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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LUCIAN DRAGOS BURCEA, Defendant and Appellant.	C051333 (Super. Ct. No. 04F11030, 03F10812)

In return for dismissal of additional charges, defendant Lucian Dragos Burcea pled no contest in case No. 03F10812 to spousal battery (Pen. Code, § 273.5, subd. (c)) and received five years' formal probation. In case No. 04F11030, he pled no contest to possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and received a drug treatment referral.

A year later, the court found defendant had violated his probation in both cases. It sentenced him to the upper term of four years for spousal battery, and sentenced him to a consecutive eight months in prison (one-third the midterm) for possessing a controlled substance. Defendant did not seek, nor

was he granted, a certificate of probable cause. (Pen. Code, § 1237.5.)[1]

On appeal, we rejected defendant's claim that the trial court improperly imposed the upper term and full consecutive sentences by relying on facts not submitted to the jury and proved beyond a reasonable doubt, in violation of the principles enunciated in *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). We thereafter granted his request for rehearing in light of the Supreme Court's opinion in *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*).

We now conclude that, because defendant was apprised that the maximum four-year sentence was a possible consequence of his plea to spousal battery, his attack on the upper term sentence constitutes an attack on the plea. Accordingly, we shall dismiss his challenge to the imposition of the upper term sentence in case No. 03F10812 for failure to obtain a certificate of probable cause.

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[1] Penal Code section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

"(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

"(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

As to his challenge to the imposition of a consecutive sentence in case No. 04F11030, we find his contention to have no merit and we shall affirm the judgment.

BACKGROUND

Case No. 03F10812

According to the probation reports, in October 2003, defendant met his ex-wife at a gas station, forced her into her car, and kept her there until the following day, as he forced her to take money from an ATM, hit her in the head with his fist and a metal box, and threatened to kill her. He was charged (among other things) with spousal abuse, robbery, and kidnapping.

In exchange for dismissal of the other charges, defendant pled no contest to spousal battery on June 9, 2004. In open court, the court informed defendant that, on his spousal battery conviction, "[t]he potential prison sentence is two, three or four years. [¶] The understanding is you're not going to go to prison. You'll be placed on probation with certain conditions. If you later violate probation, you could then go to prison for up to four years. Following any prison sentence you would be on parole supervision for up to five years. Do you understand?" Defendant responded "Yes."

Case No. 04F11030

In December 2004, officers responding to a report by defendant's ex-wife that he was confronting her with a knife determined defendant to be under the influence of methamphetamine; following his arrest, they found a baggie of

methamphetamine in his wallet and he was charged with one count of possessing the drug.

On December 22, 2004, he entered a plea of no contest to the possession charge, "with a promise of [the] low term [of] 16 months state prison stayed and a Prop[osition] 36 referral[,]" together with a reinstatement of his probation in case No. 03F10812. Defendant responded, "I understand" after the court explained that the potential consequences of his no contest plea included a potential state prison sentence of 16 months, two years, or three years. Defendant also responded "I understand" when the court explained that "if you violate the terms and conditions of your probation, you may then be sentenced to state prison for a stipulated prison term of 16 months."

Probation Revocation and Sentencing

Following revocation of defendant's probation in both cases, the trial court imposed the upper term for the spousal battery offense in case No. 03F10812 -- four years' imprisonment -- after finding eight factors in aggravation, including that "defendant's criminal conduct is of increasing seriousness" and "defendant was on two grants of probation at the time the crimes underlying these violations of probation were committed."[2] (Cal.

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[2] The probation report reveals that defendant was convicted in 1996 of petty theft; in 1998 of misdemeanor theft; in 2001 of driving under the influence of alcohol or drugs and possessing controlled substance paraphernalia; in 2002, of misdemeanor assault with a deadly weapon, and felony unauthorized taking of a vehicle; in 2003 of misdemeanor spousal battery; in 2004 of

Rules of Court, rule 4.421(b)(2) & (b)(4).) It also sentenced him to eight months (one-third the midterm) on the methamphetamine possession conviction in case No. 04F11030 and ordered consecutive sentencing because the crimes in the two cases were committed at different times or separate places and their objectives were predominantly independent of one another.

DISCUSSION

I.

Defendant contends that the trial court erred in imposing the upper term based on aggravating factors on which there was no jury trial, and erred in imposing consecutive sentences in the two cases which are the subject of this appeal. The Attorney General replies (among other things) that the appeal should be dismissed because defendant failed to seek and obtain a certificate of probable cause under section 1237.5. The Attorney General argues that defendant's *Cunningham* claim constitutes a challenge to a negotiated sentence imposed as a part of the plea bargain and hence represents a challenge to the plea, which requires a certificate of probable cause. (See, e.g., *People v. Shelton* (2006) 37 Cal.4th 759 (*Shelton*); *People v. Bobbit* (2006) 138 Cal.App.4th 445, 447-448 (*Bobbit*); *People v. Young* (2000) 77 Cal.App.4th 827, 834.)

As to defendant's appeal in case No. 03F10812 only, we agree and shall dismiss the appeal.

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intentionally violating a protective order, and spousal abuse; and in 2005 of possessing a controlled substance.

As noted, Penal Code section 1237.5 provides that a defendant may not appeal "from a judgment of conviction upon a plea of guilty or nolo contendere" unless the defendant has applied to the trial court for, and the trial court has executed and filed, "a certificate of probable cause for such appeal." Nonetheless, certain issues may be raised on appeal following a guilty or nolo contendere plea without the need for a certificate. The permitted issues include some issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. (See, e.g., *People v. Buttram* (2003) 30 Cal.4th 773, 780; Cal. Rules of Court, rule 8.304(b)(4)(B) [certificate not required if appeal is based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity"].)

"'[A] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself' and thus requires a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 79.)" (*Shelton, supra*, 37 Cal.4th at p. 766.) The result is the same for a challenge to the trial court's authority to impose an agreed-upon sentence "lid" (a term lower than the maximum possible under sentencing law for the admitted offenses). When the lid is imposed as part of a plea bargain, an appellate attack "is in substance a challenge to the validity of the negotiated plea" and thus also requires a certificate of probable cause. (*Id*. at p. 771.) *Shelton's* logic applies where

the attack is based upon a claim of *Blakely* and *Cunningham* error. (See *Bobbit, supra*, 138 Cal.App.4th at pp. 447-448.)

The only difference in this case from *Shelton* and *Bobbit* is that the challenge is to the trial court's authority to impose the maximum possible term for the spousal battery offense under sentencing law, rather than a lid term. We see no basis for distinction on this ground.

The core rationale of *Shelton* is that the plea bargain contract must give effect to the mutual intention of the parties, with ambiguity resolved in favor of the sense the promisee, the prosecutor, would have understood it. (*Shelton, supra*, 37 Cal.4th at p. 767.) In this case the agreements' terms regarding sentencing were, in essence, that (1) in exchange for the dismissal of other charges, defendant would receive a grant of probation on the spousal abuse charge, and (2) if defendant's probation for spousal battery were revoked, the court would sentence pursuant to the determinate sentencing law, with the express understanding the maximum sentence under that law was the four-year term defendant received. Sentencing on the spousal battery charge comes within *Shelton's* reasoning.

From a prosecutor's point of view, such an agreement as the parties entered into for defendant's plea of no contest on the spousal battery charge necessarily implies an understanding and belief that the stated maximum sentence under that law is a sentence that the trial court may lawfully impose. If the prosecutor understood or believed that the trial court lacked authority to impose that sentence, the benefit gained by giving

up the possibility of a greater sentence with conviction on the additional dismissed charges would be illusory. Thus, to challenge the trial court's authority to impose the acknowledged maximum sentence, it was incumbent upon defendant to reserve such a right in the plea bargain. (See *Shelton, supra*, 37 Cal.4th at p. 769.) He did not.

Like the Supreme Court in *Shelton*, we conclude that defendant's challenge to the trial court's authority to impose the upper term on his spousal battery conviction is in substance a challenge to the validity of the negotiated plea. Therefore, defendant's failure to secure a certificate of probable cause bars consideration of this challenge and requires dismissal of his appeal in case No. 03F10812.

II.

Defendant contends that the reasoning of *Apprendi* and its progeny as applied to California's upper term determinate sentencing is equally applicable to California's consecutive determinate sentencing. He argues that imposing a consecutive sentence under Penal Code section 669, based on facts not determined by the jury, violates the same constitutional norms as gave rise to *Blakely* and *Cunningham*.

While this petition for rehearing was pending, the California Supreme held in *People v. Black* (2007) 41 Cal.4th 799 at pages 821 through 823 (*Black II*), that the constitutional right to jury trial is not implicated by the trial court's imposition of consecutive sentences. We are bound by this

holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The appeal in case No. 03F10812 is dismissed. In all other respects, the judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.