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Opinion on remand from United States Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL EDWARD MAYZES, Defendant and Appellant.	A106553 (Marin County Super. Ct. No. SC132695)

INTRODUCTION

Defendant Miguel Edward Mayzes pleaded guilty to inflicting corporal injury on his spouse. Although the probation department recommended probation, the trial court sentenced him to the upper term of four years in state prison. Defendant contends that in so doing the trial court violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and also improperly relied on uncharged offenses and elements of the underlying offense. Here, in our fourth opinion in this case, we again hold as we did in our first opinion, that the trial court's sentence of defendant to the upper term did violate *Blakely*. We thus remand with directions to the trial court to reconsider defendant's sentence.

By way of background, on April 8, 2005, we filed our first opinion, where we agreed with defendant's claim of *Blakely* error, and disagreed with defendant's other claims of sentencing error. (*People v. Mayzes* (April 8, 2005, A106553 [nonpub. opn.] (*Mayzes I*).) Thereafter the California Supreme Court granted review and ultimately

remanded for reconsideration in light of *People v. Black* (2005) 35 Cal.4th 1238, in which that Court held there is no constitutional right to a jury trial or proof beyond a reasonable doubt on aggravating factors.

On October 25, 2005, we issued our second opinon in this case, in which we vacated our earlier opinion and, following *Black*, rejected defendant's *Blakely* claim. (*People v. Mayzes* (October 25, 2005, A106553 [nonpub. opn.] (*Mayzes II*).)

On November 8, 2005, defendant filed a petition for rehearing, noting that *Mayzes II* failed to address the non-*Blakely* issues that had been addressed in *Mayzes I.* We granted rehearing, and on December 21, 2005, issued *Mayzes III*, rejecting defendant's *Blakely* claim as we did in *Mayzes II* and rejecting defendant's other claims as we had in *Mayzes I.* (*People v. Mayzes* (Dec. 21, 2005, A106553 [nonpub. opn.].)

On February 20, 2007, the United States Supreme Court issued an order granting certiorari, vacating the judgment, and remanding to us for consideration in light of *Cunningham v. California* (2007) __U.S. __, 127 S.Ct. 856. (*Mayzes v. California* (2007) __ U.S. __ [127 S.Ct. 1239].) Following that, defendant submitted a letter on February 20, 2007, requesting that in light of *Cunningham* we reissue our original opinion with appropriate modification, and without the need for further briefing. On March 9, 2007, the Attorney General filed opposition, urging that "the more prudent course of action may be to stay these proceedings and await direction from the California Supreme Court and the Legislature on the proper remedy."

We disagree with the Attorney General and conclude that defendant's request is well taken, and no further briefing will add to that originally submitted by the parties. We accordingly issue the within opinion, holding that defendant's *Blakely* claim has merit, and remanding to the trial court with directions to reconsider defendant's sentence in accordance with the views here expressed.

FACTUAL AND PROCEDURAL BACKGROUND

On November 28, 2003, defendant's wife went to a hospital emergency room with severe bruises, swelling, and abrasions on her face and neck.[1] When law enforcement personnel were called to investigate, she reported to them that she had awakened that morning in extreme pain, but did not recall how she had been injured. The victim told the officers that her seven-year-old daughter had told her that "Daddy did that to you." The victim explained that defendant was a martial arts expert and had assaulted her many times in the past, though she had never reported it.[2] The daughter told the officers that her father hit her mother frequently. She said the couple had been fighting the day her mother was injured, and that she had seen her father punch and kick her mother and call her names.

The investigating officers found defendant and arrested him. He told them that he had suffered a work-related back injury, and was in constant pain. He said he had "whited out," and that when he regained consciousness, he had his hands on the victim's neck. He indicated that he had had similar experiences in the past. In later discussions with the probation officer, defendant attributed his loss of consciousness to a stress reaction from pain, and requested counseling.

On December 1, 2003, defendant was charged with assault by means likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)[3]) and inflicting corporal injury upon a spouse or cohabitant (§ 273.5, subd. (a)), with an allegation, as to both counts, of personal infliction of great bodily injury under circumstances involving domestic

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[1] Appellant and his wife separated after the incident that led to his conviction, and the record suggests that she had instituted divorce proceedings by the time appellant was sentenced. We will therefore refer to her from now on as the victim rather than as appellant's wife. Because appellant pleaded guilty, the facts are taken from the probation officer's presentence report.

[2] Appellant has no prior criminal record.

[3] All further unspecified references to statutes are to the Penal Code.

violence (§ 12022.7, subd. (e)). After a psychological evaluation, defendant was found competent to stand trial.

On March 12, 2004, in accordance with a negotiated disposition, defendant pleaded guilty to the felony of inflicting corporal injury on a spouse resulting in a traumatic condition. (§ 273.5, subd. (a).) No specific sentence was promised in exchange for the guilty plea, but the assault charge and the great bodily injury allegation were dismissed. Defendant did not waive his right to have the dismissed offenses excluded from consideration in connection with his sentencing. (See *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).)

The probation report, which was dated April 16, 2004, listed two aggravating factors: (1) defendant's behavior caused the victim not only significant physical harm, but also emotional harm, and she was extremely fearful of him (Cal. Rules of Court, rule 4.421(a)(1)[4]); and (2) defendant had engaged in violent conduct indicating a serious danger to society, particularly in that he claimed not to remember the event and his violent behavior toward the victim had occurred on a number of prior occasions. The report identified as mitigating factors defendant's assertion that he was in a "white out" state and not aware of his behavior; his lack of a prior criminal record; and his acknowledgment at the time of his arrest that he was aware that he had hurt the victim. The report noted that defendant had successfully completed college and had a history of steady employment prior to his significant back injury. The report recommended that defendant be placed on probation with a one-year jail term and treatment conditions. However, it suggested that if defendant were sentenced to prison, he be given the middle term.

On April 22, 2004, the probation department submitted an additional statement from the victim for consideration in connection with the sentencing. The victim asserted that defendant had abused her severely and frequently throughout their marriage, using his martial arts skills to do so. She also asserted that he had sent her a letter from jail

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[4] All further unspecified references to rules are to the California Rules of Court.

addressing her by a name he had told her he would use if he intended to kill her, and expressed fear that he would kill her if he were released from custody.

Defendant submitted a psychological evaluation, dated April 27, 2004, which had been conducted at the request of his defense counsel. The evaluator diagnosed defendant as suffering from schizotypal personality disorder, which is similar to schizophrenia but of lesser severity, and possibly also from depression. She opined that defendant's reported "white outs" could have been caused by the schizotypal personality disorder, and recommended that he undergo treatment in the form of long-term psychotherapy, low-dose antipsychotic medications, and possibly anti-depressants. She also recommended that defendant reside with his mother[5] and that he be barred from contact with the victim and their children until his psychiatric disorder was under better control.

At the initial sentencing hearing on April 30, 2004, the judge recognized that defendant had "some form of mental health problem," and stated that "[w]hether [defendant] can be kept safely away from the victim is my biggest concern." Defendant said he did not know where the victim and their children currently resided, and his counsel assured the court that defendant had made no efforts to locate them and was willing to abide by a recently issued family court order barring him from contact with his wife and allowing him to see his children only under professional supervision. The judge continued the sentencing for a week to allow defendant's counsel to complete the details of a proposed mental health treatment plan and monitoring system for defendant, but cautioned that he was "skeptical" about the idea of probation and "quite concerned that [defendant] is very dangerous . . . for whatever reason, probably including some form of mental health problem, to his spouse and children."

After the initial sentencing hearing, defendant's counsel submitted documentation regarding a private electronic monitoring firm that was available to monitor defendant if

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[5] Appellant's mother offered to have him reside with her in Alameda County if he were granted probation, and averred that she could and would supervise him closely, with the help of her extended family. Appellant concurred in this proposal.

he were placed on probation. At the hearing, counsel gave the court the names and qualifications of two psychotherapists who could treat defendant, and a list of family and community members who were willing to oversee him when neither his mother nor his grandmother were available, so that he would be under 24-hour supervision. The court also received numerous character reference letters from members of his family and community urging that he be granted probation.

In the meantime, however, the court had also received, through the prosecutor, two letters from the victim. In her letters, the victim reiterated that defendant had repeatedly used his martial arts skills to abuse her. She asserted that he had practiced ways of killing her and had moved the family to Marin in order to isolate her so that he could abuse or even kill her with impunity. She also reported that defendant had told her he would be put on probation rather than sent to prison because of his educational background; that he was knowledgeable about psychology; and that "he would gladly run circles around a psychologist for a few days a week to keep his freedom and teach me the final lesson." The prosecutor acknowledged that defendant must have made this statement before the date of the offense to which he pleaded guilty, because he had had no contact with the victim since then.

At the continued sentencing hearing on May 7, 2004, the victim appeared and made a brief unsworn statement in open court confirming the contents of her letters and again imparting her fear that defendant would kill her. She expressed concern that having defendant's mother supervise him on probation would be ineffective, because his mother had known of the past abuse, had done nothing to stop it, and could not be trusted to do so. Defendant's mother responded by contending that the victim "seems very troubled," and reiterated that she and her support network would ensure that defendant had no contact with the victim, would supervise him, and would make sure he got treatment for his mental illness. Defendant's counsel pointed out that although defendant did not deny his physical abuse of the victim, he did deny the psychological abuse she alleged, which had not been part of the charges and had not been independently verified.

At the conclusion of the continued sentencing hearing, the trial court denied probation and imposed the upper term of four years in state prison, as urged by the prosecutor. The judge explained his choice of the upper term by stating that "in view of all of the circumstances of this incident, it appears that its aggravated nature, both in terms of the substantial and continuing injury to the principal victim, and the perpetration of the activity in the presence of children of tender years, make it clearly an aggravated event." Defendant's notice of appeal was timely filed on May 17, 2004.

DISCUSSION

Although defendant's trial counsel vigorously urged that he be given probation, on appeal he does not challenge the trial court's decision to impose a prison term. He argues, however, that the trial court erred in imposing the upper term, contending both that this decision violated *Blakely, supra*, 542 U.S. 296, and that it reflected other errors independent of *Blakely*.

In *Blakely*, the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely*, *supra*, 542 U.S. at pp. 303-304.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, " 'Other 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, supra,* at p. 301.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, 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,* at pp. 303-304.)

In response to defendant's argument that *Blakely* invalidates his upper term sentence, the People contend that California's "triad" sentencing system does not implicate *Blakely* at all, and that any one of the three legislatively authorized terms for an

offense, including the upper term, can be imposed by a trial court without violating a defendant's Sixth Amendment rights. Under the People's view of the California system, although there is a "presumptive mid-term sentence," the upper term is the statutory maximum sentence that the trial court has discretion to impose.

The People's argument may have been persuasive before *Blakely* was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but rather the sentence it may impose without making *any additional findings*. (*Blakely, supra*, 542 U.S. at pp. 303-304.) Under California's determinate sentencing law, the maximum sentence a judge may impose for a conviction without making any additional findings is the middle term. Section 1170, subdivision (b), states that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Furthermore, California Rules of Court, rule 4.420, subdivision (b), states that "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." In our view, therefore, *Blakely* precludes the imposition of upper term sentences under California's determinate sentencing law on the basis of aggravating factors that have not been found by a jury to exist beyond a reasonable doubt.

The People also argue that even if *Blakely* applies, defendant cannot rely on it, because his guilty plea precludes him from raising any constitutional challenge to his sentence without first obtaining a certificate of probable cause as required by section 1237.5. We agree with defendant that the controlling authority on that question is *People v. Buttram* (2003) 30 Cal.4th 773 (*Buttram*). *Buttram* held that no certificate of probable cause is required when a defendant pleads guilty under an arrangement that provides for a range of possible sentences, and then seeks to argue on appeal that the trial judge erred in imposing a sentence at the top of that range. (*Id.* at p. 777.) This is precisely the fact pattern here. Defendant's plea bargain involved an agreement to dismiss another charge and an enhancement allegation, but did not address sentencing at all.

The People attempt to distinguish *Buttram* on the basis that defendant's challenge is a constitutional one rather than an attack on the trial judge's exercise of sentencing discretion, citing *People v. Young* (2000) 77 Cal.App.4th 827 and *People v. Cole* (2001) 88 Cal.App.4th 850.[6] This argument is without merit. In *Buttram*, the Supreme Court stated that in determining whether a certificate of probable cause is necessary for an appeal following a guilty plea, " 'the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]' [Citation.]" (*Buttram*, *supra*, 30 Cal.4th at p. 782.) A challenge to a sentence is deemed to challenge the validity of the plea " 'if the sentence was part of a plea bargain. [Citation.] It does not if it was not . . . .' " (*Id*. at p. 785.) Thus, the test under *Buttram* does not focus on the *grounds* of the challenge to the sentence, but only whether or not the sentence was a specified term of the plea bargain.

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[6] In *People v. Cole*, *supra*, 88 Cal.App.4th 850, the plea bargain provided that the defendant would plead no contest with the assurance that his maximum sentence would be 25 years to life instead of more than 75 years to life, as it would have been without the bargain. (*Id*. at pp. 858-859, 873.) The court imposed the 25-year sentence, and the defendant sought to argue on appeal that the sentence was cruel and unusual punishment. The Court of Appeal held the defendant could not make that argument without a certificate of probable cause. The court noted that although the argument was styled as a challenge to the sentence, it really was a challenge to the validity of the plea, because the plea bargain expressly authorized a sentence of up to 25 years to life, the sentence the defendant received. That term was a negotiated term of the bargain, given in consideration for the reduction in exposure. Having agreed to the bargain, the defendant could not challenge the sentence given pursuant to it. (*Id*. at p. 873.)

In *People v. Young*, *supra*, 77 Cal.App.4th 827, the defendant agreed to a maximum sentence of 25 years to life in return for the prosecution's agreement not to seek consecutive sentences, which would have increased the maximum punishment to 52 years to life. (*Id*. at p. 830.) As in *Cole*, the defendant sought to argue on appeal that the sentence was cruel and unusual punishment. Holding that the defendant could not do so without a certificate of probable cause, the court stated: "The prosecution agreed to a maximum sentence of 25 years to life in return for defendant's plea. Yet, defendant now attacks that maximum sentence on the ground that it is cruel and unusual punishment. By

Unlike the defendants who sought to appeal in *People v. Young*, *supra*, 77 Cal.App.4th 827, and *People v. Cole*, *supra*, 88 Cal.App.4th 850, defendant's challenge to the imposition of the upper term in no way implicates the validity of the plea bargain itself, which did not include an agreement to a four-year sentence, or indeed to any prison sentence at all. Instead, defendant is arguing that the sentence imposed by the court, *independently* of the plea bargain, is illegal under *Blakely*. This is a challenge to the sentence, not the plea. Under the rationale of *Buttram*, such an appeal does not require a certificate of probable cause, even if the appellant raises constitutional arguments.

We also reject the People's contention that defendant forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See § 1170, subd. (b); Cal. Rules of Court, rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture doctrine is to "encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors" (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it particularly

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arguing that the maximum sentence is unconstitutional, he is arguing that part of his plea bargain is illegal and is thus attacking the validity of the plea." (*Id*. at p. 832.)

inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after defendant was sentenced.[7]

Accordingly, we turn to the merits of defendant's *Blakely* argument. As already noted, the sentencing judge explained that his choice of the upper term was based on "the substantial and continuing injury to the principal victim, and the perpetration of the activity in the presence of children of tender years, make it clearly an aggravated event." These factors clearly fall within the ambit of *Blakely*, and were neither proven beyond a reasonable doubt nor admitted by defendant. No other aggravating factors were cited, and because defendant has no prior criminal record, no recidivism-related factors could have played a part in the judge's decision.[8] Thus, the imposition of the upper term was based solely on factors which, in our view, the trial court could not properly consider under *Blakely*.

Moreover, we cannot find that this error was harmless beyond a reasonable doubt.[9] In finding the aggravating factors on which the upper term was based, the trial judge

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[7] We are not persuaded otherwise by the People's references to two federal cases, which, they contend, characterize *Apprendi* claims that were not raised in the trial court as forfeited notwithstanding the fact that *Apprendi* was decided while the cases were on appeal. (See *United States v. Cotton* (2002) 535 U.S. 625; *U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967.) As these cases illustrate, under federal appellate procedure, characterizing a claim as "forfeited" does not mean that the claim may not be reviewed on appeal. Rather, such a claim is reviewed for "plain error." In addition, we note that after the close of briefing in this case, the Ninth Circuit withdrew its original opinion in *U.S. v. Ameline*, *supra*, 376 F.3d 967; issued a new opinion (*U.S. v. Ameline* (9th Cir. 2005) 400 F.3d 646); and subsequently issued yet another opinion en banc. (*U.S. v. Ameline* (9th Cir.2006) 409 F.3d 1073.

[8] At least some recidivism-related aggravating factors are valid, even under a *Blakely* analysis, in light of *Apprendi*, *supra*, 530 U.S. 466.

[9] Because the *Blakely* court rested its holding on *Apprendi*, *supra*, 530 U.S. 466, we apply the standard of prejudice applicable to *Apprendi* errors, which is the "*Chapman* test." (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Applying that test, we must determine whether the failure to obtain jury determinations as to the aggravating factors discussed above was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

relied in large part on the victim's unsworn and uncorroborated statements regarding defendant's past behavior. Our review of the record does not convince us beyond a reasonable doubt that a jury would have necessarily drawn the same conclusions for this proffer as did the sentencing judge. Accordingly, we concur with defendant that *Blakely* requires that defendant be resentenced.[10]

DISPOSITION

The cause is remanded to the trial court with directions to reconsider defendant's sentence in accordance with the views expressed herein. The judgment is otherwise affirmed.

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Richman, J.

We concur:

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Kline, P.J.

_____
Haerle, J.

[10] As noted, defendant also contends that the trial court erred in treating as aggravating factors conduct by defendant that either was inherent in the charge to which he pleaded guilty, or constituted uncharged criminal conduct that the court was barred from considering under *Harvey*, *supra*, 25 Cal.3d 754. These issues are moot given our resolution of the *Blakely* issue.