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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JACQUELINE ANN MARBLE, Defendant and Appellant.	C051378 (Super. Ct. No. CM019984)

In return for dismissal of additional charges, defendant Jacqueline Ann Marble pleaded no contest to one count of assault with a deadly weapon on a person known, or who reasonably should be known, to be performing duties as a peace officer. (Pen. Code, § 245, subd. (c).)[1] Sentenced to five years in state prison, she appeals, contending the trial court erred under *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*) in imposing the upper term for the offense based upon facts not determined by a jury. Defendant was apprised that the maximum five-year sentence was a possible consequence

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

(***SEE CONCURRING AND DISSENTING OPINION.***)

of her plea and we will find her attack on the sentence is an attack on the plea. Accordingly, we shall dismiss the appeal for failure to obtain a certificate of probable cause.[2]

FACTUAL AND PROCEDURAL BACKGROUND

Under a plea bargain defendant pleaded no contest to the assault charge on December 9, 2003. On her plea bargain form she initialed, inter alia, that she understood and agreed that: (1) as a consequence of the plea: "I MAY SERVE THIS MAXIMUM SENTENCE AS A RESULT OF MY PLEA: [FIVE] YEARS IN STATE PRISON"; (2) "THE MATTER OF PROBATION AND SENTENCE IS TO BE DETERMINED SOLELY BY THE SUPERIOR COURT JUDGE"; and (3) "THE SENTENCING JUDGE MAY CONSIDER MY PRIOR CRIMINAL HISTORY . . . WHEN GRANTING PROBATION, ORDERING RESTITUTION OR IMPOSING SENTENCE." During the plea hearing, she acknowledged understanding "the potential consequences of [her] plea including the maximum penalty."

The trial court imposed the upper term for the offense, five years' imprisonment, as recommended by the probation

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[2] Section 1237.5 provides:

"No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

"(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

"(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

department. The court gave three reasons for that sentencing choice: (1) defendant's prior convictions are numerous and of increasing seriousness, (2) she has served a prior prison term, and (3) her prior performance on probation was unsatisfactory.

DISCUSSION

Defendant contends that the trial court erred in imposing the upper term based on aggravating factors on which there was no jury trial. The Attorney General replies, preliminarily, that the appeal should be dismissed because defendant failed to seek and obtain a certificate of probable cause under section 1237.5. The Attorney General argues that the defendant's *Cunningham* claim is a challenge to a negotiated sentence imposed as a part of the plea bargain and hence a challenge to the plea, which requires a certificate of probable cause. (See, e.g., *People v. Shelton* (2006) 37 Cal.4th 759 (*Shelton*); *People v. Bobbit* (2006) 138 Cal.App.4th 445, 447-448 (*Bobbit*); *People v. Young* (2000) 77 Cal.App.4th 827, 834.) We agree and shall dismiss the appeal.

As noted, section 1237.5 provides that a defendant may not appeal "from a judgment of conviction upon a plea of guilty or nolo contendere" unless the defendant has applied to the trial court for, and the trial court has executed and filed, "a certificate of probable cause for such appeal." Nonetheless, certain issues may be raised on appeal following a guilty or nolo contendere plea without the need for a certificate. The permitted issues include some issues regarding proceedings held

subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. (See, e.g., *People v. Buttram* (2003) 30 Cal.4th 773, 780; Cal. Rules of Court, rule 8.304(b)(4)(B) [certificate not required if appeal is based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity"].)

"'[A] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself' and thus requires a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 79.)" (*Shelton, supra,* 37 Cal.4th at p. 766.) The result is the same for a challenge to the trial court's authority to impose an agreed-upon sentence "lid" (a term lower than the maximum possible under sentencing law for the admitted offenses). When the lid is imposed as part of a plea bargain, an appellate attack "is in substance a challenge to the validity of the negotiated plea" and thus also requires a certificate of probable cause. (*Id*. at p. 771.) *Shelton's* logic applies where the attack is based upon a claim of *Blakely*[3] and *Cunningham* error. (See *Bobbit, supra,* 138 Cal.App.4th at pp. 447-448.)

The only difference in this case from *Shelton* and *Bobbit* is that the challenge is to the trial court's authority to impose the maximum possible term for the admitted offenses under

[3] *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403].

sentencing law, rather than a lid term. We see no basis for distinction on this ground.

The core rationale of *Shelton* is that the plea bargain contract must give effect to the mutual intention of the parties, with ambiguity resolved in favor of the sense the promisee, the prosecutor, would have understood it. (*Shelton*, *supra*, 37 Cal.4th at p. 767.) In this case the agreement's terms regarding sentencing were, in essence, that the court would sentence pursuant to the determinate sentencing law, with the express understanding the maximum sentence under that law was the five-year term defendant received.

From a prosecutor's point of view, such an agreement necessarily implies an understanding and belief that the stated maximum sentence under that law is a sentence that the trial court may lawfully impose. If the prosecutor understood or believed that the trial court lacked authority to impose that sentence, the benefit gained by giving up the possibility of a greater sentence with conviction on the additional dismissed charges would be illusory. Thus, to challenge the trial court's authority to impose the acknowledged maximum sentence, it was incumbent upon defendant to reserve such a right in the plea bargain. (See *Shelton*, *supra*, 37 Cal.4th at p. 769.) She did not.

Like the Supreme Court in *Shelton*, we conclude that defendant's challenge to the trial court's sentencing authority is in substance a challenge to the validity of the negotiated

plea. Therefore, defendant's failure to secure a certificate of probable cause bars consideration of this challenge and requires dismissal of her appeal.

DISPOSITION

The appeal is dismissed.

BUTZ, J.

I concur:

CANTIL-SAKAUYE, J.

I do not agree that the appeal must be dismissed because defendant did not obtain a certificate of probable cause and, therefore, is precluded from claiming that imposition of the upper term violated the Sixth Amendment to the United States Constitution, as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*), and *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (hereafter *Cunningham*).

It is true that defendant agreed to a sentencing "lid" that exposed her to the upper term. However, her claim of sentencing error is not an attack on the trial court's legal authority to impose the upper term; it is simply a challenge to the court's exercise of discretion based on factors that were not found true by a jury beyond a reasonable doubt. In other words, an *Apprendi/Blakely/Cunningham* claim of error is not a challenge to the validity of a plea; thus, a certificate of probable cause is not needed to raise the claim of error. (*People v. Buttram* (2003) 30 Cal.4th 773, 790-791 ["certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence. Such an agreement, by its nature, contemplates that the [trial] court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority will be reviewable on appeal, as they would otherwise be"].)

Nevertheless, defendant is not entitled to relief for the following reasons.

Apprendi held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant; thus, when a court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. at pp. 303-305 [159 L.Ed.2d at pp. 413-414].) In *Cunningham*, *supra*, 549 U.S. at p. ___ [166 L.Ed.2d. at p. 864], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Ibid*., overruling *People v. Black* (2005) 35 Cal.4th 1238 on this point.)

Here, the trial court imposed the upper term based in part on the facts that defendant had many prior convictions. As noted above, this is an aggravating circumstance that did not have to be submitted to the jury. The court also relied in part on the fact that defendant had served a prior prison term. This also was an aggravating factor that could be considered by the court even though it had not been submitted to, and found true by, a jury.

(*People v. Thomas* (2001) 91 Cal.App.4th 212, 223; see *U.S. v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820 [the rule does not apply to "'subsidiary findings'" that are "related to" a prior conviction, such as the defendant's status on probation]; see also *People v. Black* (2007) 41 Cal.4th 799, 819 (hereafter *Black II*).)

Because these two factors made defendant "*eligible* for the upper term," the Sixth Amendment "permit[ted] the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Black II, supra,* 41 Cal.4th at p. 813.)

In any event, the trial court's reliance on a third factor that did have to be submitted to a jury, but was not, provides defendant with no basis for relief because it is readily apparent, beyond a reasonable doubt, that the court would have imposed the upper term based solely on the fact that defendant had numerous prior convictions. (See *Washington v. Recuenco* (2006) 548 U.S. __, __ [165 L.Ed.2d 466, 474-477]; *People v. Sandoval* (2007) 41 Cal.4th 825, 838-839.)

Thus, I would affirm the judgment.

SCOTLAND, P.J.