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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RUDY MURILLO,

Defendant and Appellant.

D042605

(Super. Ct. No. SCE222140)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed in part and reversed in part.

A jury convicted appellant Rudy Murillo of mayhem (Pen. Code, § 203),¹ assault with caustic acid (§ 244, subd. (a)(1)), arson causing great bodily injury (§ 451, subd. (a)), battery with serious bodily injury (§ 243, subd. (a)), and corporal injury to a cohabitant (§ 273.5, subd. (a)) in connection with his assault on the victim, Sheri Vargas (Sheri). The jury found true the special allegations, appended to all the charged offenses except the arson offense, Murillo personally used a dangerous weapon in committing the

offenses (§ 12022, subd. (b)(1)) and he inflicted great bodily injury in connection with the offenses within the meaning of section 12022.7 (the GBI enhancement). The court sentenced Murillo on the mayhem count to the upper term of eight years, plus a consecutive upper five-year term for the GBI enhancement, plus a consecutive one-year term for the deadly weapon enhancement, for a total term of 14 years.²

On appeal, Murillo argues the court erred by imposing the upper term sentence on the mayhem conviction and by imposing any term for the GBI enhancement. Murillo also asserts that even if the court could impose a term for the GBI enhancement, it was error to impose the upper term on the GBI enhancement.

I

FACTS

A. Prosecution Case

Murillo met Sheri and her sister, Olivia, when they were all children. As they grew up together, Murillo and Olivia became romantically involved and had a baby together in 1998. Murillo, Olivia and their baby lived with Olivia's family (including Sheri) at the Vargases' family home in Riverside, California.

Shortly after the baby was born, Murillo and Sheri became romantically involved. When Olivia discovered their relationship, she demanded that Murillo leave. Murillo and Sheri left the Vargas home and moved in with Murillo's father. However, after approximately eight months, Sheri moved out and returned to live with her ailing father

¹ All further statutory references are to the Penal Code unless otherwise specified.

in Riverside. While Sheri was in Riverside, Murillo dated both Sheri and Olivia. Sheri stopped seeing Murillo when she learned he had resumed his relationship with Olivia, but after Murillo terminated his relationship with Olivia, Sheri reconciled with Murillo and returned to live with him at his father's home for several months before the assault.

On the morning of the assault, Murillo, Sheri, and Murillo's father drove to Pauma Casino to check on a job for Murillo. They learned Murillo had been hired and, on the drive home, celebrated by consuming two 18-packs of beer. By the early evening, Murillo and Sheri had consumed approximately 15 beers each and, although they had gotten along fine during the day, they began arguing in the early evening about Sheri's plan to visit her mother in Riverside. During the argument, Sheri told Murillo she did not want to be with him because he treated her poorly, and later told Murillo she planned to leave him.

Murillo told Sheri to leave. However, when she started to gather her clothes, Murillo grabbed them from her, walked outside, threw them on the ground and sprayed lighter fluid on them. She confronted him, pushed him, and asked what he was doing. He told her, "Shut up [or] I'll light you on fire, too," and Sheri replied, "Well, do it then" because she did not believe Murillo's threat. Murillo reacted by spraying her with lighter fluid, but Sheri continued arguing defiantly with Murillo, not believing he would light her on fire.

² The court imposed but stayed the sentences for the remaining counts under section 654.

Murillo pulled a lighter from his pocket and moved to set the pile of clothes on fire. Sheri pushed Murillo and a shoving match ensued. As she advanced on Murillo, he lit the sleeve of her sweater on fire. The fire spread quickly despite their joint efforts to extinguish the flames. Murillo shouted for his father, who brought water and eventually extinguished the flames. Sheri went inside and asked for help from Felicia, the girlfriend of Murillo's brother, telling Felicia that Murillo had thrown lighter fluid and a match on her.

Before Murillo's father took Sheri to the hospital, Murillo told Sheri he was sorry and she assured him she would not "tell on him" because she did not want him to get in trouble. While in the hospital, Sheri told Olivia Murillo had deliberately set her on fire but asked Olivia not to tell anyone because Sheri did not want Murillo to get in trouble. Police only learned the incident was not an accident when they contacted Felicia in response to her complaint that Murillo's brother had assaulted her. After telling the deputy of Murillo's brother's assault on her, Felicia told the deputy Murillo had deliberately set Sheri on fire.

Sheri suffered severe external burn injuries, and also suffered burn injuries to her lungs, trachea and vocal chords. She has a poor prognosis and doctors believe it is "just a matter of time" before her airway will irreparably close.

B. The Defense Case

The defense admitted Murillo set Sheri on fire but claimed it was an accident. Murillo testified he was drunk and angry with Sheri. He took her clothes, piled them on the ground, and soaked them with lighter fluid intending to light the clothing pile on fire.

She grabbed the clothes, but he pulled them away from her, knocking her to the ground in the process. When he lit the clothes pile on fire, the flames "went up and [Sheri] caught fire as well." He helped extinguish the fire, and suffered burns in the process.

While Sheri was hospitalized, Murillo and Olivia resumed their romantic relationship. Olivia testified that she visited Sheri in the hospital, and Sheri said she and Murillo had been fighting when he burned her. A week later, Sheri told Olivia the fire was an accident. However, Sheri also told Olivia that if she (Sheri) could not have Murillo, nobody could, and she would try to have him imprisoned. Murillo's father testified that when he drove Sheri to the hospital, she told him to tell Murillo she loved him and it was only an accident.

II

THE SECTION 12022.7 ENHANCEMENT ISSUE

The information specially alleged that in connection with the charged offense of aggravated mayhem, Murillo inflicted great bodily injury in connection with the offense within the meaning of section 12022.7, subdivision (e).³ The jury found this allegation true in connection with its verdict finding Murillo guilty of mayhem, a lesser-included offense to the charged offense. The court sentenced Murillo on the mayhem conviction to the upper term and imposed a consecutive five-year upper term for the GBI enhancement. Murillo argues it was improper to impose any additional term for the GBI

³ Section 12022.7, subdivision (e) provides an enhanced term for "[a]ny person who personally inflicts great bodily injury under circumstances involving domestic violence As used in this subdivision, 'domestic violence' has the meaning provided in subdivision (b) of Section 13700."

enhancement because great bodily injury is an element of the offense of mayhem (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1575), and section 12022.7 ordinarily bars imposing a GBI sentence enhancement when great bodily injury is an element of the underlying offense. (*People v. Pitts* (1990) 223 Cal.App.3d 1547, 1558-1560.)

Section 12022.7 precludes imposing its sentence enhancement if great bodily injury is an element of the underlying offense under most, but not all, of its specified circumstances. Section 12022.7 imposes additional punishment for great bodily injury (subdivision (a)), for great bodily injury causing the victim to be comatose or paralyzed (subdivision (b)), for great bodily injury to an elderly victim (subdivision (c)) or to a young victim (subdivision (d)), and for great bodily injury in a domestic violence context (subdivision (e)). Subdivision (g) then specifies that "[s]ubdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense." Thus, even if great bodily injury is an element of the underlying offense, the enhancement may be imposed if the offense was committed under circumstances involving domestic violence. (*People v. Hawkins* (2003) 108 Cal.App.4th 527, 531.)

Murillo concedes a sentence enhancement for a section 12022.7, subdivision (e) violation is not barred by subdivision (g), but argues the jury did not find he violated subdivision (e) because the court instructed the jury only on subdivision (a)'s general elements and did not instruct on the additional "domestic violence" element required by subdivision (e). The court did erroneously omit the "domestic violence" element when it instructed on the GBI enhancement. However, not instructing on an element of an enhancement, like not instructing on an element of a crime, does not require reversal of

the true finding if the error was harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-326.) A court may conclude the error was harmless under this standard when it is clear beyond a reasonable doubt the omitted element was uncontested and was supported by overwhelming evidence, or when a court can determine beyond a reasonable doubt, based on jury findings that may be inferred from other instructions, the instructional omission did not contribute to the verdict. (*People v. Garcia* (2001) 25 Cal.4th 744, 761 (conc. & dis. opn. of Kennard, J.).)

The section 12022.7, subdivision (e) enhancement applies when a person inflicts great bodily injury under circumstances involving domestic violence, and specifies the term " 'domestic violence' has the meaning provided in subdivision (b) of Section 13700." Section 13700, subdivision (b) defines domestic violence as abuse committed against a person who is a "cohabitant . . . or person with whom the suspect has had a . . . dating . . . relationship. For purposes of this subdivision, 'cohabitant' means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship." It is uncontested Murillo and Sheri were cohabitants at the time of the assault and the existence of that relationship was supported by overwhelming evidence, which supports the conclusion the omission of the element was harmless beyond a reasonable doubt.

More importantly, other portions of the verdict convince us the instructional omission did not contribute to the verdict. The same assault and injury that formed the basis for the verdict on the mayhem and GBI enhancement charges also formed the basis for the verdict on count 6, charging Murillo with corporal injury to a cohabitant (§ 273.5,

subd. (a)), which caused great bodily injury to the victim. The jury was instructed that to find Murillo guilty of count 6 and the appended GBI enhancement, it was necessary to find that he willfully inflicted bodily injury "upon his cohabitant," and defined cohabitant as "unrelated persons living together in a substantial relationship, one shown at least by permanence and sexual or amorous intimacy." The jury, by its guilty verdict on count 6 and its true finding on the appended GBI enhancement, necessarily found beyond a reasonable doubt Murillo and Sheri were cohabitants at the time of the assault that produced the great bodily injury.⁴ We are therefore convinced beyond a reasonable doubt the instructional omission did not contribute to jury's true finding on the section 12022.7, subdivision (e) enhancement.

III

THE IMPACT OF *BLAKELY*

A. Background

The prosecution sought the upper term on the mayhem conviction and filed a statement listing numerous aggravating factors to support the upper term; the probation report also recommended the upper terms on both the mayhem conviction and the GBI enhancement, citing numerous aggravating factors. Murillo filed a statement seeking either probation or the lower term, citing numerous mitigating factors. At sentencing,

⁴ Because the jury was instructed on and affirmatively found the facts necessary to the enhanced punishment provided by section 12022.7, subdivision (e), we are also convinced *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) does not bar imposition of a term based on the true finding.

Murillo argued the facts cited by the prosecution in aggravation did not support the upper term, and the factors in mitigation outweighed the factors in aggravation.⁵

The trial court sentenced Murillo to the eight-year upper term on the mayhem conviction, citing two aggravating facts: the crime involved great violence disclosing a high degree of cruelty and viciousness (Cal. Rules of Court, rule 4.421(a)(1)),⁶ and Murillo's criminal behavior was increasing in seriousness (rule 4.421(b)(2)). The trial court also sentenced Murillo to a consecutive five-year upper term on the GBI enhancement, citing five aggravating facts: the victim's injuries were so severe that her life span was reduced (rule 4.408(a)); Murillo was armed with and used a deadly weapon (rule 4.421(a)(2)); Sheri was particularly vulnerable (rule 4.421(a)(3)); Murillo evidenced a high degree of cruelty, viciousness and callousness (rule 4.421(a)(1)); and Murillo's convictions and true findings are increasing in seriousness (rule 4.421(b)(2)).

On appeal, Murillo initially argued resentencing was necessary because the court relied on certain aggravating factors to impose the upper term on both the mayhem conviction and the GBI enhancement in violation of the proscription against the so-called "dual use of facts"; the Attorney General argued, among other things, the court did not

⁵ For example, the prosecution cited the particular vulnerability of the victim, but Murillo argued Sheri was considerably larger than him and Sheri testified she never "back[ed] down" when confronting Murillo. The prosecution also cited the "high degree of cruelty, viciousness or callousness" factor, but Murillo's counsel contested this factor, arguing that Murillo's intoxicated state led to a series of rash acts that produced unintended results, and his efforts to put out the fire and his remorse showed this was not a cold or calculated attack.

⁶ All further rule references are to the California Rules of Court.

rely on elements of the offenses or enhancements and therefore did not violate the prohibition against the dual use of facts. However, during the pendency of this appeal the United States Supreme Court issued its decision in *Blakely*, which held a state trial court's imposition of a sentence exceeding the statutory maximum of the standard range for the charged offense on the basis of additional factual findings made by the court violated the defendant's Sixth Amendment right to trial by jury. (*Blakely, supra*, 124 S.Ct. at p. 2538.) Because the trial court imposed upper terms for the mayhem conviction and the GBI enhancement true finding, we requested further briefing from the parties on the effect of *Blakely* in this case.

In his brief, Murillo contends, pursuant to the analysis of *Blakely*, the court's finding of facts to justify its imposition of upper term sentences violated his right to a jury trial. The Attorney General responds that Murillo waived or forfeited the issue by not raising a challenge to the sentences in the proceedings below, *Blakely* is inapplicable to California's sentencing scheme, and even if *Blakely* might apply to some California cases, its application was mooted here by Murillo's criminal history.

B. The Issue Is Preserved

In *People v. Scott* (1994) 9 Cal.4th 331, the California Supreme Court held a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. However, *Scott's* reasons for its waiver rule--it was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources (*id.* at pp. 351-353)--is a pragmatic rationale that

does not support the application of the waiver rule here. Prior to *Blakely*, California courts and numerous federal courts consistently held there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) No published case in California had held a different rule applied in connection with the imposition of an upper term. Because of this state of the law, an assertion of a constitutional challenge to the imposition of an upper term would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after Murillo's sentencing, Murillo cannot be said to have knowingly and intelligently waived his right to a jury trial. (See *Blakely, supra*, 124 S.Ct. at p. 2541 [noting that "[i]f appropriate waivers are procured," a state is free to utilize judicial fact-finding in its sentencing scheme].)

The Attorney General argues Murillo forfeited his right to assert the sentence was error because he did not object below.⁷ However, Murillo vigorously advocated in the

⁷ The Attorney General argues that *U.S. v. Cotton* (2002) 535 U.S. 625 held a defendant's failure to object at trial can forfeit his right to assert improper sentencing under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) even though *Apprendi* had not been decided at the time of trial. The Attorney General argues that, by extension, Murillo's failure to object at trial forfeited his right to assert improper sentencing under *Blakely* even though his trial pre-dated *Blakely*. However, the Attorney General does not articulate how the forfeiture doctrine is distinct from *Scott's* waiver doctrine, much less why such distinctions should call for a different analysis. Moreover, *Cotton* evaluated a

trial court for a mitigated sentence by filing a statement in mitigation urging the court to impose a lesser sentence and, more significantly for purposes of the concerns expressed in *Blakely*, by arguing the facts militated against affirmative findings on many of the aggravating factors identified by the court. Under the circumstances, it would be unreasonable to find Murillo forfeited a constitutional challenge of which he was unaware, and we find the forfeiture rule to be inapplicable.

C. *Blakely* Applies to an Upper Term Determination

In *Blakely*, the United States Supreme Court held 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.' " (*Blakely, supra*, 124 S.Ct. at p. 2356.) The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence is currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004,

distinct claim--whether a grand jury indictment alleging conspiracy to possess and distribute drugs but omitting any quantity allegation deprived the court of the ability to sentence the defendant to the higher sentence based on the amount possessed when the defendant did not object *and it was* " 'essentially uncontroverted' " the amount possessed by the defendant qualified for the higher sentence. (535 U.S. at pp. 632-633.) *Cotton* effectively concluded that the omission was harmless because, considering the evidence, "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved [the requisite amount]." (*Id.* at p. 633.) Thus, the forfeiture analysis in *Cotton* turned on its conclusion that the omission was harmless to the defendant's rights. Here, however, Murillo did contest the factual basis for the sentence and it was not " 'essentially uncontroverted' " that the aggravating factors were present.

S126182.) Pending resolution of the issue by the Supreme Court, we must determine whether *Blakely* applies here.

Under California's determinate sentencing law, where a penal statute provides for three possible prison terms for a particular offense, the court is required to impose the middle term unless it finds, by a preponderance of the evidence, the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); rule 4.420(c), (d).) The Attorney General argues that imposition of an upper term sentence under the California determinate sentencing scheme is not the same as "the imposition of a penalty beyond the standard range" and thus does not implicate *Blakely*. We conclude this distinction is one without a difference. Although an upper term is a "statutory maximum" penalty in the sense that it is the highest sentence a court can impose for a particular crime, it is not necessarily the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," which is the relevant standard for purposes of applying *Blakely*. (*Blakely, supra*, 124 S.Ct. at p. 2357; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 491-497 [state hate crime statute authorizing the imposition of an enhanced sentence based on a judge's finding of certain facts by a preponderance of the evidence violated the due process clause]; *Ring v. Arizona* (2002) 536 U.S. 584, 592-593.)

As explained in *Blakely*, when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, "it remains the case that the jury's verdict alone does not authorize the sentence," as required to comply with constitutional principles. (*Blakely, supra*, 124 S.Ct. at p. 2538.) The same is true here. Because the

maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies. Thus, the question becomes whether the trial court could properly rely on any of the cited factors as the basis for its decision to impose the upper term without violating *Blakely*.

In the present case the trial court relied on a number of aggravating factors as the basis for its decision to impose the upper term for the mayhem conviction and the GBI enhancement. The court noted Sheri's injuries were severe, she was particularly vulnerable, and Murillo evidenced a high degree of cruelty, viciousness and callousness. Under *Blakely*, the constitution requires a jury to determine any fact the law makes essential to the punishment other than the fact of the defendant's prior conviction. (*Blakely, supra*, 124 S.Ct. at p. 2537, fn. 5, p. 2540 [any fact that pertains to whether the defendant has a legal right to a lesser sentence].) Applying those standards to the present case, there is no finding by the jury on which the trial court could rely for the selection of the upper term. Accordingly, we find on this record the court's decision to select the upper term for the mayhem conviction and the GBI enhancement violated the defendant's Sixth Amendment right to a jury trial, as defined in *Blakely*.

D. The Attorney General's Argument

The Attorney General argues that, even if *Blakely* requires jury findings on facts justifying selection of the upper term sentences in some cases, Murillo's prior criminal record removes this case from *Blakely's* application. The Attorney General notes that both *Blakely* and *Apprendi* expressly preserved *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, which held that a defendant has no right to have a jury determine the truth of a

prior conviction allegation. The Attorney General argues Murillo's juvenile record automatically qualified him for the upper term regardless of the presence of other aggravating factors (because a single factor in aggravation may qualify a defendant for the upper term, see *People v. Cruz* (1995) 38 Cal.App.4th 427, 433), and under *Almendarez-Torres* a court may determine the truth of this "upper-term-eligible" factor for sentencing purposes without offending the federal Constitution. The Attorney General's argument is that because the combined impact of the jury's verdict and the court's *Almendarez-Torres* finding makes the upper term a permissible sentence, the trial court's remaining decision of *whether* to impose the maximum term may be guided by consideration of traditional sentencing factors unencumbered by *Blakely's* requirements for jury findings. Stated another way, the Attorney General argues if there is one aggravating factor that does not require a jury finding under *Blakely*, the upper term becomes the maximum term and consideration of *Blakely* aggravating factors then is irrelevant because the upper term sentence is within the maximum.

We are not persuaded by the Attorney General's argument because it is founded on the legal predicate that, under rule 4.421(b)(2) [prior convictions are numerous or of increasing seriousness], Murillo's prior juvenile adjudication is a sentence aggravation factor allowing imposition of the upper term.⁸ The legal predicate is not correct in this

⁸ There is a split of authority on the second aspect of the Attorney General's argument, e.g. whether or not the "numerous" or "increasing seriousness" issues are *Blakely* issues. (Compare *People v. George* (2004) 122 Cal.App.4th 419, 425-426 [increasing seriousness is a *Blakely* issue] with *People v. Sample* (2004) 122 Cal.App.4th 206, 221-225 [increasing seriousness is within *Almendarez-Torres* exception].) Although *Blakely* did reaffirm the *Almendarez-Torres* rule that a defendant has no Sixth

case under the language of rule 4.421(b)(2). That rule provides a circumstance in aggravation can include the fact that "[t]he defendant's *prior convictions* as an adult or sustained *petitions* in juvenile delinquency proceedings are numerous or of increasing seriousness." (*Ibid.*, italics added.) The plain language of rule 4.421(b)(2) requires an evaluation of the quantity or quality of a defendant's *prior offenses*, and therefore has no application to a defendant who does not have at least two prior convictions or juvenile adjudications to serve as the grist for the quantitative or qualitative determination described by rule 4.421(b)(2). The Attorney General cites no authority holding that a defendant like Murillo--one whose prior record is limited to a *single* prior offense--is "upper term eligible" under rule 4.421(b)(2). Accordingly, even apart from applicability of *Blakely*, there is no showing Murillo was "upper term eligible" based on a sustained petition for a single offense when he was 14 years old, and he thereafter successfully completed his probation and remained "clean" during the ensuing six years. Therefore,

Amendment right to have a jury determine the truth of a prior conviction allegation for sentencing purposes, the core of *Blakely* is premised on the notion a defendant has a constitutional right under the Sixth Amendment to a jury trial as to any *other* factual determination increasing the sentence that could be imposed based on the finding of guilt on the offense alone. Under California's determinate sentencing law, the mere fact of one or more prior convictions (although relevant for Three Strikes purposes) does not alone serve as an aggravating factor; instead, there must be an additional quantitative finding (the defendant's prior convictions are "numerous") or qualitative determination (the defendant's prior convictions are "of increasing seriousness") before a defendant's criminal history qualifies as an aggravating factor. (Rule 4.421(b)(2).) Whether these quantitative or qualitative determinations may be beyond the limited *Almendarez-Torres* exception preserved by *Blakely* and, as such, remain factual determinations within the province of a jury, are questions we need not in this case resolve because we conclude the language of rule 4.421(b)(2) precludes its application in this case even if these quantitative or qualitative determinations were within the *Almendarez-Torres* exception.

the Attorney General's argument is not applicable to this case because there is no aggravating factor that does not require a jury finding under *Blakely*.

DISPOSITION

The sentence, insofar as the court imposed the upper terms for the mayhem conviction and the GBI enhancement, is vacated; in all other respects, the judgment is affirmed. The case is remanded to the superior court to conduct a new sentencing hearing consistent with the principles discussed in this opinion.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.