

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WILLIAM TILLEY,

Defendant and Appellant.

C055089

(Super. Ct. No.
06F1483)

After pleading guilty to 19 different sex crimes against two minor victims pursuant to a plea agreement, defendant Michael William Tilley was sentenced to an agreed-upon "lid" of 40 years in prison, which included an upper term sentence on one molestation count as the principal term. On appeal, defendant contends: (1) the trial court violated his Sixth Amendment rights in imposing the upper term sentence based on facts not admitted by him or found true by a jury and (2) the factors the trial court used to impose the upper term sentence and to run all of the subordinate terms consecutively were invalid under California law.

We conclude that defendant's appeal must be dismissed because he failed to obtain a certificate of probable cause.

FACTUAL AND PROCEDURAL BACKGROUND

On January 4, 2007, as part of a plea agreement that called for the dismissal of three counts and two enhancements, defendant pled guilty to 19 different sex crimes involving two different victims (both of whom were minors) and admitted two enhancements. The agreement called for a 40-year "state prison lid." Given the possible prison terms for the crimes defendant admitted, the 40-year lid could be reached only if defendant received the upper term of eight years for one of his crimes and all of the terms for the other crimes were ordered to run consecutively.

At the time of defendant's plea, *People v. Black* (2005) 35 Cal.4th 1238 had not been overruled. In *Black*, the California Supreme Court rejected the argument that *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*) applied to California's determinate sentencing law and held "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*People v. Black*, 35 Cal.4th at p. 1244.) On January 22, 2007, however, the United States Supreme Court decided *Cunningham v. California* (2007) 549 U.S. ____ [166 L.Ed.2d 856], in which the court rejected *Black* and held that California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth

Amendments" to the extent the law allows a judge to impose an upper term sentence "based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Id.* at p. ____ [166 L.Ed.2d at p. 860].)

Defendant's sentencing was originally scheduled for February 9. Two days before the hearing, however, the court continued the sentencing, in part based on defense counsel's request for time to review the *Cunningham* decision.

At sentencing on February 23, 2007, the prosecutor argued that defendant had "waiv[ed] . . . any jury trial right on aggravating factors" by "stipulat[ing] to being sentenced up to 40 years," which could be reached only by imposing an upper term on one of the charges. The trial court asked the prosecutor whether it was "in anyone's real interest to add two years to the prison term if it creates the potential that the case would be sent back by an appellate court for resentencing." When the prosecutor insisted on imposition of an upper term, the court reiterated its "concerns . . . about the *Cunningham* decision," but ultimately agreed with the prosecutor that by waiving his right to a jury trial in light of a lid that could be reached only with the imposition of an upper term sentence, defendant "knowingly waived [his] right to a jury trial on the aggravation factor that would achieve a 40-year sentence." The court proceeded to find a number of aggravating circumstances and imposed the upper term on one of the charges, then ordered all of the other terms to be served consecutively, for an aggregate term of 40 years.

Defendant filed a notice of appeal "based on the sentence or other matters occurring after the plea." Defendant did not seek, and did not obtain, a certificate of probable cause.

DISCUSSION

Relying on *Cunningham*, defendant argues that the trial court violated his Sixth Amendment right to a jury trial by imposing the upper term based on findings not made by a jury.¹ Consistent with the decision in *People v. Bobbit* (2006) 138 Cal.App.4th 445 (*Bobbit*), the People contend this argument amounts to a challenge to the validity of defendant's plea and cannot be considered on appeal without a certificate of probable cause, which defendant neither requested nor received. We agree with the People.

Generally, a defendant who has entered a plea of guilty or no contest must obtain a certificate of probable cause from the trial court to appeal. (Pen. Code, § 1237.5.) No certificate is required, however, when the grounds for appeal "arose after entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4)(B).) In determining whether a certificate is required, "the critical inquiry is whether a challenge to the sentence is in substance a challenge to the

¹ The heading of defendant's argument suggests that it also encompasses a challenge to the imposition of consecutive, rather than concurrent, sentences, but no such argument actually appears in the text, therefore we limit our discussion to the upper term issue.

validity of the plea" (*People v. Panizzon* (1996) 13 Cal.4th 68, 76, italics omitted.)

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.)'" (*People v. Shelton* (2006) 37 Cal.4th 759, 767 (*Shelton*).)

In exchange for his guilty plea, defendant secured dismissal of three felony counts and two enhancements and a sentencing lid of 40 years. The sentence imposed conformed to the agreement.

"'[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term.'" (*Bobbit, supra*, 138 Cal.App.4th at p. 447, quoting *Shelton, supra*, 37 Cal.4th at p. 768.) "Accordingly, a challenge to the trial court's authority to impose the lid sentence is a challenge to the validity of the plea requiring a certificate of probable cause." (*Shelton, supra*, at p. 763.)

Because the plea agreement here was based on a mutual understanding that, in exchange for dismissal of felony counts and enhancements, the court could order defendant to serve a 40-

year term in state prison, defendant's contention that the sentence violated *Cunningham* is in substance a challenge to the plea's validity. Such a challenge after a guilty plea requires a certificate of probable cause. (*Shelton, supra*, 37 Cal.4th at p. 763.)

Defendant claims that *Bobbit* is not on point because, in that case, the defendant "wanted to appeal 'from all pre-trial rulings, all rulings made at the time of defendant's plea and the Court's sentence.' In the present case, [defendant] is not doing that. [He] is only appealing the sentence." This attempt to distinguish *Bobbit* misses the mark. Although the notice of appeal in *Bobbit* was broad, the issue that we decided was whether he needed a certificate of probable cause to challenge the sentence imposed based on *Blakely*. (*Bobbit, supra*, 138 Cal.App.4th at p. 447.) That is precisely the issue defendant attempts to argue here, also without obtaining a certificate of probable cause.

The proper disposition when a defendant fails to obtain a certificate of probable cause in a case such as this is dismissal. (*Bobbit, supra*, 138 Cal.App.4th at p. 448.)

DISPOSITION

The appeal is dismissed.

NICHOLSON, Acting P.J.

I concur:

HULL, J.

ROBIE, J.

I respectfully dissent.

Relying on *People v. Shelton* (2006) 37 Cal.4th 759 (*Shelton*) and *People v. Bobbit* (2006) 138 Cal.App.4th 445, the majority concludes that for defendant to challenge on appeal the trial court's imposition of the upper term sentence for child molestation, he had to obtain a certificate of probable cause. I disagree. In my view, the majority has misread *Shelton*, just as the panel in *Bobbit* did. Properly understood, *Shelton* does not apply to any of the sentencing issues defendant raises here. Accordingly, I would not dismiss this appeal, but would consider it on its merits.

Defendant's first argument on appeal is that the trial court violated his Sixth Amendment right to a jury trial -- as recognized in *Cunningham v. California* (2007) 549 U.S. ____ [166 L.Ed.2d 856] -- by imposing an upper term sentence based on findings not made by a jury. The People contend this argument amounts to a challenge to the validity of defendant's plea and cannot be considered on appeal without a certificate of probable cause. As I will explain, the People are mistaken.

"Penal Code section 1237.5 provides that a defendant may not appeal 'from a judgment of conviction upon a plea of guilty or nolo contendere' unless the defendant has applied to the trial court for, and the trial court has executed and filed, 'a certificate of probable cause for such appeal.'" (*Shelton, supra*, 37 Cal.4th at p. 766.) Despite this broad statutory language, the Supreme Court has recognized two types of issues

that may be raised on appeal from a guilty or no contest plea without a certificate of probable cause: "issues relating to the validity of a search and seizure, for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m), 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. Buttram* (2003) 30 Cal.4th 773, 780.)

While the phrasing of the second exception to the requirement of a certificate of probable cause might suggest that any sentencing issue can be raised on appeal without a certificate, that is not the case. Rule 8.304(b)(4)(B) of the California Rules of Court clarifies that a defendant need not obtain a certificate of probable cause if the appeal is based on "[g]rounds that arose after entry of the plea *and do not affect the plea's validity.*" (Italics added.) Thus, to the extent what appears to be merely a sentencing issue actually amounts to a challenge to the validity of the plea, that issue cannot be raised on appeal without a certificate of probable cause.

This principle is exemplified by *Shelton*, where the Supreme Court concluded that a challenge to the trial court's legal authority to impose a "lid" sentence pursuant to a plea agreement required a certificate of probable cause. (*Shelton, supra*, 37 Cal.4th at p. 763.) In *Shelton*, the defendant agreed to "plead no contest to two counts--stalking in violation of a protective order . . . and making a criminal threat . . .--for which [the] defendant would be sentenced to a prison term not to exceed three years and eight months." (*Id.* at pp. 763-764.) At

the time of the plea, the court explained that the defendant could “argue for something less than three years and eight months,” but would receive a prison sentence. (*Id.* at p. 764.)

At the sentencing hearing, “[d]efendant’s attorney argued that the multiple punishment prohibition of Penal Code section 654 applied to the two counts to which defendant had pleaded no contest because “[t]he threat occurred at the time of the stalking and is also one of the elements of the stalking.” (*Shelton, supra*, 37 Cal.4th at p. 764.) Notwithstanding this argument, the trial court imposed the middle term of three years on the stalking charge and a consecutive eight-month term on the criminal threat charge. (*Id.* at pp. 764-765.)

On review, the Supreme Court decided that defendant needed a certificate of probable cause to “raise on appeal his claim of trial court sentencing error under Penal Code section 654.” (*Shelton, supra*, 37 Cal.4th at pp. 763, 766.) The court reasoned “that inclusion of a sentence lid implies a mutual understanding and agreement that the trial court has authority to impose the specified maximum sentence and preserves only the defendant’s right to urge that the trial court should or must exercise its discretion in favor of a shorter term.” (*Id.* at p. 763.) “Because the plea agreement was based on a mutual understanding (as determined according to principles of contract interpretation) that the court had authority to impose the lid sentence, defendant’s contention that the lid sentence violated the multiple punishment prohibition of Penal Code section 654 was in substance a challenge to the plea’s validity and thus

required a certificate of probable cause, which defendant failed to secure." (*Shelton*, at p. 769.)

Three months after *Shelton*, in *People v. Bobbit*, *supra*, 138 Cal.App.4th at page 445, a panel of this court applied the reasoning in *Shelton* to a challenge to "the trial court's authority to impose an upper term sentence in light of *Blakely v. Washington* (2004) 542 U.S. 296, [159 L.Ed.2d 403, 124 S.Ct. 2531]" -- the decision that preceded *Cunningham*. (*Bobbit*, at p. 447.) In *Bobbit*, the defendant "pled no contest to one count of sale of cocaine [citation] and one count of offering to sell cocaine [citation] and admitted that he had suffered a prior serious felony conviction," subject to "a sentencing lid of 12 years and eight months." (*Ibid.*) The trial court sentenced the defendant to the lid, apparently by using an upper term sentence. (*Ibid.*) On appeal, this court concluded that because "the plea agreement did not preserve, either at sentencing or on appeal, the issue that the court did not have the authority to impose an upper term sentence in the absence of a jury finding of one or more aggravating circumstance(s)," the appeal had to be dismissed because the defendant did not obtain a certificate of probable cause. (*Id.* at p. 448.)

Relying on *Bobbit* and *Shelton*, the People argue here -- and the majority agrees -- that defendant's challenge to the imposition of the upper term sentence is, in substance, a challenge to "the validity of his negotiated plea [to] a 40-year state prison lid," which requires a certificate of probable cause. I do not agree.

Shelton rests on the proposition "the specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose." (*Shelton, supra*, 37 Cal.4th at p. 768.) What that meant in *Shelton* was that under the plea agreement the trial court could lawfully impose an aggregate prison term of three years eight months. In effect, however, by arguing that the multiple punishment prohibition of Penal Code section 654 applied to his convictions, the defendant was arguing that the trial court could *not* lawfully impose that prison term. This was so because if Penal Code section 654 applied to the defendant's convictions, the trial court would have been required to stay imposition of the eight-month sentence on the criminal threats charge. (See *People v. Kramer* (2002) 29 Cal.4th 720, 722 ["When a defendant is convicted of two or more offenses for which [Penal Code] section 654 prohibits multiple punishment, the trial court must impose sentence for one of them and stay imposition of sentence for the others"].) In effect, by arguing that Penal Code section 654 applied to his convictions, the defendant in *Shelton* was arguing that the maximum term the trial court could lawfully impose was three years (the middle term for the stalking charge), rather than the lid of three years eight months to which he had agreed.¹ It was

¹ Obviously the trial court would have been barred by the lid of three years eight months from imposing the upper term of four

under these specific factual circumstances that the Supreme Court concluded the defendant's challenge to his sentence was, in substance, a challenge to the validity of his plea.

The same conclusion does not necessarily follow in a case like this, where the defendant seeks to raise a claim of *Blakely/Cunningham* error. In a case like this, the defendant's argument is that the trial court violated his Sixth Amendment rights by imposing the upper term sentence *based on aggravating circumstances that did not pertain to any prior convictions and that were not admitted by him or found by a jury*. In substance, this argument is not an argument that the trial court *could not* have lawfully imposed the upper term sentence to reach the lid; rather, it is an argument that the trial court *did not* lawfully impose the upper term sentence to reach the lid because the court violated *Cunningham* by relying on its own findings of aggravating circumstances that were unrelated to prior convictions.

This is a subtle but critical distinction. As the Supreme Court explained in *Shelton*, "a challenge to the trial court's authority to impose the lid is a challenge to the validity of the plea requiring a certificate of probable cause." (*Shelton, supra*, 37 Cal.4th at p. 763.) If the defendant is not challenging the trial court's *authority* to impose the lid but

years on the stalking charge. (See Pen. Code, § 646.9, subd. (b).) The only way the court could reach the lid of three years eight months was if the court imposed sentence on both charges, with the sentences to run consecutively.

only the particular manner by which the court reached the lid -- e.g., making its own findings of aggravating circumstances unrelated to prior convictions -- when the lid might have been reached lawfully another way, then the defendant's challenge is not a challenge to the validity of the plea and does not require a certificate of probable cause.

This distinction is brought into sharper focus by *People v. Buttram, supra*, 30 Cal.4th at page 773. In *Buttram*, the defendant "pled guilty to felony drug charges, and admitted two prior serious or violent felonies, in return for an agreed maximum sentence, or 'lid.' The agreement included no waiver of [the] defendant's right to appeal sentencing issues. At a contested sentencing hearing, the trial court denied [the] defendant's request for diversion to a drug treatment program, and it imposed the negotiated maximum. Without a certificate of probable cause, defendant appealed, urging that the trial court abused its sentencing discretion. In a published decision, the Court of Appeal majority dismissed the appeal for lack of a certificate." (*Id.* at p. 776.)

The Supreme Court reversed, explaining that "[b]y agreeing only to a maximum sentence, the parties leave unresolved between themselves the appropriate sentence within the maximum. That issue is left to the normal sentencing discretion of the trial court, to be exercised in a separate proceeding." (*People v. Buttram, supra*, 30 Cal.4th at p. 785.) "This exercise of discretion is not made standardless and unreviewable simply because its exercise is confined to a specified range by the

terms of a plea bargain that included no express waiver of appeal. In such a circumstance, when the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was 'part of [the] plea bargain.' [Citation.] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself." (*Id.* at pp. 785-786, italics omitted.)

Essentially, *Buttram* and *Shelton* stand for the following principles: Where the parties agree to a maximum, or lid, sentence, and the trial court imposes that sentence, any argument by defendant that the trial court lacked the authority to impose the lid generally must be considered a challenge to the validity of the plea, which requires a certificate of probable cause.² Thus, if the defendant's argument relies on a legal principle -- like Penal Code section 654's multiple punishment prohibition (as in *Shelton*) or the constitutional

² Of course, the court in *Shelton* recognized that "a prosecutor and a defendant may enter into a negotiated disposition that expressly recognizes a dispute or uncertainty about the trial court's authority to impose a specified maximum sentence . . . and preserves the defendant's right to raise that issue at sentencing and on appeal. [Citation.] In that situation, the plea agreement's validity and enforceability would be unaffected by the ultimate resolution of the disputed issue because each party could be understood to have expressly or impliedly accepted and assumed the risk that the issue would be resolved in the opposing party's favor." (*Shelton, supra*, 37 Cal.4th at p. 769.) Thus, an exception to the general rule applies when the defendant "reserve[s], either expressly or implicitly, a right to challenge the trial court's authority to impose the lid sentence." (*Ibid.*)

prohibitions against cruel and unusual punishment (as in *People v. Young* (2000) 77 Cal.App.4th 827) -- that would deprive the court of authority to impose the lid sentence *at all*, then the validity of the plea is at issue and a certificate of probable cause is required for appellate review. If, on the other hand, the defendant's argument relies on some other legal principle governing his or her sentencing that does not pose an absolute bar to imposition of the lid sentence, the validity of the plea is not at issue and no certificate is required.

For example, just as in *Buttram* the defendant did not need a certificate of probable cause to argue that the trial court abused its discretion in denying his request for diversion to a drug treatment program, in *Shelton* the defendant would not have needed a certificate to argue that the trial court abused its discretion in imposing the middle term of three years on the stalking charge, rather than the lower, mitigated term. Likewise, the defendant in *Shelton* would not have needed a certificate to argue that the trial court abused its discretion in imposing a consecutive term on the criminal threat charge, rather than a concurrent term. Neither of those arguments would have challenged the trial court's *authority* to impose the lid sentence and therefore they would not have implicated the validity of the plea.

Here, defendant's argument that the trial court committed *Blakely/Cunningham* error is equivalent to the argument that was not barred in *Buttram* and the arguments that would not have been barred in *Shelton*. It is true that defendant's assertion of

Blakely/Cunningham error here does not claim an *abuse of discretion* by the trial court, but that distinction is immaterial. The critical distinction is not in the standard of review that applies to the defendant's argument on appeal, but rather the nature of the legal principle on which the defendant relies. As I have explained, if the legal principle the defendant seeks to invoke is one that would deny the trial court authority to impose the lid sentence at all, then the defendant is challenging the validity of the plea; if, on the other hand, the legal principle the defendant seeks to invoke does not absolutely bar the trial court from imposing the lid, then the defendant is not challenging the plea's validity.

The panel in *Bobbit* failed to recognize this distinction. The *Bobbit* panel concluded that because the claim of *Blakely/Cunningham* error was not preserved by the plea agreement, a certificate of probable cause was needed. (*People v. Bobbit, supra*, 138 Cal.App.4th at p. 448.) But under *Shelton*, the only type of argument that must be expressly or implicitly preserved by the plea is an argument that the trial court lacks the authority to impose the lid sentence at all. (See *Shelton, supra*, 37 Cal.4th at p. 769; see *ante* at p. 8, fn. 2.) A challenge to the imposition of an upper term sentence under *Blakely* and *Cunningham* does not challenge the trial court's authority to impose the lid sentence, even where (as here) an upper term sentence is necessary to reach the lid. Rather, a claim of *Blakely/Cunningham* error simply asserts that the method the trial court used to reach the lid -- imposing an

upper term sentence not based on aggravating circumstances found by a jury or admitted by the defendant but based on the trial court's own findings of aggravating circumstances unrelated to prior convictions -- violated the defendant's constitutional rights. This is not a challenge to the validity of the plea. Where, as here, it was at least conceivable the trial court could have imposed the upper term sentence by relying on one or more aggravating circumstances that did not require a jury finding (i.e., prior convictions or a circumstance admitted by defendant) or by obtaining a jury finding of one or more aggravating circumstances, the defendant's claim of *Blakely/Cunningham* error is not a challenge to the trial court's authority to impose the lid sentence, but only a challenge to the manner by which the court reached the lid. Because such a challenge does not implicate the validity of the plea, no certificate of probable cause is required.

In addition to his claim of *Blakely/Cunningham* error, defendant also argues on appeal that: (1) the aggravating circumstances on which the trial court relied to impose the upper term sentence were not valid under California law; and (2) the criteria on which the trial court relied to impose consecutive sentences were also invalid. The majority does not expressly address either of these arguments. It is clear to me, however, that just like defendant's claim of *Blakely/Cunningham* error, these arguments can be raised on appeal without a certificate of probable cause. Like defendant's claim of *Blakely/Cunningham* error, these arguments do not challenge the

trial court's *authority* to impose the upper term sentence, or its *authority* to impose consecutive sentences. Instead, these arguments challenge the trial court's *basis* for imposing those sentences. Defendant does not claim the trial court could not have identified a valid basis for imposing the upper term sentence and/or imposing consecutive sentences, only that the trial court did not do so. Because such an argument does not challenge the trial court's authority to act, *Shelton* does not apply and a certificate of probable cause is not needed for appellate review.

For the foregoing reasons, I would address defendant's appeal on its merits.

ROBIE, J.