Filed 12/20/06 P. v. Lara CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEE LARA, Defendant and Appellant.	B186598 (Los Angeles County Super. Ct. No. VA081428)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Schuur, Commissioner. Affirmed as modified.

Patricia A. Andreoni, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Lee Lara appeals from the judgment entered upon his conviction by jury of making criminal threats and of assault with a deadly weapon, an automobile, in the commission of which he personally inflicted great bodily injury. (Pen. Code, §§ 422, 245, subd. (a)(1), 12022.7, subd. (a).)[1] He was sentenced to seven years in prison, comprised of the upper term of four years with a three-year great bodily injury enhancement for the assault, and to a concurrent two-year middle term for making criminal threats.

Appellant contends (1) that the upper term sentence violated his constitutional rights and *Blakely v. Washington* (2004) 542 U.S. 296, and the trial court abused its discretion in imposing the upper term; and (2) that the trial court exceeded its jurisdiction by entering a protective order pursuant to section 136.2. Respondent agrees that the protective order was unauthorized, and we order that it be stricken. We otherwise affirm.

FACTS

The evidence established that on February 4, 2004, after appellant and a companion parked in front of the home of Marisa Valle (Valle), appellant made threatening calls to Valle, stating that "we" were going to "get" her brother, George Rodriguez (Rodriguez), "fuck him up," and kill him. Appellant also told Valle that she and her family were dead. Valle believed that appellant would carry out the threats because she knew him to be violent and aggressive. She had dated him for a few months in 2003 but had broken up with him after he tried to choke her and struck her in the face during an argument. After that, he continued to call her, telling her that he had seen her in various places and knew what she was doing. She did not wish to resume the relationship and decided to break off all contact with him.

After appellant made the threats, Valle called the police. Rodriguez went to appellant's house and told him not to come to his and Valle's home. Shortly

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

thereafter, Rodriguez discovered that the window of his Chevy Tahoe had been broken.

The next day, as Rodriguez was driving his son home from high school, he drove by appellant's house and saw appellant, who was driving his car out of his driveway. Rodriguez gestured to indicate that he knew appellant had broken his window. Appellant followed Rodriguez, then sped up and stopped two cars in front of Rodriguez's vehicle at an intersection. When the light turned green, appellant did not move, but remained blocking the intersection. Appellant got out of his car and came towards Rodriguez with a tire iron. Rodriguez was unable to drive away because his Tahoe was blocked by other vehicles. He reached for one of his daughters' baseball bats in the back of his vehicle, got out, and chased appellant back to appellant's car. Appellant got into his car, made a U-turn, and drove straight at Rodriguez, striking him in the leg with his car as Rodriguez attempted to get back into his own vehicle. Appellant then called Valle and told her that her brother and her whole family were dead.

As a result of the attack, Rodriguez suffered a fractured knee and fractured finger. He had surgery during which a plate and bolts were placed in his leg. He had an eight-inch scar and was on crutches for four to five months, and at the time of trial he continued to limp and was in pain.

After the incident, Valle and Rodriguez stayed with friends for a few days because they feared appellant. They changed their daily routines, completed the installation of a security system with cameras at their home, and adopted a Rottweiler.

DISCUSSION

I. Appellant was properly sentenced.

In imposing the upper term for assault, the trial court found four factors in aggravation and none in mitigation.[2] Appellant contends that the imposition of the

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[2] The trial court found, as stated in the probation report, that the crime involved great violence, great bodily harm, the threat of great bodily harm, or other acts

upper term based on factors that were not found true beyond a reasonable doubt by the jury, other than the infliction of great bodily injury, violated his rights to jury trial and proof beyond a reasonable doubt under the Sixth and Fourteenth Amendments of the United States Constitution, and violated *Blakely v. Washington, supra,* 542 U.S. 296 (*Blakely*) and *United States v. Booker* (2005) 543 U.S. 220. This contention must fail.

We need not decide whether, as respondent asserts, appellant's claim has been forfeited in the absence of any objection on this ground in the trial court. As appellant acknowledges, his contention was rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238. In *Black*, the Supreme Court concluded that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id*. at p. 1244.) We are bound by this decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[3]

Appellant further contends that the trial court abused its discretion in imposing the upper term because it did not address or weigh the factors in mitigation. Appellant's sentencing memorandum listed several mitigating factors, including that

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disclosing a high degree of cruelty, viciousness or callousness; the crime involved multiple victims; appellant's prior convictions or adjudications were numerous or of increasing seriousness; and he was on probation or parole when the crimes were committed.

In arguing that the trial court violated his constitutional rights, appellant asserts that the trial court engaged in a prohibited dual use of facts with respect to the great bodily injury enhancement, and that the multiple victim factor was inapplicable. These claims of sentencing error have been forfeited because they were not raised in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353, 355.)

3 Appellant raises the issue to preserve his right to federal review. The United States Supreme Court has granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], certiorari granted *sub nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) ___ U.S. ___ [126 S.Ct. 1329], on the issue of whether *Blakely* applies to California's determinate sentencing law.

the crime was the product of his relationship with Valle and Rodriguez and was not perpetrated against random victims; that, given the evidence that Rodriguez armed himself with a bat before appellant struck him with his vehicle, appellant may have believed in the need to defend himself; and that appellant suffered from a mental illness.[4] The trial court indicated that it had read the prosecutor's sentencing memorandum and appellant's statement in mitigation, and asked if either counsel wished to add anything. Neither party did so. The trial court then adopted the four factors in aggravation set forth in the probation report and stated that there were no mitigating circumstances.

Appellant points to the circumstance of his mental illness, as well as to the evidence that Rodriguez had armed himself with a baseball bat before appellant struck him with his car, in claiming that the trial court abused its discretion in failing to address or weigh the factors in mitigation. However, this issue has been forfeited because appellant failed to object on this ground at the sentencing proceeding. (*People v. Scott, supra,* 9 Cal.4th at pp. 353, 355; *People v. Kelley* (1997) 52 Cal.App.4th 568, 582.) In any event, this claim lacks merit. The trial court stated it had read and considered appellant's statement in mitigation, and it is presumed to have considered the relevant factors. (*People v. Kelley*, *supra*, at p. 582.) The trial court was not required to state reasons for rejecting any factors in mitigation. (*People v. Downey* (2000) 82 Cal.App.4th 899, 919.)

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[4] On two occasions prior to trial, defense counsel declared a doubt as to appellant's competency. The trial court found appellant competent to stand trial on each occasion, based on reports submitted, respectively, by Dr. Kaushal Sharma and Dr. Gordon Plotkin. Dr. Sharma, observing that appellant had twice previously been hospitalized at Patton State Hospital pursuant to section 1370, concluded, based on his prior examination of appellant on one of those occasions, that appellant was mentally ill although not incompetent. Dr. Plotkin indicated that appellant had a mental disorder but was not incompetent.

II. The section 132.6 restraining order must be stricken.

On March 22, 2004, at the conclusion of the preliminary hearing, the trial court issued a restraining order pending trial pursuant to section 136.2, protecting Valle and Rodriguez for three years, through March 24, 2007. Trial commenced in September 2005, and appellant was sentenced to prison on October 6, 2005.

Appellant contends that the order was unauthorized and that the trial court lacked jurisdiction to impose the order because the assault was perpetrated before the commencement of criminal proceedings, without intent to interfere with the proceedings, and therefore the facts failed to support the issuance of the order. He further argues that the order was unauthorized because it was not limited to the duration of the proceedings.

As respondent agrees, the purpose of the restraining order provided for in section 132.6 is, as here relevant,[5] to protect victims and witnesses in connection with the criminal proceeding in which the restraining order is issued, to "preserv[e] the integrity of the administration of criminal court proceedings and [to] protect[] those participating in them." (*People v. Stone* (2004) 123 Cal.App.4th 153, 159.) The Legislature did not intend to authorize such orders beyond those proceedings. (*Ibid*.) The trial court here therefore lacked authority to extend the restraining order until March 24, 2007, long past the date the criminal proceedings concluded. Under these circumstances, the order must be stricken.[6]

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[5] A section 136.2 order may be issued as a condition of probation. Appellant was not granted probation.

[6] We therefore need not address appellant's claim that the evidence did not support a finding of good cause for issuance of the restraining order in that there was no good faith belief that harm to, or dissuasion of, a victim or witness in the criminal proceeding had occurred or was reasonably likely to occur. (See *People v. Stone*, *supra*, 123 Cal.App.4th at p. 160.)

DISPOSITION

The judgment is modified to strike the restraining order issued pursuant to section 136.2. In all other respects, the judgment is affirmed.

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_____, J.

ASHMANN-GERST

We concur:

_____, Acting P. J.

DOI TODD

_____, J.

CHAVEZ