Filed 4/28/05 P. v. Rosas CA2/4

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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. RICARDO ROSAS, Defendant and Appellant.	B170749 (Los Angeles County Super. Ct. No.VA066423)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Schuur, Judge. Affirmed in part, reversed in part and remanded.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Ricardo Rosas appeals from judgment entered following a remand for the limited purpose of resentencing after this court determined the trial court had erred in concluding full, consecutive sentencing was mandatory under Penal Code section 667.6, subdivision (d). Sentenced to prison for a total of 12 years for having committed three counts of forcible lewd acts upon a child (Pen. Code, § 288, subd. (b)(1)) to whom he was a stranger (Pen. Code, § 1203.66, subd. (a)(3)) with substantial sexual conduct (Pen Code, § 1203.066, subd. (a)(8)) and use of force, violence, duress, menace and fear of bodily injury (Pen. Code, § 1203.066, subd. (a)(1)), he appeals.[1]

After review of the record, appellant's court-appointed counsel filed an opening brief requesting this court to independently review the record pursuant to the holding of *People v. Wende* (1979) 25 Cal. 3d 436, 441.)

On February 23, 2004, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. An extension to file a supplemental brief was granted to May 24, 2004. On May 17, 2004, appellant filed a supplemental brief on appeal challenging the sufficiency of evidence to support his convictions.

On June 15, 2004, this court filed its opinion stating we had examined the entire record and we were satisfied that no arguable issues exist and that appellant had, 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.

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[1] The evidence, as briefly stated in our opinion filed June 13, 2003, "proved that in July 2001, appellant took the 10-year-old daughter of a woman he had recently met into the bedroom of the woman's apartment. He put the bed in front of the door, and then began a sexual assault that included the licking of the girl's vaginal area, rubbing and penetration of her vaginal area with his finger, and rubbing and penetration of her vaginal area with his penis."

On July 14, 2004, appellant filed a motion for this court to withdraw its opinion and for permission to file a supplemental brief. On July 14, 2004, this court ordered that the opinion filed on June 15, 2004, be withdrawn and permission to file appellant's supplemental brief, received July 14, 2004, was granted. Respondent was granted permission to file a supplemental response no later than August 13, 2004. Appellant was granted permission to file a supplemental reply brief by September 2, 2004. Respondent did not file a supplemental brief, nor did appellant file a supplemental reply brief.

Appellant contends based on *Blakely v. Washington* (2004) 542 U.S. ___ [124 S. Ct. 2531], remand to the trial court is required for a jury trial on the aggravating factors or alternatively for imposition of a midterm sentence on the base term and concurrent sentences on the subordinate counts.

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, and we shall assume for purposes of this review, that the holding in *Blakely* applies to all cases not yet final when that case was decided in June 2004. (See *Schriro v. Summerlin* (2004) 542 U.S. ___ [124 S.Ct. 2519].)

At sentencing, the court stated that appellant "is the worst type of predator that there is. He goes into a stranger's house. He locks a little girl in a room and then does all these things to her. I don't know what can be much worse than that. [¶] But, in any event, he's not eligible for probation, because the special allegations were found true. Probation is denied. The court selects count 1 as the principal term or the base term. And the court selects the high term of eight years. [¶] And because I do adopt all the aggravating circumstances, one through five in the probation report, and I also adopt the mitigating circumstance in the probation report.[2] The court finds the aggravating factors listed in the probation report 1 and 2 outweigh the mitigating circumstance. [¶] In considering concurrent or consecutive sentences the court adopts the aggravating circumstances 3, 4 and 5, in the probation report, and I intend to impose consecutive sentences of one-third the midterm on counts 2 and 3, and that's pursuant to California Rules of Court 4.425(D). [¶] So, the sentence then would be, on count 1, the high term of eight years; count 2, an additional and

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[2] The probation report listed as circumstances in aggravation:

"1. The crime involved a high degree of cruelty, viciousness, or callousness.

"2. The victim was particularly vulnerable.

"3. The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

"4. The defendant took advantage of trust to commit the crime.

"5. Defendant has engaged in violent conduct which indicates a serious danger to society."

As the only circumstance in mitigation, it was reported that the defendant had no prior record.

consecutive two years; and on count 3, again, an additional and consecutive two years, both those at one-third the midterm. So, the total aggregate sentence then is 12 years in prison."

Imposition of the upper term was a violation under *Blakely*. 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 the first two factors referred to in the probation report, that the crime "involved a high degree of cruelty, viciousness, or callousness" and that the victim "was particularly vulnerable." Appellant was entitled to have a jury determine the facts used to impose the upper term, and the resulting sentence here is an invalid sentence. With regard to consecutive sentences however, neither *Blakely* nor *Apprendi* purport to create a jury trial right to the determination whether to impose consecutive sentences as both cases involved a conviction for a single count. Here, the court's decision to sentence consecutively was made after a jury had found appellant guilty beyond a reasonable doubt on the three 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.*

DISPOSITION

The sentence is reversed and the matter remanded to the trial court for resentencing in accordance with the views expressed herein. In all other respects, the judgment is affirmed.

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EPSTEIN, P.J.

We concur:

HASTINGS, J.

WHITE, J.*

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*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.