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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO VASQUEZ,

Defendant and Appellant.

D042623

(Super. Ct. No. SCN140092)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P.

Weber, Judge. Reversed and remanded with directions.

After a jury acquitted Fernando Vasquez of first-degree murder and failed to reach a verdict on the charge of second-degree murder, Vasquez pled guilty to voluntary manslaughter (Pen. Code, § 192¹) and personal use of a deadly weapon (§ 12022, subd. (b)(1)). The court sentenced Vasquez to 12 years in state prison, consisting of the upper term of 11 years for voluntary manslaughter and a consecutive one-year term for the

¹ All further statutory references are to the Penal Code unless otherwise specified.

personal use enhancement. Vasquez appealed, contending the trial court abused its discretion by sentencing him to the upper term of voluntary manslaughter.

During the pendency of this appeal, we asked the parties for supplemental briefing on the applicability of the recent United States Supreme Court case of *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*) on this appeal. In his brief, Vasquez contends that under *Blakely*, the court's factual findings justifying its imposition of the upper term violate his Sixth Amendment right to a jury trial. The People respond (1) Vasquez forfeited this claim by failing to object to the sentence in the proceedings below; (2) Vasquez was required to obtain a certificate of probable cause; (3) there is no constitutional violation under *Blakely*; and (4) even if the sentence was erroneously imposed, the error is harmless. We disagree, reverse the judgment, vacate the sentence imposed and remand for resentencing consistent with *Blakely*.

FACTUAL AND PROCEDURAL HISTORY

On September 2, 1999, Vasquez killed Gustavo Vega during a fight. Vega was stabbed seven times in his left leg, right buttocks, abdomen, and chest.

After a nine-day jury trial, the jury acquitted Fernando Vasquez of first-degree murder but could not reach a verdict on the charge of second-degree murder. After the court declared a mistrial, Vasquez pled guilty to voluntary manslaughter and personal use of a deadly weapon. The plea agreement provides that Vasquez "unlawfully killed Gustavo Vega with a knife during a sudden quarrel/heat of passion and in the honest but unreasonable belief in the necessity of self defense." Vasquez initialed that he understood that as a result of the plea, he could receive a maximum sentence of 12 years.

At the sentencing hearing, prior to counsels' arguments, the court stated that it "was in general agreement" with the probation department's recommendation that Vasquez be sentenced to the upper term for manslaughter. The court continued, "I did find the aggravants under [Rules of Court, rule] 408 as indicated by the probation department for the defendant fleeing the scene and the country. [¶] The primary one that you may want to concentrate on in your remarks that I agreed with was under [Rules of Court, rule] 421 (a)(1). It did appear from the state of the evidence that the stabbing occurred while the decedent was running away from [Vasquez]. And my recollection of the testimony, in reviewing the report, and everything, was that the victim was on the ground, was not defending himself — or not able to defend himself, and was stabbed again repeatedly by [Vasquez]. So I did find [Rules of Court, rule] 421 (a)(1) to be the primary circumstance in aggravation."

Defense counsel objected to the court's finding of aggravating factors and pointed out that under the parameters of the plea agreement, Vasquez killed Vega in the honest, but unreasonable belief in the need for self-defense, which negated the presumption that he killed Vega in a cruel manner. Defense counsel argued that the court's factual findings did not comport with either Vasquez's testimony or other evidence, including the placement of the wounds and the lack of defensive wounds.

Although the court agreed that Vasquez's lack of a prior record was a "substantial mitigant," it imposed the upper term, finding "the number of knife wounds, and how this stabbing occurred, and fleeing the scene, and changing his name to be very substantial aggravants in this case."

DISCUSSION

I. *Application of Blakely*

In *People v. George* (2004) 122 Cal.App.4th 419, 424 - 425 (*George*), we explained *Blakely's* applicability to California's determinate sentencing scheme as follows:

"In *Blakely*, the United States Supreme Court held that "[o]ther 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." [Citation.] The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence is currently under review by the California Supreme Court. [Citations.] Pending resolution of the issue by the high court, we must undertake a determination of whether *Blakely* applies under the circumstances presented.

"Under California's determinate sentencing law, where a penal statute provides for three possible prison terms for a particular offense, the court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. [Citations.] The Attorney General argues that the imposition of an upper term sentence under the California determinate sentencing scheme is not the same as the imposition of a penalty beyond the standard range and thus does not implicate *Blakely*. The attempted distinction, however, is one without a difference. Although an upper term is a 'statutory maximum' penalty in the sense that it is the highest sentence a court can impose for a particular crime, it is not

necessarily the 'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*' which is the relevant standard for purposes of applying *Blakely*. [Citations.]

"As explained in *Blakely*, when the judge's authority to impose a higher 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,' as required to comply with constitutional principles. [Citation.] The same is true here. Because the maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies. Thus, the question becomes whether the trial court could properly rely on any of the cited factors as the basis for its decision to impose the upper term without violating *Blakely*."

Under *Blakely*, a jury trial is required to determine beyond a reasonable doubt any fact that "the law makes essential to the punishment," other than the fact of a defendant's prior conviction. (*Blakely, supra*, 125 S.Ct. at p. 2537 & fn. 5.) Here, the court based its decision to impose the upper term for manslaughter on (1) Vasquez's knifing the victim seven times while the victim was running away or on the ground unable to defend himself; and (2) Vasquez's fleeing the country and changing his name. Because the jury made no such findings, the court's decision to select the upper term sentence violated Vasquez's Sixth Amendment right to a jury trial.

II. *Prejudice*

The People contend the court's failure to apply *Blakely* is harmless under the standard of *Chapman v. California* (1967) 386 U.S. 18. The People argue that because

the evidence as to the aggravating factors applied by the court was overwhelming and essentially uncontroverted, any jury would have found the aggravating factors to be true.

As we explained in *People v. Lemus* (2004) 122 Cal.App.4th 614, 622: "The decision in *Blakely* is premised on the notion that the defendant has a constitutional right under the Sixth Amendment to a jury trial as to any factual determination which increases the sentence which could be imposed based upon the finding of guilt on the offense alone. In this case, we have concluded [defendant] had a constitutional right to a jury trial on any fact that would justify the trial court increasing the sentence beyond the presumptive middle term Accordingly, we believe that the loss of the jury trial right cannot be found harmless on the theory that if a jury trial had been held the defendant would have lost on the issue. The point of *Blakely* is that the jury trial must be held."

In any event, we do not find the error harmless in this case. The People mistakenly characterize the evidence of the aggravating factors as uncontroverted. Vasquez vigorously argued that the court's fact-finding was contradicted by Vasquez's trial testimony and other evidence offered at trial.

III. *Waiver*

We reject the People's contention that Vasquez waived the *Blakely* sentencing issue by failing to object under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, which provides: "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." As we explained in *George, supra*,

122 Cal.App.4th at p. 424: "In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the California Supreme Court held that a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. The Attorney General argues that the holding of *Scott* is equally applicable here. However, the *Scott* court reasoned that its waiver rule was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources [citation], a pragmatic rationale that does not support the application of the waiver rule here. Prior to *Blakely*, California courts and numerous federal courts consistently held that there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. [Citations.] No published case in California held that a different rule applied in connection with the imposition of an upper term sentence. [Citation.] In light of this state of the law, [defendant's] assertion of a challenge to the imposition of an upper term sentence would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after [defendant's] sentencing, [defendant] cannot be said to have knowingly and intelligently waived his right to a jury trial." Additionally, Vasquez vigorously argued against the court's imposition of an upper term sentence, contending the court's factual findings were outside the parameters of the plea agreement and did not comport with the evidence presented at trial. Under these circumstances, it would be unreasonable to find Vasquez had abandoned a constitutional challenge of which he was unaware.

IV. *Certificate of Probable Cause*

Finally, we reject the People's contention that Vasquez was required to obtain a certificate of probable cause. Defendants who enter a guilty plea may not appeal their convictions unless the trial court executes and files a certificate of probable cause. (§ 1237.5) There is an exception to this requirement for "issues regarding proceedings held subsequent to the plea for purpose of determining the . . . penalty to be imposed." (*People v. Buttram* (2003) 30 Cal.4th 773, 780 (*Buttram*); see Rules of Court, rule 30, subdivision (b)(4)(B) [certificate of probable cause not required for "grounds that arose after entry of the plea and do not affect the plea's validity"].) To determine whether section 1237.5 applies to the imposition of a sentence, "the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." (*Buttram, supra*, 30 Cal.4th at p. 782.) An appeal of a sentence challenges the validity of the plea "if the sentence was part of a plea bargain. [Citation.] It does not if it was not" (*People v. Lloyd* (1998) 17 Cal.4th 658, 665.)

The People's line of cases are easily distinguishable. (*People v. Panizzon* (1996) 13 Cal.4th 68, 79; *People v. Cole* (2001) 88 Cal.App.4th 850, 868; *People v. Young* (2000) 77 Cal.App.4th 827, 834.) Unlike the defendants in those cases, Vasquez does not contend his sentence violates the prohibition against cruel and unusual punishment. Instead, he contends the court violated his Sixth Amendment right to a jury trial by sentencing him to the upper term based upon on facts not determined by a jury beyond a reasonable doubt. Accordingly, a certificate of probable cause is not required.

DISPOSITION

The judgment is reversed. The sentence is vacated and the case is remanded to the superior court to conduct a new sentencing hearing consistent with the principles discussed in this opinion.

O'ROURKE, J.

I CONCUR:

HUFFMAN, Acting P. J.

IRION, J., Dissenting.

For the reasons stated in *People v. Wagener* (2004) ___ Cal.App.4th ___ [2004 Cal.App. LEXIS 1760], I respectfully dissent from the conclusion in part I of the majority opinion that the holding of *Blakely v. Washington* (2004) 542 U.S. ___ [124 St.Ct. 2531, 159 L.Ed.2d 403] requires remand for resentencing in this case.

I agree that under the holding of *People v. Buttram* (2003) 30 Cal.4th 773, 780, Vasquez was not required to obtain a certificate of probable cause to challenge the imposition of the upper term sentence. I would reach his argument that the trial court abused its sentencing discretion in that regard, but affirm the judgment under the rule that precludes a reviewing court from reweighing mitigating and aggravating factors. (*People v. Scott* (1994) 9 Cal.4th 331, 355 ["The reviewing court cannot substitute its reasons for those omitted or misapplied by the trial court, nor can it reweigh valid factors bearing on the decision below"].)

IRION, J.