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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD D. YOUNG,

Defendant and Appellant.

D044200, D044662

(Super. Ct. No. SCS178035)

CONSOLIDATED APPEALS from an order and a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser and Raymond Edwards, Jr., Judges. Appeal from the order (D044200) dismissed as moot. Judgment affirmed in part, reversed in part.

Ronald D. Young pleaded guilty to one count of false imprisonment by violence, menace, fraud or deceit. Under the plea agreement, Young was to receive probation subject to certain conditions, including his completion of a 90-day residential drug treatment program, and was allowed to seek a reduction of the felony to a misdemeanor after 18 months. At the sentencing hearing, the court imposed a three-year upper term sentence and

stayed execution before placing Young on probation and imposing the agreed-upon conditions. Young appeals from the court's order imposing sentence before granting probation, arguing that the imposition of sentence deprived him of the benefit of his plea bargain because it precluded him from seeking a reduction of the felony to a misdemeanor in the future. He also appeals the judgment insofar as the court imposed an upper-term sentence as violative of his right to a jury trial under the Sixth Amendment to the United States Constitution. We reject the People's contentions that Young cannot raise his challenges to the order on appeal, but conclude that Young's subsequent violation of the conditions of his probation renders his appeal from the court's order moot and thus dismiss that appeal (D044200). Because we find merit in Young's constitutional challenge to the sentence imposed in the judgment, however, we reverse the judgment in that regard and remand the matter for resentencing. Otherwise we affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

In October 2003, the district attorney filed an information charging Young with two counts of making a criminal threat and one count each of false imprisonment by violence, menace, fraud or deceit, felony child abuse, cruelty to a child and resisting an officer; the information also alleged that Young had three prior felonies and had served two prior prison terms. In January 2004, Young pleaded guilty to the false imprisonment count pursuant to an agreement that the court would release him to a 90-day residential drug treatment program as soon as a bed was available and that he could seek a reduction of the felony to a misdemeanor after 18 months. (All relevant dates are in 2004 except as otherwise noted.) At the change of plea hearing, the court dismissed the remaining counts against Young.

On January 26, Young was released from custody and entered a residential drug rehabilitation program. On February 9, Judge Jeffrey Fraser sentenced Young to three years in prison, but stayed the execution of the sentence and placed Young on probation, subject to his compliance with various conditions, including that he successfully complete a 90-day drug treatment program, submit to warrantless searches as required by his probation officer, not possess weapons or ammunition and not use drugs or alcohol. Young filed a notice of appeal from the court's order granting probation and requested a certificate of probable cause, which Judge Fraser denied.

On February 19, Young was terminated from the residential drug treatment program for failing to comply with its requirements. Young was referred by his probation officer to an outpatient drug program to assist him in complying with a reunification order issued by the juvenile court in a separate proceeding relating to his children; the officer also instructed Young to seek enrollment in another residential treatment program pending a hearing on his probation violation. Young enrolled in the outpatient program and put his name on a waiting list for a residential treatment program, but dropped out of the outpatient program after a short period of time and, in early May, was removed from the residential program waiting list for failing to maintain required contact with the facility. He also failed to attend parenting classes and therapy sessions required by the juvenile court's reunification plan.

On May 13, probation officers arrested Young for violating his probation and, over Young's objection, searched the home pursuant to the probation search condition. They found an empty holster, gun-cleaning equipment and a partially consumed bottle of beer in the bedroom Young shared with his girlfriend and nunchakus in another room of the home.

The officers took Young to the police station and while he was awaiting booking, Young got verbally aggressive with one of them.

In June, Judge Raymond Edwards, Jr. held an evidentiary hearing and found that Young had violated his probation by failing to participate in and complete a residential drug treatment program, failing to comply with the juvenile court's reunification order and making threats against another person. Judge Edwards revoked Young's probation, lifted the stay on the sentence previously imposed by Judge Fraser and entered judgment sentencing Young to three years in prison. Young appeals.

## DISCUSSION

### 1. *Imposition of Sentence Before Granting Probation*

"When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024 (*Walker*); see *Santobello v. New York* (1971) 404 U.S. 257, 262 [once his plea agreement is accepted by the court, the defendant has a due process right to be sentenced in accordance with the agreement].) A court may not impose punishment that significantly exceeds that to which the parties agreed and a defendant is entitled to relief from a variance that is significant in light of the plea bargain as a whole. (*Walker, supra*, 54 Cal.3d at p. 1024.) Here, Young complains that the trial court's imposition of sentence prior to granting him probation violated his plea agreement because the court could not thereafter reduce the felony to a misdemeanor.

The People agree that the law supports the merits of Young's argument (see Pen. Code, § 17, subd. (b)(3); *People v. Wood* (1998) 62 Cal.App.4th 1262, 1266, 1271), but contend that he cannot now challenge the court's order, for several reasons. First, they assert that Young waived this claim by failing to object to it at sentencing. However, the failure to object to the imposition of sentence in violation of the plea bargain does not constitute a waiver of the error unless the trial court complied with the requirements of Penal Code section 1192.5 by advising the defendant that he had a right to withdraw his plea if the judgment did not conform to the plea agreement. (*Walker, supra*, 54 Cal.3d at p. 1025; *People v. DeFilippis* (1992) 9 Cal.App.4th 1876, 1879.) Here, the trial judge did not advise Young of his right to withdraw his plea in accordance with the statutory requirement and thus he did not waive his appellate challenge by failing to raise the issue below.

Second, the People argue that Young is precluded from raising this challenge on appeal because the trial court denied his request for a certificate of probable cause. A defendant who has been convicted based on a guilty plea or who has admitted a probation violation must obtain a certificate of probable cause from the trial court to obtain review on appeal of issues going to *the validity of the plea or the admission*. (Pen. Code, § 1237.5; Cal. Rules of Court, rule 31(d); see *People v. Mendez* (1999) 19 Cal.4th 1084, 1095, 1098-1099.) However, the law does not require a defendant to obtain a certificate of probable cause before appealing 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 (*Buttram*); see Cal. Rules of Court, rule 30(b)(4)(B) [certificate

of probable cause not required for "grounds that arose after entry of the plea and [that] do not affect the plea's validity".)

In determining whether a certificate of probable cause is required for an appeal from the imposition of sentence, "the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea[.]" (*Buttram, supra*, 30 Cal.4th at p. 782, italics in original.) An appeal of a sentence challenges the validity of the plea if the sentence was part of a plea bargain; otherwise, a certificate of probable cause is not required. (*People v. Lloyd* (1998) 17 Cal.4th 658, 665; *People v. Panizzon* (1996) 13 Cal.4th 68, 79 [certificate of probable cause required before defendant may challenge the sentence imposed in accordance with his plea agreement as cruel and unusual].) Here, Young does not challenge the validity of the plea or the term of the sentence that was to be imposed if he did not successfully complete probation; rather he challenges the court's premature imposition of sentence as denying him one of the benefits promised to him as part of his plea agreement. The absence of a certificate of probable cause does not preclude Young from raising this challenge.

Finally, the People contend that Young's challenge to the court's failure to abide by the terms of the plea agreement is moot in light of his subsequent violation of probation. We agree. Even if we were to correct the error by reversing the judgment and specifically enforcing the plea agreement (that is, ordering the trial court to enter a new judgment granting probation without the imposition of a sentence (see *People v. Mancheno* (1982) 32 Cal.3d 855, 860-861)), Young would not be entitled to seek a reduction of the classification of the offense because he failed to comply with the terms of the agreement giving him that

right. As we cannot grant Young any effective relief from the court's order, we conclude that his appeal from the order imposing sentence and granting probation is moot. (See *People v. Cheek* (2001) 25 Cal.4th 894, 897; *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214; *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316.)

## 2. *Imposition of the Upper Term*

A criminal defendant has a constitutional right to a jury trial on all the elements of the crime charged. (See *Patterson v. New York* (1977) 432 U.S. 197.) Further, the United States Supreme Court has held that a defendant's right to a jury trial extends to any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*)). In *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531] (*Blakely*), the nation's high court clarified that the relevant "statutory maximum" for *Apprendi* purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely, supra*, 124 S.Ct. at p. 2537.) Young contends that, in light of the fact that a middle term sentence is the presumptive sentence under the California determinate sentencing law (Pen. Code, § 1170, subd. (b)), the trial court's imposition of an upper term sentence based on its findings of aggravating factors violated his Sixth Amendment right to a jury trial in accordance with the foregoing United States Supreme Court authorities.

The question of whether *Blakely* precludes a trial court from relying on its own findings of aggravating facts in support of an upper term sentence is currently pending review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) The appellate courts in

our state are divided on this issue, as are the justices within this court. (*People v. George* (2004) 122 Cal.App.4th 419, review granted Dec. 15, 2004, S128931; *People v. Lemus* (2004) 122 Cal.App.4th 614, review granted Dec. 1, 2004, S128771; compare *People v. Wagener* (2004) 123 Cal.App.4th 424, review granted Nov. 29, 2003, S129579.) However, the majority of courts to face the issue have concluded that the "statutory maximum" under the California determinate sentencing scheme is the middle term and that, accordingly, a trial court can only rely on facts found by the jury, admitted by the defendant or relating to a prior conviction to impose an upper term sentence. (See *People v. White* (2004) 124 Cal.App.4th 1417, 1434-1440, pet. for review pending, pet. filed 1/12/05, and cases cited therein.) Pending resolution of the issue by the California Supreme Court, we will adhere to the majority view that the imposition of an upper term sentence based on facts other than those found by the jury, admitted by the defendant or relating to the fact of a prior conviction violates the Sixth Amendment.

Here, the superior court imposed an upper term sentence based on Young's "extensive criminal history" of substance abuse and another incident of domestic violence and the viciousness of the current offense. Although the former factor arguably falls within the exception for prior convictions (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 246), we cannot conclude that the trial court would have imposed the upper term based on this factor standing alone because it also noted Young's progress in dealing with his substance abuse problem as a mitigating factor. Accordingly, we reverse the judgment as to the sentence and remand the case back to the superior court for resentencing.



DISPOSITION

Young's appeal from the order imposing sentence before granting probation is dismissed as moot. The judgment is reversed as to the sentence and is otherwise affirmed. The matter is remanded to the trial court for resentencing.

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McINTYRE, J.

WE CONCUR:

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HALLER, Acting P.J.

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McDONALD, J.