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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD NELSON PATTON, Defendant and Appellant.	H027044 (Santa Clara County Super. Ct. No. CC262233)

Appellant pleaded no contest to two counts of committing a lewd or lascivious act on a child by force, violence, menace or fear (Pen. Code, § 288, subd. (b)(1), counts one and two) and two counts of committing a lewd or lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a), counts three and four).[1] In addition, appellant admitted that as to counts two and four the victim was under the age of 14 and that he had substantial sexual contact with the victim within the meaning of Penal Code section 1203.066, subdivision (a)(8).

On October 8, 2003, the court sentenced appellant to a total term of 17 years consisting of the upper term of eight years for count one; a consecutive lower term of

[1] It appears that appellant entered an open plea recognizing that the maximum sentence would be 26 years in state prison and the minimum would be six years.

three years for count two; a consecutive mid-term of six years for count three and a concurrent mid-term of six years for count four.

On March 23, 2004, we granted appellant relief from default for failure to file a timely notice of appeal. Appellant filed a notice of appeal on March 26, 2004.

On appeal, appellant raises one issue. He contends that the trial court's decision to sentence him to the upper term on count one and to a consecutive term for count three "violates the Supreme Court's recent decision in *Blakely v. Washington* because the trial court relied on sentencing factors not necessarily admitted by [his] nolo contendere plea."

Factual Background[2]

Appellant began molesting his daughter, Jane Doe, when she was in the fourth grade. Appellant made Jane take off her clothes and get on top of him because he was going to teach her about sex. Appellant was naked. He put his hands on Jane's buttocks to move her on his body and told her to continue doing it until it felt good. Jane did not remember if appellant's penis was erect on any of these of occasions.

In early September 2001, Jane's mother was in New Jersey. Appellant was "really drunk" and told Jane that if she did not have sex with him or hold his penis, he would commit suicide by hanging himself with a noose that was set up in the garage. Jane refused to have sex with her father. Appellant walked towards the garage and locked himself inside. Jane screamed and told appellant that she was going to wake her brother, who was sleeping in the house. When the door opened, Jane saw that appellant had started to hang himself. Jane " 'lifted' " appellant back onto the ladder. Thereupon, appellant got down. Appellant took Jane to his bedroom. He took off his clothes and told Jane to remove her clothes. Jane did not want to take off her clothes, but appellant threatened to kill himself if she refused. Appellant made Jane hold his penis and squeeze

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[2] Since appellant entered his plea before a preliminary hearing, the facts are taken from the probation report.

it. He touched her vagina and breasts with his hands. Then he got on top of her and rubbed his penis over her entire body. Appellant touched her vagina with his penis, but did not penetrate her. This went on all night. Anytime that Jane refused to cooperate, appellant threatened to kill himself. For that reason Jane felt pressured to do as he said.

A few days after September 11, 2001, appellant apologized to Jane. Then, he took off his pants and made Jane look at his penis. Appellant told Jane that he wanted her to feel comfortable. Later, in the living room, appellant told Jane he was going to take his blood pressure with a blood pressure cuff. He took off his pants again, put the blood pressure cuff on his arm and made Jane hold his penis. He said that his blood pressure was low. Then, appellant put the blood pressure cuff on Jane's arm and took her blood pressure while he touched her bare vagina. He told Jane that her blood pressure was high.

In July 2002, appellant tried to show Jane how to give herself a breast examination. Appellant reached under her shirt and began rubbing her breasts.

In sentencing appellant to a total term of 17 years, the court stated that it had arrived at 17 years as follows: "Count 3 it's the midterm of six years. Count 4, the midterm of six years concurrent for a total term of six years per 1170.1 of the Penal Code. Consecutive to that referring to Count 1 the aggravated term of eight years consecutive to the six. Count 2, three years, the mitigated term consecutive for a total term of 17 years."

The trial court gave the following reasons for imposing the aggravated term on count one and a consecutive sentence on count two. As to count one, the court stated that the "events occurred repeatedly over a period of approximately four years. There are virtually no mitigators, they were all aggravators in this matter as to Count 1. The victim was incredibly vulnerable pursuant to [California Rules of Court] rule 4.421A1, this crime involved acts disclosing a high degree of cruelty and callousness. How a father can do this repeatedly to his daughter is incredibly callous. [¶] A3, the victim was very

vulnerable. The child was the daughter of this man. He threatened suicide on several occasions if she didn't comply, made her under incredible pressure. [¶] A7, other counts which are consecutive sentences could have been imposed for which concurrent sentence was imposed. [¶] And clearly, A11, defendant took advantage of a position of trust or confidence with his daughter."

With respect to the consecutive sentence on count two, the court stated that it was because the defendant "had the same victim, separate occasions which requires mandatory full time consecutive sentencing."

Discussion

Appellant contends that the trial court's decision to sentence him to the upper term on count one and to a consecutive sentence on count three violated his right under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) to have his sentence based only on facts found by the jury.[3]

Appellant concedes that Penal Code section 667.6, subdivision (d) mandates consecutive terms for counts one and two. Accordingly, he does not contest that part of his sentence.

The Attorney General argues that appellant has forfeited his claims of *Blakely* error by failing to object at sentencing based on *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).[4] In addition, the Attorney General contends that *Blakely* does not apply

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[3] From the record, it appears that the trial court imposed sentence on count three and ordered appellant to serve a consecutive sentence on count one. However, the abstract of judgment reflects that count one is the principal term and the sentence on count three was to run consecutive to count one.

[4] At issue in *Apprendi* was an enhancement under New Jersey law that could potentially double the maximum sentence for firearm possession from 10 to 20 years if a trial judge found a hate crime by the preponderance of the evidence. (*Apprendi*, *supra*, 530 U.S. at pp. 468-469.) The defendant admitted two counts of firearm possession and another offense under a plea bargain that his maximum sentence could be 20 years for two counts of firearm possession unless the court found a hate crime, in which case the maximum would be 30 years. (*Id.* at p. 470.) The defendant reserved the right to

to California's determinate sentencing law or the choice between consecutive and concurrent terms, and that any error is subject to harmless error analysis under *Chapman* v. *California* (1967) 386 U.S. 18. Alternatively, the Attorney General argues that if there was error, the prosecution should be allowed to seek a jury determination on the aggravating factors, or re-determination of the entire sentence.

In *Blakely, supra*, __ U.S. __ [124 S.Ct. 2531], the United States Supreme Court held that a sentence that exceeded the statutory maximum of the standard range for the offense based on factual findings that were made by the court, rather than by a jury, or that were admitted by the defendant, violated the defendant's Sixth Amendment right to trial by jury. (*Id*. at p.___ [124 S.Ct. at pp. 2536-2538].)

The defendant in *Blakely* pleaded guilty to second degree kidnapping involving domestic violence and the use of a firearm. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months under Washington law. (*Blakely, supra*, __ U.S. __ [124 S.Ct. at pp. 2534-2535].) Washington law provides that the court may impose a sentence above the standard range if the court finds substantial and compelling reasons justifying the exceptional sentence. After hearing the victim's description of the ordeal, the court imposed a 90-month sentence on the ground that the defendant had acted with "deliberate cruelty," one of the statutorily enumerated grounds for departing from the standard sentencing scheme. (*Id*. at p. ___ [124 S.Ct. at p. 2535].)

Faced with a more than three-year increase in his sentence, the defendant objected. Thereafter, the trial court conducted a three-day bench trial on the issue of deliberate cruelty and concluded that there were sufficient facts to support its initial finding.

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challenge the constitutionality of the enhancement statute. After an evidentiary hearing on the enhancement, the court imposed an enhanced term of 12 years on one possession count with concurrent terms on the remaining counts. (*Id.* at p. 471.) The United States Supreme Court explained that historically judges had little discretion to determine a sentence after a jury verdict, although there was some discretion "in imposing sentence *within statutory limits* in the individual case." (*Apprendi*, *supra*, 530 U.S. at p. 481.)

(*Blakely, supra*, __ U.S. __ [124 S.Ct. at pp. 2535-2536].) The defendant appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

The United States Supreme Court agreed and reversed. The court applied the rule of *Apprendi, supra*, 530 U.S. at page 490, which provides: " '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*, __ U.S. __ [124 S.Ct. at p. 2536].) The court explained, "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose *without* any additional findings." (*Id*. at p. ___ [124 S.Ct. at p. 2537].) Summarizing previous cases on this issue, the court explained that "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . , one of several specified facts . . . , or *any* aggravating fact (as [in *Blakely*]), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Id*. at p. ___ [124 S.Ct. at p. 2538], fn. omitted.) The court concluded that the defendant's sentence was invalid because it depended on a judicial finding of deliberate cruelty. (*Ibid*.)

Initially, we note that the issues of whether *Blakel*y precludes a trial court from making findings on aggravating factors in support of an upper term sentence, and *Blakely's* effect on the trial court's decision to sentence consecutively, are currently under review by the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677 (*Towne*) and *People v. Black*, review granted July 28, 2004, S126182

(*Black*).[5] Pending resolution of these issues by the Supreme Court, we must undertake a determination of whether *Blakely* applies under the circumstances presented here. We begin by addressing the forfeiture/waiver issue.

The Attorney General argues that appellant forfeited his claim of *Blakely* error by failing to object on *Apprendi* grounds at the time of sentencing.

The term "waiver" has been applied both to the intentional relinquishment of a known right and the forfeiture of a claim by failing to timely assert it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) " ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ." ' (*People v. Walker* (1991) 54 Cal.3d 1013, 1023 . . . .) ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' (*United States v. Olano* (1993) [507 U.S. 725].)" (*Id.* at p. 590, fn. omitted.)

In *People v. Scott* (1994) 9 Cal.4th 331, 351, 353 (*Scott*), the California Supreme Court held that a defendant's failure in the trial court to challenge the imposition of an aggravated sentence based on erroneous or flawed information waived the issue on appeal. The *Scott* court reasoned that its waiver rule was necessary to facilitate the prompt detection and correction of errors in the trial court, thereby reducing the number of appellate claims and preserving judicial resources.

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[5] In addition, the court has granted review on a grant and hold basis for *Towne* or *Black* or both in *People v. Sykes* (2004) 120 Cal.App.4th 1331, review granted Oct. 20, 2004, S127529; *People v. Vonner* (2004) 121 Cal.App.4th 801, review granted Oct. 20, 2004, S127824; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, review granted Nov. 17, 2004, S128417; *People v. Sample* (2004) 122 Cal.App.4th 206, review granted Dec. 1, 2004, S128561; and *People v. Lemus* (2004) 122 Cal.App.4th 614, review granted Dec. 1, 2004, S128771.

Consistently, before *Blakely*, California courts and numerous federal courts held that there was no right to a jury trial in connection with a court's imposition of *consecutive* sentences. (See e.g. *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, 1045-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982.)

Similarly, before *Apprendi,* California courts had expressly rejected the argument that there was any right to a jury trial on sentence aggravating factors (apart from death penalty cases under Pen. Code, § 190.3). California has conferred statutory rights to jury trial on enhancements (Pen. Code, § 1170.1, subd. (e)) and the issue of "whether or not the defendant has suffered" an alleged prior conviction. (Pen. Code, § 1025, subd. (b); cf. § 1158.) However, the California Supreme Court characterized these statutory rights as "limited" in *People v. Wiley* (1995) 9 Cal.4th 580, 589 (*Wiley*). Relying on *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 86, *Wiley* stated that there was no federal or state constitutional right to a jury determination of "the truth of prior conviction allegations that relate to sentencing." (*Wiley, supra,* 9 Cal.4th at p. 586.) *Wiley* explained: "[T]he ability of courts to make factual findings in conjunction with the performance of their sentencing functions never has been questioned. From the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process . . . ." (*Ibid.*)

Accordingly, even if appellant had objected to the imposition of the aggravated term, it would not have achieved the purpose of the prompt detection and correction or error in the trial court. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

Notwithstanding the foregoing, *Blakely* observed, "nothing prevents a defendant from waiving his *Apprendi* rights." (*Blakely, supra,* 124 S.Ct. at p. 2541.) In this case, appellant entered an open plea. That is, he pleaded no contest to all charges with the understanding that his maximum sentence could be as much as 26 years. In so doing, appellant waived his right to a jury trial. However, since *Blakely* was decided after appellant's sentencing hearing, appellant cannot be said to have entered a knowing and intelligent waiver of his right to a jury trial on the aggravating factors.

Consecutive Sentences

Neither *Blakely* nor *Apprendi* purports to create a jury trial right to a determination as to whether to impose consecutive sentences. Both *Blakely* and *Apprendi* involved convictions for a single count. The imposition of consecutive sentences was not at issue in *Blakely* and there is no indication that *Blakely* was intended to apply to consecutive sentences. (*Blakely, supra*, __ U.S. __ [124 S.Ct. at pp. 2534-2536]; *Apprendi, supra,* 530 U.S. at pp. 476-483, 489, fn. 15, 490.)

Moreover, in *Apprendi,* Associate Justice John Paul Stevens explained the jury trial right at issue: "We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.' [Citation.] But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond [a] reasonable doubt." (*Apprendi, supra,* 530 U.S. at pp. 483-484, fn. omitted.) The consecutive sentencing decision does not involve the facts "necessary to constitute a statutory offense." (*Id*. at p. 483.) In fact, the consecutive sentencing decision can only be made once the accused has been found beyond a reasonable doubt to have committed two or more offenses. This fully complies with the Sixth Amendment jury trial and Fourteenth Amendment due process clause rights. While those facts that affect the appropriate sentence within the range of potential terms of incarceration for

each *offense* are subject to *Blakely* and *Apprendi,* numerous courts have held that *Apprendi* does not apply to the decision to impose consecutive sentences. (*United States v. Harrison*, *supra*, 340 F.3d 497, 500; *United States v. Lafayette*, *supra*, 337 F.3d 1043, 1049-1050; *United States v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *United States v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. White* (2d Cir. 2001) 240 F.3d 127, 136; *People v. Groves*, *supra,* 107 Cal.App.4th at pp. 1230-1231.)

The Upper Term Sentence

Under California's determinate sentencing law, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. . . ." (Pen. Code, § 1170, subd. (b).)

The *Blakely* court explained that when a judge's authority to impose a particular 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. The judge acquires that authority only upon finding some additional fact." (*Blakely*, *supra*, 124 S.Ct. at p. 2538.) This does not comport with constitutional principles. (*Id*. at p. 2539.) In California, the middle term is the maximum penalty that a court may impose without making additional findings of fact. Thus, this is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, *supra*, ___ U.S. at p. ___ [124 S.Ct. at p. 2537], italics omitted.)

A violation of Penal Code section 288, subdivision (a) is punishable by three, six or eight years in state prison. Thus, the trial court could have chosen either count three or count four as the principal term and imposed six years. In addition, a violation of Penal Code section 288, subdivision (b) is punishable by three, six or eight years in state prison. Counts one and two were both violations of Penal Code section 288, subdivision (b), but, pursuant to Penal Code section 667.6 subdivision (d), full term consecutive sentences were mandatory on counts one and two.

The aggregate term of imprisonment for all convictions "shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements . . . ." (Pen. Code, § 1170.1, subd. (a).) The crimes charged in counts one and two (Pen. Code, § 288, subd. (b)) are violent sex crimes committed on different occasions against the same victim and are governed by Penal Code section 667.6, subdivision (d). Since they are governed by Penal Code section 667.6, subdivision (d), they may not be used as components of a term calculated under section 1170.1, either as a principal term or as a subordinate term. (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 125.) As noted above, the court imposed sentence on count three (the principal term) and was required to run counts one and two as full, separate, and consecutive terms pursuant to Penal Code section 667.6, subdivision (d).

Appellant, ignoring the sentence imposed orally by the judge, implicitly has argued that the court chose the sentence on count one, a violation of Penal Code section 288, subdivision (b), as the principal term and ran the sentence on count three, a violation of Penal Code section 288, subdivision (a), consecutively. In fact, the abstract of judgment reflects such a state of affairs. Ordinarily we would be able to correct the abstract of judgment on our own motion to reflect that count three is the principal term and counts one and two are to run consecutively. However, at sentencing, the court aggravated count one and mitigated count two. A defendant subject to Penal Code section 667.6, subdivision (d) must be sentenced in a manner that does not dilute the impact of full, consecutive terms of imprisonment. (*People v. Pelayo*, *supra*, 69 Cal.App.4th at p. 125.) The court was required under section 667.6, subdivision (d) to impose full term consecutive sentences. Thus, even if we were to correct the abstract of judgment to reflect the sentence as pronounced orally, appellant's sentence would be an unauthorized sentence. Although we may correct an unauthorized sentence at any time (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6), because the trial court found some

mitigating factors in this case, we feel compelled to return the matter to the lower court for resentencing.

On resentencing, the trial court should calculate the appropriate terms for counts three and four under section 1170.1, making the necessary discretionary choices concerning the length of the principal term (keeping *Blakely* in mind) and consecutive versus concurrent sentences. The terms selected should be added to the full term, consecutive sentences imposed for counts one and two.

Disposition

The matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.