Filed 6/1/07 P. v. Rodriguez CA1/1
Opinion following remand from U.S. Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO GOMEZ RODRIGUEZ, Defendant and Appellant.	A108071 (Mendocino County Super. Ct. No. SCUKCRCR04-60854-2)

Under a plea agreement, defendant Alfredo Gomez Rodriguez pleaded guilty to committing a lewd and lascivious act on a child under the age of 14 and admitted a special allegation that he engaged in substantial sexual conduct with the victim. The trial court sentenced him to the upper term sentence of eight years. Defendant appealed from the imposition of the upper term sentence, contending that the trial court committed prejudicial error by: (1) disregarding significant mitigating factors shown in the record, and (2) relying on aggravating circumstances neither admitted in his plea nor proven beyond a reasonable doubt to a jury. We affirmed the judgment in an opinion issued on September 29, 2005.

On February 20, 2007, the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to this court for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*). We have recalled the remittitur and afforded the parties an opportunity to file supplemental briefs on the effect of *Cunningham* on the issues presented. We now vacate defendant's upper

term sentence and remand the case to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] (*Blakely*) and *Cunningham*.

I. BACKGROUND

Defendant was charged by information with committing a lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a); count one),[1] forcible oral copulation on a child under the age of 14 (§ 288a, subd. (c)(1); count two), and sodomy on a child under the age of 14 (§ 286, subd. (c)(1); count three). The information further alleged that defendant committed substantial sexual conduct with his child victim (§ 1203.066, subd. (a)(8)), and committed the charged offenses in conjunction with the commission of a kidnapping (§§ 207, subd. (b), 667.61, subd. (e)(1)).

Under a negotiated disposition, defendant pleaded guilty to count one and admitted the section 1203.066, subdivision (a)(8) special allegation. He entered a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) permitting the court to consider the dismissed counts in sentencing. The trial court sentenced defendant to the upper term sentence of eight years. Defendant timely appealed from his sentence.

The following is based on the probation officer's presentence report and testimony given at the preliminary hearing:

E. is the 13-year-old cousin of defendant's wife. On April 2, 2004, E. and her 15-year-old sister were dropped off in the early evening at the residence of defendant and his wife, to spend the night. The girls were to sleep in the home of defendant and his wife that night because E.'s sister had gotten into an argument with their father. Defendant's wife and her four children were staying at another relative's residence that night. Defendant had told E. and her sister they could stay at the apartment and he would be gone for the night. Defendant suggested that E. sleep in his bedroom and her sister could sleep in the kids' room. E. had never stayed in defendant's residence without her cousin, his wife, being there, and she had never stayed in their bedroom.

[1] All further statutory references are to the Penal Code.

E. went to sleep on top of defendant's bed, covered by her sleeping bag. She was woken up at around 6:30 the next morning by defendant who had pulled the sleeping bag off of her. Defendant, then 31 years old, was standing over her naked and wearing a condom on his erect penis. He locked the bedroom door. Defendant crawled on top of E., pushed her down, removed her pajamas and underwear, and pushed her legs apart. She tried to push him away and told him to stop but he pushed her back down on the bed and began to fondle her breasts, and touch her all over her body. She told him to stop three or four times, but he did not comply. He orally copulated her, forced her to have intercourse, and then sodomized her.

After a while, defendant took off his condom, threw it to the floor, and began to masturbate. He then grabbed E.'s hair and told her to open her mouth. When she said no, defendant pulled harder on her hair so she opened her mouth. Defendant placed his penis into her mouth and told her to " 'suck on it,' " but she refused and just left her mouth open with his penis inside.

When defendant stopped, he told E. to take a shower. After showering, E. got dressed and defendant drove her to her father's house. On the way, he told E. that if she told anyone he would get his brother or cousin to do the same thing to her. E. did not report defendant out of fear, and because he was family.

Sometime between April and June 2004, E. wrote a letter describing what had happened on the morning of April 3. She had intended to send the letter to a television show that was doing a program on rape, but had never mailed it. E.'s grandmother found the letter in E.'s school backpack on June 25, 2004, and called police. E. was interviewed by Detective Derek Scott of the Mendocino County Sheriff's Office, and recounted to him the events described in her letter.[2]

[2] E. wrote in her letter that defendant told her he would deny it and "hurt her" if she told anyone. She did not state that defendant threatened to get his brother or cousin to do the same thing to her.

When confronted with E.'s accusations, defendant admitted that he and E. had engaged in the sex acts she described, but he maintained that she had asked him to try these acts with her. He stated that he knew what he did was wrong. Defendant denied forcing E. to have sex with him and denied threatening her at any time.

II. DISCUSSION

Defendant contends that the trial court's imposition of an upper term sentence was erroneous because the court: (1) implicitly made "findings," unsupported by the record, that certain mitigating factors proposed by defendant did not exist; and (2) made findings of aggravating circumstances in a manner that violated *Blakely*. Although we find no error in the trial court's consideration of mitigating factors, we agree that the trial court's findings concerning aggravating circumstances were improper in light of *Blakely*.

A. *Mitigating Factors*

The probation officer found one factor in mitigation under California Rules of Court, rule 4.423: "The defendant has no known prior adult criminal history . . . ." In defendant's sentencing memorandum and at the sentencing hearing, defendant's trial counsel identified other mitigating factors in addition to his lack of a prior record, including the following: (1) the event occurred under unusual circumstances that are not likely to recur; (2) defendant admitted to law enforcement upon contact that he had sexual relations with the victim; and (3) defendant's family was both supportive of and dependent on him.

Before imposing sentence the trial court discussed aggravating and mitigating circumstances as follows: "The record reflects that the defendant entered a plea of guilty or no contest to . . . lewd or lascivious acts with a child under the age of 14 years. [¶] He also admitted the first special allegation . . . that [he] had substantial sexual conduct with a victim under the age of 14. [¶] The court has reviewed the criteria affecting the defendant's eligibility for probation [and] [n]otes that under 1203.066(a)(8), the defendant is statutorily ineligible for a grant of probation because of the substantial sexual conduct. Probation is therefore denied. [¶] The court has reviewed the circumstances in aggravation versus the circumstances in mitigation. [¶] In mitigation,

[the court] notes that the defendant has no known prior adult criminal history. [¶] In aggravation, the court notes that the defendant apparently threatened the victim by threatening to have his brother or cousin do the same thing to her if she told anyone, which discloses a high degree of cruelty and callousness. [¶] There is some demonstration of planning because the defendant lured the victim to sleep in his room to commit the act. [¶] Additionally, the defendant engaged in violent conduct. As I . . . read this, it was a rape. That indicates that the defendant is very likely a danger to society. [¶] The court puts a great deal of emphasis on that one aggravating factor alone and, for that reason, believes that the aggravated term is appropriate. [¶] The defendant is hereby then sentenced with respect to count 1 . . . to a period of the aggravated term of eight years in the state prison."

According to defendant, since the court expressly mentioned only one factor in mitigation—defendant's lack of a prior criminal history—it must have found, erroneously, that no other factors in mitigation were true. Defendant emphasizes three circumstances that went unmentioned by the court—his early acknowledgement of wrongdoing, the unlikeliness of a recurrence of the offense, and family factors. Defendant maintains that these circumstances were each fully supported by the evidence and should have been weighed in favor of a midterm or mitigated sentence. But rather than arguing on appeal that the trial court abused its discretion in failing to give due weight to these factors, defendant contends that the substantial evidence test must govern our review. In his view, the trial court's failure to cite these factors must be reviewed as if it were an implicit factual finding—unsupported by any substantial evidence in the record—that these factors did not exist.

We are not persuaded. Defendant treats the trial court's statement of its reasons for imposing the upper term as if it was supposed to serve as an exhaustive list of facts found true and not true by the court. It was not. When the trial court selects an upper term, it must make "a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." (Cal. Rules of Court, rule 4.420(e); see also, § 1170, subd. (b) ["[t]he court shall set forth on

the record the facts and reasons for imposing the upper or lower term"].) By opting to mention only one mitigating factor in its "concise statement" the court was in no way excluding the existence of other mitigating factors, either implicitly or otherwise. The court may well have been signaling that it did not lend much weight to defendant's proposed mitigating factors (apart from his clean criminal record) but it is impossible to read more into it than that.

Even if the existence of a particular circumstance in mitigation is undisputed, the weight or significance, if any, that the court attaches to that circumstance is a matter within its discretion. (See *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) Subject to ordinary appellate review for abuse of discretion, the trial court in this case was free to minimize or disregard any of the factors defendant offered in mitigation, and it was under no requirement to state its reasons for doing so. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401; *People v. Salazar* (1983) 144 Cal.App.3d 799, 813.)

Although defendant attempts to frame his objection on appeal as a nonwaivable challenge to the sufficiency of the evidence, it boils down in the end to a complaint about "the manner in which the trial court exercise[d] its sentencing discretion and articulate[d] its supporting reasons." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) We therefore agree with the People's position that defendant waived his current claim by failing to timely raise it in the trial court. (*Ibid*.) In any event, we would find no abuse of discretion even if the issue had been properly preserved for appellate review.

The trial court properly declined to give influential weight to the mitigating factors defendant has emphasized on appeal. First, defendant never in fact fully acknowledged his wrongdoing. Instead of admitting that he raped the victim, he insisted that she had seduced him. This denial compounded the harm to the victim by rupturing formerly close family relationships, including that between the victim and her cousin.[3] Second, defendant's claim that the incident occurred under unusual circumstances and is not

[3] This was discussed in the probation report and referred to in the victim impact statement made by E.'s grandmother.

likely to recur is unconvincing. As the trial court noted, defendant's commission of a forcible rape makes him a danger to society. The "unusual circumstance" in this case was simply that the female victim was sleeping at defendant's house when his own family was staying elsewhere overnight. But defendant returned to the house to attack the victim at 6:30 a.m. while her sister slept in a nearby room. That defendant was unable to resist the impulse to sexually assault his wife's 13-year-old cousin in those circumstances does little to establish that his risk of committing future sexual offenses is low. Finally, although defendant has family support and his immediate family is dependent on him, he has maintained family support in part by falsely impugning the conduct of his young victim. Although the hardship that defendant's prison term will work on his wife and children is unfortunate, that is not alone sufficient to warrant a lesser sentence in view of the severity of his criminal conduct.

The court twice stated during the sentencing hearing that it had in fact considered the defendant's statement in mitigation as well as the probation officer's report.[4] We find no error, abuse of discretion, or insufficiency of the evidence in the trial court's identification or consideration of mitigating factors.

B. Blakely *Error*

In reliance on *Blakely*, *supra*, 542 U.S. 296, defendant claims that the trial court violated his Sixth Amendment right to a jury trial by imposing an upper term sentence on

[4] Before hearing argument, the court stated: "The court has read the . . . probation officer's report and recommendation. I've also read the defendant's statement in mitigation of the sentence. [¶] I'm inclined to go along with the probation officer's recommendation. This was, in the court's opinion, essentially a rape of a young child." At the close of argument, the court stated: "Well, as I read the defense statement in mitigation, it's based upon some contest as to, in part, whether this was in fact a rape. So we have a contest as to the facts. [¶] The court still finds that this is violent conduct as apparently determined by the probation department from the police reports . . . . [¶] [reading from probation report] [Defendant] came back to the bed and took off her shirt. She said she pushed [defendant] off and said, 'Alfred stop,' but he kept going. [end of reading] Well, that's violence."

the basis of aggravating circumstances neither admitted by him as part of his plea nor found true by a jury beyond a reasonable doubt.

The People contend that defendant's *Blakely* claims must be rejected without consideration of their merits because he: (1) failed to obtain a certificate of probable cause before filing his appeal, and (2) failed to raise the issue of *Blakely* error in the trial court even though his sentencing took place after the *Blakely* opinion was filed. Neither of these claims was raised in the People's original briefing in this case despite ample notice in defendant's briefing that he had not obtained a certificate of probable cause or raised his *Blakely* claim in the trial court. The People made a decision instead to rest solely on the argument that the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238 foreclosed defendant's *Blakely* claim on the merits. In our view, the People have therefore waived both of these procedural barriers to our consideration of the *Blakely* claim.

We hold that the trial court violated defendant's Sixth Amendment right to a jury trial by imposing an upper term sentence on the basis of aggravating circumstances neither admitted by him as part of his plea nor found true by a jury beyond a reasonable doubt. We decline to follow the People's suggestion that we stay these proceedings and await direction from the California Supreme Court on the proper remedy for this error, and will instead remand for resentencing in light of *Blakely*.

III. DISPOSITION

The upper term sentence of eight years is vacated and the case is remanded to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely* and *Cunningham*.[5] In all other respects, the judgment is affirmed.

[5] We are not suggesting what the sentence should be or limiting the various options open to the court on remand.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Stein, J.