Filed 1/10/05 P. v. Brown CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, H025981

Plaintiff and Respondent, (Monterey County Superior Court No. SS020847)

v.

JERMAINE BROWN,

Defendant and Appellant.
_____/

In re JERMAINE BROWN, H026927

On Habeas Corpus.
_____/

Defendant Jermaine Brown appeals from a judgment of conviction entered after a jury found him guilty of attempted murder (Pen. Code, § 664/187 – count 1),[1] robbery (§ 211 – count 2), and assault with a firearm (§ 245, subd. (a)(2) – count 4). As to counts 1 and 2, the jury also found true the allegations that defendant personally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c), and (d)) and caused great bodily injury (§ 12022.7). As to count 4, the jury found true the

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

allegations that defendant personally used a firearm (§ 12022.5) and caused great bodily injury (§ 12022.7). In a bifurcated proceeding, the trial court found that defendant had suffered a prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The trial court sentenced defendant to 59 years to life in state prison. On appeal, defendant contends: (1) trial counsel rendered ineffective assistance; (2) the imposition of the upper term and consecutive sentences violated his rights to jury trial and due process; (3) the trial court erred by imposing consecutive sentences in counts 1 and 2; and (4) the trial court erred when it considered a juvenile adjudication as a prior felony conviction under the Three Strikes Law. We reverse and remand for further proceedings.[2]

I. Statement of Facts

On February 2, 2002, Fernando Gomez Flores attended the Red Barn car auction with his friend Noel Cruz Lerna. Flores bought five vehicles including a van. While Flores was at the auction, defendant spoke to him. Flores, who recognized defendant from previous auctions, did not respond.

On February 2, 2002, James Burnett, an employee of the Red Barn auction, saw defendant and his companion Joshua Chioino at the auction. Defendant and Chioino were yelling at Flores, because Flores outbid Chioino several times. Flores did not argue with the two men.

Flores left the auction in the van that he purchased, while Lerna and his relatives drove the other vehicles. Flores drove to the gas station across the highway from the Red Barn. Defendant and his companion were talking to two women, who were in a red convertible Mustang, at the gas station. Defendant approached Flores

[2] We also deny defendant's petition for writ of habeas corpus, which has been considered with this appeal.

and offered him $20 for a ride. After Flores refused, defendant returned to his companion and the two women.

Flores left the gas station. As Flores was driving on Highway 101, he noticed a white Cadillac that was following him. When the Cadillac pulled into the lane next to him, defendant, who was the front passenger, pointed a gun at Flores and gestured for him to pull over. Flores drove faster, but the Cadillac cut in front of him. Flores pulled over.

The driver of the Cadillac stood at the rear of his vehicle on the driver's side. Defendant entered the passenger side of Flores's van, pointed a gun at Flores's head, and demanded money. After Flores gave him change from his pockets, defendant said that he wanted more money and rifled through Flores's pockets. Defendant took Flores's wallet, which contained $300, and documents relating to the vehicles that Flores had purchased. Defendant then exited the vehicle, pointed the gun 15 inches from Flores's head, and shot him in the face. Flores pretended to be dead and fell against the steering wheel.

After defendant and his companion drove away, Flores exited his van, stood on the side of the highway, and tried to get help. When no one stopped, he drove to Lerna's home, and was eventually taken to a hospital in King City. He was later taken by ambulance to a hospital in Salinas.

Dr. Robert Block performed surgery on Flores. He retrieved a .38 caliber bullet that had traveled through Flores's top lip, destroyed four teeth, went through his tongue, pierced his left tonsil, broke his jaw in several places, and stopped just short of his carotid artery.

Deputy Sheriff Mike Richards interviewed Flores at the hospital in King City while a nurse acted as a translator. Flores was in a lot of pain and had a difficult time communicating due to the injuries that he had suffered. At times he could not speak.

Deputy Sheriff Santiago Limas interviewed Flores on three occasions in February 2002.[3] When Limas first interviewed Flores on February 5, 2002, Flores was in the intensive care unit, his mouth was wired, and he had a tube in his throat to assist him with breathing. Limas would ask Flores questions, and he would write his responses. Limas had to piece the story together from Flores's responses.

On February 8, 2002, Officer William Clark searched defendant's home at 700 Diaz Street in Sand City. Clark found an expended .38 caliber bullet in the master bedroom. Defendant claimed that he occasionally stayed at this residence with his girlfriend Michelle Collins and with his father at a different address. Clark had also instructed Officer Barry Pasquarosa to conduct a traffic stop of defendant and Joshua Chioino ten days earlier.

On February 12, 2002, Limas took Flores to the Red Barn, and Flores retraced his steps from the night of the incident. Limas testified that he found dried blood on the ground where Flores stated that he had exited his van to seek help. Flores identified defendant as his assailant from a photo lineup, but he was not sure of his identification of the driver of the Cadillac from a second photo lineup.

Lauren Zephro, a forensic evidence technician, examined Flores's van. She positively identified a palm print belonging to defendant on the driver's side of Flores's van.

On February 13 and 14, 2002, defendant called Collins from the county jail. They discussed the search warrant executed on their residence and the items seized by the police. The search warrant listed the items that the police were authorized to seize from the residence, including firearms and ammunition. Defendant asked Collins which of his belongings were seized. Collins told him that the police had overlooked

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[3] Flores's prior inconsistent statements are summarized in the defense case portion of this statement of facts.

some items during their search. One of those items was an orange ticket that Collins burned.

Scott Armstrong, a criminalist, compared the bullet taken from Flores's face to the bullet found in defendant's residence. Armstrong testified that the bullets were the same make, model, caliber and had been expended from a revolver. According to Armstrong, it was "very likely" the bullets were fired from the same gun. He was reluctant to positively identify the bullets as having been "fired from the same gun to the exclusion of all other [guns] in the world without any doubt whatsoever."

Defense Case

Defendant called several witnesses to testify and extensively cross-examined Flores about his numerous prior inconsistent statements.

Richards interviewed Flores at the hospital in King City on February 2, 2002, shortly after he was shot. Flores told him that a large white sedan pulled in front of his van as he left the gas station. Two men exited their vehicle and approached his van. Flores described them as a tall black man and a tall white man with short brown hair. They robbed him of $700, and shot him. When no one at the gas station would help him, he drove on Highway 101. His assailants followed him and drove in front of him for about seven minutes.

On February 5, 2002, Limas interviewed Flores while he was in the hospital. Flores told Limas that the two women in the Mustang left the gas station before his assailants arrived, that the robbery occurred at the gas station, that after the shooting occurred, he was unsuccessful in getting help from other motorists at the gas station, that when he left the gas station the Cadillac followed him, and that one of the suspects was white and the other was black.

On February 8, 2003, Limas again interviewed Flores. Flores told him that both suspects were black, that after the robbery he picked up some papers the robber

had thrown on the ground, that the robber pushed the gun against his head, and that the robber was still inside the van when he fired his gun.

On February 12, 2002, Flores identified defendant as his assailant from a photo lineup. For the first time, Flores told Limas that the robbery did not occur at the gas station. Flores also told him that defendant was talking to two women at the gas station. Flores told Limas that he had been in the Mexican military police, that he was familiar with guns, and that he was certain that defendant had shot him with either a .22 or .25 caliber semiautomatic firearm. Flores did not tell Limas that defendant offered him $20 for a ride to the gas station.

Eliseo Uribe, an investigator and interpreter with the public defender's office, testified that he speaks fluent Spanish and English, and that he interviewed Flores on September 5, 2002. Flores told Uribe that he did not have a disagreement with anyone at the auction, he did not speak to defendant at the auction, the suspects were at the gas station when Flores arrived, and defendant offered him $20 for a ride. Flores also said that the robber took $300 from him.

Clark described Joseph Horne as a black male, six feet tall, 180-185 pounds, and approximately 22 years old.

Mark Stewart operates the Red Barn car auction. Stewart identified Horne from a photograph and testified that Horne attended the car auctions. Horne bought a silver Mustang on February 2, 2002. Michelle Chioino, Joshua Chioino's sister, bought a white Cadillac at the same auction.

II. Discussion

A. Ineffective Assistance of Counsel

Defendant contends that trial counsel rendered ineffective assistance, because he failed to file a motion to suppress the .38 caliber bullet that was seized from defendant's residence. Defendant also argues that trial counsel should have filed a motion to unseal the police affidavit used to issue the search warrant to determine

whether the search warrant was supported by probable cause, and whether the information provided by the confidential informant was reliable.

1. Procedural History

On September 16, 2002, defendant filed a motion to suppress the jewelry and a moped that were found in defendant's residence. On the same day he also filed a motion to suppress the .22 ammunition that was found in his vehicle. Defendant argued that the seizure of the moped and jewelry during the search of his residence were beyond the scope of the search warrant, and the seizure of the ammunition from his vehicle was the result of an unlawful detention. On October 4, 2002, the parties filed supplemental points and authorities regarding whether the search of the vehicle was an inventory search. That same day, the trial court heard evidence and took the motion under submission.

On October 7, 2002, the prosecutor brought a motion to admit evidence regarding the .38 bullet found at defendant's residence, because it was the same caliber as the bullet removed from Flores's neck. Trial counsel objected on the ground that the evidence was disclosed too close to the trial date. The trial court granted the motion and continued the trial at defendant's request. When the prosecutor stated that she would not seek to admit the .22 ammunition found in defendant's vehicle, trial counsel withdrew his motion to suppress this evidence. Trial counsel did not request additional time to file a motion to suppress the .38 bullet. Trial counsel also did not file a motion to unseal the police affidavit used to issue the search warrant.

On November 20, 2002, the trial court denied defendant's motions to suppress and specifically found that the .38 bullet was admissible since ammunition was named in the search warrant.

2. Legal Analysis

"A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of

reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 440.)

"Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excluded evidence in order to demonstrate actual prejudice." (*People v. Wharton* (1991) 53 Cal.3d 522, 576, quoting *Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.)

Here defendant has failed to show that a motion to suppress the .38 bullet would have been meritorious. The search warrant included any firearm and ammunition, and thus a motion to suppress that specifically mentioned the .38 bullet would not have been successful. Defendant's alternative argument that trial counsel should have filed a motion to unseal the police affidavit has no merit. After independently reviewing the sealed affidavit used to issue the search warrant, we have found no information that would have served as the basis to challenge the search warrant on the grounds that the search warrant was not supported by probable cause, or that the information provided by the confidential informant was not reliable. Accordingly, we reject defendant's claim of ineffective assistance.

B. Prior Juvenile Adjudication

Defendant next argues that the trial court erred by finding that his prior juvenile adjudication could be used as a "strike," because he did not have the right to a jury trial in the juvenile proceeding.

Though defendant acknowledges that this court has rejected his argument in *People v. Lee* (2003) 111 Cal.App.4th 1310, he relies on the United States Supreme Court decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, which was applied to juvenile adjudication by the Ninth Circuit in *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d

1187. He also relies on the dissent in *Lee*. (*People v. Lee*, *supra*, 111 Cal.App.4th at pp. 1319-1323.) After carefully considering the analysis in *Apprendi* and *Tighe*, this court concluded that there were sufficient procedural safeguards in juvenile adjudications to satisfy the concerns of the Supreme Court in *Apprendi.* (*People v. Lee*, *supra*, 111 Cal.App.4th at p. 1316.) Thus, we find no error.

C. Rights to Jury Trial and Due Process

Relying on *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531], and *Apprendi v. New Jersey, supra,* 530 U.S. 466, defendant contends that he had a constitutional right to a jury trial and proof beyond a reasonable doubt regarding the facts that the trial court used to impose the upper term and consecutive sentences.[4]

Here defendant was convicted of attempted premeditated murder in count 1 and second degree robbery in count 2. Prior to imposing sentence on defendant, the trial court stated, "Well, what's also telling is the comment in the CYA report on Mr. Brown's release. It says he failed to correct his anger, and there were continued acts of violence. [¶] And, Mr. Brown, you're a very angry man. I don't know what it is

[4] The People contend that defendant has forfeited this claim, because he failed to raise it below. We disagree. Courts have held that a defendant need not object to preserve an issue for appeal where to do so would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 [prosecutorial misconduct]; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 [judicial misconduct].) The rationale for this exception also applies when statutory or case law that is binding on the trial court would have precluded the claim. (Cf. *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver of claim where the lower court was bound by case law on the issue].) Here it would have been futile for defendant to request a jury trial or a reasonable doubt standard regarding aggravating circumstances, because California statutory and case law before *Blakely* clearly prescribed that the trial court was authorized to impose the upper term or consecutive sentences under specified circumstances. (§§ 1170. subd. (b), 1170.1, subd. (a); *In re Hoddinott* (1996) 12 Cal.4th 992, 1000; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1769.) In order to do so, the trial court was required to find facts to support its decision under a preponderance standard. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) Thus, given the state of the law, defendant was not required to raise this issue before the trial court in order to preserve it for appeal.

that makes you so angry. If the purpose of stopping the victim's vehicle was a robbery, that was accomplished. He didn't need to get shot in the face for it. You're a very dangerous man and should not be out in the free society." The trial court then imposed the upper term of five years in count 2 and doubled that sentence under the Three Strikes Law. In imposing the upper term the trial court stated: "And I find the factors in aggravation: The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. The defendant was armed with or used a weapon at the time of commission of the crime. The manner in which the crime was carried out indicates planning, sophistication, or professionalism. The defendant's prior performance on probation or parole was unsatisfactory." In imposing a consecutive 39 years to life term for count 1, the trial court found: "[T]he Court is going to be running sentence consecutively. And for that purpose, the Court does find that the crimes and their objectives are predominantly independent of each other. [¶] Further, the defendant has engaged in violent conduct which indicates a serious danger to society. And the defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness." The trial court stayed the sentence imposed in count 4.

In *Apprendi v. New Jersey, supra,* 530 U.S. 466, the court 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." (*Id.* at p. 490.) In that case, the court focused on "the narrow issue" of whether the sentence for a single crime exceeded the statutory maximum. (*Id.* at p. 474.)

In *Blakely*, *supra*, 124 S.Ct. 2531, the court considered application of the *Apprendi* holding. In *Blakely*, the defendant pleaded guilty to second-degree kidnapping involving a firearm and domestic violence. (*Id.* at pp. 2534-2535.) Under

Washington law, when the trial court imposes a sentence that departs from the standard range sentence, it must make findings of fact and conclusions of law to support the determination. (*Id.* at p. 2535.) Thus, pursuant to this statutory scheme, the trial court sentenced the defendant to more than three years above the statutory 49 to 53-month maximum after it found that the defendant had acted with "deliberate cruelty." (*Ibid.*) The court concluded "that 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*. . . . 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* any additional findings." (*Id.* at p. 2537.) Thus, the court found the defendant had been denied his right to a jury trial, because the trial court relied on facts not found by the jury or admitted by the defendant. (*Id.* at p. 2538.)

In imposing a prison term, the trial court shall impose the middle term unless there are circumstances in aggravation or mitigation of the crime. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(a),(b).)[5] Rules 4.421 and 4.423 list the possible circumstances in aggravation and mitigation. Any fact that is an element of the crime or the basis for a sentence enhancement cannot be used to justify imposition of the upper term. (§ 1170, subd. (b); rule 4.420(c),(d).) However, the trial court may strike the enhancement and use it as a factor in aggravation.

Here the trial court relied on four factors, including that the crime involved great violence and great bodily harm, defendant used a weapon, the crime was carried out in a sophisticated or professional manner, and defendant's prior performance on probation or parole was unsatisfactory.[6] Though the jury found that defendant used a

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[5] All further references to rules are to the California Rules of Court.

[6] Relying on *Crawford v. Washington* (2004) ___ U.S. ___ , 124 S.Ct. 1354, defendant contends that the trial court erred by relying on inadmissible hearsay in the

weapon and caused great bodily injury when he robbed the victim, these facts were the bases for sentence enhancements, which were not stricken by the trial court, and thus could not be used to justify an upper term. The finding relating to the manner in which defendant carried out the crime was not submitted to a jury and proved beyond a reasonable doubt, and thus violated the *Apprendi/Blakely* rule.

However, the People argue that both *Blakely* and *Apprendi* recognized that *Almendarez-Torres v. United States* (1998) 523 U.S. 224 created an exception to the requirements of a jury finding of proof beyond a reasonable doubt, that is, that "the fact of a prior conviction" could serve as the basis for increasing the penalty without violating the defendant's rights to a jury trial or due process. (*Blakely*, *supra,* 124 S.Ct. at p. 2536; *Apprendi*, *supra,* 530 U.S. at pp. 487-488, 490.) They claim that the trial court's finding regarding defendant's performance on probation is the equivalent of "the fact of a prior conviction." We disagree. First, defendant had no prior adult convictions. Second, even assuming that defendant's juvenile adjudications come within the prior conviction exception, here the trial court's finding related to defendant's performance on probation, not the fact of the prior conviction. Thus, this finding also ran afoul of the *Apprendi/Blakely* rule. Accordingly, we remand for further proceedings.

We next consider whether *Apprendi* and *Blakely* apply to California's consecutive sentencing scheme. Section 669 requires that the trial court determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) At issue in both *Apprendi* and *Blakely* was the defendant's right to a jury trial on a single count. There was no discussion of consecutive sentencing. In discussing the jury trial right,

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probation report. A defendant's failure to object or challenge the contents of the probation report waives any defects. (*People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 15.)

Apprendi stated: "We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.' (*Jones* [*v. United States* (1999)] 526 U.S. at 247-248.) But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 483-484.) The decision to impose consecutive sentences does not involve the facts "necessary to constitute a statutory offense." (*Id.* at p. 483.) A trial court makes the decision to impose consecutive sentences only after the defendant has been afforded the right to a jury trial and been found guilty beyond a reasonable doubt of two or more offenses. Accordingly, we conclude that *Apprendi* and *Blakely* do not apply to the consecutive sentencing decision. [7]

D. Imposition of Consecutive Sentences

Defendant next contends that the trial court erred by imposing consecutive sentences in counts 1 and 2. He asserts that the two crimes and their objectives were not predominately independent of each other.

The trial court stated that "the Court is going to be running sentence consecutively. And, for that purpose, the Court does find that the crimes and their objectives are predominantly independent of each other." The trial court first imposed a determinate term on count 2 (second degree robbery) and a consecutive term for the personal use of a firearm enhancement. The trial court then sentenced defendant on

[7] We note that several cases, which are not yet final or have been granted review, have rejected the argument that a defendant is entitled to a jury trial as to factors used to impose consecutive sentences or have been granted review on that issue. (See, e.g., *People v. Vonner* (Oct. 20, 2004) S127824; *People v. Sykes* (Oct. 20, 2004) S127529; *People v. Ochoa* (Sept. 2, 2004) D042215; *People v. Sample* (Sept. 13, 2004) C044445; *People v. Vaughn* (Oct. 5, 2004) B165489.)

count 1 (attempted murder) consecutive to count 2 and imposed a term for the personal use of a firearm enhancement consecutive to count 1. The trial court stayed the sentence imposed for count 4.

California Rules of Court, rule 4.425 provides in relevant part that the "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) . . . Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other." "Even when violent crimes against the same victim on one occasion have separate motives, . . . consecutive sentencing is proper. (See, e.g., *People v. Nguyen* (1988) 204 Cal.App.3d 181.)" (*People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) The trial court is required to state only one criterion in aggravation in order to impose a consecutive sentence. (*People v. Davis* (1995) 10 Cal.4th 463, 552.) We will affirm the trial court's finding on this issue where it is supported by substantial evidence. (*People v. Galvan* (1986) 187 Cal.App.3d 1205, 1220.)

Here defendant and his companion forced the victim off the road. Defendant then entered Flores's vehicle, pointed a gun at him, and demanded money. After taking Flores's wallet, defendant exited the vehicle and shot him in the face. Since defendant had already obtained Flores's property and Flores was not resisting, the act of shooting him was not part of the robbery, but rather a gratuitous act of violence. Thus, there was substantial evidence to support the trial court's finding that the crimes and their objectives were predominantly independent of each other.

Defendant also argues that trial counsel rendered ineffective assistance when he failed to object to the sentence on the ground that it was contrary to rule 4.425. Since the trial court did not err, defendant's argument has no merit.

III. Disposition

The judgment is reversed and remanded for further proceedings. The petition for writ of habeas corpus is denied.

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Mihara, J.

I CONCUR:

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Bamattre-Manoukian, Acting P.J.

Dissenting and Concurring

I respectfully dissent from that portion of the opinion that concludes, in reliance on *People v. Lee* (2003) 111 Cal.App.4th 1310, that a prior juvenile adjudication may constitutionally be used as a "strike" despite the fact that there is no right to a jury trial in juvenile proceedings. I continue to hold the view that this result runs counter to *Apprendi v. New Jersey* (2000) 530 U.S. 466, as the Ninth Circuit Court of Appeals found in *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187. I further adopt the reasoning set forth in the dissenting opinion of Justice Rushing in *People v. Lee*, *supra*, 111 Cal.App.4th 1310, 1319. See also the dissenting opinion of Justice Johnson in *People v. Smith* (2003) 110 Cal.App.4th 1072, 1082.

That said, I concur in the analysis and disposition of the other issues addressed by the majority concerning the claims of ineffective assistance of counsel and any other error in the imposition of sentence.

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McAdams, J.