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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 TERRIL HEROD, Defendant and Appellant.	B167962 (Super. Ct. No. YA051893)

APPEAL from a judgment of the Superior Court of Los Angeles County, James M. Ideman, Judge. Reversed in part, affirmed in part.

Michele A. Douglas, 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, Margaret E. Maxwell and Jason C. Tran, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Herod challenges his carjacking conviction, claiming the court abused its discretion in allowing a police detective to testify that he included appellant's picture in a photographic lineup based on an anonymous telephone call to the police station. He also claims that, in light of the Supreme Court's recent decision in *Blakely v. Washington* (2004) 124 S. Ct. 2531, imposition of the upper term was unlawful because the aggravating factors were not found by a jury. We affirm his conviction, but remand the cause to the trial court for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

Around 1:00 a.m. on March 3, 2002, Mark Edwards drove into a gas station at the corner of Century and Crenshaw in Los Angeles for gas. He opened the door of his car, reached into the ashtray for money, and noticed a white Jeep Cherokee pull up on the other side of the pump. A woman was driving.

A man, later identified as appellant, got out of the Jeep, walked over to the cashier, then over to the open driver's side door of Edwards's car. Appellant asked Edwards, who was still seated in his car, where he was from. Edwards replied, "I'm not with that." Appellant then asked, "Well, where do you stay?" He reached under his shirt, withdrew a gun from his waistband, pointed it at Edwards, and demanded Edwards's car keys. Edwards gave appellant the keys and got out of the car. The Jeep drove off while appellant had the gun pointed at Edwards.

Appellant got into the car, then moved the gun from his right to his left hand so it was still pointing at Edwards. Appellant closed the car door, and Edwards started to walk away. The car door opened again, and appellant called Edwards back to start the vehicle. Edwards returned to the car, started it, then exited. Appellant drove off, grinding the gears as he went.

Edwards reported the incident to the police. On March 15, 2002, Detective Scott Collins of the Inglewood Police Department showed Edwards a photographic lineup. Edwards identified appellant as the person who took his car on March 3.

On March 19, 2002, Donna Alarcon and Rollan Macadangdang were working at the front desk of the Hampton Inn on La Cienega Boulevard. Appellant came to the counter and demanded money. He had his right hand in his pocket, and it seemed as though he might have a gun. The clerks gave appellant approximately $500, which he stuffed into his pocket and inside his vest. Alarcon identified appellant from photographs taken of him on videotape during the robbery. She also identified appellant in a photographic lineup.

Appellant was arrested and charged with one count of carjacking with personal use of a firearm, and two counts of robbery. It was alleged that appellant had a serious felony prior, and three prison priors. He was convicted as charged, and the priors were found to be true. Appellant was sentenced to a total term of 35 years, 4 months, which included the upper term of nine years on the carjacking, and consecutive sentences of eight months for each robbery. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims the trial court abused its discretion in admitting evidence regarding an anonymous telephone tip received by the Inglewood Police Department. According to the offer of proof by the prosecution, an anonymous caller told an officer at the station: "Anthony Herod carjacked some guy at the 76 gas station on Century and Crenshaw, and he's the guy you're looking for." The officer gave that information to Detective Collins, who put together a six-pack photo lineup which included five random photographs and a photograph of appellant. The prosecutor did not intend to bring in the contents of the call, just that "there was a phone call that came in to the station that Detective Collins, in his investigation, learned of the phone call, spoke to some detectives, and because of that he went on to make a six-pack and to explain how the six-pack came to be. That is all."

Defense counsel objected: "[M]y objection is simply that I didn't feel that how Mr. Herod got into the six-pack was relevant, just that he did some investigation and put him in the six-pack and he was identified."

The court disagreed: "Well, I think it is relevant, otherwise, the jury is going to wonder how they ever came up with Herod because the victims evidently didn't know him, and they might think that they picked him out just because he got a record or whatever they might imagine. So I think that is germane and relevant to the case."

In accordance with this ruling, Detective Collins was asked on direct examination: "In investigating this case did a phone call come into your police station?" He answered, "Yes." He was then asked, "And based on your investigation, what did you do?" He replied, "I was able to obtain a photo off of a computer at work." Collins identified appellant as the person whose photograph he obtained, and testified that he placed it in a six-pack with five other photos. He showed the six-pack to Mark Edwards, the victim of the carjacking. Edwards "almost immediately" identified appellant's photograph as that of the perpetrator.

Appellant claims evidence of the anonymous telephone call was irrelevant and "clearly insinuated excluded hearsay statements." We disagree.

First, to the extent appellant is arguing the evidence was inadmissible hearsay, the issue is forfeited. At the time of the prosecution's offer of proof, defense counsel argued, "[M]y objection is simply that I didn't feel that how Mr. Herod got into the six-pack was relevant, just that he did some investigation and put him in the six-pack and he was identified." The court clarified, "Well, your objection is relevance, then. It wouldn't be hearsay because they're not offering the content." Defense counsel replied, "Right." The issue of hearsay has not been preserved. (See *People v. Lewis* (2001) 25 Cal.4th 610, 664.)

More importantly, there was no hearsay. The evidence was that in response to a telephone call to the station, Detective Collins obtained appellant's photograph from the computer and showed it to the victim. There was no evidence of the contents of the telephone call or its truth.

A trial court has broad discretion in determining the relevance of evidence. (*People v. Heard* (2003) 31 Cal.4th 946, 973.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of

the action." (Evid. Code, § 210.) Here, evidence of the telephone call tends to establish that Detective Collins had a reason to include appellant's picture in the six-pack. This evidence has some bearing on the weight to be given to the victim's identification of appellant from the photographic lineup. The trial court acted well within its discretion in admitting this evidence.

II

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), 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." Just after briefing was complete in this case, the Supreme Court decided *Blakely v. Washington, supra*, 124 S. Ct. 2531 (*Blakely*), in which it applied that rule to a Washington state sentencing scheme. The defendant in *Blakely* had been convicted of a Class B felony. Under Washington law, Class B felonies are punishable by a prison term up to a maximum of 10 years. The sentencing scheme also provides for a "standard range" of 49 to 53 months punishment for Class B felonies, but authorizes a judge to impose a sentence above the standard range (but within the 10-year maximum) on the basis of "'substantial and compelling reasons justifying an exceptional sentence.'" (124 S.Ct. at p. 2535, quoting Wash. Rev. Code Ann., § 9.94A.120(2).) If the judge imposes an exceptional sentence, he or she must set forth findings of fact and conclusions of law to support it. (*Ibid*.) The judge imposed an exceptional sentence of 90 months, justified on the ground that the defendant had acted with "deliberate cruelty," which was one of the statutory grounds for an exceptional sentence. (*Ibid*.)

The State of Washington argued that there was no *Apprendi* violation because the relevant "statutory maximum" was the 10-year maximum, not the 53 months at the top of the sentencing range for Class B felonies. The Supreme Court rejected that argument, holding 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.) The Supreme Court held the sentencing procedure violated defendant's Sixth Amendment right to jury trial and was therefore invalid. (124 S.Ct. at p. 2538.) It appears that the holding applies to all cases not yet final when *Blakely* was decided in June 2004. (See *Schriro v. Summerlin* (2004) 124 S.Ct. 2519.)

Appellant was sentenced to the upper term for carjacking with consecutive sentences for the robbery counts. We asked the parties to submit supplemental briefing on the application of *Blakely* to this sentence. Appellant, as expected, argues that *Blakely* applies to the California determinate sentencing law. We agree. 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." Circumstances in aggravation cannot include a fact on which an enhancement is based or a fact which is an element of the underlying offense. (Cal. Rules of Court, rule 4.420(c) & (d).) 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 turn to the facts of our case. The trial court found no mitigating circumstances, and several circumstances in aggravation: "The crimes indicate planning, sophistication, or professionalism. At least as to Count 1 the defendant used a weapon at the time of the commission of the crime. The defendant has engaged in violent conduct which indicates a serious danger to society. He's had numerous brushes with the law of which this is the latest, perhaps the wors[t]. He served a prior prison term. He was on parole when the crime was committed, and he performed poorly on parole. So all of these factors justify the imposition of the high term."

The jury found the use of a firearm to be true, and in a court trial, the court found the prior prison term to be true. But sentence enhancements were imposed for each, and the

prohibition against dual use of facts prohibits use of the same facts as factors in aggravation. (Cal. Rules of Court, rule 4.420; *People v. Coleman* (1989) 48 Cal.3d 112, 163-164.)

The remaining facts relied on by the court to impose the upper term, while proper bases for an upper term, were not found true by the jury, nor were they admitted by appellant. Under *Blakely*, use of these facts to impose the upper term does not comply with the Sixth Amendment, resulting in an invalid sentence. (*Blakely*, *supra*, 124 S.Ct. at pp. 2537-2538.)

We reach a different conclusion as to the imposition of consecutive rather than concurrent sentences for the robbery counts, which involved separate crimes on separate occasions against separate victims. The right to jury trial considered in *Apprendi* and *Blakely* involve the "requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at pp. 483-484.) The decision to impose a consecutive rather than concurrent sentence involves the cumulation of penalties for multiple crimes. The trial court is not required to make factual findings to support a decision to impose consecutive terms. Nonexclusive criteria for that decision are set out in California Rules of Court, rule 4.425, but neither the Rules of Court nor the Penal Code requires judicial fact finding to support that decision. (See Cal. Rules of Court, rules 4.406, 4.433(c); Pen. Code, § 1170.3, subd. (a)(3).)

The consecutive sentencing decision can only be made *after* the accused has been found beyond a reasonable doubt to have committed two or more offenses. This fully complies with Sixth Amendment jury trial and Fourteenth Amendment due process rights. (See *People v. Sykes* (2004) 120 Cal.App.4th 1331, 1345.)

DISPOSITION

The matter is reversed in part and remanded for resentencing on count 1, in accordance with the views expressed in this opinion; in all other respects the judgment is affirmed.

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EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.