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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VINH QUANG VU, Defendant and Appellant.	G033583 (Super. Ct. No. 03WF2265) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed in part, reversed in part, and remanded with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, David Delgado-Rucci and Robert M. Foster, Deputy Attorneys General, for Plaintiff and Respondent.

Vinh Quang Vu appeals from a judgment after a jury convicted him of unlawfully taking a vehicle, forgery, theft of an access card with the intent to defraud, and second degree commercial burglary. Relying on *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), Vu argues the trial court erred by imposing the upper term of three years on the unlawful taking count. Specifically, he claims: (1) the jury, and not the court, should have found the aggravating circumstances supporting the upper term; (2) the court applied the incorrect standard of proof in finding the aggravating circumstances; (3) prior conviction facts should be found by the jury beyond a reasonable doubt; and (4) the jury, and not the court, should perform the "qualitative" weighing of aggravating and mitigating circumstances. We find some of his contentions have merit.

FACTS

Vu went to Irvine BMW and asked an employee if he could test drive a car. The employee told Vu to go to the sales department. Vu went to the service area, got inside a BMW, and drove away.

A couple days later, Robyn Lee was at Kinko's making copies when she put her purse on the floor. After helping an older gentleman, she went to get money from her purse and her wallet was gone.

Later that day, Vu went to Best Buy to purchase stereo equipment for a BMW, a home stereo, and a big screen television. After the sales clerk totaled the purchase price, Vu gave him a credit card with the name "Robyn" on it. The clerk asked for identification, but Vu said he did not have any. Police officers arrived and took Vu outside. Vu had Lee's credit cards and a key to a BMW. Officers found the BMW and determined it was stolen. Lee's wallet was inside the car.

An information charged Vu with unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)) (count 1), forgery (Pen. Code, § 470, subds. (a) & (d)) (count 2), theft of an access card with the intent to defraud (Pen. Code, § 484e, subd. (a)) (count 3), and

second degree commercial burglary (Pen. Code, §§ 459, 460, subd. (b)) (count 4). The jury convicted Vu on all counts.

After having read and considered the probation report, the trial court denied Vu probation. For purposes of selecting the appropriate term of imprisonment, the court found there were six aggravating circumstances and one mitigating circumstance. The court found the aggravating circumstances outweighed the mitigating circumstance and selected the upper term of three years on count 1. The court's complete sentence was as follows: the upper term of three years on count 1; the middle term of two years on count 2; the middle term of two years on count 3; and the middle term of two years on count 4. The court stayed the sentences on counts 2 and 4 pursuant to Penal Code section 654, and ran the sentence on count 3 concurrently with count 1.

DISCUSSION

In *Blakely*, the defendant pleaded guilty to kidnapping. The factual admissions in the defendant's plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the trial court imposed an "'exceptional'" sentence of 90 months after determining the defendant acted with "'deliberate cruelty.'" (*Blakely, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2534].) Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the Supreme Court held the defendant's "'exceptional'" sentence violated his Sixth Amendment right to a jury trial because the facts supporting the sentence were neither admitted by the defendant nor found by the jury. (*Blakely, supra,* 542 U.S. at pp. ___-___ [124 S.Ct. at pp. 2536-2538].) The court applied the following rule first articulated in *Apprendi*: "'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.'" (*Id.* at p. ___ [124 S.Ct. at p. 2536], italics added.) The court explained "'statutory maximum'" for *Apprendi* purposes means "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. ___

[124 S.Ct. at p. 2537].) The court stated, "[i]n 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid.*)

In *Blakely*, the United States Supreme Court invalidated the defendant's sentence under Washington law. (*Blakely, supra,* 542 U.S. at p. ___, fn. 9 [124 S.Ct. at p. 2538, fn. 9].) The California Supreme Court has granted review in two cases in which it is considering the applicability of *Blakely* to California's determinate sentencing laws. (*People v. Towne,* review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182.) Pending resolution of the issue by the California Supreme Court, we must undertake a determination of whether *Blakely* applies here.

WAIVER

The Attorney General contends Vu did not raise the *Blakely* issue below, and therefore, it is waived. Vu concedes he did not raise this issue at sentencing, but contends the issue is not forfeited. We agree with Vu on this issue.

"Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. [Citation.] Furthermore, there is a general exception to this rule where an objection would have been futile. [Citation.] We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. [Citations.] In any event, we have discretion to consider issues that have not been formally preserved for review." (*People v. Butler* (2004) 122 Cal.App.4th 910, 918-919, petn. for review pending, petn. filed Nov. 3, 2004 (*Butler*); see *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5.) As with the

defendant in *Butler*, because Vu was sentenced before *Blakely* was decided, we cannot say he knowingly and intelligently waived his right to a jury trial.

UPPER TERM

Penal Code section 1170, subdivision (b), states, "When 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." (Italics added.) California Rules of Court, rule 4.420(a) provides, "When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The *middle term shall be selected* unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." (Italics added.) California Rules of Court, rule 4.420(b) states, "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Judicial Council "rules have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions." (*In re Richard S.* (1991) 54 Cal.3d 857, 863; see also *People v. Wright* (1982) 30 Cal.3d 705, 712.) Count 1, unlawful taking of a vehicle, when sentenced as a felony, is punishable by a prison term of "16 months, or two or three years[.]" (Pen. Code, § 18; Veh. Code, § 10851, subd. (a).)

Relying on *Blakely*, Vu argues the trial court erred when it imposed the upper term of three years on count 1 because the jury, and not the court, should have found the facts supporting the upper term beyond a reasonable doubt. We agree in part.

Under California law, the maximum sentence the trial court may impose without any additional findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal.

Rules of Court, rule 4.420(a).) *Blakely* holds that, "'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.'" (*Blakely, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2536].) The Supreme Court defined "'*statutory maximum*'" as "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. ___ [124 S.Ct. at p. 2537].) "[W]hen 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.] . . . Because the maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies." (*People v. George* (2004) 122 Cal.App.4th 419, 425, petns. for review pending, petns. filed Oct. 20 and 22, 2004 (*George*); contra, *People v. Picado* (2004) 123 Cal.App.4th 1216; *People v. Wagener* (2004) 123 Cal.App.4th 424, petn. for review pending, petn. filed Nov. 29, 2004.)

AGGRAVATING CIRCUMSTANCES

Therefore, the issue we must decide is whether the court could rely on any of the aggravating circumstances without making additional findings in violation of *Blakely*. In imposing the upper term, the trial court found the six aggravating circumstances outweighed the one mitigating circumstance. The court found the aggravating circumstances to be the following: (1) Vu carried out the crime with "planning and criminal sophistication"; (2) the crime involved an "attempted and actual taking of great monetary value"; (3) Vu's "prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous"; (4) Vu "was on probation when he committed the crimes"; (5) Vu's "prior performance on probation had been unsatisfactory as evidenced by violations"; and (6) the court could have imposed

consecutive sentences. The court found there was one mitigating circumstance, Vu was addicted to methamphetamine.

1. *Aggravating Circumstances Relating to the Crime*

Clearly, the trial court could not rely on the first two aggravating circumstances, i.e., Vu carried out the crime with "planning and criminal sophistication" and the crime involved an "attempted and actual taking of great monetary value." These aggravating circumstances required the jury to make additional factual findings.

The trial court also relied on the fact it could have imposed consecutive sentences on the other counts in imposing the upper term. Vu argues this was error because the court improperly "retr[ied] facts previously found by the jury" as to counts 2, 3, and 4, and "us[ed] those facts solely as aggravating circumstances to elevate the sentence for" count 1. We disagree. The court's decision to impose the upper term when it could have imposed consecutive sentences did not require any additional factual findings by the jury. (*People v. Calhoun* (2004) 123 Cal.App.4th 1031, 1054.) We find the court was constitutionally entitled to consider the possibility of consecutive sentences as a circumstance to support the imposition of the upper term.

2. *Aggravating Circumstances Relating to the Defendant*

As we explained above, *Apprendi* and *Blakely* 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.'" (*Blakely, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2536]; *Apprendi, supra,* 530 U.S. at p. 490, italics added.) "The requirement that a fact which increases a sentence beyond the statutory maximum must be found by a jury does not apply to the fact of a prior conviction. [Citations.] This prior conviction exception to the *Apprendi* rule has been construed broadly to apply not just to the fact of the prior conviction, but to other issues relating to the defendant's recidivism. [Citation.] [However,] in some cases, extrinsic

facts relating to a recidivist aggravating circumstance may implicate *Apprendi*." (*Butler, supra,* 122 Cal.App.4th at p. 920.)

Vu contends the jury must find prior convictions beyond a reasonable doubt before the trial court can rely on them to impose the upper term. Essentially, Vu asks us to ignore *Blakely*, *Apprendi*, and *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243 (*Almendarez-Torres*) [recidivism most traditional basis for increasing sentence]. We decline his invitation. As an intermediate appellate court, we must follow United States Supreme Court precedent on matters of federal constitutional law. (*People v. Prince* (1996) 43 Cal.App.4th 1174, 1179.)

The issue we must decide is whether the court could have properly relied on any of the three remaining aggravating circumstances to impose the upper term. One of the aggravating circumstances the trial court relied upon in imposing the upper term was Vu's "numerous" prior convictions as an adult and sustained petitions in juvenile delinquency proceedings. Clearly, a trial court may rely on prior convictions to impose the upper term. (*Blakely, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2534]; *Apprendi, supra,* 530 U.S. at p. 490; *Almendarez-Torres, supra,* 523 U.S. at p. 247.) California law ensures juvenile proceedings provide the necessary procedural safeguards, including notice, the right to counsel, the privilege against self-incrimination, the right to confrontation and cross-examination, the protection against double jeopardy, and the allegation must be proved beyond a reasonable doubt. (*People v. Lee* (2003) 111 Cal.App.4th 1310, 1315-1316 [use of defendant's prior juvenile adjudication as "strike" was not precluded by *Apprendi* rule]; contra, *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187.) California Rules of Court, rule 4.421(b)(2) authorizes the court to consider sustained juvenile petitions as an aggravating circumstance when deciding whether to impose the upper term. We find Vu's juvenile adjudications come within the prior conviction exception.

Another aggravating circumstance the trial court relied upon was that Vu was on probation when he committed the crimes. "Because this fact arises out of the fact of a prior conviction and is so essentially analogous to the fact of a prior conviction, we conclude that constitutional considerations do not require that matter to be tried to a jury and found beyond a reasonable doubt. As with a prior conviction, the fact of the defendant's status as a probationer arises out of a prior conviction in which a trier of fact found (or the defendant admitted) the defendant's guilt as to the prior offense. [Citations.] As with a prior conviction, a probationer's status can be established by a review of the court records relating to the prior offense. Further, like a prior conviction, the defendant's status as a probationer '"does not [in any way] relate to the commission of the offense, *but goes to the punishment only* . . . ."' [Citation.]" (*George, supra,* 122 Cal.App.4th at p. 426.) We conclude the trial court was constitutionally entitled to consider the fact Vu was on probation at the time he committed the offenses as a basis for imposing the upper term.

The trial court also found Vu's unsatisfactory performance on probation to be a circumstance in aggravation. We find this aggravating circumstance does not fall within the prior conviction exception. Although Vu's prior performance on probation derives from prior convictions, this aggravating circumstance requires a factual finding as to whether Vu's performance on probation was "unsatisfactory." This aggravating circumstance must be found by the jury beyond a reasonable doubt because it requires an additional factual finding.

In summary, we find the trial court was not entitled to consider the following aggravating circumstances as a basis for imposing the upper term: Vu carried out the crime with "planning and criminal sophistication"; the crime involved an "attempted and actual taking of great monetary value"; or Vu's "prior performance on probation had been unsatisfactory as evidenced by violations." The court was entitled to consider the following aggravating circumstances as a basis for imposing the upper term:

Vu's "prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous"; Vu "was on probation when he committed the crimes"; and the court could have imposed consecutive sentences.

STANDARD OF REVIEW

Vu argues the denial of his right to a jury trial is a "'structural'" defect that is reversible per se and harmless error analysis is inappropriate. The Attorney General contends harmless error analysis is appropriate and implies the *Watson* standard of review is proper. (*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).) Specifically, the Attorney General claims any error was harmless because the trial court may impose the upper term based on a single aggravating circumstance and even if the first two aggravating circumstances were improper under *Blakely*, there were four aggravating circumstances remaining.

When a defendant bases his appeal on federal constitutional grounds, we apply the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). For errors of state law, we apply the reasonable probability of a more favorable result standard of *Watson*. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1041.) A comprehensive analysis of the issues in this case requires us to apply both standards.

First, "[a]pplying [the *Chapman*] test, we must determine whether the failure to obtain jury determinations as to the aggravating factors discussed above was harmless beyond a reasonable doubt. [Citation.]" (*Butler, supra,* 122 Cal.App.4th at p. 919.) This we cannot do here. We cannot be certain, beyond a reasonable doubt, a jury would have made the factual findings to support the three aggravating circumstances discussed above. Therefore, those aggravating circumstances cannot be used to support the trial court's imposition of the upper term. However, this does not end our analysis. We must determine whether the remaining three aggravating circumstances are sufficient

to sustain the trial court's sentencing choice under California law. For this determination we apply the *Watson* standard.

"When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492; see *Watson, supra,* 46 Cal.2d at p. 836.) A single aggravating circumstance "is sufficient to support imposition of [the] upper term." (*Butler, supra,* 122 Cal.App.4th at p. 920.) Although we do not conclusively find the upper term is precluded, we conclude it is reasonably probable the court would have selected the middle term. The six aggravating circumstances here were of similar persuasive value, and we have excluded three of them. Therefore, the appropriate remedy is to vacate the judgment, and remand the matter so the trial court can again engage in the required weighing process. For purposes of imposing the upper term, the court may only consider aggravating circumstances permitted by *Blakely* and *Apprendi* as set forth in this opinion. Any such decision will be reviewable for an abuse of discretion according to the procedures generally applicable.

WEIGHING OF CIRCUMSTANCES

Finally, Vu argues *Apprendi* and *Blakely* "require the *jury* to perform the further 'qualitative' fact-finding function of weighing fact-based aggravating and mitigating factors and determining whether aggravating or mitigating facts preponderate, before the trial court may impose a constitutionally valid upper-term determinate sentence based on preponderating aggravating factors." (Italics added.) We disagree.

As we have explained, it is the duty of the sentencing judge to select the appropriate term. The judge must impose the middle term, unless after considering all the facts, the court decides the aggravating or mitigating circumstances justifies imposing the upper or lower term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a), (b).) We decline Vu's invitation to rewrite the Penal Code and California Rules

of Court to impose the burden of "weighing" aggravating and mitigating circumstances on the jury. *Apprendi* and *Blakely* do not require the jury to engage in any "qualitative weighing" of circumstances. (*Blakely, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2534]; *Apprendi, supra,* 530 U.S. at p. 490.)

DISPOSITION

The convictions are affirmed. The sentence is reversed and the matter is remanded for resentencing consistent with this opinion.

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O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.