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Opinion following remand from U.S. Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGELIO ROBLES,

Defendant and Appellant.

F045695

(Super. Ct. No. 54533)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Deanna F. Lamb, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Louis M. Vasquez, Brian Alvarez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Cornell, J. and Gomes, J.

On January 31, 2001, appellant Rogelio Robles was convicted of voluntary manslaughter (Pen. Code, § 192, subd. (a).)[1] On March 8, 2001, the trial court sentenced Robles to the aggravated term of 11 years. Following a timely appeal, in an unpublished opinion dated January 22, 2003, this court reversed Robles's conviction based on instructional error.[2]

Following a retrial, on December 8, 2003, Robles was again convicted by a jury of voluntary manslaughter. On May 5, 2004, the court sentenced Robles to the aggravated term of 11 years.

On June 8, 2004, Robles filed a timely appeal. On March 2, 2005, Robles filed his opening brief, citing *Blakely v. Washington* (2004) 542 U. S. 296 (*Blakely*) to argue that the imposition of the aggravated term based on facts not found true by a jury beyond a reasonable doubt violated his Sixth Amendment right to a jury trial.

On October 19, 2005, we relied on *People v. Black* (2005) 35 Cal.4th 1238 to reject this contention.

On November 17, 2005, Robles petitioned for review in the California Supreme Court. Following the denial of this petition, on March 29, 2006, Robles petitioned for a writ of certiorari in the United States Supreme Court.

On January 22, 2007, the United States Supreme Court issued its opinion in *Cunningham v. California* (2007) ____ U. S. ___ [127 S.Ct. 856] (*Cunningham*), holding that *Blakely* applies under California law.

On February 20, 2007, the United States Supreme Court granted Robles's petition for writ of certiorari, vacating the judgment in this matter and remanding it back to this court for further consideration in light of *Cunningham*.

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

[2] Respondent's motion for judicial notice of this court's opinion in case No. F037996, filed on January 22, 2003, is hereby granted.

On March 16, 2007, Robles filed a supplemental opening brief, again arguing that under *Cunningham* the imposition of the aggravated term based on facts not found true by a jury violated his right to jury under the Sixth and Fourteenth Amendments. Robles also contends that California case law and the Fifth Amendment's double jeopardy clause require that his aggravated term be reduced to the middle term. We will find that the court committed *Blakely* error and remand for further proceedings. In all other respects, we will affirm.

FACTS

On February 24, 2000, Robles was driving a car in Visalia with Humberto Iniguiz, Felipe Aceves, and Adolfo Godinez. Robles had in his possession a .30-caliber rifle, which he gave to Iniguiz, the front seat passenger, to hold.

At approximately 1:00 a.m. Robles pulled over on Mooney Boulevard because Iniguiz, who had been drinking, felt nauseated. During the stop Aceves got out of the car and began spray-painting graffiti on a car belonging to Samson San Miguel. Meanwhile, San Miguel and Gabriel Ward came out of a house located on a cul de sac that abutted Mooney Boulevard and began fighting with Aceves.

Robles then exited the car with the rifle and fired four shots at San Miguel and Ward, striking Ward, who was unarmed, in the back of the head as he ran back toward the house in the cul de sac. During the trial Robles testified that he recalled firing three times in the direction of Ward and San Miguel in order to scare them because they were beating his friend.

In sentencing Robles to the aggravated term of 11 years, the trial court stated:

> "This individual, Mr. Ward, although he was engaged in a fight with somebody who was vandalizing property there, spray painting a car, once that confrontation clearly ended, Mr. Ward was on his way out as fast he could when this defendant aimed, pulled the trigger more than once, and shot him in the head. This is an aggravated offense. I'm going to make the following findings:

"The crime involved great violence, great bodily harm, [disclosing] a high degree of viciousness or callousness as the defendant fired a high powered rifle multiple times [California Rules of Court, rule 4.421(a)(1)].[3]

"Defendant was armed at the time of the commission [of the offense] [rule] 4.421(a)(2).

"[The victim] was particularly vulnerable and unarmed, running away when the defendant discharged the firearm, [rule] 4.421(a)(3).

"Factor in mitigation, defendant has no prior record of criminal conduct, [rule 4.423(b)(1)].

"Based on the significance of the offense, of course, I [] believe that probation is inappropriate.

"Based upon the factors in aggravation, also, . . . I believe it's the aggravated term, and I am certain of this, based upon the seriousness of the offense, the aggravated term is more appropriate."

DISCUSSION

The Court Committed Blakely Error

Robles contends that the court committed *Blakely* error because it imposed the aggravated term on his voluntary manslaughter conviction based on factors that were not found true by a jury beyond a reasonable doubt. He further contends *People v. Najera* (1972) 8 Cal.3d 504 (*Najera*) and double jeopardy principles require a reduction of his aggravated term to the middle term. We will find that the court committed *Blakely* error and remand for further proceedings.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), a five-justice majority of 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." (*Id*. at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a

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3 All further rule references are to the California Rules of Court.

judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.]" (*Blakely*, *supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California's determinate sentencing scheme, the upper term can only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham*, *supra*, 549 U.S. at p. ____ [127 S.Ct. at p. 868].)

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence: (1) "'the fact of a prior conviction'" (*Blakely*, *supra*, 542 U.S. at p. 301); (2) "facts reflected in the jury verdict" (*id*. at p. 303, italics omitted); and (3) facts "admitted by the defendant" (*ibid*., italics omitted).

Here, in imposing the aggravated term the trial court articulated one circumstance in mitigation, Robles's lack of a prior record, and three circumstances in aggravation--the callousness and viciousness of the offense, that Robles was armed during the offense, and that the victim was particularly vulnerable. However, none of the three aggravating circumstances found by the court came under any of the above-noted exceptions and they were found true by the trial court by only a preponderance of the evidence. Accordingly, we conclude that the court committed *Blakely* error when it imposed the aggravated term on Robles's manslaughter conviction based on aggravating circumstances that were not found true by a jury beyond a reasonable doubt.

The People did not Waive the Right to Retry the Aggravated Circumstances Found by the Court

Robles cites *Najera*, *supra*, 8 Cal.3d 504 to contend that his upper term on his voluntary manslaughter conviction must be reduced to the middle term because the prosecution waived any sentence above a middle term. We disagree.

In *Najera*, the information alleged that the defendant was "armed with a deadly weapon, to wit, a gun" when he committed a robbery offense. (*Najera*, *supra*, 6 Cal.3d at pp. 506-509.) However, although the People sought and obtained an instruction directing the jury to determine whether the defendant was armed with a gun during the robbery,

they did not request or receive instructions directing the jury to determine whether the defendant "used" a firearm. (*Id*. at p. 509.) Nevertheless, the court imposed the additional punishment provided for by section 12022.5 for using a firearm during the robbery.

On appeal, the People conceded that section 12022.5 was inapplicable. Further, in accepting the People's concession the court noted:

> "The question before us in the instant case is whether or not, by reason of the People's failure to request jury instructions covering that section, the People should be deemed to have waived the application of that section.
>
> "The People took no steps whatever at trial to secure a verdict or judgment stating the applicability of section 12022.5. The People did request and receive an instruction directing the jury to determine whether or not defendant was armed with a deadly weapon (as defined in another instruction) at the time of the offense. However, the People failed to request an instruction under section 12022.5 directing the jury to find whether or not defendant 'used' a firearm during the offense, as that term is defined in cases cited above." (*Najera*, *supra*, 8 Cal.3d at p. 509, fn. omitted.)

The *Najera* court further noted that, in an identical situation, the court in *People v Spencer* (1972) 22 Cal.App.3d 786 rejected the People's request to remand the matter to the trial court to allow the People to try to a jury the allegation that the defendant "used" a gun in committing the underlying offense because such a procedure would constitute a "piecemeal trial." (*Najera*, *supra*, 8 Cal.3d at p. 510.) In so doing the *Najera* court quoted as follows from *Spencer*:

> "*It seems not unreasonable to hold that the failure of the prosecution to request either the necessary jury instruction or the submission of the requisite special verdict should be taken as an indication that section 12022.5 has not been invoked*. [Citations.]" (*Najera*, *supra*, 8 Cal.3d at p. 511, italics in original quote.)

The instant case is readily distinguishable from *Najera* because it does not involve an enhancement that the People neglected to request a jury finding on through

instructions or a special verdict form. Further, since there was no requirement when Robles was sentenced that aggravating circumstances be included in the charging document or that a jury find these allegations true beyond a reasonable doubt, the People cannot be deemed to have waived the right to prove up aggravating circumstances on remand. Accordingly, we reject Robles's contention that *Najera* requires that the aggravated term on his voluntary manslaughter conviction be reduced to the middle term.

The Double Jeopardy Clause does not Bar a Retrial of the Aggravating Circumstances Found by the Court

Robles contends that penalty provisions like California's upper-term aggravating factors are the functional equivalent of elements of a greater offense than the one covered by the jury's verdict because they expose a defendant to greater punishment than that authorized by the jury's verdict. Thus, according to Robles, the federal Constitution's double jeopardy clause applies to the trial court's *Blakely* error and bars a retrial of the aggravating circumstances at issue because these principles prohibit multiple trials and they afford him the right to a trial completed before a particular tribunal. We will reject these contentions.

> "The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: '[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' We have previously held that it protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense. [Citation.] Historically, we have found double jeopardy protections inapplicable to sentencing proceedings [citation] because the determinations at issue do not place a defendant in jeopardy for an 'offense,' see, e.g., *Nichols v. United States*, 511 U.S. 738, 747 (1994) (noting that repeat-offender laws '"penaliz[e] only the last offense committed by the defendant"'). Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence 'because of the manner in which [the defendant] committed the crime of conviction.' [Citations.] An enhanced sentence imposed on a persistent offender thus 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes' but as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'

[Citations.]" (*Monge v. California* (1998) 524 U.S. 721, 727-728 (*Monge*).)

> "Sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal. We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. [Citation.] Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt. The pronouncement of sentence simply does not 'have the qualities of constitutional finality that attend an acquittal.' *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980); see also *Bullington* [*v. Missouri* (1981) 451 U.S. 430, 438] ('The imposition of a particular sentence usually is not regarded as an "acquittal" of any more severe sentence that could have been imposed')." (*Monge*, *supra*, 524 U.S. at p. 729.)

Preliminarily we note that the circumstances the court relied on to impose the aggravated term are sentencing factors and not elements of the underlying offense. (See *Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546] [failure to instruct on sentencing factor that defendant was armed with a firearm subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24].) Further, since the imposition of the aggravated term here involved a sentencing proceeding to which double jeopardy principles do not apply, under *Monge* retrial of these allegations is not barred by the double jeopardy clause.

Moreover, double jeopardy precludes a second trial only when a conviction is reversed for evidentiary insufficiency. (*Burks v. United States* (1978) 437 U.S. 1, 15-18.) Here, the basis for reversing the court's findings on the aggravating circumstances is that they were not found true by a jury beyond a reasonable doubt. Thus, even assuming that double jeopardy principles apply to a court's finding of aggravating circumstances, they do not bar a retrial of these allegations on remand.

DISPOSITION

Robles's sentence is vacated and the matter is remanded to the trial court with directions. In all other respects the judgment is affirmed. The trial court, by written

notice to counsel, and the prosecutor, by written notice to the trial court and counsel, each has the right to initiate, within 30 days after the filing of the remittitur in the trial court, a contested resentencing hearing within 60 days after the filing of the remittitur in the trial court at which the trial court shall sentence Robles in compliance with *Cunningham*. If neither the trial court nor the prosecutor initiates those proceedings, the trial court shall proceed as if the remittitur constituted a modification of the judgment to show the imposition of the middle term on Robles's voluntary manslaughter conviction. The trial court shall also issue and send to all interested parties certified copies of an appropriately amended abstract of judgment.

Robles has the right to be present at any contested resentencing hearing but not at a hearing, if any, calendared solely for amendments of his abstract of judgment. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.)