

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM FELTON BUTLER,

Defendant and Appellant.

A101799

(Humboldt County
Super. Ct. No. CR024877S)

BY THE COURT:

It is ordered that the opinion filed herein on September 27, 2004, be modified in the following particulars:

The text contained in footnote 7 on page 20 is deleted. The deleted text is replaced with the following language:

“We are not persuaded otherwise by the People’s troubling reliance on two federal cases, *United States v. Cotton* (2002) 535 U.S. 625 (*Cotton*) and *United States v. Ameline* (2004) 376 F.3d 967 (*Ameline*). The People erroneously contend these cases support their view that a *Blakely* claim can properly be deemed ‘forfeited’ under California law, and thus not subject to review *at all*, even when, as here, *Blakely* was decided after the defendant’s sentencing hearing.

“As any fair analysis of these federal cases should acknowledge, characterizing a claim as ‘forfeited’ under federal law does not mean the claim is not reviewable on appeal. Rather, such a claim is reviewed for ‘plain error’ pursuant to rule 52(b) of the Federal Rules of Criminal Procedure. (See *Cotton, supra*, 535 U.S. 625, 631-632; *Ameline, supra*, 376 F.3d 967, 978-979.) In their supplemental brief, the People

acknowledge that a plain error analysis was applied in *Cotton* but then argue that such an analysis is inapplicable in this state appeal. We agree. But, by the same token, these federal cases are not sound authority for denying *any review* of a state law claim which arose while the criminal appeal was pending.

“In any event, California has a well-recognized waiver rule (see, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 351-356) applicable in circumstances of this sort and, as noted above, we have no problem in holding there was no waiver of *Blakely* error. (See, to the same effect, *People v. Ochoa* (1994) 121 Cal.App.4th 1551 [2004 Cal.App. LEXIS 1464, at p. 6]; *People v. George* (September 15, 2004, D042980) ___ Cal.App.4th ___ [2004 Cal.App. LEXIS 1532].) To the extent the recent decision of the Third District in *People v. Sample* (September 13, 2004, C044445) ___ Cal.App.4th ___ [2004 Cal.App.LEXIS] holds to the contrary, we respectfully disagree with it.”

This modification does not effect a change in the judgment.

Both petitions for rehearing are denied.