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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL XAVIER BELL, Defendant and Appellant.	B171066 (Los Angeles County Super. Ct. No. NA047579)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judge Joan Comparet-Cassini. Reversed and remanded for resentencing.

Marylou Hillberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Deputy Attorney General, and Mary Sanchez, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Michael Bell appeals from the judgment imposed on resentencing, after a previous appeal in which this court modified and affirmed his convictions of kidnapping to commit rape or robbery (Pen. Code, § 209, subd. (b)(1); undesignated section references are to that code), three counts of robbery (§ 211), three counts of forcible rape (§ 261, subd. (a)(2)), two counts of forcible oral copulation (§ 288a, subd. (c)(2)), and one count of assault with a firearm (§§ 245, subd. (a)(2)), with jury findings that he committed the sex offenses during the commission of a residential burglary (§ 667.61, subd. (e)(2)), that he personally used a firearm in committing those offenses and in committing the kidnapping and two of the robberies (§§ 667.61, subd. (e)(4), 12022.5, subd. (a)(1), 12022.53, subd. (b)), and that a principal was armed in the commission of the assault (12022, subd. (a)(1)). Because appellant's upper term sentence for the principal term was based on a judicial finding in aggravation, not in accordance with *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), the matter must again be remanded for resentencing.

BACKGROUND

Based on a rash of offenses that he and an accomplice committed after successively entering the homes of two neighborhood families, appellant originally was convicted as described above. The trial court imposed consecutive terms, comprising determinate terms aggregating 28 years and eight months, an indeterminate term of 25 years to life for one of the rapes (under section 667.61, subd. (a)), and a life term for the kidnapping.

On appeal, we affirmed the judgment, with two modifications. First, after finding that the evidence was insufficient to show a completed kidnapping for robbery or rape, but instead reflected an attempt to commit that offense, we modified the kidnapping conviction to one of attempted aggravated kidnapping (§§ 664/209, subd. (b)(1)). Second, we ordered stricken the principal-armed enhancement with respect to the assault count (see § 12022, subd. (a)(1), former § 1170.1, subd. (a)), and we further directed that

on resentencing, the sentence on that count be stayed, under section 654. (*People v. Bell* (July 31, 2003) B158891 [nonpub. opn.].)

After receiving the remittitur, the trial court resentenced appellant, in a manner paralleling the original sentencing. The court again chose count 2, one of the robbery counts, as the principal determinate term, and imposed the upper term of six years (§ 213, subd. (a)(1)(B)), plus a 10-year enhancement under section 12022.53, subdivision (b). The court stated that "The reason I chose the high term is because of the great violence involved in the underlying crime." Next, the court again imposed consecutive one-third middle term sentences for count 1 and counts 4 through 9, including the attempted aggravated kidnapping in count 8. For each of these counts, the court stated a separate reason for the consecutive sentence. The court then imposed but stayed a mid-term sentence for count 10, the assault with a firearm. The unstayed determinate sentences totalled 29 years. Finally, with respect to the rape conviction in count 3, the court again imposed a term of 25 years to life, per section 667.61, subdivision (a). The aggregate sentence thus amounted to 54 years to life.

Appellant again filed a notice of appeal, and we appointed counsel to represent him. Counsel originally filed a brief raising no issues. (See *People v. Wende* (1979) 25 Cal.3d 436, 441-442.) On May 18, 2004, we advised appellant that he had 30 days within which to submit, by brief or letter, any grounds of appeal, contentions, or argument he wished this court to consider. On June 4, 2004, we received a letter from appellant, dated May 26, 2004, summarily raising three questions, none of which, as explained below, is cognizable on this appeal.

On June 24, 2004, the United States Supreme Court decided *Blakely, supra,* 124 S.Ct. 2531. On August 19, 2004, we invited the attorneys for appellant and respondent to file letter briefs, regarding the propriety, in light of *Blakely*, of the upper term and consecutive sentences the trial court had imposed on resentencing, and regarding the proper disposition if we found those aspects of the sentencing erroneous under *Blakely.* In response, counsel for both appellant and respondent filed letter briefs, taking contrary

positions about whether the upper base term and consecutive sentencing were at odds with *Blakely*'s constitutional restrictions. Upon inquiry, both counsel subsequently informed us that they considered the appeal ripe for determination without oral argument.

DISCUSSION

We first briefly address the issues that appellant personally raised in his May 26, 2004 letter, namely (1) a claim of ineffective assistance of trial counsel, (2) failure to hold a fitness hearing (Welf. & Inst. Code, § 707, subd. (a)), and (3) a request that the gun "that was used against me on trial" be tested for fingerprints. None of these claims provides a basis for challenging the present judgment on resentencing. The second and third issues should have been raised, if at all, on appellant's original appeal, and they now have been waived. Moreover, on the merits, appellant was not entitled to a fitness hearing, by reason of Welfare & Institutions Code section 707, subdivision (b). Finally, any post-appeal claim of ineffective assistance of counsel would have to be raised and documented by petition for habeas corpus.

There remain for consideration the contentions that appellant's consecutive and upper base term sentences were imposed in violation of *Blakely, supra,* 124 S.Ct. 2531. In *Blakely,* Washington's standard range of sentence for second-degree kidnapping was 49 to 53 months. The trial court, however, imposed an "exceptional" sentence of 90 months, based on the court's finding that the defendant had acted with "'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases." (124 S.Ct. at p. 2535.) Reversing for violation of the right to jury trial (U.S. Const., 6th & 14th Amends.), the Supreme Court reiterated and applied the rule it had stated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), 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." The *Blakely* court rejected Washington's assertion that the relevant "statutory maximum" sentence was the general maximum of 10 years for the class of felonies involved. Rather, the court explained, "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.* [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 may impose *without* additional findings." (*Blakely, supra,* 124 S.Ct. at p. 2537.)

Respondent preliminarily asserts that appellant "forfeited" (i.e., waived) any claims under *Blakely* by failing to raise them at resentencing. We disagree. First, appellant could not have invoked *Blakely* at the time of sentencing, because the decision had not yet then been rendered. That the high court had already decided *Apprendi, supra,* 530 U.S. 466, is of no consequence, because it is *Blakely*'s clarification of the "statutory maximum" sentence under *Apprendi* that provides the viable basis for appellant's claims. Conversely, an objection made before *Blakely* would have been futile. Finally, a waiver by appellant would not preclude this court itself from inquiring into the validity of his sentence under *Blakely*. (*People v. Williams* (1998) 17 Cal.4th 141, 161, fn. 6.)

Appellant contends that his resentencing violated the strictures of *Blakely,* because the court, not the jury, made various findings of aggravating factors (Cal. Rules of Court, rule 4.421)[1] to authorize appellant's consecutive and upper term sentences. Moreover, the court was required so to find only by a preponderance of the evidence. (Rules 4.420(b), 4.425(b).)

Appellant's consecutive sentencing, based on judicial findings of facts not necessarily embraced in the jury verdicts, did not run afoul of *Blakely*. Appellant himself states the primary reason: "The central holding of *Blakely* (and the preceding opinion in *Apprendi*) is 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." But consecutive sentencing did not and does not increase the penalty for any of the crimes of which appellant was convicted

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[1] Further references to these rules are made to "rules."

beyond their statutory maxima. Indeed, with one exception, the terms that the trial court imposed to run consecutively (see § 669) were each one-third of the middle term (see § 1170.1, subd. (a)), which, as we hold below, generally constitutes the statutory maximum as defined in *Blakely*.[2] Accordingly, appellant's consecutive sentences and the manner of their imposition were not erroneous under that decision.

We reach a different conclusion, however, with regard to appellant's further contention that his upper base term sentence on count 2 was imposed in conflict with *Blakely*'s principles. Once again, *Blakely* precludes imposition, without qualifying jury findings, of a sentence greater than the statutory maximum for the offense, meaning the maximum that may be imposed based on the facts of the conviction, without additional findings. (*Blakely, supra,* 124 S.Ct. at p. 2537.) Under section 1170, subdivision (b), the court must impose the middle term, unless it finds "circumstances in aggravation . . . of the crime." (Accord, rule 4.420(a).) Thus, just as the upper term requires additional findings in aggravation, the middle term necessarily constitutes the statutory maximum term as defined in *Blakely*. But imposition of the upper term – as occurred here – based on a judicial finding in aggravation does not comport with *Blakely* and its jury trial guarantee. (Accord, *People v. Vu* (2004) 124 Cal.App.4th 1060.) We find unpersuasive respondent's contrary argument, in essence that an upper term sentence is part of an authorized "sentencing range," and may validly be chosen even though the statutory scheme provides for that choice to be made upon judicial findings that exceed the verdict (here, that the robbery in count two involved great violence).

Respondent argues that the error in imposing the upper term for count 2 should be deemed constitutionally harmless, for various reasons. We agree with respondent's reasoning only to this extent: the trial court would have been entitled to aggravate the sentence on the ground that appellant was on juvenile probation when he committed the

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[2] The additional, indeterminate term under section 667.61 was based on special jury findings made beyond a reasonable doubt.

offense. (See *Blakely, supra,,* 124 S.Ct. at p. 2536, quoting *Apprendi, supra,* 530 U.S. at p. 490; rule 4.421(b)(4).) But because the court relied on this factor to impose another term consecutively, the present sentence cannot be justified on this ground. Rather, remand for resentencing is required.

DISPOSITION

The judgment is reversed and the case is remanded, solely for resentencing in accordance with *Blakely*, *supra*, 124 S.Ct. 2531.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.