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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURO HERNANDEZ, JR.,

Defendant and Appellant.

F048747

(Super. Ct. No. 1023344)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Stanislaus County. John G. Whiteside, Judge.

S. Lynne Klein, 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, Assistant Attorney General, Kathleen A. McKenna and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Vartabedian, Acting P.J., Gomes, J., and Kane, J.

## INTRODUCTION

Appellant, Mauro Hernandez, Jr., was found guilty after a jury trial of voluntary manslaughter (Pen. Code, § 192, subd. (a)).<sup>1</sup> Appellant had earlier pled nolo contendere to one count of battery causing great bodily injury (§§ 242 & 243, subd. (d)). The jury found true an allegation appellant personally used a dangerous or deadly weapon (§§ 12022, subd. (b)). In a bifurcated proceeding, the trial court found true an allegation that Hernandez committed a prior serious felony within the meaning of the three strikes law. The court sentenced appellant to the upper term of 11 years for voluntary manslaughter, which it doubled to 22 years pursuant to the three strikes law. The court added a consecutive term of one year for the weapon enhancement.

Appellant appealed in case No. F043763 challenging the sufficiency of the evidence of the prior conviction.<sup>2</sup> We affirmed appellant's conviction for manslaughter and the jury's true finding on the arming enhancement. We remanded the case giving the prosecutor 30 days to give notice of an intent to seek retrial of the prior conviction. In the concluding sentence of our disposition, we stated that if the prosecutor fails to give such notice, "the court shall resentence Hernandez without reference to the strike allegation."

The prosecutor did not provide notice of intent to seek retrial of the truth of the prior conviction. On June 21, 2005, defense counsel filed a brief challenging an upper term sentence based on *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). The motion further challenged some of the aggravating factors used by the trial court in the original sentencing proceeding as being an improper dual use of facts. In a brief resentencing hearing, defense counsel inquired as to whether the trial court had considered the *Blakely* issue. The court responded affirmatively. The parties made no

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

<sup>2</sup> We grant appellant's motion to take judicial notice of the record in *People v. Hernandez* (Dec. 18, 2004, F043763 [nonpub. opn.]) (Evid. Code, §§ 452, 459).

other arguments. The court stated the prior conviction had been vacated by this court and “the remaining sentence as modified stands as originally pronounced.” The court imposed the upper term of 11 years plus a consecutive term of one year for a total prison term of 12 years.

On appeal, appellant raises two issues. First, the aggravating factors relied upon by the trial court were based on an improper dual use of facts. Respondent contends this issue has been waived because appellant failed to raise it on the first appeal. Second, appellant argues the trial court erred in sentencing him to the upper term in violation of *Blakely*.

### **UPPER TERM SENTENCE**

Appellant contends the dual use of facts prohibition in sentencing applies to the trial court’s findings that appellant caused great bodily harm to the victim and appellant used a weapon in the commission of the crime. Appellant argues voluntary manslaughter necessarily caused harm to the victim and that the jury’s true finding on the use of a weapon meant the trial court could not use that factor as an aggravating factor.

#### ***First Sentencing Hearing***

The probation report for the original sentencing hearing noted three factors in aggravation.<sup>3</sup> During the sentencing hearing on July 21, 2003, defense counsel argued that aggravating factors one and two were essentially the same factor and should not be used by the trial court in choosing an aggravated term. Counsel did not argue, however, that these factors constituted a dual use of facts. Defense counsel further argued that the victim initiated the altercation with appellant (Cal. Rules of Court, rule 4.423(a)(2)) and appellant suffered from a mental illness which mitigated the degree of his culpability (Cal. Rules of Court, rule 4.423(b)(2)).

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<sup>3</sup> The three factors were: (1) the crime involved great violence (Cal. Rules of Court, rule 4.421(a)(1)); (2) the defendant engaged in violent conduct which indicates a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1)); and (3) the defendant was on probation when the crime was committed (Cal. Rules of Court, rule 4.421(a)(4)). The probation officer listed no factors in mitigation.

The trial court found four aggravating factors applicable: (1) the crime involved great violence (Cal. Rules of Court, rule 4.421(a)(1)); (2) the defendant engaged in violent conduct which indicates a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1)); (3) the defendant was on probation when the crime was committed (Cal. Rules of Court, rule 4.421(a)(4)); and (4) the appellant was armed with or used a weapon when he committed the offense (Cal. Rules of Court, rule 4.421(a)(2)). The fourth factor applied by the trial court was an additional factor not set forth in the probation report.

The court noted appellant had a prior history of violence. The court observed that the victim did not die from a single stab wound, but from multiple stab wounds. Most of these were apparently to the head and neck. The court found appellant's mental condition to be a mitigating factor, but noted appellant had already received consideration for this factor when the jury reduced the original allegation of first degree murder to voluntary manslaughter. The court explained that to "some extent" the victim initiated or provoked the incident, but the court stated the victim only verbally teased the appellant. The court found the factors in aggravation outweighed the factors in mitigation and imposed the upper term.

It was not until the second sentencing hearing that defense counsel discussed the issue of the dual use of facts in imposing the upper term.

### ***Waiver***

Respondent argues appellant cannot challenge the trial court's dual use of facts to justify the upper term because appellant failed to raise this issue on his first appeal. Respondent acknowledges that appellant raised this issue before the trial court prior to resentencing in a written brief, but did not even argue the point to the trial court during resentencing.

The failure to lodge an objection to a trial court's sentencing choices at the time of sentencing concerning its use of mitigating and aggravating factors generally constitutes a waiver of the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353-355.) Where a defendant fails to object to what he or she later considers to be an improper dual use of

facts to impose the upper term, the defendant has waived the issue on appeal. (*People v. Erdelen* (1996) 46 Cal.App.4th 86, 90-91.)

In *People v. Murphy* (2001) 88 Cal.App.4th 392, 393-394 (*Murphy*), the defendant successfully appealed the first time based on *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). *Murphy* further argued his sentence was cruel and unusual punishment. We rejected this argument as premature and affirmed the judgment in all other respects. On remand, *Murphy* urged the court to exercise its discretion under *Romero*, and argued a life sentence was cruel and unusual. The trial court rejected these arguments. (*Id.* at p. 394.)

On the second appeal, *Murphy* asserted the trial court's use of a prior burglary conviction both to elevate his petty theft to a felony and to invoke the sentencing provisions of the three strikes law violated constitutional due process and double jeopardy principles. We rejected this new argument because we remanded the case to the trial court for the sole purpose of deciding whether to exercise its discretion under *Romero* and affirmed the judgment in all other respects without reversing appellant's sentence. (*Murphy, supra*, 88 Cal.App.4th at p. 394.)

Our *Murphy* decision found that where the remand was limited and defendant failed to raise other sentencing issues during the first appeal, the defendant was precluded from doing so on the second appeal. The only issue before the court on the second remand was for the trial court to exercise its discretion under *Romero*. (*Murphy, supra*, 88 Cal.App.4th at p. 395-396.) The *Murphy* case noted, however, that where a matter is remanded for resentencing, the entire sentence is before the trial court. (*Id.* at p. 395, citing *People v. Senior* (1995) 33 Cal.App.4th 531, 534.)

Our disposition of the first appeal stated the trial court "shall resentence Hernandez without reference to the strike allegation." Arguably, this can be interpreted as a limited remand for the trial court to simply remove the strike allegation from appellant's sentence. As in *Murphy*, we did not reverse appellant's sentence. On the other hand, the phrase directs the court to "resentence" appellant. We find this phrase

ambiguous enough to conclude that appellant was not barred from raising the dual use of facts issue to the trial court after our remand from the first appeal. We will, therefore, reject respondent's waiver argument and find the instant action distinguishable from *Murphy*.

### ***Dual Use of Facts***

Appellant argued to the trial court and argues on appeal that two aggravating factors applied by the trial court were inapplicable to his case; the crime involved great violence or great bodily harm, and appellant was armed or used a weapon during the offense. The parties pose lengthy arguments concerning whether the trial court's application of the use of a weapon was dual use of facts because this factor was already applied to appellant's sentence through the section 12022, subdivision (b) enhancement. Because there were three other valid aggravating factors, and because the trial court found the two mitigating factors to be weak, we will not discuss the trial court's application of weapon use as an aggravating factor and will assume, arguendo, this factor was invalid.

Appellant does not contest the validity of the court's consideration that he was on probation when he committed the instant offense, or that his conduct constituted a danger to society, as aggravating factors. As to the second factor, the trial court explained appellant had a history of criminal conduct. Appellant's argument that his conviction for voluntary manslaughter is, necessarily, a crime of great violence and therefore covered in the elements of the offense fails. The trial court noted appellant's violence was particularly egregious. The court noted appellant did not simply stab the victim once, but repeatedly stabbed him. Where in the course of killing his or her victim a defendant commits cruel, vicious, or callous acts which transcend the basic fact of great bodily harm, the taking of the victim's life does not immunize appellant from California Rules of Court, rule 4.421(a)(1). (*People v. Duran* (1982) 130 Cal.App.3d 987, 990-991 [applying the predecessor to rule 4.421(a)(1), rule 421(a)(1); both rules are substantially the same]; also see *People v. White* (1981) 117 Cal.App.3d 270, 282 [disapproved on

another ground in *People v. Scott, supra*, 9 Cal.4th at p. 353, fn. 16] [rule applicable where defendant shot victims multiple times even after they were incapacitated].)

Although the trial court noted appellant had a mental problem, the court found the jury had already taken that factor into account in finding him guilty of voluntary manslaughter rather than first or second degree murder. The court noted the victim to “some extent” initiated the incident but further observed that the victim only used words to tease appellant. These findings by the trial court indicate the court did not give great weight to the two mitigating factors argued by defense counsel.

Sentencing courts have wide discretion in weighing aggravating and mitigating factors and may balance them against each other in both qualitative *and* quantitative terms. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) This is precisely what the trial court did here. The court found the aggravating factors stronger than the mitigating factors. Only a single valid aggravating factor is necessary to justify the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Here, there were at least three valid aggravating factors and the mitigating factors were not considered strong by the trial court.

Where the trial court has given proper and improper reasons for sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable the trial court would have chosen a lesser sentence had it known one or more of its reasons were improper. (*People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.) If we were to remand this case for a third sentencing hearing with instructions to the trial court not to consider appellant’s use of a weapon as an aggravating factor, it would not be reasonably probable the court would reduce appellant’s sentence.

### ***BLAKELY***

Appellant contends that in imposing the upper term, the court violated his right to a jury trial under the Sixth Amendment as set forth in the Supreme Court’s recent decision in *Blakely v. Washington* (2004) 542 U.S. 296. The California Supreme Court,

however, found that California's sentencing scheme for imposing an upper term does not implicate the Sixth Amendment right to a jury trial. (*People v. Black* (2005) 35 Cal.4th 1238, 1256.) We are bound by the decisions of our high court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

### **DISPOSITION**

The judgment is affirmed without prejudice to any relief to which defendant might be entitled after the United States Supreme Court determines in *Cunningham v. California*, No. 05-6551, the effect of *Blakely v. Washington, supra*, 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220, on California law.