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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. RODRICO ANTHONY LOPEZ, Defendant and Appellant.	A111691 (Sonoma County Super. Ct. Nos. MCR-368678 & MCR-368748)

Defendant pleaded guilty to three counts of burglary. Imposition of sentence was suspended, and he was placed on probation. After his second probation violation, Judge Lawrence G. Antolini sentenced defendant to four years four months, suspended execution of the sentence, and again placed defendant on probation. A little over a year later, after a contested hearing, Judge Dean Beaupre found defendant had violated probation on the basis of new criminal charges. Believing that the federal courts would reverse *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), Judge Beaupre reduced the previously imposed sentence. At a subsequent court appearance on the new charges, Judge Antolini reinstated the original sentence.

Defendant contends that Judge Antolini erred in reinstating the original sentence. We do not address that contention because we find that Judge Beaupre was without authority in the first place to modify the original sentence. Because that sentence must be reinstated, defendant's contentions regarding the conduct of Judge Antolini are moot. In addition, we conclude that defendant's failure to challenge his sentence under *Blakely v.*

Washington (2004) 542 U.S. 296, 303–304 (*Blakely*) at the time it was imposed precludes a collateral attack on that ground now. We therefore affirm.

I. BACKGROUND

Defendant was charged in case No. MCR-368678, filed December 6, 2000, with four counts of second degree burglary (Pen. Code, § 459),[1] three counts of possessing a forged check (§ 475, subd. (a)), three counts of receiving stolen property (§ 496, subd. (a)), and one count of falsifying his identification to a police officer (§ 148.9, subd. (a)). Two days later, he was charged in a second complaint, case No. MCR-368748, with additional single counts of second degree burglary (§ 459), possessing a forged check (§ 475, subd. (a)), and receiving stolen property (§ 496, subd. (a)).[2] Defendant pleaded no contest to three counts of second degree burglary. Imposition of sentence was suspended, and he was placed on probation.

In early 2002, defendant's probation was summarily revoked and later reinstated after he admitted the violation. On June 21, 2004, after defendant had again admitted violating the terms of his probation, he was sentenced by Judge Antolini to a term of four years four months, comprised of the aggravated term of three years on the first count and two consecutive eight-month terms (one-third of the two-year middle term) on the other two counts. Judge Antolini based his imposition of the aggravated term on findings that (1) the manner of execution of the crime indicated advance planning, (2) defendant's prior convictions as an adult are numerous, and (3) defendant's prior performance on probation was unsatisfactory. Although he imposed sentence, Judge Antolini suspended its execution and placed defendant on an extended term of probation. No appeal was taken.

Three days later, on June 24, 2004, the United States Supreme Court decided *Blakely*, which held that Washington State's determinate sentencing law was

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

[2] Defendant was accused of passing bad checks. Because the nature of defendant's crimes is not material to the issues raised on appeal, we do not discuss the conduct underlying these charges further.

unconstitutional because it permitted the enhancement of sentence based on facts, other than a prior conviction, not found by a jury or admitted by the defendant. (*Blakely, supra,* 542 U.S. at pp. 303–304.) Slightly less than a year later, on June 20, 2005, the California Supreme Court held in *Black* that California's determinate sentencing law was not rendered unconstitutional by *Blakely.* (*Black, supra,* 35 Cal.4th at pp. 1255–1258.)

Eight days after *Black* was decided, on June 28, 2005, defendant was arrested on unrelated new criminal charges. After a hearing on July 12 before Judge Beaupre, defendant was found in violation of his probation. When defendant subsequently appeared before Judge Beaupre in connection with this probation violation, defense counsel urged the judge to reevaluate defendant's sentence. Counsel argued that *Black* would ultimately be overturned by the federal courts, rendering the prior sentence unconstitutional under *Blakely.* The judge accepted the argument, reduced the sentence on the first count from the aggravated term of three years to the middle term of two years, and "resentenced" defendant to a term of three years four months. The new criminal charges were transferred to Judge Antolini for setting of trial.

When the parties appeared before Judge Antolini in connection with the new charges, on August 17, 2005, the prosecutor argued that "the sentence that was handed down last week on the violation of probation [by Judge Beaupre] is actually an illegal sentence, the Court having [no] discretion to go back and change a sentence that had already been imposed; so I'm preparing a motion to ask that judge to [re]consider that determination . . . ." Judge Antolini declined to address the issue on that day, but at a hearing on September 16, he vacated the sentence imposed by Judge Beaupre and reinstated the sentence of four years four months imposed on June 21, 2004.

II. DISCUSSION

A. The Reinstatement of the Initial Sentence

Defendant contends that Judge Antolini erred in vacating the sentence imposed by Judge Beaupre, arguing that (1) his right to due process was violated when the prosecutor sought amendment of the sentence imposed by Judge Beaupre in connection with the burglary convictions without notice at a hearing on the new criminal charges, and (2) one

superior court judge is without power to amend a sentence duly imposed by a different judge of the same court. Defendant claims that if the prosecution believed Judge Beaupre's conduct to have been in error, it was required to move to recall the sentence before Judge Beaupre under section 1170, subdivision (d), or take an appeal.

Even if defendant's argument is correct, it would not lead to the reinstatement of the sentence as modified by Judge Beaupre. The Attorney General properly argues that Judge Beaupre was himself without authority to revise the sentence originally imposed, citing *People v. Howard* (1997) 16 Cal.4th 1081 (*Howard*). As explained in *Howard*, the imposition of sentence upon revocation of probation is governed by both statute and the rules of court. (*Id.* at p. 1087; § 1203.2, subd. (c); Cal. Rules of Court, rule 4.435(b).) When granting a defendant probation, the trial court has the discretion either to suspend imposition of sentence or to impose sentence and suspend its execution. (*Howard*, at p. 1084.) Upon revocation of probation, if the trial court originally suspended *imposition* of the defendant's sentence when placing the defendant on probation, the court must impose sentence, exercising the full range of sentencing discretion. (*Id.* at p. 1087; § 1203.2, subd. (c); Cal. Rules of Court, rule 4.435(b)(1).) If, on the other hand, the court originally sentenced the defendant but suspended *execution* of the sentence, upon revocation of probation the court must order that sentence. (*Howard*, at pp. 1087–1088; § 1203.2, subd. (c); Cal. Rules of Court, rule 4.435(b)(2).) As *Howard* summed up the situation, "On revocation of probation, if the court previously had imposed sentence, the sentencing judge must order that exact sentence into effect . . . ." (*Howard*, at p. 1088.) Because Judge Antolini had already imposed sentence at the time defendant appeared in front of Judge Beaupre, Judge Beaupre was required to order into effect the sentence previously imposed.

If Judge Antolini's initial sentence had truly been unlawful, Judge Beaupre might have had the power to correct it, despite section 1203.2, subdivision (c). (See *People v. Price* (2004) 120 Cal.App.4th 224, 244.) Judge Beaupre reduced the sentence to the middle term on the assumption that, at some point in the future, *Black* would be overturned by the federal courts, and defendant does not argue that the original sentence

was unlawful for reasons other than those articulated in *Blakely*.[3] Notwithstanding Judge Beaupre's concern for the fate of *Black*, a trial court is bound to determine the legality of a sentence by reference to the law actually in effect, not on the basis of speculation that existing law might some day be changed. Because *Black* constituted an authoritative statement of the law governing the application of *Blakely* in California *at the time* Judge Beaupre acted, Judge Antolini's sentence was not unlawful under *Blakely*. By modifying a lawful sentence, Judge Beaupre acted outside the scope of his proper discretion.

Defendant argues, contrary to *Howard*, that "[a] sentence that has been imposed but suspended may be vacated and modified at any time before execution of the sentence begins." The decisions defendant cites as authority, however, were all decided before *Howard.* The most pertinent of these, *People v. Karaman* (1992) 4 Cal.4th 335, was carefully considered and distinguished in *Howard.* The *Howard* court characterized *Karaman* as holding that "although the trial court imposed a sentence, which was entered into the court's minutes, the court did not lose jurisdiction to modify the defendant's prison term during the brief period when it stayed execution of the sentence at his request." (*Howard, supra*, 16 Cal.4th at p. 1090.) It concluded that the present situation, involving "the court's power to modify an imposed sentence, long ago final in terms of appealability, execution of which the court had suspended during a probationary period" (*ibid.*), was governed by statute rather than common law and that the statutes dictated a different result. (*Id.* at pp. 1092–1093.) *Howard,* not *Karaman*, is binding here.

We note that the Attorney General is permitted to raise in this court the issue of the legality of Judge Beaupre's modification in spite of the prosecution's failure to seek recall before Judge Beaupre or to appeal his order. "A claim that a sentence is unauthorized . . . may be raised for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court." (*People v.*

[3] After Judge Beaupre reduced defendant's sentence, the United States Supreme Court did, in fact, overrule *Black* in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*), as discussed below. At the time Judge Beaupre acted, however, the interpretation of *Blakely* found in *Black* constituted a precedent binding on California's trial courts.

Dotson (1997) 16 Cal.4th 547, 554, fn. 6; see also *People v. Price, supra,* 120 Cal.App.4th at p. 244; *People v. Turner* (1998) 67 Cal.App.4th 1258, 1269.) An "unauthorized sentence" is one that could not lawfully be imposed under any circumstances in the particular case. That is, it is an error that is clear and correctable independent of any factual issues presented by the record at sentencing. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) "[O]bvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*Ibid.*) Because Judge Antolini's original sentence was not illegal, Judge Beaupre's modification of that sentence constituted an "obvious legal error" that this court is required to correct once the error has been brought to our attention. (*People v. Dotson*, at p. 554, fn. 6.)

As a result of the foregoing, defendant's arguments on appeal are moot. Even if he is correct that Judge Antolini acted improperly on September 16, 2005, thereby requiring us to vacate his reinstatement of the four-year four-month sentence, we would also be required to vacate Judge Beaupre's reduction of the original four-year four-month sentence for the reasons stated above. The result is the reinstatement of the initial sentence, the same four-year four-month sentence under which defendant is currently incarcerated.

B. **Blakely *Error***

Defendant has also challenged his sentence under *Blakely*. Because *Black* was the governing law at the time this appeal was briefed, the challenge was originally made solely for the purpose of preserving a federal claim. On January 22, 2007, however, the United States Supreme Court overruled *Black* in *Cunningham, supra*, ___ U.S. ___ [127 S.Ct. 856]. We must therefore evaluate defendant's claim under *Blakely*, as interpreted in *Cunningham*, rather than under *Black*.

In *Blakely*, the Supreme Court extended the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that a defendant's constitutional right to a jury is violated when a judge makes a factual finding relevant to sentencing and "impose[s] a sentence greater than the maximum he could have imposed under state law

without the challenged factual finding." (*Blakely, supra,* 542 U.S. at p. 303.) In *Blakely,* 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." (*Id.* at pp. 303–304.)

Black distinguished the California determinate sentencing law from that of Washington State, which was overturned in *Blakely* (*Black, supra,* 35 Cal.4th at pp. 1255–1258), but the United States Supreme Court rejected this interpretation in *Cunningham.* Overruling *Black,* the court held, "In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] . . . Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the [California determinate sentencing law] violates *Apprendi*'s bright-line rule: Except for 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.' [Citation.]" (*Cunningham, supra,* 127 S.Ct. at p. 868.) We assume without deciding that, as defendant contends, Judge Antolini's reliance on the manner in which defendant carried out his crimes and conducted himself on probation in imposing an upper term sentence violated the Constitution because defendant did not expressly admit these matters in entering his plea.

Nonetheless, we conclude that defendant is precluded from seeking relief on this ground by his failure to raise *Blakely* error in a timely appeal from the imposition of sentence.[4] Under section 1237, Judge Antolini's imposition of sentence in June 2004, was a "final judgment of conviction" that was immediately appealable, notwithstanding

[4] Because this issue was not discussed by the parties in the appellate briefs, we afforded them an opportunity to address it in supplemental letter briefs.

the grant of probation.[5] When defendant failed to appeal that sentence within the 60 days allotted (Cal. Rules of Court, rule 8.308), the judgment became "final and nonappealable." (*Howard*, *supra*, 16 Cal.4th at pp. 1084, 1087.)

It is long established that a defendant who elects not to appeal from an order granting probation cannot raise claims of error with respect to the grant of probation in a later appeal from an order revoking the probation. As held in *People v. Howard* (1965) 239 Cal.App.2d 75, 77, "Under section 1237 of the Penal Code, appellant could have challenged the merits of his conviction on an appeal from the order granting probation which is deemed to be a final judgment. [Citation.] Appellant's 'acceptance of probation would not . . . prevent him from taking advantage of any error inhering in the judgment . . . .' [Citation.] Since no appeal was taken within the allowable time from this order, appellant is now precluded from going behind the order granting probation. [Citation.]" (See similarly *People v. Glaser* (1965) 238 Cal.App.2d 819, 821 (*Glaser*), disapproved on other grounds in *People v. Barnum* (2003) 29 Cal.4th 1210, 1218–1219, 1225 ["Although an appeal may lie from a subsequent order, which revokes probation and places the sentence into effect, the matters arising prior to the pronouncement of judgment cannot thereby be reviewed"].)

In *People v. Chagolla* (1984) 151 Cal.App.3d 1045, this general principle was applied to preclude a defendant from raising a claimed error in the imposition of sentence in an appeal from an order revoking probation, when the sentence had been imposed previously and no appeal had been taken: "When [defendant] was sentenced to state prison . . . , failure to state reasons for the imposition of the state prison sentence would have been appealable at that time. That judgment is now final. [Citation.] Failure to state reasons for the state prison commitment should have been called to our attention for

[5] Section 1237 states, "An appeal may be taken by the defendant: [¶] (a) From a final judgment of conviction except as provided in Section 1237.1 and Section 1237.5. A sentence, an order granting probation, or . . . the commitment of a defendant for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section. . . . [¶] (b) From any order made after judgment, affecting the substantial rights of the party."

review when the sentence was imposed. [Defendant] did not, we will not." (*Id.* at p. 1048; see similarly *People v. Preyer* (1985) 164 Cal.App.3d 568, 576.)[6] Although *Blakely* error was not available as a ground for appeal to defendant at the time his sentence was imposed, *Blakely* was decided only three days after he was sentenced, and *Black* had not yet rejected *Blakely*'s application in California. There was therefore ample time for defendant to raise any claimed *Blakely* error in a timely appeal from his sentence. When he did not, his sentence became final and nonappealable.

Glaser recognized an exception to this general rule of finality for "violations of fundamental constitutional rights [that] '. . . so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice.' [Citation.]" (*Glaser*, *supra*, 238 Cal.App.2d at p. 824.) In deciding that *Apprendi* and *Blakely* are not to be applied retroactively, however, both the United States Supreme Court and this court have concluded that the decisions did not announce this type of "watershed" rule of criminal procedure. (*Schriro v. Summerlin* (2004) 542 U.S. 348, 355 (*Schriro*); *People v. Amons* (2005) 125 Cal.App.4th 855, 865–867 (*Amons*).)[7] As we noted in *Amons,* "[N]othing in the *Blakely* opinion corrected a procedure that acutely diminished the accuracy of previously rendered convictions or sentences. [Citations.] The conclusion in *Blakely* . . . impacts only the length of sentences, so the integrity of the underlying convictions has not been placed in issue at

[6] Other cases have recognized a similar rule. (E.g., *People v. Howerton* (1953) 40 Cal.2d 217, 220; *People v. Baird* (2004) 116 Cal.App.4th 1318, 1321; *People v. Broughton* (2003) 107 Cal.App.4th 307, 320; *People v. Colado* (1995) 32 Cal.App.4th 260, 262; *People v. Latham* (1988) 206 Cal.App.3d 27, 31; *People v. Mitchell* (1981) 125 Cal.App.3d 715, 718; *People v. Olken* (1981) 125 Cal.App.3d 1064, 1067; *People v. Munoz* (1975) 51 Cal.App.3d 559, 563; *People v. Vest* (1974) 43 Cal.App.3d 728, 731; but see *People v. Hackler* (1993) 13 Cal.App.4th 1049, 1057 [even when no appeal was taken from an earlier order imposing conditions of probation, courts have permitted a belated challenge to a condition following a revocation of probation based on a violation of the challenged condition].)

[7] The ruling of *Schriro* and *Amons* that *Blakely* is not to be applied retroactively does not govern in this case because defendant's sentence was not yet final on June 24, 2004, when *Blakely* was issued. (See *Amons*, *supra*, 125 Cal.App.4th at p. 863 [*Blakely* does not apply to judgments that were final at the time it was decided].)

all. [Citation.] . . . [¶] Further, the *Blakely* rule that merely shifts some factfinding duties upon which a sentence choice is conditioned from an impartial judge to a jury does not implicate the intrinsic reliability and fundamental fairness of sentencing proceedings. [Citation.] . . . At the very least, we do not think 'judicial factfinding so "seriously diminishe[s]" accuracy' as to produce 'an " 'impermissibly large risk' " ' of injustice." (*Amons*, at p. 866.)

Defendant argues that we should conclude that *Cunningham* announces such a "watershed" rule because it not only requires a jury, rather than a judge, to make factual findings to support an aggravated sentence under the determinate sentencing law, but it also requires those findings to be made beyond a reasonable doubt, rather than by a preponderance of the evidence. (E.g., *Cunningham, supra,* 127 S.Ct. at p. 864.) The requirement that factual findings must be made beyond a reasonable doubt, however, did not originate with *Cunningham*, nor was it absent from the decisions on which *Amons* and *Schriro* relied. As noted in *Cunningham,* "[t]his Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, *and established beyond a reasonable doubt, not merely by a preponderance of the evidence*. While this rule is rooted in longstanding common-law practice, its explicit statement in our decisions is recent." (*Id.* at pp. 863–864, italics added.) The court proceeded to discuss *Apprendi* and *Blakely*, among others, as the "recent" decisions in which the principle was stated explicitly.

Schriro expressly recognized *Apprendi's* holding that facts supporting an aggravated sentence must be proven beyond a reasonable doubt. (See *Schriro*, *supra*, 542 U.S. at p. 350 ["In *Apprendi*, we interpreted the constitutional due-process and jury-trial guarantees to require 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' "].) The decision necessarily took that aspect of *Apprendi*'s holding into account when concluding, nonetheless, that *Apprendi* did not announce a watershed rule of criminal procedure. (*Shriro*, at pp. 355–358.) *Amons* similarly recognized the holding in *Blakely* that facts supporting an

aggravated sentence must be found beyond a reasonable doubt when concluding that *Blakely* did not state a watershed rule. (*Amons, supra*, 125 Cal.App.4th at p. 867 ["The *Blakely* rule governs only that limited class of cases in which a sentence is imposed by the trial court beyond the statutory maximum. All other sentences within the statutory range still do not require findings by the jury beyond a reasonable doubt under *Blakely*. Therefore, *Blakely* has not declared the kind of 'sweeping rule' necessary to fall within the watershed exception"].) Accordingly, defendant's failure to raise the *Blakely* error on appeal after imposition of his sentence precludes him from raising it collaterally on this appeal.

III. DISPOSITION

The reinstatement of the original sentence is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Stein, J.