shall be established by a preponderance of the evidence (rule 4.420(b)). “To comply with

section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so.” (Cal. Rules of Court, rule 4.420(c).) “A fact that is an element of the crime shall not be used to impose the upper term.” (Cal. Rules of Court, rule 4.420(d).)

Thus, appellant could only be sentenced to the upper term of imprisonment if the trial court found by a preponderance of the evidence aggravating facts not encompassed within the jury verdicts. This scheme is unconstitutional under *Blakely*, at least to the extent the aggravating factors cannot be characterized as pertaining to recidivism.

C. The Case Should Be Remanded for Resentencing.

The opinion in *Blakely* was silent as to whether the error found was structural, requiring automatic reversal, or whether harmless error review should be undertaken. Arguably, the failure to accord a jury trial on factors used to impose a greater sentence is structural, because a series of factual findings has been made by the wrong entity, under the wrong standard of proof, with the result that an additional term of imprisonment has been imposed. (Cf. *Sullivan v. Louisiana* (1993) 508 U.S. 275.) There is no verdict within the meaning of the Sixth Amendment, and, therefore, no basis for harmless error analysis. (*Id.* at p. 280.)

Even if the error is not structural, the error was not harmless and the

case should be remanded for resentencing. *Apprendi* errors concerning enhancements have been held to be subject to the *Chapman* standard of harmless error analysis; that is, whether the error was harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; see *Chapman v. California, supra*, 386 U.S. 18, 24.) In this context, involving an adjudicated “element,” a reviewing court must examine whether the omitted element is reasonably susceptible to dispute. (*Neder v. United States* (1999) 527 U.S. 1, 19.)

Three of the six aggravating factors relied upon by the trial court in sentencing appellant pertained to the facts of this case, rather than to recidivism. The court was particularly adamant about the “great bodily injury” factor (RT 1863-1864), but that factor was speculative and unsupported by the evidence. There was no evidence of any physical injury to Ms. Bennett (RT 898), and none was alleged. Thus, this factor, upon which the court placed great emphasis, was certainly subject to dispute, and was objected to by trial counsel (RT 1855).

The trial court also relied upon three factors pertaining to recidivism, but the combined weight those factors command is open to question. Appellant’s current crime is distasteful, but attempted rape actually carries a

lower sentencing range than appellant's prior crime, residential burglary.¹ A finding the current crime is of increasing seriousness would of necessity, therefore, turn on a subjective comparison of the facts of the respective crimes. There is no information in the record about the facts underlying appellant's residential burglary conviction.

Appellant was on probation at the time of the current crime.

However, the factor of his "poor performance" on probation is of dubious significance; appellant's contacts with law enforcement have arisen out of his mental illness and threats to commit suicide. (RT 930-952.) His only adjudicated probation violation was in connection with this case. (Probation Rept. at p. 1.)

In sum, removing from consideration the factors not related to recidivism, it is not clear that the trial court would nevertheless have concluded the upper term of imprisonment should be imposed. The case should be remanded for resentencing.

And, appellant does not concede that it is proper to impose an additional sentence on account of factors related to recidivism without a jury trial and findings beyond a reasonable doubt on those factors. Although appellant admitted the prior residential burglary conviction, that admission

1. The remainder of his criminal record is trivial. (Prob. Rept. at p. 1.)

did not encompass the truth of the particular factors relied upon by the trial court, as discussed above. However, appellant acknowledges this Court remains bound by *Almendarez-Torres v. United States* (1998) 523 U.S. 224, and asks that his contention be at least acknowledged in this Court's opinion to preserve it for future review.