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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ELIAS A. GAITAN, Defendant and Appellant.	A102560 (Sonoma County Super. Ct. Nos. SCR32021, SCR32048)
In re ELIAS A. GAITAN, on Habeas Corpus.	A104091

Elias A. Gaitan appeals from convictions entered upon his pleas of no contest to one count of possession of a forged check and one count of possession of methamphetamine. He challenges the trial court's refusal to allow him the opportunity to withdraw his pleas after the court withdrew its approval of a plea agreement and its imposition of a more severe sentence than was called for in the plea agreement. He further contends the trial court erred in refusing to order specific performance of the plea agreement because there was insufficient evidence to support the court's finding that he failed to comply with the agreement. In a related petition for habeas corpus, appellant[1] claims he received ineffective assistance of counsel in that his attorney did not advise him that he had a right to withdraw his pleas.

[1] For convenience, we will continue to refer to "appellant" rather than "petitioner" when discussing the petition.

STATEMENT OF THE CASE

Appellant was charged by information filed on March 25, 2002, in Sonoma County Superior Court (No. SCR-32021), with one count of possession of a forged bank check (Pen. Code, § 475, subd. (a))[2], one count of commercial burglary (§ 459) and one count of attempted petty theft (§§ 664, 484, subd. (a)).

On April 8, 2002, a second information was filed in the same court (No. SCR-32048), charging appellant with one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), one count of misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364) and one count of misdemeanor resisting or obstructing an officer (§ 148, subd. (a)(1)). It was alleged that at the time he committed the first count, appellant was on bail within the meaning of section 12022.1.

On May 10, 2002, pursuant to a plea bargain, appellant entered pleas of no contest to the counts of possession of a forged check (No. SCR-32021) and possession of methamphetamine (No. SCR-32048), and admitted the on-bail allegation. The court granted the prosecution's motion to dismiss the remaining counts in both cases at the time of sentencing. The plea agreement called for imposition of a sentence of five years eight months, with execution of sentence suspended and appellant placed on probation, and for appellant to be released on his own recognizance pending sentencing. As part of the plea bargain, appellant agreed to work for and cooperate with Detective Michael Tosti of the Santa Rosa Police Department.

On November 5, 2002, after a contested hearing, the court found appellant had violated the terms of his plea agreement by failing to cooperate with Tosti. Appellant was remanded into custody. On December 20, the court denied probation and sentenced appellant to a prison term of five years eight months, consisting of the upper term of three years on the forgery count, a consecutive one-third middle term of eight months on the methamphetamine count, and a two year on-bail enhancement.

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[2] All further section references are to the Penal Code unless otherwise indicated.

On May 28, 2003, this court granted appellant's application for permission to file a late notice of appeal. On June 2, appellant filed a notice of appeal and request for a certificate of probable cause, which the trial court granted on June 12, 2003.

STATEMENT OF FACTS

Case No. SCR-32021

According to the probation report, at about 12:45 p.m. on December 26, 2001, appellant attempted to cash a check for $410.25 at a jewelry store in Santa Rosa. The check was determined to be part of a series of checks that had been stolen from a Rohnert Park business approximately one week before. The burglary victim said the account had been closed for years. An employee of the jewelry store recalled appellant having attempted to cash two other checks from the same bank account on December 24, 2001, one for $500, and the other for $410.25. Appellant stated that he received the check, in the amount of $455, as payment for yard work from a woman for whom he had worked for five days. He initially denied having attempted to cash checks at the jewelry store before, then later admitted he had tried twice on December 24 to cash the same check he was attempting to cash on December 26.

Case No. SCR-32048

At about 10:00 p.m. on February 24, 2002, a deputy police officer contacted appellant, who was the passenger in a suspicious vehicle parked behind a Santa Rosa business. The deputy determined that appellant and the driver of the car both had outstanding arrest warrants. Appellant appeared to be trying to hide something to the right of the passenger seat and when the deputy approached the right side of the car to arrest him, appellant pushed open the car door and ran. After a brief foot pursuit and struggle, appellant was arrested and a search revealed two glass drug pipes in appellant's pockets. A plastic bag which was subsequently determined to contain 0.10 gram of methamphetamine was found on the floor between the front passenger seat and the door. Both appellant and the driver denied possessing the bag and suggested it must have belonged to the person from whom they purchased the car the day before. Appellant said he resisted arrest because he did not want to return to jail.

The plea agreement

On May 9, 2002, Santa Rosa Police Detective Michael Tosti met with appellant at the county jail. They discussed "gang information" appellant was aware of regarding "the possibility of locating an assault rifle that was stolen from the Sonoma County Sheriff's Department." Appellant told Tosti he wanted to "cooperate with law enforcement in certain areas." Appellant "thought he could be successful in meeting with the individuals and obtaining information which would lead [the police] to the location of the weapon." Appellant gave another detective a list of names of people involved in "check" cases and narcotics cases.

On May 10, appellant withdrew his previous pleas of not guilty and pleaded no contest to the charges of forgery and possession of methamphetamine. The prosecutor told the court that the parties had entered an agreement "that the defendant would work for and cooperate with law enforcement, being Detective Tosti of the Santa Rosa Police Department, . . . in return for a sentence of execution of sentence suspended as well as immediate release on supervised OR." The terms of the agreement included a suspended prison term of five years eight months. Appellant was informed that once he was placed on probation, if he violated any of the terms of probation he could be sentenced to state prison. He was told that probation would interview him, collect other information and report to the judge, who would make the sentencing decision, and that if the judge determined a prison sentence was appropriate appellant would be given an opportunity to withdraw his plea. Appellant was released from custody that day. The parties stipulated that the plea agreement called for appellant to contact Tosti immediately upon his release from custody and appellant knew how to do so.

Appellant did not contact Tosti immediately upon his release; Tosti called the prosecutor, who in turn called appellant's attorney, and appellant contacted Tosti within a day or two of his release. The two met on May 15, at which time Tosti filled out an "informant worksheet," which included information such as how to reach appellant and advisements about things the police were not asking appellant to do. Tosti testified that

as part of the agreement, he directed appellant to contact him by telephone daily, sometime in the morning.

That same day, they began an undercover investigation which entailed appellant wearing a wire, going to a location where the police believed there might be people with knowledge about the stolen weapon, and engaging in conversation to get comfortable with them. Tosti did not want appellant to move too quickly into discussion of the gun, but rather contemplated further meetings when this could be accomplished. After appellant talked with the people in question, Tosti told him they would do the same thing again and that it would be "slow going to get him in." He told appellant to call him the next day.

Appellant called Tosti on May 16, but Tosti then heard nothing from appellant until May 29. Tosti called the phone number appellant had given him and left messages. On May 18, Tosti learned that appellant had been involved in a domestic dispute with his girlfriend or wife. A "stop and hold" was issued for appellant's arrest. On May 29, Tosti participated in appellant's arrest. Appellant, woken from sleeping in his car and "crying a little bit," apologized for not calling Tosti and said that he had tried to call and still wanted to "do things" but had not been able to reach Tosti.

Appellant testified that when he was released from custody he was "trying to get situated." He and his fiancé moved to his mother's house and "it was just a matter of two days" before he called Tosti on May 13. Asked why he did not contact Tosti between May 15 and May 29, appellant explained that his uncle had had a stroke, went into a coma and eventually died, and that he was trying to get money for himself and his wife to go to San Jose to be with the family there. Appellant testified that this was the only reason he did not contact Tosti. "I had no time. I thought this was priority over that." Appellant also testified that he called Tosti sometime after May 15, probably after the May 18 domestic violence incident; Tosti asked if appellant had found anything, appellant said he was still looking and Tosti told him to call back. Appellant told Tosti he had not been calling because he had been looking for work so he could go to see his uncle.

Appellant testified that he was sleeping in his car on the morning of his arrest because he was homeless and not because he was trying to evade the police. He testified that he did not know there was a warrant for his arrest. Appellant acknowledged that he knew he was supposed to be in daily contact with Tosti: "I was suppose to call him every day. That was our—that was—that was the agreement for me to keep in contact." Appellant also stated that he knew he had not completed his work for the police after the one undercover meeting on May 15, 2002.

DISCUSSION

I.

Appellant contends the trial court erred in failing to allow him the opportunity to withdraw his no contest pleas after it withdrew approval of the plea agreement and imposed a more severe punishment than that specified in the plea agreement. He further urges the court erred in refusing to order specific performance of the plea agreement because there was insufficient evidence that appellant failed to comply with his agreement to act as a cooperating witness for the police.

Section 1192.5 provides in pertinent part: "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea."

We consider first appellant's claim that the court erred in finding he did not substantially comply with the terms of the plea bargain. The court gave three reasons for

this finding: That the agreement required appellant to be in daily contact with Tosti but "there were significant periods of time when the contact was not made" and after May 16, there was no contact until appellant's arrest; that appellant had a positive drug test; and that appellant was arrested for a domestic violation incident.

Appellant addresses only one of these points, arguing that daily contact was *not* a term of the plea agreement; appellant called Tosti within a day or two of his release from custody, participated in an undercover investigation, failed to contact Tosti for less than two weeks, and told Tosti he remained willing to participate in the investigation.

We agree that the evidence does not support the court's conclusion that daily contact was part of the plea bargain. The discussion of the plea bargain on the record at the time the plea was entered did not mention cooperation with the police at all: Appellant's attorney told the court appellant was prepared to plead no contest to the counts of forgery and possession and the on-bail enhancement, with a maximum exposure of five years eight months, and the prosecutor agreed to have this sentence imposed, with execution of sentence suspended, appellant released on supervised "OR" immediately and then placed on probation, subject to conditions imposed by the court, and the remaining charges dismissed.

Subsequently, at the hearing on the motion to enforce the plea agreement, the prosecutor reminded the court that an agreement for appellant to "cooperate" with Detective Tosti had been discussed between the parties and the court but intentionally kept off the record. The prosecutor explained: "The Court probably will recall, and I guess I'm asking for purposes of this hearing the Court take judicial notice of notes in its file. [Defense counsel] and I met with you in chambers and asked you to place a note in the file rather than placing it in open court on the record that we were entering into that agreement. [¶] We asked the Court to note that we were entering into an agreement that the defendant would work for and cooperate with law enforcement, being Detective Tosti of the Santa Rosa Police Department, that was understood between the defendant and the People and his counsel, the defendant's counsel, in return for a sentence of execution of sentence suspended as well as immediate release on supervised OR."

Nothing in the record specifically states that daily contact between appellant and Tosti was a term of the plea bargain. Both appellant and Tosti testified that appellant was supposed to be in daily contact with Tosti. But Tosti's testimony suggests that this requirement was imposed after appellant's release, when appellant and Tosti met and began appellant's undercover work, not as part of the plea negotiations. For all that appears in the record, the actual plea agreement specified only that appellant was to "work" and "cooperate" with the police; Tosti then defined one parameter of the "work" or "cooperation" by imposing the requirement of daily contact.

On this record, the court erred in finding daily contact was a term of the plea bargain. In effect, the court delegated its discretion over the terms of a plea bargain by permitting the police to define the specific terms of the agreement *after* it was entered and approved by the court. Here, appellant faced a term of five years eight months in prison if he failed to comply with the plea agreement. He should not face this degree of sanction for failing to abide by a police officer's directive that was not grounded in the terms of the plea approved by the court.

Despite this error, however, appellant ignores the larger context. Putting aside the condition of daily contact, appellant acknowledges that the plea required him to cooperate with Tosti within a "reasonable" time. Appellant maintains he satisfied this condition because he was out of contact with Tosti for only 13 days. But appellant did not voluntarily contact Tosti at this point: Rather, Tosti was present at appellant's arrest on the domestic violence charge. The trial court was not required to assume appellant would have contacted Tosti if the arrest had not occurred, nor to believe appellant's explanations that he had tried unsuccessfully to reach Tosti and that he had been out of touch because of his uncle's illness and death.

Moreover, appellant ignores the facts that he was involved in an incident of domestic violence and submitted a positive chemical test for methamphetamine after his release on May 10. These were unquestionably violations of the conditions of appellant's release on OR, which justified the court in finding appellant out of compliance with the terms of the plea bargain.

II.

Appellant next argues the court improperly sentenced him to prison without giving him an opportunity to withdraw his pleas. "Under section 1192.5, if a plea agreement is accepted by the prosecution and approved by the court, the defendant 'cannot be sentenced on the plea to a punishment more severe than that specified in the plea . . . .' The statute further provides that if the court subsequently withdraws its approval of the plea agreement, 'the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.' (§ 1192.5; *People v. Johnson* (1974) 10 Cal. 3d 868, 872.)" (*People v. Masloski* (2001) 25 Cal.4th 1212, 1217.) When a plea bargain is violated, " '[t]he usual remedies . . . are to allow the defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain . . . .' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1026-1027, quoting *People v. Mancheno* (1982) 32 Cal.3d 855, 860-861; *In re Jermaine B.* (1999) 69 Cal.App.4th 634, 639.)

In arguing he should have been given an opportunity to withdraw his plea, appellant points in particular to cases in which a defendant "breached the [plea] agreement by failing to appear for sentencing" or made misrepresentations in negotiating the plea such that specific enforcement was precluded. In *People v. Cruz* (1988) 44 Cal.3d 1247, the defendant entered into a plea bargain, was released on bail, then failed to appear for sentencing. When he was apprehended and sentenced, the court refused to adhere to the sentence specified in the plea bargain or to allow the defendant to withdraw his plea. *Cruz* held the defendant's failure to appear for sentencing was not a breach of the plea agreement but rather a separate offense upon which the defendant was entitled to trial. Accordingly, the trial court's determination not to follow the terms of the plea bargain required that the defendant be given an opportunity to withdraw his plea. (*Id.* at pp. 1249, 1253-1254; see *People v. Morris* (1979) 97 Cal.App.3d 358.) In *People v. Johnson, supra,* 10 Cal.3d 868, the defendant pled guilty in exchange for a misdemeanor sentence and probation. The court subsequently learned that the defendant had concealed his true name and criminal history during plea negotiations and sentenced him to prison, contrary to the terms of the plea bargain, without offering him an

opportunity to withdraw his plea. *Johnson* reversed, holding that the provisions of section 1192.5, requiring that a defendant be given an opportunity to withdraw a plea if the court withdraws its approval, "makes no exception for defendants who have committed fraud in negotiating a plea bargain." (*Id.* at pp. 872-873.) In these cases, although it was the defendants' conduct that made enforcement of the plea bargains inappropriate, when the court withdrew its approval of the bargain, the defendants were entitled to an opportunity to withdraw their pleas.

Respondent relies upon caselaw establishing that "where a defendant granted probation as part of a plea bargain violates that probation, subsequent sentencing is not limited by the terms of the original plea." (*People v. Martin* (1992) 3 Cal.App.4th 482, 487; *People v. Hopson* (1993) 13 Cal.App.4th 1, 3.) "A consummated plea bargain is not a perpetual license to a defendant to violate his probation. The plea bargain does not insulate a defendant from the consequences of his future misconduct. 'A defendant gets the benefit of his bargain only once. Like time, a plea bargain once spent is gone forever.' (*People v. Jones* (1982) 128 Cal.App.3d 253, 262.) . . . If a defendant violates probation he may be sentenced accordingly notwithstanding the terms of any plea bargain. (*People v. Allen* (1975) 46 Cal.App.3d 583, 590.)" (*People v. Bookasta* (1982) 136 Cal.App.3d 296, 299-300.)

Unlike the situation in these cases, appellant was not on probation. His plea bargain specified that he would be placed on probation in the future, but his failure to cooperate with the police, and his violations of the conditions of his release, came before sentencing occurred. Had appellant been sentenced in accordance with the plea bargain and subsequently violated conditions of his probation, the plea bargain contemplated that the court would simply order execution of the previously imposed sentence. Contrary to respondent's characterization, however, this is not what the trial court did. When the court found appellant had not complied with the bargain, the prison term had not yet been suspended; appellant had not yet been sentenced at all. The court concluded there had been a "failure of consideration" for the plea bargain and therefore refused to enforce the bargain. Although the sentence it ultimately imposed was that specified in the plea

bargain, it was imposed only after a full sentencing hearing at which the court considered arguments for and against probation and weighed aggravating factors.

Appellant's situation was analogous to that of the defendant in *People v. Johnson, supra,* 10 Cal.3d 868, who concealed his true name and criminal history during plea negotiations: The defendant's improper conduct precluded specific enforcement of the plea bargain, but because the bargain could not be enforced, the defendant had to be permitted to withdraw his plea. Appellant correctly characterizes the court as having retracted its approval of the plea bargain. If a court withdraws its approval of a plea agreement, the defendant must be permitted to withdraw his or her plea if he or she so desires. (*People v. Masloski, supra,* 25 Cal.4th at p. 1217.)

Respondent argues that appellant had an opportunity to seek to withdraw his plea but failed to take advantage of it. At the hearing on November 5, 2002, when the trial court denied appellant's motion for specific performance of the plea agreement, defense counsel asked for "some time after sentencing for execution of that sentence," noting that the defense "may decide that we're gong to make a motion." Asked if appellant wanted a short continuance to allow him to consider making a motion to withdraw his plea, counsel indicated appellant "would seek a short continuance and a short turn-in date so we can make a decision." The matter was continued. On December 19, the sentencing hearing went forward with no further attempt by the defense to raise the issue of appellant's plea.

This failure of the defense might well constitute a forfeiture of appellant's rights for purposes of appeal. In a petition for writ of habeas corpus being considered with this appeal, however, appellant urges that he was denied effective assistance of counsel because his attorney failed to advise him of his right to withdraw his plea after the trial court withdrew its approval of the plea agreement.

"Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability'

that, but for counsel's failings, defendant would have obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *In re Wilson* (1992) 3 Cal.4th 945, 950.) A 'reasonable probability' is one that is enough to undermine confidence in the outcome. (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *In re Jones* (1996) 13 Cal.4th 552, 561.)

"Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel's conduct from counsel's perspective at the time. (*In re Jones, supra*, 13 Cal.4th at p. 561.) A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. (*Strickland v. Washington, supra*, 466 U.S. at p. 689.) Thus, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy under the circumstances. (*Ibid*.) Nevertheless, deference is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions. (*In re Jones, supra*, 13 Cal.4th at pp. 561-562.)" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

Respondent, viewing appellant's claim as "frivolous," contends the record establishes that defense counsel discussed with appellant the option of withdrawing his plea and appellant specifically rejected it. Respondent correctly notes that defense counsel, at the November 5 hearing, acknowledged the possibility that appellant could seek to withdraw his plea if the trial court refused to specifically enforce the plea bargain.[3] Counsel stated, "at that point my client could at least request permission to withdraw his plea. It's my understanding at this point that that's not his intent or

[3] This subject was initially raised by the prosecutor, who stated that if the court found appellant had not complied with the plea agreement, the prosecution would be able to withdraw from the agreement and the defendant would be "back to square one." The court's opinion was that if appellant had complied with the agreement, sentencing would be in accordance with the agreement; if appellant had not, sentencing would not be bound by the terms of the agreement. The prosecutor stated that in the latter case, "[i]f the defendant was at that point going to make any particular motions, then the Court could consider the motions or not."

desire . . . . But I don't think that it's his intent—his desire to withdraw his plea, although that may change. But his desire was to have the Court enforce the agreement which he thinks that he's complied with." After the court found the plea agreement could not be enforced because appellant had not substantially complied with it, defense counsel requested "some time after sentencing for execution of that sentence, him to be given a turn-in date. We may decide that we're going to make a motion." Asked if appellant was seeking a continuance to consider making a motion to withdraw his plea, counsel stated, "probably we would seek a short continuance and a short turn-in date so we can make a decision. But I don't know if we can consider that at this point." The court then agreed to a continuance and granted the prosecution's motion to remand appellant into custody.

We disagree with respondent's assertion that this record establishes that appellant specifically rejected the option of moving to withdraw his plea after discussing the matter with his attorney. Defense counsel's statements at the November 5 hearing reflect his understanding of appellant's position going into the hearing—that is, before the court denied appellant's motion to specifically enforce the plea. Counsel stated that appellant had thus far not wanted to withdraw his plea but noted that this could change and requested a continuance in part to consider making a motion to withdraw the plea. Quite clearly, this hearing concluded with the expectation that the defense would consider whether appellant should move to withdraw his plea. While respondent's assumption that counsel discussed the option with appellant is plausible enough, nothing in the record demonstrates that he in fact did so. Rather, appellant states in a declaration that his appointed attorney never told him he could move to withdraw his no contest pleas or that such a motion would likely have been granted. He further states that if he had known he could withdraw his pleas once the trial court refused to specifically enforce the plea bargain, he would have done so. Appellant additionally submits the declaration of his appellate attorney, who states that he spoke with the attorney who represented appellant on his motion for specific performance and on sentencing and that attorney said he did not discuss with appellant the option of seeking to withdraw his plea.

We review the petition to determine whether, if the petition's factual allegations are true, appellant would be entitled to relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) As discussed above, the trial court in the present case did not impose a previously suspended sentence, but rather refused to enforce the plea bargain. In this situation, appellant was entitled to an opportunity to withdraw his plea. (*People v. Masloski, supra,* 25 Cal.4th at p. 1217.) If, as he claims, his failure to take advantage of this opportunity was due to his attorney's failure to inform him of it, he would appear to have a meritorious claim for ineffectiveness of counsel. Appellant was entitled to be informed of his right to move to withdraw his plea, so that he could make an informed decision whether to do so. It is difficult to conceive of a tactical reason for adhering to the plea. Appellant pled no contest to felony counts of possession of a forged check and possession of methamphetamine, and admitted having committed the latter offense while on bail. As part of the plea bargain, two felony counts—commercial burglary and attempted petty theft—and two misdemeanor counts were dismissed. The sentence appellant could have received if he had been tried and convicted on all counts, however, would not likely have been greater than the aggravated sentence he in fact received, since the two dismissed felony counts appear to have been based on the same conduct and therefore would not be punished separately (Pen. Code, § 654). In light of appellant's declaration that his attorney did *not* inform him that he could move to withdraw his plea, and that he would have so moved if he had been informed, appellant has established a prima facie case of ineffective assistance of counsel. Accordingly, an order to show cause shall issue, returnable in the Superior Court of Sonoma County, requiring the Department of Corrections to show cause why the relief granted in the petition should not be granted.

III.

In a supplemental brief, appellant argues the trial court violated his constitutional rights under *Blakely v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 2531 (*Blakely*), by sentencing him to an aggravated term based upon factors not found by a jury beyond a

reasonable doubt. We consider this issue as it will be relevant if appellant's petition for habeas corpus is denied.

We recently considered the application of *Blakely* to the California determinate sentencing scheme in *People v. Butler* (*Butler*) (Sept. 27, 2004, A101799) ___Cal.App.4th ___ [2004 DJDAR 12083]. We explained, "In *Blakely*, the [United States] Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the 'standard range' of 49 to 53 months to 90 months based upon the trial court's finding that the defendant acted with 'deliberate cruelty.' (*Blakely, supra,* 124 S.Ct. at p. 2537.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), that ' "[o]ther 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." ' (*Blakely, supra,* 124 S.Ct. at p. 2536.)" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12088].)

"Under California's determinate sentencing law, the maximum sentence a judge may impose for a conviction without making any additional findings is the middle term. Penal Code section 1170, subdivision (b), states that 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' Furthermore, [Cal. Rules of Court,] rule 4.420(b), states that '[s]election 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.' " (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12088].)

As in *Butler*, the People here contend that California's sentencing system does not violate *Blakely*, as the Legislature has prescribed three terms of imprisonment for each offense and the choice between these terms is validly left to the trial court's discretion. In the People's view, where the Legislature has established a maximum offense-specific penalty, *Blakely* is not implicated as long as the defendant's sentence does not exceed that maximum. This position, however, "is flatly contradicted by the Supreme Court's

holding that the statutory maximum is 'not the maximum sentence a judge may impose after finding additional facts,' but rather the sentence it may impose without making *any additional findings*. (*Blakely, supra*, 124 S.Ct. at p. 2537.) Under California law, the maximum sentence a judge may impose without any additional findings is the middle term. (Pen. Code, § 1170, subd. (b); [Cal. Rules of Court,] rule 4.420.)" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at pp. 12088-12089].)

Also as in *Butler*, we reject the People's contention that appellant forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. "Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See Pen. Code, § 1170, subd. (b); rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture doctrine is to 'encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors,' (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after defendant was sentenced.[4]" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12089].)

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4 "We are not persuaded otherwise by the People's misleading references to two federal cases which, they contend, characterize *Apprendi* claims that were not raised in the trial court as forfeited notwithstanding the fact that *Apprendi* was decided while the cases were on appeal. (See *United States v. Cotton* (2002) 535 U.S. 625; *United States v. Ameline* (2004) 376 F.3d 967.) As these cases illustrate, under federal appellate procedure, characterizing a claim as forfeited does not mean that the claim may not be

The trial court based its decision to impose an upper term sentence on several factors: The crime was carried out in a manner that indicated planning, as appellant went twice to the same place to try to cash the fraudulent check (Cal. Rules of Court, rule 4.421(a)(8); appellant previously had engaged in violent conduct indicating he was a serious danger to society (rule 4.421(b)(1); appellant's prior convictions as an adult and sustained petitions as a juvenile were numerous (rule 4.421(b)(2)); and appellant's prior performance on probation was unsatisfactory (rule 4.421(b)(5)). Appellant contends all of these are factors which, under *Blakely*, must be found by a jury beyond a reasonable doubt if not admitted by the defendant.

Appellant is clearly correct as to two of the aggravating factors relied upon by the court: The determinations that the offense was carried out in a manner indicating planning and that appellant had previously engaged in violent conduct indicating he was a serious danger to society required factual findings beyond those "reflected in the jury verdict or admitted by the defendant." (*Blakely, supra,* 124 S.Ct. at p. 2537, italics omitted.)

The remaining two factors relied upon here—that appellant's prior convictions or sustained juvenile petitions were numerous and that appellant's prior performance on probation was unsatisfactory—pertain to appellant's recidivist status. "The requirement that a fact which increases a sentence beyond the statutory maximum must be found by a jury does not apply to the fact of a prior conviction. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi, supra*, 530 U.S. at pp. 488, 490; *Blakely, supra,* 124 S.Ct. at p. 2536.) This prior conviction exception to the *Apprendi* rule has been construed broadly to apply not just to the fact of the prior conviction, but to other issues relating to the defendant's recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.)" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12089].) We are not persuaded, however, that the two findings at issue here fall within

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reviewed on appeal. Rather, such a claim is reviewed for plain error. (*Ibid*.)" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12089, fn. 7].)

the "narrow exception" carved out by the Supreme Court. (*Apprendi,* at p. 490 [characterizing *Almendarez-Torrez* as a "narrow exception" arising from "unique facts"].) In some cases, extrinsic facts relating to a recidivist aggravating circumstance may implicate *Apprendi,* and the subjective factors involved in finding these two recidivist circumstances appear to involve such extrinsic facts. Although clearly stemming from the fact of a prior conviction or convictions, each of these two aggravating factor requires additional findings which are not only factual, but subjective—that the prior convictions were "numerous" and that appellant's performance on probation was "unsatisfactory." These additional facts appear to us to require a jury determination and proof beyond a reasonable doubt.

Since the *Blakely* court rested its holding on *Apprendi*, we measure the prejudice resulting from *Blakely* error by the *Chapman* standard of prejudice applicable to *Apprendi*. (Butler, supra, ___ Cal.App.4th ___ [2004 DJDAR at p. 12089], citing *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Under this test, we are required to reverse unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

We cannot find harmless error under this standard, because no jury considered—and appellant did not admit—the factual issues underlying the aggravating factors upon which the court relied. Moreover, the sentence could not stand even if the trial court's reliance upon appellant's history of prior convictions and prior performance on probation was proper. "In order to determine whether error by the trial court in relying upon improper factors in aggravation requires remanding for resentencing 'the reviewing court must determine if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* [(1956)] 46 Cal.2d [818, 836].)' [Citation.] However, '[t]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption.' [Citation.] Thus, the reviewing court may not simply ask whether the imposed sentence would be 'wholly unsupported or arbitrary in the absence

of error' but must also reverse where it cannot determine whether the improper factor was determinative for the sentencing court. [Citation.]" (*People v. Avalos* (1984) 37 Cal.3d 216, 233.)

Although under California law a single factor in aggravation is sufficient to support imposition of an upper term sentence (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 581; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401), the record in this case does not permit us to conclude the court would have imposed the aggravated term based upon any one or more of these factors, without the others. The transcript of the sentencing hearing demonstrates that the court thought long and hard about whether to impose a prison sentence at all rather than placing appellant on probation in order to permit him to participate in a rehabilitation program. At the conclusion of the first phase of the sentencing hearing, the court commented that "this matter presents a very difficult dilemma for the Court. You have two prior felonies which means that I have to find unusual factors [in order to grant probation]. [¶] You've got a history that would tell the Court you can't or won't comply with probation. [¶] You've expressed to the Court a very sincere deep-rooted fear of going to prison, which is a—probably a very strong motivating factor, and I'm trying to balance all of these things." The court then put off a decision until the next day, explaining that "there's very strong arguments on both sides of this one, and I've had many, many discussions, but there's a lot of information here. And I just . . . want some more time to review everything very carefully because I know the impact this is going to have on your life." The next day, the court explained that after reviewing the reports, it questioned appellant's seriousness about participating in a treatment program and therefore could not find unusual circumstances permitting a grant of probation. The court then imposed the aggravated term as described above. On this record, we cannot determine what sentence the court would have imposed if some of the aggravating factors it cited were not valid under *Blakely, supra,* 124 S. Ct.. 2531. The matter must be remanded for resentencing.

The matter is remanded to the trial court with instructions that appellant be permitted to withdraw his no contest plea if he moves to do so within 30 days of the date the remittitur is filed in the superior court. (See *People v. Cruz, supra,* 44 Cal.3d at p. 1254.) If he does so move, the prosecution shall be given the opportunity to reinstate the charges dismissed as part of the plea bargain. (See *People v. Gentry* (1992) 7 Cal.App.4th 1255, 1268-1269.) If appellant does not so move, the court shall reconsider appellant's sentence in accordance with the views expressed herein.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.