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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH WILLIAM ACKERMAN, Defendant and Appellant.	H026899 (Santa Clara County Super. Ct. No. CC304438)

Defendant Joseph William Ackerman entered a guilty plea to one count of failing to register as a sex offender (Pen. Code,[1] § 290, subd. (g)(2)) and admitted two prior felony convictions for lewd and lascivious conduct with a minor (§ 288, subd. (a)), which qualified as "strikes" under the Three Strikes Law (§§ 667, subds. (b) – (i); 1170.12). Defendant also admitted a "prison prior" within the meaning of section 667.5, subdivision (b).

Defendant filed a motion to dismiss the two "strikes" pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court granted defendant's *Romero* motion in part and struck one of the "strike" priors. The court sentenced defendant to seven years in state prison (the three-year upper term on the section 290 offense, doubled pursuant to the Three Strikes Law (§ 1170.12, subd. (c)(1)), plus one year for the "prison prior").

[1] All further statutory references are to the Penal Code.

Defendant filed an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We reviewed the entire record and concluded that there was no arguable issue on appeal.

The day before we filed our original opinion in this case, the United States Supreme Court decided *Blakely v. Washington* (2004) __ U.S. __, [124 S.Ct. 2531] (*Blakely*). Defendant filed a petition for rehearing in which he argued that his sentence violated the standards set forth in *Blakely* and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) because the court imposed the upper term based on factual findings that were neither admitted by defendant nor found by a jury. He also argued that in making its findings, the court applied the preponderance of the evidence standard rather than the proof beyond a reasonable doubt standard required by *Blakely*. We granted rehearing and requested supplemental briefing on the *Blakely* issues.

Upon rehearing, we conclude that defendant has not forfeited his claim of *Blakely* error by failing to object to the imposition of the upper term on the basis of *Apprendi* in the trial court. We also hold that since defendant was a Three Strikes offender, his maximum statutory sentence under *Blakely* was 25 years to life. We conclude that since his seven-year sentence was less than the statutory maximum, the sentence does not violate *Blakely*. We will therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Prior to the preliminary examination, defendant pleaded guilty to one count of failing to register as a sex offender. He also admitted the two prior felony convictions for molesting his daughter and stepdaughter (§ 288, subd. (a)), which qualified as "strikes" under the Three Strikes Law, and a "prison prior" within the meaning of section 667.5, subdivision (b).

As noted previously, at the sentencing hearing, the court granted defendant's *Romero* motion in part and struck one of the "strike" priors. In the papers filed in support of his *Romero* motion, defendant had acknowledged that he had violated his parole

"because he did not notify his parole agent that he got a truck and he was out at night." He also stated he had "several other parole violations for dirty drug tests." According to the probation report, defendant violated parole four times by being under the influence of methamphetamine. According to the prosecutor, defendant's parole violations occurred in 1998, 2000, 2001, and 2002.

The probation report listed circumstances in aggravation and mitigation for the court to consider in sentencing defendant. The aggravating factors included: (1) defendant had served a prior prison term (Cal. Rules of Court, rule 4.421(b)(3)) and (2) defendant's prior performance on parole was unsatisfactory due to his drug addiction and his violations of parole (Cal. Rules of Court, rule 4.421(b)(5)). The only mitigating factor listed in the probation report was the fact that defendant had "voluntarily acknowledged wrongdoing . . . at an early stage of the criminal process" (Cal. Rules of Court, rule 4.423(b)(3)).

Defense counsel asserted that the fact that defendant had already been discharged from parole when he committed the current offense was an additional mitigating factor the court should consider. Defense counsel argued that probation was not "out of the realm of probability" and that it was inappropriate to impose the aggravated term.

After reviewing the probation report and hearing oral arguments, the court sentenced defendant to seven years in prison, based on the following: the three-year upper term on the section 290 offense, doubled pursuant to the Three Strikes Law, plus a one-year enhancement for the "prison prior." The court based its choice of the upper term on the probation officer's report that defendant's prior performance on parole had been unsatisfactory. The trial judge did not rely on the prior prison term as an aggravating factor in choosing the upper term because he used the prison prior to enhance the sentence pursuant to section 667.5, subdivision (b). In deciding to impose the upper term, the court stated that defendant's prior poor performance on parole outweighed the factors favorable to defendant.

CONTENTIONS

Defendant contends his sentence violates *Blakely* because the court imposed the upper term based on factual findings that were not admitted by his plea nor found by a jury. He also contends the trial court erred because, in making its findings, it applied the preponderance of the evidence standard rather than requiring proof beyond a reasonable doubt. Defendant argues that he did not waive his claim of *Blakely* error by failing to object on the basis of *Apprendi* in the trial court and that the error was prejudicial.

The Attorney General argues that defendant has forfeited his claim of *Blakely* error by failing to object on the basis of *Apprendi* at the sentencing hearing. He also argues that *Blakely* does not apply to upper term sentences imposed under California's determinate sentencing law. He asserts further that since defendant was a Three Strikes offender, the statutory maximum sentence for the purpose of *Blakely* was a life sentence and that since defendant was sentenced to seven years, his sentence did not violate *Blakely*. The Attorney General also contends defendant's sentence does not run afoul of *Blakely* because defendant admitted the truth of the single aggravating factor that the court relied on in imposing the upper term sentence in his *Romero* motion.

DISCUSSION

Summary of Holding in Blakely

While this case was pending on appeal, the United States Supreme Court decided *Blakely, supra,* 124 S.Ct. 2531, which held that a sentence that exceeded the statutory maximum of the standard range for the offense based on factual findings that were made by the court, rather than factual findings that were made by a jury or admitted by the defendant, violated the defendant's Sixth Amendment right to trial by jury. (*Id.* at pp. 2536-2538.)

The defendant in *Blakely* pleaded guilty to second degree kidnapping involving domestic violence and the use of a firearm. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months under Washington law. (*Blakely, supra*, 124 S.Ct. at pp. 2534-2535.) Washington law provides that the court may impose a sentence above the standard range if the court finds substantial and compelling reasons justifying the exceptional sentence. After hearing the victim's description of the ordeal, the court imposed a 90-month sentence on the ground that the defendant had acted with "deliberate cruelty," one of the statutorily enumerated grounds for departing from the standard sentencing scheme. (*Id.* at p. 2535.)

Faced with a more than three-year increase in his sentence, the defendant objected. The court therefore conducted a three-day bench trial on the issue of deliberate cruelty and concluded that there were sufficient facts to support its initial finding. (*Blakely, supra*, 124 S.Ct. at pp. 2535-2536.) The defendant appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

The United States Supreme Court agreed and reversed. The court applied the rule of *Apprendi, supra,* 530 U.S. at p. 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.' " (*Blakely, supra*, 124 S.Ct. at p. 2536.) The court explained, "[T]he '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*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose *without* any additional findings." (*Id.* at p. 2537.) Summarizing previous cases on this issue, the court explained that "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . , one of several specified facts . . . , or *any*

aggravating fact (as [in *Blakely*]), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Id.* at p. 2538, fn. omitted.) The court concluded that the defendant's sentence was invalid because it depended on a judicial finding of deliberate cruelty. (*Ibid.*)

The question of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of an upper term sentence is currently under review by the and California Supreme Court in *People v. Towne,* review granted July 14, 2004, S125677 and *People v. Black,* review granted July 28, 2004, S126182. Pending resolution of this issue by the Supreme Court, we must undertake a determination of whether *Blakely* applies under the circumstances presented here. We begin by addressing the forfeiture/waiver issue.

Forfeiture/Waiver[2]

The Attorney General argues that defendant forfeited his claim of *Blakely* error by failing to object on the basis of *Apprendi* at the time of sentencing. The term "waiver" has been applied both to the intentional relinquishment of a known right and the forfeiture of a claim by failing to timely assert it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) " ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.) ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the

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[2] This court recently addressed the forfeiture issue in *People v. Barnes* (2004) 122 Cal.App.4th 858, 876-879, petition for review pending, petition filed November 2, 2004, and *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1580-1583, and concluded that the defendant had not forfeited his claim of *Blakely* error by failing to object on the basis of *Apprendi* in the trial court.

Five other courts have addressed the forfeiture/waiver issue. Division One of the Fourth District Court of Appeal has concluded that *Blakely* contentions were not forfeited by the defendant's failure to assert them in the trial court. (*People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1564-1565, review granted Nov. 17, 2004, S128417 [involving consecutive sentencing]; *People v. George* (2004) 122 Cal.App.4th 419, 424, petn. for review pending, petn. filed Oct. 19, 2004 [involving an upper term sentence]; *People v. Lemus* (2004) 122 Cal.App.4th 614, 619-620, petn. for review pending, petn. filed Oct. 27, 2004 [upper term].)

The First District Court of Appeal, Divisions Two and Five, and the Second District Court of Appeal, Division Four, have also rejected the Attorney General's forfeiture argument. (*People v. Butler* (2004) 122 Cal.App.4th 910, 918-919 petn. for review pending, petn. filed Nov. 3, 2004 [upper term]; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1368-1369, petn. for review pending, petn. filed Nov. 5, 2004 [upper term and consecutive sentences]; *People v. Picado* (Nov. 5, 2004, A102251) ___ Cal.App.4th ___ [upper term and consecutive sentences].)

However, the Third District has held that *Blakely* issues are forfeited by the failure to object on the basis of *Apprendi* in the trial court. (*People v. Sample* (2004) 122 Cal.App.4th 206, 216-227, petn. for review pending, petn. filed Oct. 19, 2004 [upper term].) *Sample* did not discuss the futility of making such an objection, one of the issues presented in this case.

failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' (*United States v. Olano* (1993) [507 U.S. 725].)" (*Saunders*, *supra*, 5 Cal.4th at p. 590, fn. omitted.)

As *Blakely* observed, "nothing prevents a defendant from waiving his [or her] *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. [Citations.] If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his [or her] interest if relevant evidence would prejudice [the defendant] at trial." (*Blakely, supra*, ___ U.S. at p. ___, 124 S.Ct. at p. 2541.)

The Attorney General relies on *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*). In *Scott*, the California Supreme Court concluded, "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case . . . ." (*Id.* at p. 353.) The court held, "[A] criminal defendant cannot argue for the first time on appeal that the court . . . aggravated a sentence based on items contained in a probation report that were erroneous or otherwise flawed. [Citation.]" (*Id*. at pp. 351-352.)

In our view, the waiver rule from *Scott* does not apply to claims of *Blakely* error. In *Scott*, the court reasoned that its waiver rule was necessary to facilitate the prompt detection and correction of error in the trial court, thereby reducing the number of appellate claims and preserving judicial resources. (*Scott, supra*, 9 Cal.4th at pp. 351, 353.) However, *Scott's* pragmatic rationale 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. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *U.S. v. Chorin* (3d Cir. 2003) 322 F.3d 274, 278-279; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) Furthermore, no published case in California had held that a different rule applied in connection with the imposition of an upper term sentence. Given this state of the law, the 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. Moreover, since *Blakely* was decided after defendant was sentenced, the defendant cannot be said to have knowingly and intelligently waived his right to a jury trial.

Some courts have concluded that claims of *Apprendi* error are forfeited by failing to assert them in the trial court. (*United States v. Cotton* (2002) 535 U.S. 625, 631, 634; *U.S. v. Nance* (7th Cir. 2000) 236 F.3d 820, 824; *U.S. v. Lopez* (6th Cir. 2002) 309 F.3d 966, 969; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.) One federal case has found a *Blakely* waiver based on the defendant's failure to raise the issue until supplemental briefing on appeal. (*U.S. v. Curtis* (11th Cir. 2004) 380 F.3d 1308.) However, the federal rule applied in *Curtis* appears stricter than California's rule. In California, while a party may need a good reason to present a new issue in a supplemental brief (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26), an intervening decision may be a good reason. (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 23-24.)

Given the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental constitutional rights are not forfeited by failure to object].)

Defendant argues that an objection is not required when it is futile under controlling precedent. As the court explained in *People v. Welch* (1993) 5 Cal.4th 228, 237-238, "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]"

Prior to *Apprendi*, California courts expressly rejected the argument that there was a right to a jury trial on sentence aggravating factors apart from death penalty cases under section 190.3. (*People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-413.) California has conferred statutory rights to jury trial on enhancements (§ 1170.1, subd. (e)) and the question of whether the defendant has suffered a prior conviction (§ 1025, subd. (b); cf. § 1158). The California Supreme Court characterized these statutory rights as "limited" in *People v. Wiley* (1995) 9 Cal.4th 580, 589 (*Wiley*). Relying on *McMillan v. Pennsylvania* (1986) 477 U.S. 79, *Wiley* stated that there was no federal or state constitutional right to a jury determination of "the truth of prior conviction allegations that relate to sentencing." (*Wiley, supra*, 9 Cal.4th at p. 586.) *Wiley* explained: "[T]he ability of courts to make factual findings in conjunction with the performance of their sentencing functions never has been questioned. From the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process . . . ." (Ibid.)

"Currently, under the provisions of the Determinate Sentencing Act, trial courts are assigned the task of deciding whether to impose an upper or lower term of imprisonment based upon their determination whether 'there are circumstances in aggravation or mitigation of the crime,' a determination that invariably requires numerous factual findings. [Citation.] Similarly, trial courts are called upon to make factual determinations in their decision whether to impose consecutive sentences." (*Wiley, supra*, 9 Cal.4th at p. 587.) The California Supreme Court has stated there is no

constitutional right to a jury trial on an enhancing factor (*People v. Wims* (1995) 10 Cal.4th 293, 304) or on a prior prison term allegation (*People v. Vera*, *supra*, 15 Cal.4th [at p.] 277).

In *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326, the California Supreme Court explained that *Apprendi* had implicitly overruled part of its holding in *People v. Wims, supra*, 10 Cal.4th 293. But *Apprendi* was understood to apply to sentence enhancements, not to aggravating factors. In light of this precedent, we conclude that it was reasonable for a defense attorney not to object at sentencing that the court could only rely on facts found by the jury beyond a reasonable doubt. The holding in *Blakely* was sufficiently unforeseeable that we find no forfeiture due to defendant's failure to object at the time of sentencing.

For all these reasons, we conclude that defendant did not waive his claims of *Apprendi* or *Blakely* error by failing to object in the trial court.

Application of Blakely to Defendant's Sentence

The first step in applying *Blakely* to the sentence in this case is to determine the statutory maximum sentence the court may impose without any additional factual findings. The Attorney General relies on the fact that defendant admitted two prior convictions that qualified as strikes under the Three Strikes Law and argues that defendant's statutory maximum was life in prison because he was a Three Strikes offender. The Attorney General observes, "California has a system of enhancements and alternate sentencing schemes, by which a sentence can be extended beyond the standard range imposed by the Legislature," which must be pleaded and proven to the jury beyond a reasonable doubt. The Attorney General argues, "California satisfies *Blakely's* requirement that, before a defendant can be sentenced outside the standard range identified by the Legislature . . . , a jury must find beyond a reasonable doubt that the

defendant is eligible for an enhancement or alternative scheme that exposes the defendant to a higher sentence."

As the court stated in *Blakely*, "the '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.) Moreover, *Blakely* does not require a jury determination of the fact of a prior conviction. (*Id.* at pp. 2536, fn. 5 & 2537.) In addition, a defendant may waive his or her *Apprendi* rights and consent to judicial fact-finding regarding sentence enhancements or other components of a sentence. (*Id.* at p. 2541.) In this case, defendant admitted the prior convictions that exposed him to a Three Strikes sentence. There was no judicial fact-finding regarding that component of his sentence that implicated *Blakely*. Upon admitting the two prior convictions that qualified as strikes, defendant was subject to a maximum statutory penalty of 25 years to life. (§ 1170.12, subd. (c)(2).) Defendant was repeatedly advised of that fact when the court took his plea.

The question then becomes, how does the court's decision to strike one of the strikes affect the analysis? The Attorney General argues that the trial court's decision to strike one of the prior convictions did not change defendant's statutory maximum for constitutional purposes under *Blakely*, because it amounted to nothing more than a downward departure from the maximum sentence available. He argues, "Because the upper term, which was selected by the court and doubled pursuant to the three strikes law, did not exceed the statutory maximum of life in prison, the constitutional mandates of *Blakely* were not implicated."

In *People v. Garcia* (1999) 20 Cal.4th 490, 496, our State Supreme Court stated: " '[t]he striking or dismissal of a charge of prior conviction . . . is not the equivalent of a determination that defendant did not in fact suffer the conviction [citations]; such judicial action is taken . . . "for the purpose of sentencing" only and "any dismissal of charges of prior convictions . . . does not wipe out such prior convictions or prevent them from

being considered in connection with later convictions" [citation].' [Citation.] Thus, we acknowledged that a court might strike a prior conviction allegation in one context, but use it in another."

Moreover, in *Apprendi, supra*, 530 U.S. at pp. 481-482, after reviewing the history of the jury trial right at common law, the court stated, "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case . . . . [O]ur periodic recognition of judges' broad discretion in sentencing . . . has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature. [Citations.]"

The fact that the court struck one of the strike priors does not impact our calculation of the statutory maximum penalty. There is no problem with the sentencing judge considering additional facts not found by the jury as long as the resulting sentence is within the range established by the jury's findings and the defendant's admissions. (*Apprendi, supra*, 530 U.S. 466, 494, fn. 19.) A sentence within the maximum allowed under the verdict and the facts admitted by the defendant does not violate *Blakely*. (*United States v. Lucca* (8th Cir. 2004) 377 F.3d 927, 934; *United States v. Salvidar-Trujillo* (6th Cir. 2004) 380 F.3d 274; cf. *United States v. Silva* (9th Cir. 2001) 247 F.3d 1051, 1060 [no *Apprendi* error when sentence is within range under facts admitted by the defendants in guilty pleas].)

Defendant admitted the facts that authorized the imposition of a maximum statutory sentence of 25-years-to-life under the Three Strikes Law. Since his seven-year sentence did not exceed his maximum statutory sentence, we conclude that the sentence did not violate *Blakely*.

In light of our conclusion, we shall not reach the Attorney General's contention that defendant had admitted that he performed poorly on parole in the papers and oral argument in support of his *Romero* motion or the parties' arguments regarding the applicable prejudice standard in cases of *Blakely* error.

DISPOSITION

The judgment is affirmed.

_____
McAdams, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

_____
Mihara, J.

Trial Court:	Santa Clara County Superior Court Superior Court No. CC304438
Trial Judge:	Hon. Robert Ahern
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