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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY HAMILTON,

Defendant and Appellant.

B173224

(Los Angeles County  
Super. Ct. No. PA044497)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles L. Peven, Judge. Affirmed in part, reversed in part, and remanded.

Julie Sullwold Hernandez, 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, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Hamilton appeals from judgment entered following a court trial in which he was convicted of voluntary manslaughter. (Pen. Code, § 192, subd. (a).) Sentenced to the upper term of 11 years, he contends his sentence violated the Sixth Amendment to the United States Constitution under *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_ [124 S.Ct. 2531] (*Blakely*). For reasons explained in the opinion, we affirm the conviction and reverse only the sentence and remand for resentencing.

### **FACTUAL AND PROCEDURAL SUMMARY**

Following a jury waiver, appellant was convicted by the court of voluntary manslaughter and found sane. With reference to appellant's sanity, the court observed it was "a very, very close case," but while there was no question that appellant was mentally ill, he had not overcome the presumption of sanity at the time of the commission of the offense.

Before appellant killed his father, appellant had had a history of mental illness, drug abuse, and bizarre behavior. On May 22, 2003, after an altercation between appellant and his father, police officers arrived at the home of the victim and found the victim dead with a suspender wrapped in a single loop around his neck. There was a hat on the victim's chest; and under the hat and underneath the T-shirt he was wearing, there were two wedge-shaped slices of apple. A large wedge of apple had been placed in the victim's mouth after he died. Part of the victim's ear appeared to have been bitten off at or near the time of death and was found on the floor near the body. The cause of death was asphyxia due to ligature strangulation, and there were injuries on the victim's body indicating he was trying to defend himself.

At sentencing, the court stated it found "one mitigating factor in that the defendant was suffering from a mental condition that significantly reduced his

culpability for the crime. [¶] However, the court does find that there are aggravating circumstances here[] in that the crime certainly involved great violence, and great bodily harm, and certainly the defendant, the court does note, was on probation when he committed this offense. And the probation was for a spousal abuse offender, which was another crime of a violent nature.” The court found that the aggravating circumstances outweighed the one mitigating circumstance and selected the high term of 11 years.

### DISCUSSION

Appellant contends that *Blakely* applies to this case and that his sentence was unauthorized. He argues that no jury found the aggravating factors true or that the factors in aggravation outweighed that in mitigation. Additionally, he argues that the factual determinations made by the trial judge were made by a lesser standard of proof than that required by the federal constitution as interpreted in *Blakely*.

His contention is partially well taken. Appellant waived his right to a jury trial and agreed to allow the court to decide his guilt or innocence, his sanity, and his sentence. Having waived a jury trial, appellant is deemed to have consented to a court trial on all of the issues in the case. (See *People v. Berutko* (1969) 71 Cal.2d 84, 94.) The trial court acted as the fact finder, occupying the same position as a jury, and was similarly able to determine whether the aggravating circumstances existed. Unlike the situation in *Blakely*, where the trial court imposed a sentence after a guilty plea, here the trial court heard all of the evidence that allowed it to determine the aggravating factors and the mitigating factor.

However, pursuant to California Rules of Court, rule 4.420, circumstances in aggravation and mitigation had to be established only by a preponderance of the evidence and there is nothing in this record to indicate the trial court deviated from

this standard. Under the circumstances, the matter must be remanded to the trial court for further proceedings to determine the aggravating factors beyond a reasonable doubt. (Cf. *People v. Earley* (2004) 122 Cal. App. 4th 542, 550.)

**DISPOSITION**

The sentence is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion and in all other respects the judgment is affirmed.

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CURRY, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.