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Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN BRUCE PERRY, Defendant and Appellant.	A104398 (Lake County Super. Ct. No. CR033930)

I. INTRODUCTION

Appellant pled guilty to one count of what was originally a six-count complaint filed against him in Lake County Superior Court. That count charged the infliction of corporal injury to a cohabitant resulting in a traumatic condition. (Pen. Code, § 273.5, subd. (a).).[1] Appellant was sentenced to the upper term of four years in prison and ordered to pay certain statutory fines. Appellant filed both a timely notice of appeal and a request for a certificate of probable cause. The trial court which sentenced him granted the latter. His appellate counsel then filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 asking that we independently review the proceedings below. We conclude that in sentencing defendant, the trial court relied on factors that must under *Blakely v. Washington* (2004) __U.S. __ [124 S.Ct. 2531] (*Blakely*), be submitted to the jury. Accordingly, we remand this matter for resentencing.

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

On June 27, 2003, Lakeport police were dispatched to the home of appellant and his wife and family on Todd Road following the hang-up of a 911 call. While enroute, the officers were told by their dispatcher that there had been three more such calls, during some of which sounds of an argument could be heard. The officers were met by Jennifer Marconi, who told them that her godmother, appellant's wife Michelle, had been assaulted by appellant. Upon arriving at the residence, the officers noted that its front door had apparently been kicked in; some debris blocked one of the front steps.

The police soon determined that appellant had left his residence when he saw the police arriving. The officers interviewed Michelle, appellant's wife, who was crying, obviously quite upset over what had gone on previously, and also appeared hurt. She had dried blood on her lip where, she said, appellant had struck her. She further told the officers that appellant had been drinking during the day and, after returning from a trip to the store with Marconi, had gotten into an argument with his wife. That argument resulted in appellant yelling at her and throwing various items around. Michelle then told appellant to leave the house, but he then slapped her across the mouth, grabbed her, and knocked her to the ground. Michelle tried to call the police, but appellant kept ripping the phone away from her. She was eventually able to get appellant out of the house, lock the doors, and complete her call to the police. Then appellant returned, started tearing up the front porch and ramp, and kicked in the front door to regain entry. At that point, Michelle put down, but did not hang up, the phone. Appellant was by then carrying a .22 caliber rifle and began walking around the house pointing the rifle at his wife as he continued to berate her. When Michelle told appellant she had called the police, he put the rifle down and left the house again.

Michelle told the officers that this was not the first time appellant had hit her and that several other such incidents were a matter of record in Sonoma County. She also

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2 This (abbreviated) statement of facts is taken from the probation report, as no preliminary hearing was held in this case.

told the officers that she did not permit appellant to stay overnight in the house because she did not trust him and was afraid of him.

The officers also spoke with Michelle and appellant's three-year old son who told them he had seen "his daddy being mean to his mommy."

On July 1, 2003, appellant was charged with six counts, four being felonies (violations of §§ 459, 273.5, subd. (a), 136.1, subd. (b)(1), 12021, subd. (c)(1)) and two being misdemeanors (§§ 417, subd. (a)(2) and 603). Two days later, appellant entered a plea of not guilty to all counts.

On July 18, 2003, the date set for appellant's preliminary hearing, appellant changed his plea to guilty to count two (the charged violation of section 273.5, subdivision (a)) in exchange for an outright dismissal of one felony count, and dismissal of the others albeit with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754. In the course of accepting this plea, the court gave appellant all the requisite advice concerning the consequences of it and elicited the appropriate waivers. Appellant then pled guilty to count two and the court accepted that plea.

On August 18, 2003, and consistent with the probation department's recommendation, the court denied appellant probation. The court set forth several specific reasons for so doing, including the "nature, seriousness and circumstances of the crime," and the fact that appellant was armed, that he inflicted injury "both physical and emotional" on his wife, the victim, that he "took advantage of a position of trust to commit the offense," that his prior convictions "are numerous and increasing in seriousness," and that his prior performance on probation "has been poor." The court then found that the circumstances in aggravation outweighed any in mitigation, and imposed the upper term of four years in state prison, restitution and parole revocation fines, and gave appellant a total of 73 days of custody credits.

Appellant filed a timely notice of appeal and also a request for a certificate of probable cause, which the trial court later granted.

III. DISCUSSION

Appellant's application for a certificate of probable cause states that the Lake County District Attorney had told his "court appointed attorney that if I would plead no contest to PC 273.5 that they would drop all other charges they filed against me and would recommend to Judge probation; . . . Instead they recommend max. sentence to probation dept. report and max. sentence to Judge A.H. Man [sic] and use the charges that they drop to persuade Judge A.H. Man [sic] to lean toward max. sentence."

In point of fact, the record is to the contrary. At the time the court accepted appellant's guilty plea to the one count of violating section 273.5, subdivision (a), the court and appellant had the following explicit dialogue:

"THE COURT: Do you understand that you will be sentenced in this matter based in part on a report and recommendation that will be prepared by the probation department?

"THE DEFENDANT: Yes, sir.

"THE COURT: And you understand that at this time no promise is being made as to what your eventual sentence in the case might be?

"THE DEFENDANT: Yes, sir. . . .

"THE COURT: Are you pleading guilty to count two because you are in fact guilty of the conduct set forth in that count?

"THE DEFENDANT: Absolutely."

It is, of course, axiomatic, that a guilty plea waives any irregularity in the proceedings which would not preclude a conviction. "Thus irregularities which could be cured, or which would not preclude subsequent proceedings to establish guilt, are waived and may not be asserted on appeal after a guilty plea." (*People* v. *Turner* (1985) 171 Cal.App.3d 116, 126.) Appellant's conviction should, thus, be affirmed.

However, there are problems relating to the sentence imposed by the trial court, i.e., the upper term of four years. We conclude this sentence violates *Blakely, supra,* __ U.S. __ [124 S.Ct. 2531].

In *Blakely,* the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely, supra*, __ U.S. __ [124 S.Ct. at p. 2537].) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) 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,* __ U.S. __ [124 S.Ct. at p. 2536].) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "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." (*Ibid*.)

In this case, the trial court imposed the aggravated term based on the following factors: (1) "the defendant was armed with or used a weapon at the time of the commission of the offense;" (2) "the defendant has engaged in violent conduct which indicates he's a danger to society;" (3) his prior convictions as an adult "are numerous and of increasing seriousness;" (4) "he was on a grant of summary probation at the time this crime was committed;" (5) "the defendant's prior performance on summary probation has been unsatisfactory." Under *Blakely*, at least four of these five factors must be determined by a jury. The trial court, therefore, violated *Blakely* by relying on these factors in sentencing appellant.

We now turn to the question of prejudice. The *Blakely* court rested its holding on *Apprendi* and, therefore, we apply the *Chapman* standard of prejudice applicable to *Apprendi* errors to the trial court's error here. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Under this test, we are required to reverse unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) We cannot conclude, beyond a reasonable doubt, that a jury would have made the requisite findings to support the aggravating factors noted above had the matter been submitted to them as

Blakely requires. Therefore, these aggravating factors cannot support the sentence imposed by the trial court. However, this conclusion does not end our analysis.

Although *Blakely* error is evaluated under the *Chapman* test, under California law "[i]n order to determine whether error by the trial court in relying upon improper factors in aggravation requires remanding for resentencing 'the reviewing court must determine if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." [Citation.]' [Citation.] However, '[t]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption.' [Citation.] Thus, the reviewing court may not simply ask whether the imposed sentence would be 'wholly unsupported or arbitrary in the absence of error' but must also reverse where it cannot determine whether the improper factor was determinative for the sentencing court. [Citation.]" (*People v. Avalos* (1984) 37 Cal.3d 216, 233.)

In answering this question, we must consider whether there are any aggravating factors that might properly have been relied on to support appellant's upper term sentence. If so, we must determine whether it is reasonably probable the trial court would have imposed a lesser sentence had it realized that some of the aggravating factors upon which it relied were not valid. Further, we must reverse if we cannot say whether the improper factors were determinative for the sentencing court.

As noted above, the trial court relied on one recidivist factor in imposing the aggravated term, namely, that defendant's prior convictions are "numerous and of increasing seriousness." It is not clear whether this factor is a "'fact of a prior conviction'" which need not be submitted to the jury (see *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223), or whether it involves a sufficiently subjective analysis so as to require a jury finding under *Blakely.*

We need not, however, answer this question. Even if the trial court could have relied on this single factor in sentencing appellant, we cannot say whether the four improper factors were determinative for the trial court or whether the trial court would

have imposed the upper term simply based on the single recidivist factor. This uncertainty alone justifies remand for resentencing.

We reach this conclusion based on the following facts: First, the trial court imposed the aggravated term after balancing five aggravating factors against a single factor in mitigation (that defendant "voluntarily acknowledged wrongdoing at an early state in the criminal process.") There is nothing in the record indicating whether the trial court's determination was based primarily on the sheer number of aggravating factors in this case or whether any one factor, such as the number and seriousness of defendant's prior convictions, bore more weight than the other factors. Second, it is not clear what weight the trial court assigned to the single mitigating factor. Therefore, we cannot determine how the trial court would have come out, even if, post-*Blakely*, it could properly weigh the number or increasing seriousness of appellant's previous convictions against the factor in mitigation identified by the court. Thus, this matter must be remanded for resentencing.

Via supplemental briefing we received after we granted the People's petition for rehearing in this case, the People make several arguments which merit comment. First of all, and citing a recent decision of the Third District in *People v. Sample* (2004) 122 Cal.App.4th 206, review granted December 1, 2004 (*Sample*), they argue that appellant has "forfeited" his right to raise the issue of *Blakely* error. We reject this view and, in so doing, express our respectful, but strong, disagreement with *Sample*. Some of our reasons for so doing were set forth recently in our recent published opinion in *People v. Butler* (2004) 122 Cal.App.4th 910 (*Butler*); others are set forth in the footnote below.[3]

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[3] In addition to the points we made in *Butler* regarding the "forfeiture" argument, we add—albeit briefly: (1) the "forfeiture" rule is, purely and simply, a federal court doctrine deriving from rule 52 of the Federal Rules of Criminal Procedure and there seems to us no point in importing such a rule into California criminal jurisprudence when this state already has a well-recognized "waiver" rule (see, e.g., *People v. Scott* (1994) 9 Cal.4th 331; and (2) under authority issued before *Sample*, there is no waiver of *Blakely* error in circumstances of this sort. (See *People v. George* (2004) 122 Cal.App.4th 419.)

Secondly, the People urge that "the aggravating factor relating to appellant's prior convictions does indeed fall within" the prior conviction exception to *Blakely*. We disagree. To be sure, one of the aggravating factors upon which the trial court relied was, as noted above, that appellant's prior convictions were "numerous and increasing in seriousness." This factor derives, of course, from rule 4.421(b)(2) of the California Rules of Court and, in *Butler*, we found that a trial court's specific reliance on that factor satisfied the "prior conviction exception" to *Blakely*. But, as we noted in *Butler*, that trial court "clearly expressed its intent to impose the upper term even if only one of the aggravating factors it identified was proper . . . ." (*Butler, supra,* 122 Cal.App.4th at p. 921.) Such is not the case here. From this record, unlike the record in *Butler*, it is impossible to tell whether the four improper factors were "determinative" for the trial court. To put it another way, we cannot determine whether that court would have imposed the upper term *based solely* on defendant's increasing criminality.

Third, the People urge that any *Blakely* error is harmless because of the "undisputed and indisputable nature of four of the five aggravating factors relied on by the trial court." Expanding on this argument, the People urge that those four aggravating factors were either admitted by appellant or "were all reflected in appellant's court file and were simply not subject to any legitimate challenge." Thus, the People continue, they involved "essentially mechanical evaluations based on the most straightforward of factual determinations."

Again, we cannot agree. In the first place, there is nothing "mechanical" about the determination of aggravating factors. Second, we interpret *Blakely* to mean that, no matter what a criminal defendant either implicitly or explicitly admits, and no matter what is reflected in a probation report or other similar record before the trial court (except possibly for the prior conviction exception already discussed), sentencing factors that result in a prison term longer than the middle term must be determined by a jury and not a judge. This did not occur here and, therefore, we must remand for resentencing.

IV. DISPOSITION

Appellant's conviction is affirmed; however, the matter is remanded to the trial court for resentencing in light of *Blakely, supra,* __ U.S. __ [124 S.Ct. 2531].

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Haerle, J.

We concur:

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Kline, P.J.

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Lambden, J.