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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JESSIE THOMAS IVEY, Defendant and Appellant.	A105165 (Lake County Super. Ct. No. CR032957)

Defendant pleaded guilty to charges of financial fraud. Immediately prior to his sentencing hearing, the prosecution provided to defendant and the sentencing court an investigator's report strongly implying that defendant had been involved in extensive additional fraud. Although the trial court denied a continuance to permit defense counsel to investigate and respond to the report, the court nonetheless considered the report in imposing sentence. In addition, when imposing the upper term sentence the trial court considered various factual matters beyond those that defendant admitted in pleading guilty. Defendant contends that the trial judge erred both in considering the investigator's report and by taking into account non-admitted facts in imposing the upper term. Finding merit in both arguments, we remand for resentencing.

I. DISCUSSION

Defendant was charged in a complaint filed April 8, 2003, with grand theft in excess of $400 (Pen. Code,[1] § 487, subd. (a)), possession of forged items with intent to

[1] All statutory references are to the Penal Code unless otherwise indicated.

defraud (§ 475, subd. (c)), and three counts of forgery. (§ 470, subd. (d).) With respect to the first count, the information alleged excessive taking within the meaning of section 12022.6, subdivision (a).

Defendant pleaded guilty to all five counts. As part of a plea agreement, the excessive taking allegation was stricken.

The probation report disclosed that defendant, a bookkeeper, was entrusted with management of the financial affairs of a small business. Because the owner of the business was "clinically dyslexic," he was particularly dependent upon defendant. For a period running from December 1996 through February 2000, defendant systematically looted the business, in the process forging the owner's name on over 200 checks. Defendant's fraud resulted in the owner's financial ruin. Defendant stipulated to restitution in the amount of $61,281, although the actual loss to the victim might have been considerably greater.

On the morning of the sentencing hearing, December 5, 2003, defense counsel was presented with a memorandum prepared by an investigator for the district attorney's office. The memorandum reported the substance of an interview conducted with a subsequent employer of defendant, the owner of another small business. The owner described what appeared to be another extended embezzlement by defendant which again led to the ruin of a small business, this time accompanied by threats by defendant against the owner to prevent her from reporting his conduct. Defense counsel requested a continuance to review and respond to the memorandum's charges, asserting that defendant "has told me that he has records to show that these further allegations are not true." The trial court denied the requested continuance.

After listening to prosecution argument in which the allegations of the memorandum figured significantly, the trial judge denied probation, noting that he was relying on the memorandum as well as the probation report and the victim's statement. The trial court found defendant statutorily eligible for probation but denied it on the basis of several findings pursuant to California Rules of Court, rule 4.414, including that the nature, seriousness, and circumstances of the crime, as compared to other instances of the

same type of crime, were extremely serious; the victim was vulnerable because he was dyslexic; defendant's actions inflicted emotional injury on the victim; the degree of monetary loss to the victim was great; defendant was an active participant; the manner in which the crime was carried out demonstrated criminal sophistication and professionalism; and defendant took advantage of a position of trust in committing the offense. The court recognized that defendant had no prior criminal record but determined that the likelihood of defendant's completing probation was low because defendant might repeat his misconduct, a conclusion presumably influenced by the charges of the memorandum. The court also acknowledged that the effect of imprisonment on defendant would be substantial but found that defendant posed "a high danger to the property and finances of others if not imprisoned," a conclusion similarly influenced by the memorandum. The same considerations caused the court to impose the upper term sentence of five years eight months.

II. DISCUSSION

Defendant contends that the trial court's failure to provide him an adequate opportunity to respond to the investigator's memorandum deprived him of due process and that the trial court's imposition of the upper term sentence on the basis of factual allegations he had not admitted as part of his guilty plea violated *Blakely v. Washington* (2004) 540 U.S. ___ [124 S.Ct. 2531] (*Blakely*).

A. The Investigator's Memorandum

Section 1204 limits the trial court's sources of information in imposing sentence to a probation report submitted pursuant to section 1203 and evidence presented in open court at the sentencing hearing. (See *In re Calhoun* (1976) 17 Cal.3d 75, 83.) Section 1203, subdivision (b)(2)(D), requires the probation report to be made available to the defendant no less than five days prior to sentencing. If the trial judge receives information from a source other than those permitted by section 1204, the judge can either disregard the information or give the parties a fair opportunity to respond. (*People v. Shaw* (1989) 210 Cal.App.3d 859, 867–868.)

The People concede both that the investigator's memorandum should not have been considered because it "did not meet the requirements of section 1204" and that the trial court erred by not granting a continuance. They argue, however, that the errors should not result in remand because they were not prejudicial.

The failure to provide sufficient time to the defense to evaluate and respond to materials presented at sentencing is ordinarily presumed to be prejudicial. As noted in *People v. Leffel* (1987) 196 Cal.App.3d 1310, 1318 (overruled on other grounds in *People v. Bullock* (1994) 26 Cal.App.4th 985, 987–989), which concerned a failure to comply with the time requirements of section 1203, "the possibilities for prejudice are clear and the actual prejudice suffered is a matter of conjecture. [¶] What the defendant might have been able to object to or to add further to the report cannot be determined because he was not afforded the proper opportunity to comprehend, analyze, investigate and evaluate the report." The same reasoning applies here. Although defendant claimed to have records that would have disproved the statements in the memorandum, his attorney was unable to use them to rebut the charges for lack of notice. "[B]ecause [counsel] was not afforded the proper opportunity to comprehend, analyze, investigate and evaluate the report," there is no way to know whether defendant would have been successful in responding to the charges. Under these circumstances, there is no need to show actual prejudice. (See similarly *People v. Bohannon* (2000) 82 Cal.App.4th 798, 808–809.)

We would, in any event, be required to reverse under a prejudice analysis. As the People note, prejudice must be evaluated under the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18. The People argue that even in the absence of the memorandum, the sentencing court would not have granted probation because "[t]he probation officer's report described a truly aggravating course of criminal conduct." While it is true that defendant committed a very serious crime, he had no prior criminal record, and he was skilled, gainfully employed, and working to pay restitution. In light of these balancing factors, it is certainly possible that the investigator's memorandum was decisive, since it created the impression that defendant

had committed another crime of equal, if not greater, severity after ruining his initial employer. The prosecutor relied on the memorandum and its implications in arguing against probation, noting that one reason defendant did not have a prior record might be that "it is very hard to catch Mr. Ivey at what he does. [¶] When he comes in and handles business affairs for the individual he gets rid of much of the evidence, as you can see from the [memorandum]." The trial court's reliance in denying probation on his belief that defendant might repeat his conduct and posed "a high danger to the property and finances of others if not imprisoned" demonstrates the impact of the memorandum. In light of this reasoning, we cannot say beyond a reasonable doubt that, in the absence of the memorandum, the trial court would have denied probation. The same analysis applies to the trial court's other sentencing decisions. The conceded errors of the trial court require that defendant be resentenced. If the information contained in the memorandum is used upon resentencing, it must be provided to the court in conformance with section 1204.

B. Blakely

In *Blakely, supra*, 124 S.Ct. 2531, the United States Supreme Court extended the rule articulated 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*, at p. 2536.) *Apprendi* involved factual findings used to support statutory sentence enhancements under a New Jersey hate-crimes statute. (*Apprendi*, at pp. 468–469.) At issue in *Blakely* was the determinate sentencing procedure followed by courts in the State of Washington.[2]

The petitioner in *Blakely* entered a guilty plea to second degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no

[2] The effect of *Blakely* on California sentencing law is now before the California Supreme Court in *People v. Black*, review granted July 28, 2004, S126182, and *People v. Towne*, review granted July 14, 2004, S125677, as well as a host of other cases in which review has been granted more recently.

other relevant facts." (*Blakely*, *supra*, 124 S.Ct. at pp. 2534–2535.) Under the Washington Criminal Code, second degree kidnapping was classified as a class B felony that carried a maximum statutory sentence of 10 years. (*Id.* at p. 2535.) The Washington sentencing guidelines further limited the presumptive " 'standard range' " to 49 to 53 months, but authorized the judge to impose a sentence above the specified range (subject to the 10-year maximum) upon a finding by a preponderance of the evidence of " 'substantial and compelling reasons justifying an exceptional sentence.' " (*Ibid.*) At the sentencing hearing, an "exceptional sentence" of 90 months was imposed, based upon the trial judge's finding that the petitioner used " 'deliberate cruelty' " in the commission of the offense. (*Ibid*.)

The court in *Blakely* expanded upon its prior determinations in *Apprendi* and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*),[3] that a defendant's constitutional rights have been violated when a judge "imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi*, *supra*, [530 U.S.] at [pp.] 491–497; *Ring*, . . . at [pp.] 603–609." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) *Blakely* rejected as contrary to *Apprendi* the State of Washington's position that "there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies." (*Ibid.*) The court defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper

[3] The petitioner in *Ring* challenged an Arizona statute authorizing imposition of a death sentence if the judge found one of ten specified aggravating circumstances. (*Ring*, *supra*, 536 U.S. at pp. 592–593.)

authority." (*Ibid*.) Defendant contends that the trial judge relied on just such "additional facts" in imposing the upper term sentence.

The People first argue that defendant waived any claim of *Blakely* error by failing to object in the trial court to imposition of the upper term on constitutional grounds. "Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed *in a procedurally* or factually *flawed manner*' are waived on appeal if not first raised in the trial court. [Citation.]" (*People v. Brach* (2002) 95 Cal.App.4th 571, 577.) "[W]ith certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) Even constitutional objections must be interposed in the trial court in order to preserve them for appeal. (See *People v. Williams* (1997) 16 Cal.4th 153, 250.)

However, not all claims of error are prohibited in the absence of a timely objection in the trial court. Claims asserting the deprivation of certain fundamental, constitutional rights may be raised for the first time on appeal. (*People v. Vera*, *supra*, 15 Cal.4th at p. 276.) The failure to object to an "unauthorized sentence" also is not subject to the waiver rule. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case, defendant claims deprivation of his fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. He raises an issue of constitutional law that we may decide without reference to the particular sentencing record developed in the trial court. Further, if defendant's position is found to have merit, the sentence was not lawfully imposed and may be corrected on appeal despite the lack of an objection in the trial court. Finally, at the time of defendant's sentencing, no

relevant judicial tribunal had construed *Apprendi* to require jury determination of facts used to impose an upper term of imprisonment under a determinate sentencing law comparable to California's. *Blakely* postdated his sentencing hearing by several months. On all of these grounds, defendant cannot be held to have waived the *Blakely* claims he now raises.

The relevant elements of California's determinate sentencing law (DSL) are set forth in section 1170. Subdivision (b) of section 1170 states in pertinent part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime. . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim . . . and any further evidence introduced at the sentencing hearing." (Italics added.) California Rules of Court, rules 4.421 and 4.423, respectively, articulate the "circumstances in aggravation and mitigation of an offense. (Judicial Council of Cal., Annual Rep. (1978) p. 3.) [¶] 'Facts relating to the crime' are set forth in subdivision (a), and 'facts relating to the defendant' in subdivision (b), of each rule." (*People v. Cheatham* (1979) 23 Cal.3d 829, 832–833.) Under rule 4.420(b) of the California Rules of Court, "[t]he circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence." (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.)

"[S]ection 1170, subdivision (b) . . . leaves to the lower court a choice . . . as to whether, even after weighing the aggravating circumstances against the mitigating circumstances and determining the aggravating circumstances preponderate, it will impose the upper or middle term as the base term. The statute does not mandate a selection by the court of either of those terms under any particular circumstances, but mandates only selection of the middle term in the absence of aggravating or mitigating circumstances." (*People v. Myers* (1983) 148 Cal.App.3d 699, 704.)

The specification of a presumptive middle term brings the California DSL into conflict with *Blakely*. Under section 1170, subdivision (b), three possible terms of imprisonment for each offense are specified, but the sentencing court may not impose the upper term without a finding by a preponderance of the evidence—rather than beyond a reasonable doubt—that circumstances in aggravation exist and outweigh circumstances in mitigation. (*People v. Wright* (1982) 30 Cal.3d 705, 709–710.) Thus, while the upper term is the most severe sentence the court may select for the commission of a particular offense, the maximum penalty the court has authority to impose under the California DSL without finding additional facts is the middle term. To select an upper term, the sentencing court does not merely *consider* sentencing factors before exercising discretion, as occurs with the choice of a consecutive or concurrent term, but rather *must find* circumstances in aggravation that outweigh circumstances in mitigation. (*People v. Wright*, at pp. 709–710.) With the requirement of a predicate finding before an upper term may be imposed, the sentencing scheme thus violates the directive in *Blakely* that the " 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.)[4]

The People argue that even if upper term sentences under the DSL are subject to *Blakely*, it was unnecessary for the trial court to make prohibited factual findings here because defendant admitted to sufficient facts to support imposition of the upper term. At the plea hearing, the trial judge asked defense counsel, "Is there a factual basis [for the plea] here[?]" Defense counsel responded, "Stipulate." Thereafter, the defendant was asked to admit, and did admit, nothing more than the bare elements of his crimes: (1) while in the employ of the victim's company, he took from the victim money or personal property with a value of over $400; (2) he possessed a financial draft with the

[4] The most recent Supreme Court case discussing the principles applied in *Blakely*, *U.S. v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738], does not affect our analysis in this case.

intent to use it for fraudulent purposes; and (3) on three occasions he attempted to pass as genuine forged checks or a forged signature card, knowing them to be forged. When the court asked defendant whether he understood that he would "almost certainly be ordered to pay restitution," defendant answered affirmatively, and his counsel noted that "as part of the disposition we did have an understanding that there would be a stipulation to restitution in the amount of $61,281.31." Finally, in his written statement to the court defendant apologized for causing the victim "so much trouble, pain and financial burden." This is the extent of the factual record on which the court could base imposition of an upper term under *Blakely*.

We first reject the People's claim that defense counsel's stipulation that there is "a factual basis" for the crime could support imposition of the upper term. That stipulation is, of course, required to insure that the defendant does not propose to plead guilty to a crime he or she did not commit. (*People v. Holmes* (2004) 32 Cal.4th 432, 439.) It "does not require more than establishing a prima facie factual basis for the charges." (*Id.* at p. 441, fn. omitted.) Where, as here, the stipulation is made without reference to any other fact, document, or item of evidence, the stipulation cannot be taken to concede anything more than that the bare factual elements of the crime have been met. Under section 1170, subdivision (b), the bare elements of the crime require imposition of the middle term.

Similarly, the facts admitted during the plea allocution could support nothing more than imposition of the middle term. It is likely that any argument to the contrary is precluded as a matter of law by *Blakely* because, as was the case with the Washington sentencing statute, the DSL allows imposition of an upper term sentence only upon a demonstration of factors beyond those used in determining the offense. (*Blakely, supra*, 124 S.Ct. at pp. 2537–2538.)

In any event, the argument fails as a matter of fact. In imposing the upper term, the trial court relied on (1) the particular vulnerability of the victim; (2) the sophistication, planning, and professionalism of the crime; (3) that "great monetary value" was involved; and (4) that the defendant took advantage of a position of trust.

(Cal. Rules of Court, rule 4.421(a)(3), (8), (9) & (11).) The elements of the crime admitted by defendant could not have informed the court as to the vulnerability of the victim, the manner in which the crime was carried out, the involvement of a large sum, or the exploitation of a position of trust. While the People argue that exploitation of a position of trust can be assumed from the fact that defendant was in the victim's company's employ at the time of the crime, the mere fact of that relationship does not require exploitation of a position of trust for a theft to have occurred; there are many conceivable ways defendant could have taken the victim's money without violating his trust. Nor can sophistication, planning, and professionalism be assumed merely from these facts.

The one fact admitted by defendant that would support a factor in aggravation was the parties' stipulation to restitution in the amount of $61,281. By entering into that stipulation, defendant was effectively admitting that his crime resulted in economic damage to the victim of that amount. Knowing that the damage equaled this substantial amount, the trial court was justified in concluding that defendant's crime involved "damage of great monetary value." (Cal. Rules of Court, rule 4.421(a)(9).)[5]

While the People are correct that the upper term may be imposed even if only a single factor in aggravation is found to exist (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), we reject their argument that the presence of one admitted fact in aggravation automatically raises the "prescribed statutory maximum" for *Blakely* purposes from the middle term to the upper term. *Apprendi* holds generally 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." (*Apprendi*, *supra*, 530 U.S. at p. 490, italics added.) While it is true that *Blakely* defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge

[5] We do not agree with the People that stipulation to this amount also allowed a finding that the crime involved sophistication and planning, since these are not necessarily required for a crime involving a large sum. Nor do we agree that defendant's vague apology can be used to support any of the factors in aggravation.

may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"* (*Blakely*, *supra*, 124 S.Ct. at p. 2537), the court immediately thereafter explained that "[i]n other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Ibid.*) Under the DSL, a judge is not permitted to impose the upper term upon the isolated finding that a factor in aggravation exists; rather, the upper term may be imposed only if the judge finds both that at least one factor in aggravation exists *and* that "after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (Cal. Rules of Court, rule 4.420(b).) Because both findings are required, even if a factor in aggravation has been admitted the upper term is not "the maximum [the trial judge] may impose *without* any additional findings." (*Blakely*, at p. 2537.) Rather, before the upper term may be imposed the trial judge must make the additional finding regarding the balance of aggravating and mitigating factors. Accordingly, for purposes of *Blakely* the statutory maximum remains the middle term even after a defendant has admitted a fact in aggravation. It would undercut the Sixth Amendment foundation for *Blakely* and *Apprendi* to hold that, once a defendant admits facts sufficient to support a single aggravating factor, the floodgates open to allow the court freely to consider any other evidence in deciding whether to impose that upper term.

Accordingly, by proceeding to consider facts neither admitted nor found by a jury in imposing the upper term, the trial court committed error under *Blakely* and *Apprendi*. In deciding whether the trial court's error requires reversal, we again apply a prejudice analysis, following the federal standard of review of constitutional errors (*People v. Amons* (2005) 125 Cal.App.4th 855, 867–868) and reversing the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the sentence. (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

We cannot say that, beyond a reasonable doubt, the trial judge would have sentenced defendant to the upper term had he relied only on the single admitted factor in aggravation. While the People are correct that this single factor *could* have supported the

imposition of an upper term (*People v. Cruz, supra,* 38 Cal.App.4th at p. 433), there is no guarantee that the trial judge actually *would* have imposed the upper term based on that factor. The defendant provided evidence of several mitigating factors, including his lack of any prior record, his early acknowledgment of wrongdoing, and his willingness to make restitution. Since the trial court's finding that "the circumstances in aggravation outweigh the circumstances in mitigation" is critical to imposition of an upper term (Cal. Rules of Court, rule 4.420(b)), the elimination of three of the four factors in aggravation easily could have changed the balance in the mind of the trial judge.

III. DISPOSITION

The trial court's sentencing order is vacated. The case is remanded to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely* and this decision.[6]

[6] We note that the People, no less than the defendant, have the right to a jury trial upon remand. (*People v. Willis* (2002) 27 Cal.4th 811, 814; *People v. Wheeler* (1978) 22 Cal.3d 258, 282, fn. 29.)

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Margulies, J.

We concur:

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Stein, Acting P.J.

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Swager, J.

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