

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

In the first appeal, we asked the parties for supplemental briefing regarding the applicability of *Blakeley v. Washington* (2004) 542 U.S. 296 (*Blakely*) on this appeal. Vasquez contended in his brief that under *Blakely*, the court's factual findings justifying its imposition of the upper term violated his Sixth Amendment right to a jury trial. The People responded (1) Vasquez forfeited this claim by failing to object to the sentence in the trial court; (2) Vasquez was required to obtain a certificate of probable cause; (3) there was no constitutional violation under *Blakely*; and (4) even if the sentence was erroneously imposed, the error was harmless. We disagreed with the People, reversed the judgment, vacated the sentence and remanded for resentencing consistent with *Blakely*. Vasquez petitioned for review in the California Supreme Court, which granted the petition and directed us to vacate our judgment in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). (Cal. Rules of Court, rule 29.3(d).) We did so in an unpublished opinion that was appealed to the United States Supreme Court, which granted certiorari, vacated our opinion and remanded the case to us for further consideration in light of *Cunningham v. California* (2007) 127 S.Ct. 856. We remand with directions.

¹ All further statutory references are to the Penal Code.

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 for 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] 408² 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).³ It did appear from the state of the evidence that the stabbing

² Rules of Court section 4.408, subd. (a) states: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge."

³ Rules of Court section 4.421, Circumstances in aggravation, subd. (a)(1) states: "Facts relating to the crime, whether or not charged or chargeable as enhancements, include the fact that: (1) The crime involved great violence, great bodily harm, threat of

occurred while the decedent was running away from [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 aggravated 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.

DISCUSSION

I. *Waiver*

We reject the People's contention 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." Because *Blakely* was decided after Vasquez's sentencing, Vasquez cannot be said to have knowingly and intelligently waived his right to a jury trial. (*Blakely, supra*, 542 U.S. at p. 310.) 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.

great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or

II. *Certificate of Probable Cause*

We also 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 8.304, 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 cases the People rely on 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

callousness[.]"

trial by sentencing him to the upper term based upon facts not determined by a jury beyond a reasonable doubt. Accordingly, a certificate of probable cause is not required.

III. *Sentencing*

Vasquez contends that under *Cunningham* the trial court erred by imposing the upper term sentence because it used aggravating factors not found true by a jury beyond a reasonable doubt, admitted by him, or related to his recidivism. At sentencing, the trial court stated that Vasquez's lack of a prior record was a "substantial mitigant," but imposed the upper term specifically because by "the number of knife wounds, and how this stabbing occurred, and fleeing the scene, and changing his name," Vasquez's conduct presented "very substantial aggravants in this case."

When a trial court imposes an upper-term sentence, it must articulate findings of fact and conclusions of law to support it. (*Blakely, supra*, 542 U.S. at p. 299.) In the context of a plea, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be admitted by the defendant. (*Id.* at pp. 302-303.) "[T]he 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 fact findings. When a judge inflicts punishment that the [plea agreement] alone does not allow, the [court] has not found all the facts 'which the law makes essential to the punishment, [citation] . . . and the judge exceeds his proper authority.'" (*Id.* at pp. 303-304.)

In *Blakely*, the defendant, in a plea agreement, admitted the elements of second degree kidnapping and allegations involving domestic violence and use of a firearm, but

no other relevant facts. (*Blakely, supra*, 542 U.S. at pp. 298-299.) The facts admitted in the plea supported a maximum sentence of 53 months, but the trial court increased the defendant's sentence to 90 months based on a judicial finding of aggravating factors. (*Id.* at p. 298.) The United States Supreme Court held the sentence was impermissible because it was based on facts not admitted in the plea agreement. (*Id.* at p. 304.)

In *Cunningham*, the jury's verdict alone limited the permissible sentence to 12 years. (*Cunningham, supra*, 127 S.Ct. at p. 870.) Additional fact finding by the trial court, however, yielded an upper term sentence of 16 years in violation of the defendant's right to a jury trial. (*Id.* at p. 860-861.) The United States Supreme Court explained, "factfinding to elevate a sentence from 12 to 16 years . . . falls within the province of the jury employing a beyond-a-reasonable-doubt standard." (*Id.* at p. 870.)

The recent California Supreme Court case, *People v. Sandoval* (S148917) __ Cal.App.4th __ [2007 D.A.R. 11051], controls this case, and the sentence must be vacated because "[n]one of the aggravating circumstances cited by the trial court come within the exceptions set forth in *Blakely* [*supra*, 542 U.S. 296]. Defendant had no prior criminal convictions. All of the aggravating circumstances cited by the trial court were based upon the facts underlying the crime; none were admitted by defendant or established by the jury's verdict. We conclude, accordingly, that defendant's Sixth Amendment rights were violated by the imposition of an upper term sentence."

DISPOSITION

The sentence is vacated and the matter remanded to the trial court for resentencing consistent with this opinion.⁴ In all other respects, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.

⁴ We note Penal Code section 1170(b) was recently modified to provide that "[w]hen a judgment of imprisonment is to be imposed and the statute provides three possible terms, the choice of the appropriate term within the sound discretion of the court[.]"