Filed 11/18/04

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT FRANCIS EMERSON, Defendant and Appellant.	C045613 (Super. Ct. No. 6237408)

APPEAL from a judgment of the Superior Court of Placer County, Gaddis, J. Affirmed.

Richard J. Krech, under appointment by the Court of Appeal, for Defendant and Appellant

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Jane N. Kirkland and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Part I of the Discussion.

SEE CONCURRING OPINION

Defendant Robert Francis Emerson was arrested after driving erratically and failing field sobriety tests. He subsequently was convicted of driving under the influence of alcohol and driving on a suspended license.

On appeal, defendant contends that the court erred in imposing the upper term of three years on the principal offense of driving under the influence (DUI) with a prior DUI conviction in the previous 10 years. We disagree and affirm the judgment.

FACTS AND PROCEEDINGS

A jury found defendant guilty of driving under the influence (Veh. Code, §§ 23152, subd. (a), 23550.5--count one), and driving with a blood-alcohol level in excess of .08 percent, with a prior felony DUI conviction (Veh. Code, §§ 23152, subd. (b), 23550.5--count two).

Before trial, defendant pleaded no contest to two counts of misdemeanor driving on a suspended license arising from the same incident: for driving when his license had been suspended for a prior DUI (Veh. Code, § 14601.2, subd. (a)--count three) and driving when his license had been suspended or revoked for other reasons (Veh. Code, § 14601.1, subd. (a)--count four). Following the jury verdicts, defendant admitted allegations he suffered a prior prison term and a prior felony DUI conviction in 2000.

On parole at the time of these offenses defendant has an extensive criminal history. The probation report prepared prior to sentencing shows that, not only was his driver’s license

suspended or revoked on nine occasions for driving under the influence of alcohol or drugs between 1985 and 2003 (the instant offenses), but defendant was convicted in 1975 of grand theft; in 1976 of burglary and receiving stolen property; in 1977 of driving under the influence (a wet/reckless); in 1978 of theft; in 1979 of trespassing; in 1980 of possessing marijuana for sale; in 1992 of felony driving under the influence; twice in 2000 of felony driving under the influence.

The probation report recommended the court select count one as the principal offense, and that it impose the applicable upper term of three years (Pen. Code, § 18) in view of the aggravating circumstances that defendant "has a significant prior record of criminal conduct involving a pattern of driving under the influence of alcohol, as well as property-related offenses" (Cal. Rules of Court, rule 4.421 (b)(2); further references to rules are to the California Rules of Court); has served three prior prison terms (rule 4.421 (b)(3)); was on parole for felony driving under the influence when he committed the instant offenses (rule 4.421 (b)(4)); and his prior performance on probation and/or parole "was unsatisfactory" (rule 4.421 (b)(5)). No circumstances in mitigation were identified in the probation report.

At the sentencing hearing, defense counsel urged the court to impose the middle term, noting that "much of [defendant's] prior felony record is made up of DUI's, and to some extent that is already taken into account by virtue of the fact that he has been charged with a felony. If he didn't have that record, he

would be charged with a misdemeanor. So to some extent, he's already been punished for that. . . . [¶] . . . [¶] It may be tempting to look at the prior DUI's and say he deserves high term, but once again I believe that already is taken into the equation."

The court rejected counsel's argument, explaining: "[T]urn[ing] to the aggravating factors opposed to the mitigating factors as listed in the report at page 30[:] [¶] It talks about facts relating to the defendant. [Defense counsel] points out that the prior convictions, many--well, some of them were listed as the basis for the felony DUI, although in reviewing the report I do note starting back in 1975 with grand theft, receiving stolen property, there were many other offenses there, many theft related. [¶] Also a possession of marijuana for sale offenses listed, 415's, various offenses. [¶] So with regard to those offenses, even if I were to exclude the DUI's, I would certainly find that the prior offenses and convictions are numerous."

Having found no applicable factors in mitigation the court selected count one as the principal offense, and imposed the upper term of three years. It also imposed a one-year enhancement for the 2000 prior prison term allegation admitted by defendant.

DISCUSSION

I

Abuse of Discretion

Defendant contends the trial court abused its discretion when it imposed the high term of imprisonment.

We review the trial court's decision with deference. Sentencing courts have wide discretion in weighing aggravating and mitigating factors enumerated in the California Rules of Court, and the appellate court does not substitute its judgment on such matters. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87.)

"A single aggravating factor is sufficient to impose an aggravated sentence where the aggravating factor outweighs the cumulative effect of all mitigating factors, justifying the upper prison term when viewed in light of the general sentencing objectives stated in [former] rule 410." (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202; see also *People v. Osband* (1996) 13 Cal.4th 622, 728.)

Defendant first contends the trial court improperly considered certain "prior convictions" as aggravating factors. Specifically, notwithstanding his admittedly lengthy criminal record, defendant contends--without authority--that the trial court abused its discretion when considering convictions before 1994 because "the available aggravating offenses are of *decreasing* seriousness and *decreasing* frequency as applied to the instant 2003 offense."

We do not agree. The applicable rule of court allows the trial court to consider defendant's prior criminal record as an aggravating factor if "[t]he defendant's prior convictions as an adult . . . are numerous or of increasing seriousness." (Rule 4.421(b)(2).) It is enough that defendant's prior convictions are numerous; the rule does not require that they *also* have been recent or of increasing seriousness in order to warrant the court's consideration.

He also contends the trial court made an improper dual use of facts because his prior DUI conviction was an element of the crime that elevated his current DUI to a felony and the court then identified the prior as a factor in aggravation of sentence.

The People argue that defendant has forfeited his right to raise this issue by failing in the trial court to raise a dual-use objection, citing *People v. Scott* (1994) 9 Cal.4th 331. We find no forfeiture. Although defense counsel did not expressly refer to a "dual use," his argument that the court should not consider as an aggravating factor defendant's prior convictions because "much of [defendant's] prior felony record is made up of DUI's, and to some extent that is already taken into account by virtue of the fact that he has been charged with a felony" adequately raised the issue and preserved it for appeal.

Defendant is correct that a sentencing court may not rely on the same fact to impose a sentence enhancement and the upper term (Pen. Code, § 1170, subd. (b)), but his contention that the trial court made this mistake is meritless. Only one prior

conviction and prison term--that associated with his 2000 DUI conviction--was alleged and used to enhance his sentence, and only one prior DUI conviction in the past 10 years was required to elevate the current offense to a felony (Veh. Code, § 23550.5, subd. (a)(1)). Defendant's other convictions--including his 1992 DUI conviction, his 1980 conviction for possessing marijuana for sale, and his "many theft related" convictions noted by the court--were available to be considered by the court in determining whether defendant's prior convictions should be weighed as aggravating circumstances. The existence of "surplus" prior convictions sufficient to elevate the current offense to a felony, as well as to constitute a valid factor in aggravation, avoids the impermissible dual use of facts claimed by defendant. (See *People v. Forster* (1994) 29 Cal.App.4th 1746, 1758.)

Defendant's assertion that the trial court failed in its duty to "explicitly exclude" defendant's prior DUI conviction from consideration in deciding whether he had suffered prior convictions is mistaken. Not only was the court permitted to consider defendant's 1992 DUI conviction (for which he served a prior prison term), as noted above, but the trial court did expressly exclude the DUI's in its analysis of defendant's prior convictions and/or prison terms by stating that "even if I were to exclude the DUI's, I would certainly find that the prior offenses and convictions are numerous."

Defendant raises the same "dual use" challenge to the court's consideration in aggravation of the fact that he had

served a prior prison term (rule 4.421 (b)(3)) and, for the same reason, it fails. In addition to defendant's admitted allegation he suffered a prior prison term as a result of his 2000 DUI conviction (which admission was used to enhance his sentence by one year), he served an additional prison term following his 1992 DUI conviction, which the court could properly consider to aggravate his sentence without running afoul of the dual use rule. (See *People v. Forster, supra,* 29 Cal.App.4th at p. 1758.)

We also cannot agree with defendant that the court should not have considered the fact that he committed the instant offenses while on parole from the 2000 DUI conviction (rule 4.421 (b)(4)) as an aggravating factor, because defendant's parole was "'factually indistinguishable from his prior prison term.'"

Defendant relies on *People v. Calhoun* (1981) 125 Cal.App.3d 731. In that case, the dual use involved an enhancement for a prior prison term and the trial court's use of the aggravating factor of poor performance on parole, where that poor performance consisted *solely* of the conviction, which resulted in the prison term. (*Id.* at pp. 733-734.) That is not the case here. Defendant's probation report showed multiple instances of poor performance on probation or parole, some of which dated from 1979. His performance on parole over the years was an appropriate consideration.

Finally, we reject defendant's contention that the trial court was obliged to consider as a mitigating factor that he

"voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process." First, the trial court was obviously aware of the fact of defendant's plea. Even if defendant had urged the trial court to consider this factor in mitigation, the trial court was entitled to minimize without explanation any mitigating factor urged by defendant. (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813.)

II

Blakely Error

By supplemental brief, defendant contends imposition of the upper term violates the holding of *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.3d.2d 403] (*Blakely*) because "[i]n selecting the upper term of imprisonment . . . the judge relied on *factors other than those admitted by appellant or found true by the jury*." We find no error.

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and

proof beyond a reasonable doubt on the additional facts. (*Blakely*, *supra,* 542 U.S. at p. ___ [159 L.Ed.2d at pp. 413-414].)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts essential to the sentence he received.

In addition to the comments of the trial judge that we have set forth above regarding his reasons for assessing the upper term of imprisonment (see, *ante*, at pp. 3-4), at the sentencing hearing the judge confirmed that each side had received a copy of the probation report and stated that he had read and considered the report in arriving at his sentence. He noted, too, that defendant had "served a prior prison term," that defendant was on parole at the time of the offense and that "pursuant to the comments of his parole agent and the conviction, his performance on parole would have to be deemed unsatisfactory." For all of those reasons, the court adjudged the upper term of three years on count one.

Defendant makes two arguments regarding his *Blakely* claim. He first says that, to the extent the court took into consideration the fact of his prior convictions, the court violated his Sixth Amendment right to a jury trial notwithstanding language in *Apprendi* and *Blakely* specifically excepting the fact of a prior conviction from those facts that must be admitted or submitted to a jury before they may be used to increase a defendant's penalty for a crime. He argues that the prior conviction exception is merely dictum and that we should not follow it.

Pointing out that he neither admitted the prior convictions referred to in the probation report nor were they proven in any formal fashion, defendant next says that reliance on those convictions cannot support his upper term sentence. We disagree with both arguments.

Assuming without deciding that *Blakely* applies to California's determinate sentencing scheme, we are able to reject defendant's first argument without entering into a lengthy discussion of holdings versus dicta in appellate opinions. "To say that dicta are not controlling . . . does not mean that they are to be ignored; on the contrary, dicta are often followed. A statement that does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed. In short, while a court is free to disregard a dictum that it strongly disapproves, it is quite likely to rely on a dictum where no contrary precedent is controlling and where the view commends itself on principle." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 947, p. 989.) This has long been the law. (See *Adams v. Seaman* (1890) 82 Cal. 636, 639 ["as the point appears to have been quite elaborately considered, and as the opinion was concurred in by the whole court in Bank, what was said is entitled to great weight, if it be not taken as authority in the strict sense"]; *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.)

In *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*), the United States Supreme Court held that title 8 of the United States Code section 1326(b)(2), which authorized a court to increase the sentence of a recidivist deported alien from two years to 20 years if the prior deportation was based upon a conviction for an aggravated felony, was a penalty provision to be imposed by the trial judge rather than a statute that defined a separate crime. In light of that, the fact that the prior aggravated felony conviction was not pleaded in the alien's indictment did not offend either the statute or the Fifth Amendment to the United States Constitution.

The following year, the court decided *Jones v. United States* (1999) 526 U.S. 227 (*Jones*). In *Jones* the Supreme Court, construing a federal statute, reiterated in a footnote that any fact that increases the maximum penalty for a crime had to be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. (*Jones, supra,* at p. 243, fn. 6.) But, parenthetically, the court excepted from those requirements the fact of a prior conviction. It did so, no doubt, in part because the court had earlier referred to *Almendarez-Torres*'s holding regarding the fact of a prior conviction and *Almendarez-Torres*'s observation that "with perhaps one exception, Congress had never clearly made prior conviction an offense element where the offense conduct, in the absence of recidivism, was independently unlawful." (*Jones, supra,* at p. 235.) In *Jones*, the court's reference to *Almendarez-Torres*'s discussion and its holding that a sentence enhancing prior conviction was not an element of title 8 of the

United States Code section 1326(b)(2) underscored the thought that the fact of a prior conviction had never been one that had to be alleged and proven to a jury beyond a reasonable doubt. The fact of a prior conviction was instead a traditional basis for a trial judge's decision to increase a criminal penalty. (*Jones, supra,* at p. 244.)

The court returned to this issue in *Apprendi*. There, the court again addressed *Almendarez-Torres* and, although the court referred to it as "an exceptional departure" (*Apprendi, supra,* 530 U.S. at p. 487 [147 L.Ed.2d at p. 453]) from the historic practices described in *Apprendi*, the court again excepted the fact of a prior conviction from those facts that must be submitted to a jury and proved beyond a reasonable doubt. (*Id.* at pp. 489-490 [147 L.Ed.2d at pp. 454-455].) Noting that *Almendarez-Torres* had admitted and had not challenged the three earlier convictions upon which his sentence depended and that those convictions had been attended by proceedings with substantial procedural safeguards of their own, the *Apprendi* court found that "the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range" (*Apprendi, supra,* at p. 488 [147 L.Ed.2d at p. 454]) were mitigated.

As the above demonstrates, the United States Supreme Court has given considerable thought to, and has preserved, the exception for the fact of a prior conviction from those facts relating to sentence that must be tried to a jury and proved beyond a reasonable doubt. While, arguably, the statement of that exception

stands as dictum in *Apprendi* and *Blakely* because neither case dealt with prior convictions, it is nonetheless dictum made after careful consideration and in the course of a considerable review of the authorities. It is therefore persuasive and we follow it here.

As we said earlier, defendant also argues that the sentence to the upper term cannot be justified based upon the fact of the prior convictions because those convictions were not admitted or otherwise proved, but were merely set forth in the presentence report. This argument has no merit.

Having concluded that defendant did not have a right to a jury trial as to the truth of allegations of prior convictions, the trial judge had the authority to determine whether defendant had sustained prior convictions and, if so, their effect on the ultimate sentence.

The prior convictions upon which the trial court relied in assessing the upper term were set forth in the report of the probation officer that the trial court and the parties had read and considered. Defendant made no objection concerning the accuracy of the fact of those prior convictions that he was required to do if one or more of them had not been true. (*People v. Scott* (1994) 9 Cal.4th 331.) Not only did the defendant fail to challenge the truth of the prior convictions, defendant's attorney expressly acknowledged the fact of the many convictions during his argument regarding an appropriate sentence and took the position that the convictions were not the sort that supported a sentence to the upper term. Defendant cannot now be heard to claim that prior convictions he knew were part of the calculus of the sentence he

was to receive were untrue or not adequately proven, when he accepted the truth of those facts during the sentencing proceedings. (See *People v. Peters* (1950) 96 Cal.App.2d 671.) Under the circumstances, the trial court's implied finding that defendant had been convicted of the offenses set forth in the probation report is adequately supported by the record. There was no error.

Finally, we can reserve for another day the question of whether the trial court erred in considering the prior prison term and defendant's performance on parole. We will assume for the sake of argument that it was error to consider such matters since they were not decided by the jury or expressly or impliedly admitted by defendant. Having so assumed, we must consider the effect of that error.

In *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860] (*Cotton*), a case decided after the court's decision in *Apprendi*, the Supreme Court unanimously held that a defendant's failure to object to *Apprendi* error in the trial court forfeits the right to raise it on appeal if the error did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings, i.e., if a factor relied upon by the trial court in violation of *Apprendi* was uncontroverted at trial and supported by overwhelming evidence. (*Cotton, supra,* at p. 631 [152 L.Ed.2d at p. 868].)

Although the degree to which *Cotton* applies to California law may be debated, it stands at least for the proposition that *Apprendi*, and, by extension, *Blakely* error is not so fundamental

that it requires reversal of a sentencing decision in all circumstances. It is appropriate therefore to consider the effect of the error on the sentencing proceedings to determine whether the error can be deemed harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Considering the number of defendant's prior convictions dating back to 1975, we are convinced beyond a reasonable doubt that error in considering defendant's prior prison term and his performance on parole, if there was error, was harmless. Defendant's *Blakely* challenge to the upper term sentence cannot be sustained.

DISPOSITION

The judgment is affirmed.

HULL, J.

I concur:

MORRISON, J.

I concur, except as to Part II in which I concur in the result.

In *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403] (hereafter *Blakely*), the United States Supreme Court reiterated its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) 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 tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely upon facts reflected by a jury's verdict or admitted by the defendant. Thus, when a court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at pp. 413-414].)

In this case, the aggravating facts cited by the trial court as justification for imposing the upper term were that defendant had numerous prior convictions, he had served a prison term, and his performance on parole was unsatisfactory--indeed, he was on parole when he committed the offense prosecuted in this case. Although none of these facts was tried to the jury, defendant did not make an *Apprendi* objection.

In *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860] (hereafter *Cotton*), a case decided after its opinion in *Apprendi*, the Supreme Court unanimously held that a defendant's failure to object to *Apprendi* error in the trial court forfeits the right to raise it on appeal if the error did not seriously affect

the fairness, integrity, and public reputation of the judicial proceedings, i.e., if a factor relied upon by the trial court in violation of *Apprendi* was uncontroverted at trial and supported by overwhelming evidence. (*Cotton, supra,* 535 U.S. at p. 631 [152 L.Ed.2d at p. 868].) Although denominated a "forfeiture" rule, the holding in *Cotton* is in effect a harmless error rule.

It has been suggested that the forfeiture/harmless error rule of *Cotton* should not apply to judgments in state criminal cases decided before *Blakely* because (1) defense counsel could not have anticipated the *Blakely* holding and thus should be excused for failing to make an objection based on its legal principles, and (2) in any event, such an objection made prior to the decision in *Blakely* would have been futile because California trial courts would have rejected it.

I do not subscribe to such cynical view of trial judges and defense counsel. The holding of *Blakely* is an application of the legal principles articulated in *Apprendi*, a case decided four years earlier. Therefore, a *Blakely* objection is, in essence, an *Apprendi* objection. It is not too much to expect that the trial judge in this case, a seasoned jurist, would have conscientiously considered such an objection based upon recent United States Supreme Court precedent. In other words, it cannot be said that such an objection necessarily would have been futile, i.e., useless and in vain. And it cannot be said that no reasonable attorney would have made such an objection and, hence, the absence of an objection here should be excused. After all, defense counsel tendered an *Apprendi* objection

in the trial court in *Blakely*. (See *State v. Blakely* (2002) 111 Wash.App. 851, 865 [47 P.3d 149, 156].)

In any event, such a suggestion does not serve to distinguish this case from the situation in *Cotton*. The defendants in *Cotton* were sentenced **before** the Supreme Court rendered its decision in *Apprendi*. (See *Cotton, supra*, 535 U.S. at p. 628 [152 L.Ed.2d at p. 866].) Thus, not only did the defendants lack the authority of *Blakely*, they lacked the authority of *Apprendi* upon which to base an objection. Nevertheless, the Supreme Court found it appropriate to apply a forfeiture-harmless error rule.

I perceive no rational basis in California law upon which to provide criminal defendants with a right to relief to which they are not entitled under federal law. I explain.

Pursuant to our determinate sentencing law, sentencing in conformance with rules adopted by the Judicial Council has been the operative procedure in this state since July 1, 1977. (*People v. Wright* (1982) 30 Cal.3d 705, 709.) This sentencing scheme does not violate state constitutional, statutory, or judicially-established principles. A claim of *Apprendi* and *Blakely* sentencing error rests entirely upon an interpretation of the federal Constitution by the United States Supreme Court.

In considering a claim of federal constitutional error, California courts apply federal standards. (*People v. Howard* (1992) 1 Cal.4th 1132, 1178.) This is true with respect to both substantive standards and standards of appellate review. (*Ibid.*; see also *People v. Flood* (1998) 18 Cal.4th 470, 490, 502-503; *People v. Cahill* (1993) 5 Cal.4th 478, 510.) *Cotton* establishes

that, in the circumstances reflected in that decision, the federal Constitution does not require an appellate court to decide on the merits a claim for relief based upon *Apprendi* and *Blakely*.

Likewise, our statutory law establishes a general rule that relieves an appellate court from considering a claim of error when no objection was made in the trial court. (Pen. Code, § 1259; *In re Seaton* (2004) 34 Cal.4th 193, 197-198.) And our state Constitution expressly precludes reversal of a judgment unless there has been a miscarriage of justice. (Cal. Const., art. VI, § 13.)

Certainly, there can be no miscarriage of justice in the circumstances reflected in *Cotton*. In fact, the United States Supreme Court was unanimous in concluding that the real miscarriage of justice would be to compel reversal of the sentence imposed by the trial court. (*Cotton, supra*, 535 U.S. at p. 634 [152 L.Ed.2d at pp. 869-870].)

It would be anomalous for a California court to apply a rule of procedure that would require us to give cognizance to a claim of federal constitutional error in circumstances where our state Constitution forbids reversal and where the federal Constitution does not require us to do so. Accordingly, we can **and must** apply the forfeiture-harmless error rule of *Cotton* to appellate claims of *Apprendi/Blakely* sentencing error in state criminal prosecutions.

Here, the sentence did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings because the facts upon which the upper term was based were uncontroverted in the trial court. (*Cotton, supra,* 535 U.S. at p. 631 [152 L.Ed.2d

at p. 868].) And the *Blakely* rule does not even apply to one of the reasons the trial court gave for imposing the upper term, i.e., defendant's numerous prior convictions. (Cal. Rules of Court, rule 4.421(b)(2).)

Consequently, defendant's failure to raise in the trial court an *Apprendi*/*Blakely* objection to imposition of the upper term forfeits his right to challenge the sentence on appeal (*Cotton, supra,* 535 U.S. at p. 631 [152 L.Ed.2d at p. 868]), and the judgment must be affirmed.

SCOTLAND, P.J.