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NOT TO BE PUBLISHED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. JAMAHL RASHAD MCMILLON, Defendant and Appellant.	C053763 (Super. Ct. No. CM024710)

Defendant Jamahl Rashad McMillon pleaded no contest to rape by use of drugs (Pen. Code, § 261, subd. (a)(3); count 2)[1] and oral copulation of a person under age 18 (§ 288a, subd. (b)(1); count 4). In exchange, counts of forcible rape (§ 261, subd. (a)(2) (count 1)) and rape by use of drugs (count 3) were

[1] Further undesignated statutory references are to the Penal Code.

dismissed with a *Harvey*[2] waiver. Defendant was sentenced to state prison for 10 years, consisting of the upper term of eight years on count 2, eight months consecutive on count 4, and eight months consecutive in each of two controlled substance cases in which probation had been revoked. He did not obtain a certificate of probable cause.

On appeal, defendant contends his upper term sentence violates *Apprendi, Blakely* and *Cunningham*,[3] and he claims it is cognizable on appeal despite his failure to obtain a certificate of probable cause. Defendant also contends, and the Attorney General concedes, he was not convicted of a violent felony and his in-prison conduct credits are not limited by section 2933.1. We affirm the judgment.

FACTS[4]

Early on the morning of July 3, 2005, Butte County Sheriff's deputies were dispatched to Oroville Hospital regarding a reported rape. Deputies contacted the victim, 17-year-old A.G., who informed them that she had been raped by defendant, a family friend, after drinking and playing video games with defendant at her residence the previous evening. The

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[2] *People v. Harvey* (1979) 25 Cal.3d 754.

[3] *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*); *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*); *Cunningham v. California* (2007) 549 U.S. __ [166 L.Ed.2d 856] (*Cunningham*).

[4] Because defendant pleaded no contest, our statement of facts is taken from the probation officer's report.

victim told deputies that she became very intoxicated and passed out in her bed after drinking "Mad Dog 20/20" supplied by defendant. She awoke between 3:00 and 3:30 a.m., and found him on top of her with his penis in her vagina. Although she demanded that he get off of her, he continued his sexual assault until he ejaculated inside of her. He then left the room. She pulled up her pajama bottoms and went back to sleep. Approximately 10 minutes later, A.G. was again awakened by defendant. She was on her stomach with her pajama bottoms down, and he was behind her with his penis in her vagina from behind. A few minutes later, he performed oral sex on her.

After defendant left the residence, A.G. telephoned a friend who took her to Oroville Medical Center. Rape kits for A.G. and defendant were obtained and forwarded to the state Department of Justice (DOJ) for analysis. DOJ later reported that DNA samples collected from defendant matched those taken from the victim's rape exam.

DISCUSSION

I

Defendant contends his upper term sentence was imposed in violation of *Apprendi, Blakely* and *Cunningham*. In a separate argument, he claims the issue is cognizable despite his failure to obtain a certificate of probable cause.

Defendant acknowledges this court's holding in *People v. Bobbit* (2006) 138 Cal.App.4th 445 (*Bobbit*), that a *Blakely* claim requires a certificate of probable cause, but he claims the

present case is distinguishable. The Attorney General disagrees.

Bobbit explained: "The ultimate issue raised on appeal relates to the trial court's authority to impose an upper term sentence in light of [*Blakely, supra,*] 542 U.S. 296. [¶] This argument is not cognizable on appeal because defendant did not obtain a certificate of probable cause. '"[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. [Citation.]' (*People v. Shelton* (2006) 37 Cal.4th 759, 766 (*Shelton*), quoting *People v. Panizzon* (1996) 13 Cal.4th 68, 79.) '[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term.' (*Shelton, supra*, at p. 768.) '[A] provision recognizing the defendant's right to "argue for a lesser term" is generally understood to mean only that the defendant may urge the trial court to exercise its sentencing discretion in favor of imposing a punishment that is less severe than the maximum punishment authorized by law.' (*Ibid*.) 'Of course, a prosecutor and a defendant may enter into a negotiated disposition that expressly recognizes a dispute or uncertainty about the trial court's authority to impose a specified maximum sentence -- because of

Penal Code section 654's multiple punishment prohibition *or for some other reason* -- and preserves the defendant's right to raise that issue at sentencing and on appeal.' (*Shelton, supra*, at p. 769; italics added & omitted.)" (*Bobbit, supra*, 138 Cal.App.4th at pp. 447-448.)

Defendant claims *Shelton* is distinguishable because its section 654 claim, if successful, would have precluded imposition of the agreed-to maximum sentence; whereas his *Cunningham* claim and the *Blakely* claim in *Bobbit* do not preclude imposition of the maximum term, provided the sentencing court finds aggravating circumstances true beyond a reasonable doubt. The suggested distinction is unavailing.

Whether barred outright or barred only pending further factual findings, the agreed-to maximum term would not be one that the court could "lawfully impose" based on the record of the plea hearing alone. (*Bobbit, supra*, 138 Cal.App.4th at p. 447.) An *Apprendi-Blakely-Cunningham* claim posits that, contrary to the understanding of all concerned at the hearing, the plea agreement did not fully resolve the disputed factual issues of the case. Thus, defendant's *Cunningham* claim effectively challenges the plea.

This court noted in *Bobbit* that "*Blakely*[,] *supra,* 542 U.S. 296, was decided on June 24, 2004. The negotiated disposition was placed on the record on February 2, 2005, and sentencing took place on March 2, 2005, both of which occurred well after the highly publicized decision, which dispels any doubt that the

issue was not preserved through the oversight of defense counsel." (*Bobbit, supra*, 138 Cal.App.4th at p. 448.)

Defendant claims that by the time of his plea and sentencing (Aug. & Sept. 2006), a *Blakely* claim had been foreclosed by *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). He reasons the "absence of a *Blakely* waiver in the five-page written plea agreement in this case [citation] strongly suggests that the parties did not regard the plea bargain as including such waiver." (Fn. omitted.) We disagree.

The written plea agreement included defendant's stipulation that "the sentencing judge may consider my prior criminal history . . . when . . . imposing sentence." (Unnecessary capitalization omitted.) Thus, defendant stipulated that the court could consider his two misdemeanors in 2001 and 2004, followed by his two felonies in 2005. Because the stipulated priors were numerous and of increasing seriousness (Cal. Rules of Court, rule 4.421(b)(2)), and a single aggravating factor is sufficient to impose the upper term (§ 1170, subd. (b)), the priors were sufficient to expose defendant to an aggravated sentence under the reasoning of Justice Kennard's concurring and dissenting opinion in *Black I* (*Black I, supra*, 35 Cal.4th at p. 1270), later adopted by the court in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). Had defense counsel intended to preserve a *Blakely* claim following the February 2006 grant of certiorari in *Cunningham* (546 U.S. 1169 [164 L.Ed.2d 47]), he would not have consented to this express provision of the plea agreement.

Because he failed to obtain a certificate of probable cause, defendant's *Apprendi-Blakely-Cunningham* claim is not properly before us.

II

Defendant contends, and the Attorney General concedes, section 2933.1 does not apply to this case because none of his crimes is a "violent felony" under section 667.5, subdivision (c). We accept the Attorney General's concession.

The probation officer's report addressed the issue of resentencing on the two prior controlled substance cases as follows: "With regard to [the two prior cases] it appears the defendant is incarcerated in state prison and has never been paroled, and therefore, it appears resentencing is appropriate. As such, it appears the defendant should be sentenced to consecutive eight month terms in each case. *In light of the defendant's new violent felony conviction in [the present case,] the defendant's custodial credits in both [prior cases] shall also be limited to no more than 15% of good time/work time pursuant to § 2933.1 PC as they will be served during the same period of confinement.*" (Italics added.)

Citing *In re Reeves* (2005) 35 Cal.4th 765, the prosecutor concurred with probation that the credit limitation would apply to the subordinate terms for the two drug offenses.

Defense counsel countered that credits for the prior drug cases should be calculated pursuant to section 4019, rather than section 2933.1, because those credits had been earned prior to the convictions in the present case. Later, addressing the

sentence for the present crimes, defense counsel mistakenly conceded that defendant was "standing before the Court for a very serious crime. *It's considered a violent felony in the State of California.* It's considered one of the most horrendous crimes there is." (Italics added.) Still later, defense counsel remarked, "I believe that the law is clear that *from this point forward there's a credit limitation*. Even though those offenses are non-violent offenses, they're attached to and run consecutive to a violent term." (Italics added.) Counsel reiterated that the court should award presentence credit in the prior cases pursuant to section 4019.

In each prior case, the trial court awarded custody credits and calculated conduct credits pursuant to section 4019. At the trial court's request, the probation officer calculated the maximum amount of in-prison credit defendant could earn against his 10-year sentence with the 15 percent limitation.

The presentence custody and conduct credits were recorded on the abstract of judgment. The maximum amount of in-prison credit was not included.

Because none of defendant's crimes is a violent felony, the Attorney General properly concedes that "the limitations of section 2933.1 are inapplicable to [defendant's] future worktime credits." The concession does not require modification of the abstract of judgment, which properly reflects presentence custody awarded pursuant to section 4019.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

I concur:

CANTIL-SAKAUYE, J.

I concur in the result:

SCOTLAND, P.J.