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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. JOSEPH JAMES RAMIREZ, Defendant and Appellant.	H027409 (Santa Clara County Super. Ct. No. CC108884)

A jury convicted appellant Joseph Ramirez of two counts of lewd act on a child by force (Pen. Code, § 288 subd. (b), counts one and two); sexual battery by unlawful restraint (Pen. Code, §§ 242/243.4 subd. (a), count five); and sexual penetration by force (Pen. Code, § 289, subd. (a)(1), count six). As to counts one, two and six, the jury found true an allegation that appellant committed an offense specified in Penal Code section 667.61, subdivision (c) against more than one victim.[1] (See case number H024606.)

Appellant appealed his conviction and his initial sentence of 45 years to life in state prison. In an unpublished opinion, (H024606 filed January 6, 2004), we reversed appellant's conviction on count six, reduced the conviction on count five to a misdemeanor and remanded the case to the trial court for resentencing.

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[1] We have taken judicial notice of the record in case number H024606.

On April 8, 2004, the trial court resentenced appellant to a total term of 16 years in state prison on counts one and two, consisting of the upper term of eight years on count one and a full, consecutive term of eight years on count two. In addition, the court imposed a concurrent county jail term of six months on count five and a $200 restitution fine. The court granted custody credits of 449 days consisting of 391 actual days and 58 days of Penal Code section 4019 conduct credits.

Appellant filed a timely notice of appeal on April 28, 2004.

In this appeal after resentencing, appellant contends that the trial court's imposition of full, separate, and consecutive terms for counts one and two violates *Blakely v. Washington* (2004) 542 U.S. — [124 S.Ct. 2531] (*Blakely*). In addition, appellant contends that the trial court erred by failing to recalculate and update his custody credits to the date of resentencing. The Attorney General concedes that appellant is entitled to have his custody credits recalculated. We find sentencing error in this case for the reasons outlined in this opinion and remand to the trial court for resentencing.

Briefly, we recite the facts of this case as they pertain to this appeal.

Facts

Counts One and Two

During 2000 and part of 2001, 13-year-old Francis lived in San Jose with her older sister, her brothers and her aunt Jenny. In addition, Jenny's daughter Candy, a granddaughter Pamela, and appellant, lived in the house. The house had four bedrooms. Francis and her sister shared a room and slept in bunk beds. Appellant had the bedroom next to theirs.

Francis testified to an incident that occurred when she and her older sister were alone with appellant in the house. Her sister was in the bathroom cleaning her shoes when appellant called Francis into his bedroom and told her to lie on the bed. Appellant was already on the bed, lying on his right side. He was wearing his clothes. Francis lay on her right side in front of appellant. Appellant "scooted" her closer to him with his left

hand, placed his right had over her mouth and told her not to say anything. Appellant's erect penis touched her "butt" through the outside of her clothes. The touching stopped when the doorbell rang and Francis got up to answer the door.

On another day, appellant called Francis into the bedroom again. This time, lying on his right side he used his left hand to put a blanket over her month, told her not to say anything, and then put his right arm over her waist and began pulling her closer to him. Francis felt appellant start to do the same things as he had done on the previous occasion. Then, he touched her "private parts" with his hand. Appellant's fingers touched Francis's back and stomach as he tried to go under the front of her pants.

Discussion

Full Term Consecutive Sentences

In sentencing appellant to the eight years on count one and the consecutive eight years on count two, the trial court stated that it was "using the upper term since the factors in aggravation outweigh those in mitigation."

In a supplemental probation report, the probation officer made the following recommendation. "As the defendant committed Multiple Violent Sexual Acts, which also occurred on separate occasions, a full, separate and consecutive terms [*sic*] shall be imposed as to each remaining count, pursuant to Section 667.6 (d) of the Penal Code. As the defendant's actions involved violent conduct, which indicates a serious danger to society, it is respectfully recommended the defendant serve an aggravated term of 16 years in the California Department of Corrections."

The probation report notes three factors in aggravation: First, "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." Second, [t]he defendant took advantage of a position of trust or confidence to commit the offense." Finally, "[t]he defendant has engaged in violent conduct, which indicates a serious danger to society." The one factor in mitigation is noted as "[t]he defendant has no prior record, or an

insignificant record of criminal conduct, considering the recency and frequency of prior crimes."

Appellant filed a Statement in Mitigation in which he asked the court to grant him probation or impose the lower term for one violation of Penal Code section 288, subdivision (b) and run the remaining counts concurrently.

At the resentencing hearing, the prosecutor agreed with the probation officer's recommendation that the court impose upper terms on counts one and two. Defense counsel argued that the probation officer had used faulty logic in recommending the upper term. He pointed out that appellant did not have a prior criminal record.

In reply, the trial court noted that the "probation officer indicates that the defendant committed multiple violent sexual acts, namely the two counts. This also occurred on separate occasions. And the probation officer, therefore, is recommending the upper term since the defendant's actions involve violent conduct which indicated a serious danger to society."

Defense counsel argued that the probation officer's recommendation was based on the "illegal dual use of facts." In addition, counsel argued that the court should impose the lower term because defendant did not have a prior criminal conviction. Further, counsel urged the court to consider that the "crimes could be viewed as committed so closely in time and place as to indicate a single period of aberrant behavior."

The court sentenced defendant, stating: "In this matter, it is ordered that probation be denied in view of the nature and circumstances of the case. [¶] As to Counts 1 and 2, it is the judgment of the Court that the defendant be committed to the State Department of Corrections as to Count 1 for the upper term of eight years; and as to Count 2, for the upper term of eight years. [¶] Those terms to run consecutively to the sentence in -- Count 2 to run consecutive to the sentence imposed as to Count 1. [¶] The Court is using the upper term since the factors in aggravation outweigh those in mitigation."

Relying on *Blakely, supra,* 542 U.S. — [124 S.Ct. 2531], defendant argues that the court erred by imposing full, separate and consecutive terms as to counts one and two and by electing to impose the upper term because the factual determination necessary to make such section applicable to his sentence was not tried to, and found true by a jury.

The Attorney General counters that defendant has forfeited his claims by failing to object below, *Blakely* does not apply to consecutive sentencing, and any error in sentencing defendant to aggravated terms was harmless beyond a reasonable doubt.

Initially, we note that the effect of *Blakely* on California's Determinate Sentencing Law is pending before our Supreme Court.[2] Pending resolution of these issues by the Supreme Court, we will undertake a determination of whether *Blakely* applies under the circumstances presented here. We begin by addressing the forfeiture/waiver issue.

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

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[2] The Supreme Court has granted review in two cases involving *Blakely* issues. *People v. Towne*, review granted July 14, 2004, S125677and *People v. Black*, review granted July 28, 2004, S126182. In addition, the court has granted review on a grant and hold basis for *Towne* or *Black* or both in several cases including *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; *People v. Lemus* (2004) 122 Cal.App.4th 614, review granted Dec. 1, 2004, S128771; *People v. Jaffee* (2004) 122 Cal.App.4th 1559, review granted Jan. 26, 2005, S129344 and *People v. Ackerman* (2004) 124 Cal.App.4th 184, review granted Feb. 23, 2005, S130086.

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, (*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. (*Id*. at p. 353.)

Before *Apprendi v. New Jersey* (2000) 530 U.S. 466, 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 on 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.*)

We note that defense counsel strenuously objected to the imposition of aggravated terms, arguing that the probation officer's recommendation rested on faulty logic. Furthermore, defense counsel urged that the court impose concurrent sentences.

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.) "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.)

Furthermore, since *Blakely* was decided after defendant's sentencing hearing, defendant cannot be said to have entered a knowing and intelligent waiver of his right to a jury trial on the aggravating factors.

Accordingly, we will address defendant's claims on the merits.

Blakely and Apprendi

In *Blakely, supra*, 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 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,* 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. 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. (*Blakely, supra*, 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*, 124 S.Ct. at p. 2536.) The court explained, "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.* [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. 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. 2538, fn. omitted.) The court concluded that the defendant's sentence was invalid because it depended on a judicial finding of deliberate cruelty. (*Ibid*.)

Consecutive Sentences for Counts One and Two

Essentially, defendant contends that the maximum sentence that could be imposed would be the middle term of six years for count one, plus a concurrent term of six years

for count two. He argues that concurrent terms are the presumptive maximum sentence in this state.

In this case, it appears that the court sentenced defendant under Penal Code section 667.6, subdivision (d), which mandates consecutive sentences if the court finds that certain enumerated sex crimes were committed against the same victim on separate occasions.[3] Although the court did not expressly cite to Penal Code section 667.6, subdivision (d) when imposing sentence, both the prosecution and the Probation Report stated that the section applied and urged the court to sentence under that code section.

Defendant argues that because the court's finding that counts one and two occurred on separate occasions operated to increase his sentence beyond the presumptive maximum sentence, *Blakely* establishes that he was deprived of his constitutional right to a jury trial when the court made the determination to sentence him under Penal Code section 667.6 subdivision (d).

Defendant's argument does not persuade us. 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*, 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

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[3] Relevant to this case, Penal Code section 667.6 subdivision (d) states: "(d) A full, separate, and consecutive term shall be served for each violation of . . . subdivision (b) of Section 288, ... on the victim or another person if the crimes involve separate victims or involve the same victim on separate occasions."

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.)

Furthermore, "[w]hile there is a statutory presumption in favor of the middle term as the sentence for an offense ([Pen. Code] § 1170, subd. (b)), there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Moreover, in *People v. Groves, supra,* 107 Cal.App.4th 1227 (*Groves*), the trial court imposed consecutive terms for two counts of forcible oral copulation pursuant to Penal Code section 667.6, based on its finding that the oral copulations occurred on separate occasions. (See Cal. Rules of Court, rule 4.425(a)(1).) The defendant argued that the "imposition of these two consecutive terms without a jury finding that the offenses occurred on separate occasions violated his federal constitutional rights to a jury trial and to due process. [Citations.]" (*Groves, supra,* at p. 1230, fn. omitted.)

The *Groves* court held the imposition of consecutive terms under Penal Code section 667.6 "does not constitute an increase in the maximum possible sentence." (*Groves*, *supra*, at p. 1231.) Therefore, due process did not require that the finding of separate occasions be made beyond a reasonable doubt, and *Apprendi* did not require that a jury rather than the trial court make the finding. (*Id.* at pp. 1231-1232.)

We see no reason to depart from the holding of *Groves* in light of *Blakely*. Accordingly, we reject defendant's challenge to the imposition of consecutive sentencing under Penal Code section 667.6, subdivision (d).

The Aggravated Terms

Defendant contends that *Blakely* applies to the imposition of the upper terms on counts one and two.

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).)

As noted above, 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*, 124 S.Ct. at p. 2537, italics omitted.)

Accordingly, we must determine whether any of the factors the trial court used to impose the upper terms violates *Blakely*. To be in harmony with *Blakely*, the Constitution requires a jury trial on any fact that "the law makes essential to the

punishment," other than the fact of a defendant's prior conviction. (*Blakely, supra,* 124 S.Ct. at p. 2537 and fn. 5, also p. 2540.)

Applying this standard here, we conclude that the trial court could not rely on any of the cited factors as a basis for imposing the upper term sentences. As noted above, impliedly the court relied on three factors. These factors are that the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; the defendant took advantage of a position of trust or confidence to commit the offense; and the defendant engaged in violent conduct, which indicates a serious danger to society. None of these factors were found by the jury, or admitted by the defendant.

In accordance with the analysis of *Blakely,* the trial court was required to afford appellant the right to a jury trial before relying on the cited factors as aggravating factors supporting the imposition of the upper term. Remand for resentencing is the appropriate remedy. (*Blakely, supra*, 124 S.Ct. at p. 2543.)

Custody Credits

When the court sentenced defendant the first time on June 7, 2002, the court granted custody credits of 449 days, consisting of 391 actual days and 58 conduct days. At the resentencing hearing on April 28, 2004, the court once again granted custody credits of 449 days, consisting of 391 actual days and 58 conduct days.

Defendant argues that he was entitled to have his custody credits updated. The Attorney General concedes the issue. We agree.

Having modified defendant's sentence on remand, the trial court "was obliged, in its new abstract of judgment, to credit him with all *actual* days he had spent in custody, whether in jail or prison, up to that time." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 37.)

Accordingly, at resentencing, the court should update and credit defendant with the *actual* days he has spent in custody since the first sentencing hearing.

Disposition

The judgment is reversed. The case is remanded to the lower court for the limited purpose of resentencing in a manner consistent with this opinion; and recalculation of defendant's custody credits.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.