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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. GEORGE SANDOVAL, Defendant and Appellant.	B173406 (Los Angeles County Super. Ct. No. KA050723)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Affirmed in part, reversed in part and remanded.

Mary Woodward Wells, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

George Sandoval appeals from judgment entered following resentencing in accordance with this court's non-published opinion filed May 21, 2003. Appellant contends he was denied his federal constitutional rights to proof beyond a reasonable doubt and a jury trial because the aggravating non-recidivist factors used to increase his sentence were not found true beyond a reasonable doubt by a jury. For reasons explained in the opinion, we remand the cause for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

Appellant had been convicted following a jury trial of grand theft vehicle (Pen. Code, § 487, subd. (d); counts 1, 2); forgery (Pen. Code, § 470, subd. (d); count 3); grand theft of personal property (Pen. Code, § 487, subd. (a); counts 4, 6), and writing a non-sufficient fund check (Pen. Code, § 476a subd. (a); counts 5, 7) with a true finding as to each count on the allegation that he took property exceeding $150,000 in value (Pen. Code, § 12022.6, subd. (a)(2)).[1]

At the resentencing hearing on December 12, 2003, the court recomputed the restitution amounts, struck the imposition of the excess value enhancements on counts 2 through 7 and exercised its discretion to impose an excess value enhancement on the total sentence. The trial court stated it was adopting the previous findings it had made as well as the findings of this court.

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[1] This court reversed the trial court orders imposing an excess value enhancement pursuant to Penal Code section 12022.6, subdivision (a)(2) on count 1 and staying the remaining six excess value enhancements, imposing consecutive sentences on counts 3 and 7 and imposing $304,976 as direct restitution. We remanded the matter to the trial court with directions to (1) exercise its discretion whether to impose a single excess value enhancement on appellant's sentence as a whole rather than on any particular count; (2) strike the remaining six excess value findings; (3) stay appellant's sentences on counts 3 and 7; and (4) hold a new hearing to recalculate restitution amounts due victims Lockhart, Chan and Rademacher. In all other respects, the judgment was affirmed and on July 25, 2003, the remittitur issued.

On June 3, 2004, the trial court ordered nunc pro tunc a corrected prison sentence of seven years, eight months, in compliance with this court's directive to stay sentencing on counts 3 and 7.[2]

DISCUSSION

Appellant contends in imposing a total prison term of seven years, eight months, the resulting sentence was based on factual findings that violated appellant's Fifth, Sixth and Fourteenth Amendment rights under the case of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] because the findings were neither found true by a jury nor held to the standard of proof beyond a reasonable doubt.

At the time of the first sentencing the court stated it had read and considered the probation officer's report and the prosecution's submitted statement in aggravation, been apprised of the civil judgment against appellant by Mr. Chan, the arguments of counsel and determined appellant was not suitable for probation. The court observed, "The probation department, in fact, recommends high-based state prison term despite the defendant's somewhat minimal criminal [history.] The court notes that, after listening to the testimony of the defendant and all of the witnesses, that the defendant was engaged in a very complex, sophisticated con game, that he conned multiple victims. [¶] It would appear from the testimony there were other victims dealing with other cars in another state. But that's not before the court at this time. [¶] Probation is denied. Defendant is sentenced as follows: He is sentenced in count 1 to the upper term, three years in state prison.

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[2] The sentence was composed of the upper term of three years for count 1, consecutive eight month (one-third the mid-term) terms for counts 2, 4, 5, and 6 and two years pursuant to Penal Code section 12022.6, subdivision (a)(2) as to the entire case. Sentences as to counts 3 and 7 were imposed and stayed.

The court does find California Rules of Court[, rule] 421(a)(3) that victim Lockhart in particular and Mr. Chan, somewhat to a lesser extent, but also was definitely, and they were especially vulnerable victims. They were unsophisticated. [¶] They were dealing with someone clearly head and shoulders above them with regard to engaging in this con that he was involved in. The court also finds California Rules of Court, rule 421(a)(8) that this crime was clearly premeditated. The planning, sophistication, and professionalism with which it was carried out without a doubt indicates that it was premeditated. And the ongoing nature of and the similarities in the cons show that this was an ongoing practice of the defendant. [¶] The court also feels that under rule 421(a)(9), it's not permitted to consider the monetary loss that was actually proven in court with regard to the actual cons that took place. [¶] However, I think that Ms. Lockhart's testimony is compelling that she was forced into bankruptcy based on the actions of the defendant. In fact, the reason she was selling her car was to avoid that very thing. And that should also be a factor in aggravation although it should be clear that the court is primarily relying on rules 421 (a)(3) and 421(a)(8)." The court felt consecutive sentences were appropriate because the crimes and their objectives were predominantly independent of each other although intertwined in a con scheme. The victims did not know each other, the acts and crimes occurred at different times and separate places. There was no indication that this was a single period of aberrant behavior.

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 that the holding applies to all cases not yet final when *Blakely* was decided in June 2004. (See *Schriro v. Summerlin* (2004) 542 U.S. ___ [124 S.Ct. 2519].)

Appellant argues that *Blakely* applies to the California determinate sentencing law. We agree. 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 two factors. The court found that the victims were especially vulnerable and that the crimes were premeditated. Appellant was entitled to have a jury determine these facts used to impose the upper term, and the resulting sentence here is an invalid sentence. While appellant claims his consecutive sentences also violate *Blakely*, neither *Blakely* nor *Apprendi* purport to create a right to a jury trial determination on whether to impose consecutive sentences.

DISPOSITION

The cause is remanded for resentencing in accordance with the views expressed in this opinion and in all other respects the judgment is affirmed.

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HASTINGS, J.

We concur:

EPSTEIN, P.J.

CURRY, J.