Filed 3/24/05 P. v. Sova CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. RALPH WILLIAM SOVA, JR, Defendant and Appellant.	H027006 (Santa Clara County Super. Ct. No. CC070251)

A complaint, filed in April 2002, charged appellant Ralph Sova, Jr. with two counts of lewd and lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (a)). Count one was alleged to have occurred between 1996 and 1999. Count two was alleged to have occurred between 1973 and 1980. On November 20, 2001, appellant pleaded guilty to both counts. On February 15, 2002, the court sentenced appellant to the upper term of eight years on count one, with a concurrent term on count two of four years.

Subsequently, the United States Supreme Court decided *Stogner v. California* (2003) 539 U.S. 607, which held that a state law extending the statute of limitations for a crime after the limitations period had expired is an unconstitutional ex post facto law. (*Id.* at pp. 632-633.) Thereafter, appellant wrote to the superior court asserting that his conviction and sentence on count two was unconstitutional. The court treated the letter

as a petition for writ of habeas corpus and issued an order to show cause. On August 8, 2003, the district attorney conceded that a writ should issue. On August 20, 2003, the court dismissed count two and ordered that appellant be resentenced on count one.

On January 16, 2004, appellant was resentenced to the upper term of eight years on the remaining count. Appellant filed a timely notice of appeal.[1]

On appeal, appellant raises three issues. First, he contends that the abstract of judgment should be amended to reflect a three-year parole period upon discharge from prison. Second, the court's order requiring him to submit to DNA testing, pursuant to Penal Code section 266 violates his Fourth Amendment rights. Finally, by way of a supplemental brief, appellant contends that the imposition of the upper term violated his federal constitutional right to proof beyond a reasonable doubt and a jury trial because a jury did not find the aggravating factors.

The People concede the first issue. We find no merit in the second, but agree that appellant's sentence violates *Blakely v. Washington* (2004) 524 U.S. — [124 S.Ct. 2531] (*Blakely*). Accordingly, we remand to the trial court for resentencing.

Facts

Appellant molested two family members. One was molested between 1973 and 1980 when she was between the ages of six and 12.[2] This molest was reported in 2000. The other family member was molested between 1996 and 1999 when she was between

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[1] Judge Hayden denied appellant's request for a certificate of probable cause on January 30, 2004. Since the validity of the plea is not directly at issue here, a certificate of probable cause is not required. (*People v. Osorio* (1987) 194 Cal.App.3d 183, 187.) Two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: search and seizure issues and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74-75.)

[2] This count was the one dismissed pursuant to *Stogner v. California*, *supra*, 539 U.S. 607.

the ages of 10 and 13. When interviewed by the police, appellant admitted that he molested both victims.[3]

Discussion

The Parole Period

When appellant was resentenced, the court advised him that parole would be either three or five years. The minute order states that appellant was advised that he was subject to a five-year parole term. The abstract of judgment contains the following notation: "Adv of 5 Years Parole."

Appellant contends that at the time he committed his crime (between 1996 and 1999), the parole period for a violation of Penal Code section 288,[4] subdivision (a) was three years, not five years as it is now.

Even though for reasons that follow we must remand this case to the trial court for resentencing, we address this issue for the guidance of the trial court at resentencing.

The People agree with appellant that imposing a five-year period of parole is an ex post facto violation.

At the time appellant committed his crime, the period of parole for a violation of section 288, subdivision (a) was three years. (Stats. 1992, ch. 695, § 12, Stats. 1993, ch. 585, § 14.) Subsequently, the Legislature amended Penal Code section 3000, which now provides that parole may be as long as five years for a defendant who violates section 288. (Stats. 2002, ch. 829, § 1.)

We agree with appellant that imposing the five-year period of parole enacted after the commission of his crime would be an ex post facto violation. (*In re Thomson* (1980) 104 Cal.App.3d 950, 954.)

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[3] Since appellant pleaded guilty, we summarized the facts from the probation report. When interviewed by the probation officer, appellant claimed that he could not remember having done anything to his victims other than touch them.

[4] Unless noted, all undesignated section references are to the Penal Code.

Penal Code Section 296

At sentencing, the trial court ordered that appellant provide DNA samples as required by section 296.

Appellant contends that the court's order requiring him to submit to DNA testing violates his Fourth Amendment rights.

Initially, the People argue that appellant has waived any Fourth Amendment challenge to Penal Code section 296. Appellant argues that he is raising an issue of "constitutional dimension, [which] involves issues of pure law, and involves an order that, being violative of the United States Constitution, is necessarily beyond the court's jurisdiction . . . ."

As the court stated in *People v. Marchand* (2002) 98 Cal.App.4th 1056, an "appellate court may examine constitutional issues raised for [the] first time on appeal, especially when enforcement of penal statute is involved." (*Id*. at p. 1061.) Accordingly, we will address the merits of appellant's claim.

Appellant recognizes that this court has recently rejected a challenge to section 296 in *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259 (*Adams*).) Appellant concedes that other courts have rejected similar challenges to Penal Code section 296 and its statutory predecessors. (See, e.g., *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505 (*Alfaro*) [noting consistent rejection of similar challenges by courts in other jurisdictions], *People v. King* (2000) 82 Cal.App.4th 1363, 1370 (*King*) [noting defendant's failure to cite any case against providing blood samples pursuant to section 290.2, the statutory predecessor of section 296].) Appellant submits, however, that these "cases are at odds with recently decided United States Supreme Court cases . . . and . . . based on faulty analysis of the Fourth Amendment doctrine."

In *Adams*, we followed *Alfaro* and *King*, concluding that section 296 served a compelling governmental interest that outweighed the diminished expectation of privacy of a person convicted of one of the enumerated crimes. (*Adams*, *supra*, 115 Cal.App.4th

at pp. 257-258.) We rejected the assertion that "special needs" beyond the normal law enforcement need must be identified for an exception to the individualized suspicion requirement. (*Id*. at p. 258.) We distinguished two United States Supreme Court cases, namely *City of Indianapolis v. Edmond* (2000) 531 U.S. 32 and *Ferguson v. City of Charleston* (2001) 532 U.S. 67. We determined that these cases involved searches of the general public rather than searches of convicted felons, who "do not enjoy the same expectation of privacy that non-convicts do." (*Adams*, *supra*, 115 Cal.App.4th at p. 258.)

We see no reason to depart from this court's opinion in *Adams*. Furthermore, we observe that the "special needs" analysis may be understood as a more particular application of the traditional balancing test of reasonableness, which is ultimately the sine qua non of the Fourth Amendment. Absent an emergency, search warrants are ordinarily required for searches involving intrusions into the human body. (*Schmerber v. California* (1966) 384 U.S. 757, 770.) However, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' " (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652.) "[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' [Citation.]" (*U.S. v. Knights* (2001) 534 U.S. 112, 118-119.) "Reasonableness . . . is measured in objective terms by examining the totality of the circumstances." (*Ohio v. Robinette* (1996) 519 U.S. 33, 39.)

"The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. [Citations.]" (*Bell v. Wolfish* (1979) 441 U.S. 520, 559 [upholding visual body-cavity inspections of

inmates without individualized suspicion of wrongdoing based upon unique security interests of detention facility].)

"[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. [Citation.] In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." (*Skinner v. Railway Labor Executives' Ass'n*. (1989) 489 U.S. 602, 624.)

The concept of individualized suspicion underlying the warrant and probable cause requirements has no role to play where a person has been convicted of a felony since law enforcement authorities have a legitimate interest in an accurate record of that individual's identity. The blood specimen required by Penal Code section 296 is not taken to discover evidence of suspected criminal wrongdoing. Given that the DNA and Forensic Identification Data Base and Data Bank Act of 1998 already provides for procedural protections and, in effect, limits the permissible use of blood specimens to identification or exclusion purposes by law enforcement agencies (see Pen. Code, §§ 295.1, subd. (a), 299.5, subds. (a), (b), (f), and (g)(1)), demanding a warrant and probable cause to believe some other crime had occurred adds no practical protection, but does completely frustrate the legitimate governmental objective.

The critical question, in our view, is whether the means used to obtain the saliva and blood specimens are reasonable within the meaning of the Fourth Amendment. (Cf. *Schmerber v. California*, *supra*, 384 U.S. at p. 768 [means and procedures employed in taking blood must respect relevant Fourth Amendment standards of reasonableness].) Blood tests are "commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." (*Schmerber v.*

California, *supra*, 384 U.S. at p. 771, fn. omitted.) Here, "[t]he withdrawal of blood shall be performed in a medically approved manner. Only health care providers trained and certified to draw blood may withdraw the blood specimens . . . ." (Pen. Code, § 298, subd. (b)(2).) Appellant does not claim, and the record does not show, that any saliva or blood test performed pursuant to the court's order implementing section 296 was, or would be, administered in an unreasonable manner.

In sum, we conclude any intrusion of appellant's legitimate privacy interests occasioned by the taking of saliva and blood specimens is minimal. As a convicted felon he has no reasonable expectation of keeping his identity private from law enforcement and the statute provides the blood be withdrawn in a reasonable manner. Further, its use is limited to identification purposes by law enforcement. This minimal intrusion is justified by the legitimate governmental interest in having an accurate record of appellant's identity as a convicted felon. (Cf. *People v. Adams*, *supra*, 115 Cal.App.4th 243, 259.) The fact that appellant's DNA and forensic identification profile will be entered into a governmental databank for future law enforcement purposes does not render the taking of saliva and blood for identification analysis unreasonable under the Fourth Amendment. This is no different than law enforcement considering photographs or fingerprints of known convicts that are part of their criminal record when investigating other crimes.

Thus, we reject appellant's challenge to section 296.

The Aggravated Term

After count two was dismissed pursuant to *Stogner v. California, supra*, 539 U.S. 607, appellant was resentenced on count one. The court sentenced appellant to the upper term of eight years stating: "I believe that is justified by the defendant's conduct. He is not entitled in my opinion to any reduction as a result of the technical loss of Count 2. The actions he took were to a degree premeditated. Defendant took advantage of a position of trust, love and family relationships. This victim was vulnerable being in the

family. There was some planning and sophistication, professionalism about the way he carried it out and took advantage of the position of trust or confidence to commit this offense."

Appellant contends that the reasons cited by the trial court for imposing the upper term were not factors found true beyond a reasonable doubt by a jury. They are, therefore, impermissible because reliance on those factors deprived him of his Sixth Amendment right to a jury trial.

The People contend that appellant has forfeited his claims of *Blakely* error because he failed to raise a constitutional objection to his sentence at trial, *Blakely* does not apply to California's determinate sentencing law, and any error was harmless beyond a reasonable doubt.

Initially, we note that defense counsel strenuously objected to the imposition of an eight-year term.

" ' "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 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].)" (*People v. Saunders* (1993) 5 Cal.4th 580, 590.)

In *People v. Scott* (1994) 9 Cal.4th 331, 351, 353 (*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.[5] The *Scott* court reasoned that its waiver rule was necessary to facilitate the

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[5] As the Supreme Court noted in *People v. Saunders*, *supra*, 5 Cal.4th 580, 590 footnote 6, the terms waiver and forfeiture have long been used interchangeably. Waiver is different from forfeiture, however. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.

prompt detection and correction of errors in the trial court, thereby reducing the number of appellate claims and preserving judicial resources.

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.)

Similarly, 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 factors used to aggravate a sentence (apart from death penalty cases under section 190.3). California has conferred statutory rights to jury trial on enhancements (§ 1170.1, subd. (e)) and the issue of "whether or not the defendant has suffered" an alleged prior conviction. (§ 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.*)

Hence, even if appellant had objected to the imposition of the aggravated term on the grounds asserted here, it would not have achieved the purpose of the prompt detection and correction of error in the trial court. "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.)

Accordingly, we will address the merits of appellant's claim.

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. . . ." (§ 1170, subd. (b).)

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." (*Id*. at p. 2537, italics omitted.)

We cannot agree with the People's request that we apply a harmless beyond a reasonable doubt standard (*Chapman v. California* (1967) 386 U.S. 18, 24) to the *Blakely* violation in this case. The request is based upon the general principle that a single factor is sufficient to support imposition of the upper term. (See, e. g. *People v. Osband* (1996) 13 Cal.4th 622, 728.) The People argue such a result can be justified by holding that a jury would have found, as required by *Blakely*, a single aggravating factor. The People contend that as to appellant's victim, it is undisputed and "beyond a reasonable doubt that the crimes were knowingly incestuous. Thus, they were inherently aggravated and an abuse of appellant's position of trust . . . ." Furthermore, the People argue, appellant's guilty plea constitutes an admission that his victim was under the age of 14 (and thus at a vulnerable age) at the time of the lewd acts.

"[W]here, as here, an age range factor is an element of the offense, vulnerability based on age is generally not a proper aggravating factor. (*People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159 . . . ; *People v. Garcia* (1983) 147 Cal.App.3d 1103, 1104-1106 . . . ; *People v. Ginese* (1981) 121 Cal.App.3d 468, 475-477 . . . ; see rule [4.420].)" (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680.)

Additionally, the People argue that because the victim lived in appellant's home, he took advantage of her on an almost daily basis. Moreover, he avoided detection by molesting her while she was asleep in her bedroom, or while they were home alone, which shows planning and sophistication.

We find two problems with the People's position. If applicable here, it would also probably apply in every resident child molester case. (*People v. Fernandez, supra*, 226 Cal.App.3d at p. 680.) "Factors may be used to aggravate when they have the effect of 'making the offense distinctly worse than the ordinary.' [Citation.]" (*People v. Young* (1983) 146 Cal.App.3d 729, 734.) The planning, sophistication and professionalism aggravating factor contemplates a level of sophistication and planning that when compared to other ways in which the crime could have been committed, made its commission distinctly worse than the ordinary. (*People v. Charron* (1987) 193 Cal.App.3d 981, 994.)

More importantly, since appellant pleaded guilty there is no evidence from which we can conclude that a jury would have found the aggravating factors beyond a reasonable doubt.[6] Given that there was no jury determination of any appropriate aggravating factors, imposition of the upper term violates *Blakely*. Accordingly, the matter must be reversed and remanded to the trial court. (*Blakely, supra*, 124 S.Ct. at p. 2543.)

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[6] By pleading guilty, all appellant admitted was that between April 1, 1996 and June 30, 1999, he committed a lewd or lascivious act on a child under the age of 14.

Disposition

The judgment is reversed. The matter is remanded to the trial court for further proceedings not inconsistent with this opinion.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.