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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY LEE WILLIAMS,

Defendant and Appellant.

D043512

(Super. Ct. No. SCD177453)

APPEAL from a judgment of the Superior Court of San Diego County, Christine V. Pate, Judge. The sentence is vacated; in all other respects the judgment is affirmed.

A complaint charged Anthony Lee Williams with one count of possession of narcotics paraphernalia (Health & Saf. Code, § 11364), one count of possession of marijuana (Health & Saf. Code, § 11357, subd. (b)), and one count of receiving stolen property (Pen. Code, § 496, subd. (a)). Williams entered a negotiated guilty plea to receiving stolen property and the remaining counts were dismissed. The court sentenced him to prison for the three-year upper term, suspended execution of the sentence, and

placed him on five years' probation on the condition he serve 365 days in custody. Williams admitted he violated his probation in two unrelated cases. Williams appeals, contending the trial court violated his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments because (1) Williams was not afforded a jury trial to establish and did not admit the aggravating facts used to support the upper term, and (2) the court used the wrong burden of proof to assess the facts at issue.

FACTS

On September 13, 2003, police officers smelled a strong odor of marijuana emanating from Williams's parked van, in which Williams and two other men were sitting. Police officers detained all three men and searched the van. They found a marijuana pipe, a glass drug pipe, and an Altoids box containing marijuana. They also found stolen property, including a laptop computer, various forms of identification, a credit card, checkbooks and cameras. In a statement to police officers, Williams said Harris, one of the other men detained, possessed the laptop and a checkbook when he entered Williams's van. Williams said he assumed the laptop was stolen but it was none of his business.

DISCUSSION

Williams contends the trial court violated his rights under the Fifth, Sixth and Fourteenth Amendments because he was not afforded a jury trial on the aggravating facts used to support the upper term. In *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), the United States Supreme Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum [of the standard range] must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Id.* at p. 2536.)¹ 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. (Cal. Rules of Court, rule 4.420.) *Blakely* is implicated here because the maximum penalty the court could impose under California law without making factual findings in addition to those found by the jury is the middle term.

I

The trial court expressed the following reasons for imposing the upper term:

"Reading the report and the number of victims and the length of time that Mr. Williams has been on a criminal record which goes back to 1990, I see that he has had little time in custody up until he was ordered 365 days in 1996; but that was also suspended. And then in January of 2000, he was given his first 365 days. Where it has remained even though he has violated his probation. Your record concerns me, sir. Also the report concerns me because although based on your history at least you should understand the significance of whether it's a drug or alcohol problem, you apparently haven't really addressed that problem and yet have reoffended. So looking at your package which is the new case that

¹ The issue of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term is currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

we have plus the two probation violations are the 365 days that you previously served and you actually have sufficient credits in that so that you're sort of maxed out there, what I intend to do is I'm going to what I call hang three years over you. You're either going to get it this time, sir, or you're going to prison. There's just no two ways about it. I would impose three years which is the upper term for each of your cases, I would run them concurrently and I will suspend the imposition on the condition that you comply with probation, all probations including your two trailing revocations would terminate in [five] years. I'm really putting the pressure on you."

The trial court thus relied on several aggravating factors as the basis for its decision to impose the upper term for receiving stolen property. Under *Blakely*, the Constitution requires a jury to determine any factor " 'the law makes essential to the punishment' " other than the fact of the defendant's prior conviction (*Blakely, supra*, 124 S.Ct. at p. 2537.) Constitutional considerations also do not require the fact the defendant was on probation to be found by a jury. However, other factors that increase the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. (*Blakely, supra*, 124 S.Ct. at p. 2536.) The trial court relied in part on aggravating factors not found beyond a reasonable doubt by the jury, including the number of victims, the length of Williams's criminal record and a possible drug or alcohol problem. Accordingly, the court's decision to select the upper term for the receiving stolen property conviction violated Williams's Sixth Amendment right to a jury trial under *Blakely*.

II

The People argue that even if the use of certain aggravating factors was improper under *Blakely*, the trial court was entitled to rely on the fact of Williams's prior conviction and the fact Williams was on probation at the time of the current offense. Under California law, a trial court may rely on a single aggravating factor as a basis for imposing an upper term, so long as that factor outweighs any circumstances in mitigation. Here, there are two aggravating factors not requiring a jury finding and no factors in mitigation. The People argue Williams has at most demonstrated harmless error because there were non-*Blakely* aggravating factors and no mitigating factors, and the trial court would have imposed the upper term without consideration of the *Blakely* aggravating factors.

The constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 applies to *Blakely* errors. Applying that test, the court must determine whether the failure to obtain a jury determination as to the aggravating factors was harmless beyond a reasonable doubt. (*Chapman, supra*, at p. 24.) Therefore, before a constitutional error can be held harmless, the People must prove beyond a reasonable doubt that the error complained of did not contribute to the imposition of the upper term. (*Ibid.*) The trial court expressed both *Blakely* and non-*Blakely* reasons for imposing the upper term. We are unwilling to find beyond a reasonable doubt that even if the trial court judge had not considered the impermissible factors, she would have nonetheless selected the upper term.

DISPOSITION

The sentence is vacated and the matter is remanded to the trial court for further proceedings in accordance with this opinion. In all other respects the judgment is affirmed.

McDONALD, J.

I CONCUR:

McCONNELL, P. J.

BENKE, J., dissenting.

For the reasons expressed in this court's opinion in *People v. Wagener* (2004) 123 Cal.App.4th 424, I would conclude the sentencing here was proper. If our Supreme Court concludes otherwise, appellant may obtain relief by way of writ of habeas corpus.

BENKE, J.