Filed 3/4/05 P. v. Davie CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TODD VINCENT DAVIE,<br><br>Defendant and Appellant. | B173037<br><br>(Los Angeles County<br>Super. Ct. No. VA074008) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry S. Knupp, Judge. Affirmed in part; reversed in part.

Ronnie Duberstein, 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, Victoria B. Wilson and John Yang, Deputy Attorneys General for Plaintiff and Respondent.

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In this appeal, Todd Davie challenges the court's selection of the upper term for his sentence, claiming it violated his right to jury trial under *Blakely v. Washington* (2004) ___ U.S.___ [124 S.Ct. 2531]. We agree, and reverse and remand for resentencing.

## FACTUAL AND PROCEDURAL SUMMARY

In November 2003, appellant was a psychiatric patient at Metropolitan State Hospital in Norwalk. On the morning of November 19, as Dr. Moheb Beshay walked down the hospital hall, appellant jumped out from the bathroom and hit Dr. Beshay in the cheek. Appellant punched the doctor in the face and body and threw him to the floor. Dr. Beshay lost consciousness for a moment, then became aware that appellant was on top of him, repeatedly hitting him. As appellant was pulled away by hospital staff, he was heard threatening to kill the doctor: "You get me medication and distress my body and I'm going to kill you for that."

Appellant was charged in count one with assault by means likely to produce great bodily injury, with an allegation that he personally inflicted great bodily injury, and in count two with making criminal threats. It also was alleged that appellant served a prior prison term. Appellant initially plead not guilty, then changed his plea to not guilty by reason of insanity. A jury found appellant guilty on both counts, but found the great bodily injury allegation was not true. Appellant waived the right to jury trial on the insanity issue and the prior prison term allegation. The court found that he was not insane at the time of the crime, and found the prior prison term allegation true.

The court sentenced appellant to the upper term of four years on count one, with a one year enhancement for the prior prison term. The court imposed a concurrent midterm of two years on count two. Appellant filed this timely appeal.

## DISCUSSION

Relying on *Blakely v. Washington, supra,* 124 S.Ct. 2531, appellant claims the trial court's selection of the upper term on count one violated his constitutional right to

have a jury decide all facts necessary for imposition of this sentence. It is our view that a *Blakely* argument may be presented even if it was not raised before the trial court, where, as here, sentencing occurred before that case was decided by the Supreme Court. We turn to the merits of the argument.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme 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." In *Blakely*, the Supreme Court explained 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." (124 S.Ct. at p. 2537.)

Under Penal Code section 1170, subdivision (b), "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Like the "standard range" in the Washington sentencing scheme considered in *Blakely*, the middle term under California law is the maximum sentence the court can impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . ." (*Blakely*, *supra*, 124 S.Ct. 2531, 2537.) We conclude that *Blakely* applies to the California determinate sentencing law.[1]

In our case, the court stated the basis for its imposition of the upper term: "In this matter, the court finds that the aggravating factors, which are that the matter was premeditated and planned, defendant's prior convictions as an adult or commissions of

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[1] In *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738], the Supreme Court addressed the impact of *Blakely* on the federal sentencing guidelines. The California Supreme Court has requested further briefing in *People v. Black* (S126182) on the application of *Booker* to the California sentencing scheme. Pending further guidance, we adhere to the position we have taken, that *Blakely* applies to the California determinate sentencing law.

crimes are numerous and of increasing seriousness. He has served a prior prison term. It appears to me that the defendant is dangerous to society. I find no mitigating factors. The court will impose the high-base term of four years on count 1."

Appellant waived jury on the prior prison term allegation, and the court then found that allegation true beyond a reasonable doubt. Hence, that fact was potentially available as a factor in aggravation under the standards set out in *Blakely*. However, the court imposed a one-year enhancement for the prior prison term. A fact used to enhance a prison sentence may not also be used to impose the upper term. (Pen. Code, § 1170, subd. (b); California Rules of Court, rule 4.420(c); *People v. Jackson* (1987) 196 Cal.App.3d 380, 388-389.)

The jury did not find that the crime was premeditated and planned, appellant did not admit that fact, and the court did not find that fact beyond a reasonable doubt. Nor was there a jury determination that appellant was a danger to society. The trial court could not rely on either of these factors to impose the upper term.

That leaves the court's finding that appellant's prior convictions were numerous and of increasing seriousness,[2] a determination that may fall within the "fact of a prior conviction" recidivist exception to the necessity for a jury finding specified in *Apprendi*. (530 U.S. at p. 490.) Standing alone, this finding would support imposition of the high term. But the court also relied on the prior prison term, which could not be used both for enhancement and as a factor in aggravation, and on two other factors which it, not the jury, found to be true, in violation of appellant's right to jury. We cannot determine whether or not the trial court would have imposed the upper term based on the recidivist factor alone, and therefore must reverse the sentence and remand for resentencing.

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[2] Appellant's probation report shows an adult history of nine prior convictions from 1983 to the time of the present crime. The crimes included (in chronological order) grand theft auto, vehicle tampering, assault with a deadly weapon, malicious mischief, trespass, theft and forgery by use of credit card, burglary, forgery, assault by prisoner, and battery by prisoner.

## DISPOSITION

The judgment is reversed as to sentencing and the cause remanded for further proceedings on that issue consistent with our opinion. In all other respects, the judgment is affirmed.

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EPSTEIN, P.J.

We concur:

HASTINGS, J.

CURRY, J.