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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT TODD MYERS,

Defendant and Appellant.

A114474

(Sonoma County
Super. Ct. No. SCR-479926)

Robert Todd Myers appeals from a judgment imposed upon his guilty plea to two counts of lewd and lascivious conduct on a child (Pen. Code, § 288, subd. (a)). The trial court sentenced defendant to the aggravated term of 10 years in state prison. Defendant contends that the trial court erred in imposing the aggravated term and that the sentence violated *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403; 124 S.Ct. 2531] (*Blakely*). We affirm.

I. FACTUAL BACKGROUND

On January 13, 2006, a felony complaint was filed charging defendant with continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a) (count I)), three counts of lewd and lascivious conduct on a child (counts II-IV); and willfully inflicting physical and mental pain on a child (Pen. Code, § 273a, subd. (a) (count V)). The charges stemmed from defendant's abuse of his daughter over a 10-year period. His daughter alleged that she was sexually molested from the age of six years, and that defendant required her to orally copulate him and masturbate him on a regular basis. She stated that

initially the molestation occurred a few times per week but that recently it took place approximately once a month.

On May 10, 2006, the complaint was amended to add two additional counts of lewd and lascivious conduct on a child (counts VI & VII). Defendant pled guilty to counts VI and VII. The court dismissed the remaining counts with a *Harvey*¹ waiver. Defendant acknowledged that the court could sentence him to a maximum term of 10 years in state prison.

On June 29, 2006, the trial court sentenced defendant to the aggravated term of eight years on count VI plus a consecutive term of two years (one-third the midterm) on count VII. The court found that the aggravating factors—the seriousness of the charges, the manner of the crime indicating planning, the vulnerability of the victim, defendant’s pedophilia, his extreme danger to any child, and that he took advantage of a position of trust—outweighed any mitigating factors.

II. DISCUSSION

Defendant contends that the trial court erred in failing to impose the midterm. He argues that there are several factors justifying imposition of the midterm.

As the Attorney General argues, defendant waived his sentencing claim because he failed to object to the aggravated term below. The issue is therefore waived. (*People v. Scott* (1994) 9 Cal.4th 331, 352-353, 356 [“complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal”].)

To obviate a claim that defendant was denied the effective assistance of counsel, we nevertheless address his sentencing issue. The record demonstrates that no error occurred.

Defendant complains that the court relied on his pedophilia as an aggravating factor although California Rules of Court, rule 4.423(b)(2) provides that a defendant’s mental condition is a circumstance in mitigation. He cites two out-of-state death penalty cases in support of his claim. (*Crain v. State* (Fla. 2004) 894 So.2d 59, 62; *Com. v.*

¹ *People v. Harvey* (1979) 25 Cal.3d 754.

Edmiston (Pa. 2004) 851 A.2d 883, 886.) While the *Crain* court recognized pedophilia as a nonstatutory mitigation circumstance (*Crain, supra*, 894 So.2d at p. 67, fn. 9), the court in *Edmiston* rejected the defendant's claim that his trial counsel erred in failing to introduce expert testimony that the defendant was a pedophile as a mitigating circumstance (*Edmiston, supra*, 851 A.2d at pp. 892-893). Neither case is persuasive authority for defendant's claim here. In any event, a single factor in aggravation is sufficient to impose the aggravated term. (*People v. Osband* (1996) 13 Cal.4th 622, 732.) Defendant concedes that the factors of the offenses indicating planning, and the vulnerability of the victim or taking advantage of a position of trust supported imposition of the aggravated term. In addition, the court noted the seriousness of the offenses, stating that it was taking into account the "incredibly long period of time" during which the offenses occurred. The court had before it not only the two counts which defendant admitted, but was permitted to consider the other charges that were dismissed with the *Harvey* waiver in sentencing defendant. Given the continuous sexual molestation of the victim over a 10-year period, the court properly relied on the seriousness of the offenses as well as the other factors it cited in imposing the aggravated term.

In sentencing defendant, the court acknowledged defendant's mitigating circumstances of his early plea and his lack of a prior record, but determined that the aggravating factors prevailed. (See *People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637 [trial court may minimize or disregard mitigating factors without stating its reasons].) Even if the court relied on an improper aggravating factor, any error was harmless. On this record, it is not reasonably probable that defendant would obtain a more favorable result on remand. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defendant also asserts that the trial court's imposition of the upper term deprived him of his right to a jury trial under *Blakely* because the sentencing decision was based on facts neither admitted by him nor found true by a jury. He acknowledges that his claim was recently rejected by our Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238. In *Black*, our Supreme Court determined that *Blakely* does not apply to California's determinate sentencing scheme. "[T]he judicial factfinding that occurs when

a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant’s Sixth Amendment right to a jury trial.” (*Id.* at p. 1244.) We are bound by the court’s ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)²

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

RUVOLO, P.J.

SEPULVEDA, J.

² We note that *Blakely*’s applicability to our determinate sentencing law is now before the United States Supreme Court. (*People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], cert. granted *sub. nom. Cunningham v. California* (2006) ___ U.S. ___ [164 L.Ed.2d 47; 126 S.Ct. 1329].)