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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO PEREZ et al.,

Defendants and Appellants.

B166034

(Los Angeles County
Super. Ct. No. BA226514)

APPEALS from judgments of the Superior Court of Los Angeles County,
Ruth Ann Kwan, Judge. Affirmed in part, reversed in part and remanded.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant
and Appellant Alfredo Perez.

Margis Matulionis for Defendant and Appellant Salvador Gomez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Lance E. Winters and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff
and Respondent.

Alfredo Perez and Salvador Gomez appeal from judgments entered following a jury trial in which Perez was convicted of two counts of attempted willful, premeditated murder (Pen. Code, §§ 664/187, subd. (a)) with the finding that a principal personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b); and Gomez was convicted of two counts of the lesser included offense of attempted voluntary manslaughter with the finding that he personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a)(1). Perez was sentenced to prison for 26 years and four months, plus two consecutive terms of life with the possibility of parole. Gomez was sentenced to prison for a total of 19 years and 10 months. Gomez filed an opening brief contending the record does not support his sentence. Perez's counsel filed a *Wende* Brief.¹ This court asked the parties to file a supplemental brief addressing the application to this case of *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2531]. For reasons explained in the opinion, we affirm the conviction but reverse only the sentence of Salvador Gomez and remand the matter to the superior court for resentencing and affirm the judgment of Alfredo Perez.

FACTUAL AND PROCEDURAL SUMMARY

On January 10, 2002, at approximately 1:30 p.m., Los Angeles Police Officer Michael Martinez and his partner Officer Andre Dixon made a traffic stop at a gas station at the corner of Florence Avenue and San Pedro. While standing in front of the driver's car, Officer Martinez heard a loud boom, which sounded like backfire or a shotgun blast, and saw a cream-colored Toyota vehicle slightly behind a burgundy Ford Expedition. The rear passenger of the Toyota was outside the car, approximately five to 10 feet away from the Explorer, and armed with a

¹ *People v. Wende* (1979) 25 Cal.3d 436.

sawed-off shotgun and the front passenger was armed with a pistol. Officer Martinez then heard and observed three additional “smaller booms coming from the pistol.” At that point, the gas pump near Officer Martinez “began to rattle as if the pellets or something splattered up against it making a loud dinging noise” and the officer and the traffic violator took cover, believing that the noises were shotgun blasts. The Expedition sped off in an eastbound direction and the Toyota slowly proceeded eastbound. Gomez, the rear passenger, was outside the vehicle, tossed the shotgun into the car and attempted to get back in the car. At that point, someone in the Toyota yelled, “Oh, shit, police” and the Toyota drove off in a northbound direction on San Pedro, leaving Gomez standing in the street. The officers followed in their vehicle and Gomez raised his hands to surrender. Officer Martinez identified appellant Perez as the person who fired the handgun.

Officer Martinez and his partner pursued the Toyota at a high rate of speed and Officer Martinez observed Perez toss the handgun out along the curb on San Pedro. Someone from the vehicle also discarded the shotgun out of the driver’s side of the vehicle. The officers continued to pursue the Toyota until the Toyota came to a stop and its occupants jumped out and ran. Three of the occupants ran in the same direction and one ran parallel to the officers’ vehicle. Officer Martinez directed his units to respond to a location and set up a two-block perimeter. Once the perimeter was set up, he returned to the Toyota and observed a red shotgun shell, an expended round, in the backseat. Thereafter, he returned to the location where the occupants had been found and taken into custody and identified appellant Perez as one of them. Based on what he had observed, Officer Martinez believed that possibly someone had been shot in the Explorer. The shooting had been directly into the vehicle and when it pulled over, it nearly hit a pole and two people jumped out and ran. Another officer had observed Gomez, after he had been left by his companions, get on a bus; and when he exited the bus,

he was detained. Officer Martinez went to the location where Gomez was detained and confirmed that he was the individual from the Toyota who had fired the shotgun. The Explorer vehicle was examined at the police station and damage to its door and mirror, caused by the shotgun blast, was observed. In the interior of the vehicle, there was a small hole consistent with a bullet hole.

The parties stipulated that codefendant Victor Moreno made the following statements under oath as the factual basis for his plea. He was a member of a criminal street gang known as “SOK” or “Still Out Killing” and had the moniker “KID.” His codefendant Alfredo Perez had the moniker of “CASK” and his codefendant Salvador Gomez had a street moniker of “Boo Boo.” On January 10, 2002, Moreno was driving a car containing the two fellow codefendants and two additional people. Perez was sitting in the front passenger seat and Gomez was sitting in the passenger seat behind Perez. Moreno approached a red or burgundy Ford Expedition at the corner of Florence and San Pedro and shots were fired. Moreno did not know who fired the gun but knew that shots were fired from the rear passenger side and the front passenger side. Moreno stated that earlier they had been leaving school when the Ford Explorer drove up to them and its occupants fired at him and his companions.² Moreno happened to come across the same vehicle that fired on him earlier. After the shots were fired, Moreno stopped at the corner and the police car started following them. Gomez got out of Moreno’s vehicle and Moreno drove away. At some point, Moreno stopped the vehicle and ran.

² Alfredo Perez but not Salvador Gomez was in the car with Moreno.

APPEAL OF SALVADOR GOMEZ

DISCUSSION

Appellant Gomez contends the sentence he received “does not conform to either the jury’s findings or the facts of the case” and that “[h]e should be resentenced with proper attention paid to the facts of his case.” Respondent argues that the sentence was supported by the record. On August 11, 2004, this court asked the parties to file supplemental briefs addressing the application of *Blakely v. Washington, supra*, 124 S. Ct. 2531 to this case. Our conclusion is that appellant Gomez’s sentence violates the holding of *Blakely*, which requires the sentence to be reversed and the matter be remanded to the trial court. This renders appellant’s original contention moot.

The court selected count 1, attempted voluntary manslaughter, as the principal term. As a factor in mitigation, the court stated Gomez had no prior criminal record. As factors in aggravation, the court found the crime involved great violence and threat of great bodily harm, that Gomez went out searching for the individuals in the Ford Explorer with the intent to kill and retaliate, and that because he was one of the shooters and the first to fire shots, he occupied a position of leadership. The court concluded that the aggravating factors outweighed the mitigating factors, noting “any one of the above aggravating factors in the court’s opinion would outweigh the mitigating factors” and selected the upper term of five years and six months. This term was calculated by dividing the high term for a violation of Penal Code section 192, subdivision (a) by half pursuant to Penal Code section 664, subdivision (a). For the weapon enhancement, the court selected the high term for 10 years for a total of 15 years, 6 months for count 1. The court stated the reasons for selecting the upper term for the enhancement were that the victim was particularly vulnerable and the manner in

which the crime was carried out indicated planning. With respect to count 2, Gomez was sentenced to one-third of half the midterm, or one year, and one-third of the upper term for the enhancement, which would be three years and four months, for a total of four years and four months for count 2. The court again chose the upper term for the enhancement because the victim was particularly vulnerable and the manner in which the crime was carried out indicated planning. The court chose consecutive sentences because the crimes involved separate acts of violence or threats of violence against two separate individuals.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held: “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.” In *Blakely v. Washington, supra*, 124 S.Ct. 2531, 2537 (*Blakely*), the Supreme Court held that “the ‘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. . . . In other words, the relevant ‘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.” (Italics omitted.) It appears that the holding applies to all cases not yet final when *Blakely* was decided in June 2004. (See *Schriro v. Summerlin* (2004) 542 U.S. ____ [124 S.Ct. 2519].)

In his supplemental brief, appellant argues that his sentence violates the holding in *Blakely*. We agree the court’s imposition of upper terms was a violation. Under Penal Code section 1170, subdivision (b), “[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.” Circumstances in aggravation cannot include a fact on which an enhancement is based or a fact which is an element of

the underlying offense. (Cal. Rules of Court, rule 4.420(c) and (d).) Like the “standard range” in the Washington sentencing scheme considered in *Blakely*, the middle term under California law is the maximum sentence the court can impose “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (*Blakely, supra*, 124 S.Ct. 2531, 2537.) Here, the court imposed the upper term based on several factors. The court found that the victims were especially vulnerable, that the crime was premeditated and that appellant occupied a position of leadership. Appellant was entitled to have a jury determine these facts used to impose the upper term, and the resulting sentence here is an invalid sentence.

APPEAL OF ALFREDO PEREZ

After review of the record, appellant Alfredo Perez’s court-appointed counsel filed an opening brief requesting this court to independently review the record pursuant to the holding of *People v. Wende, supra*, 25 Cal.3d 436, 441.

On November 5, 2003, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. No response to this notice was received.

On August 11, 2004, this court requested counsel to file a supplemental brief addressing the application of *Blakely, supra*, 124 S.Ct. 2531.

Appellant filed a supplemental brief arguing that *Blakely* precludes his consecutive sentences for counts 1 and 2. We disagree. The court’s decision to sentence consecutively was made after a jury had found appellant guilty beyond a reasonable doubt on the two charged offenses thus complying with the requirement of a jury trial and due process requirements. In view of the jury’s findings, imposition of consecutive sentences did not violate the holding in *Blakely*.

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278.)

DISPOSITION

The sentence of Salvador Gomez is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion and in all other respects the judgment is affirmed.

The judgment of Alfredo Perez is affirmed.

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CURRY, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.