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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH DEWAYNE JONES,

Defendant and Appellant.

B190882

(Los Angeles County
Super. Ct. No. TAO77113)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Tammy Chung Ryu, Judge. Affirmed.

William L. Heyman, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves,
Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney
General, Lawrence M. Daniels and Kathy S. Pomerantz, Deputy Attorneys
General, for Plaintiff and Respondent.

In December 2004, Kenneth Dewayne Jones entered an open no contest plea to one count of making criminal threats (Pen. Code, § 422), acknowledging as part of a plea agreement that the maximum time in custody in [his] case [was] three years" (upper term), but that based on his open plea sentencing would be deferred for eight months, imposition of sentence would be suspended, probation would be granted with credit for the eight months served, and that if he violated any term of probation he could be sent to state prison for up to the full three years." Jones waived his right to a jury trial, and probation was later granted in conformance with the agreement. Jones violated the terms of probation and it was revoked in April 2006, at which time the trial court imposed the contemplated three-year state prison sentence.

Jones appeals, claiming the upper term sentence cannot stand because the facts on which it is based were not found by a jury. Had he not waived his right to a trial by jury, we would agree. (Cunningham v. California (2007) ___ U.S. ___ [127 S.Ct. 856].) But he did waive his right to a jury trial, and he did so knowing he was facing a three-year state prison term. (People v. Berutko (1969) 71 Cal.2d 84, 94 [It is settled that where a defendant waives a jury trial he is deemed to have consented to a trial of all issues in the case before the court sitting without a jury.]¹) It follows that (unless the California Supreme Court holds otherwise in People v. French, review granted February 7, 2007, S148845 or one of the related cases) there is no "Blakely" issue in this case.

¹ At the time the plea was taken in 2004, Jones was represented by Deputy Public Defender Robert Schmitz, the prosecutor was Deputy District Attorney Geoffrey Lewin, and the plea was taken by Judge John T. Doyle. At the time of sentencing in 2006 (after the violation), Jones was represented by Deputy Public Defender Hidea Nakano, the prosecutor was Deputy District Attorney Beth Widmark, and sentence was imposed by Judge Tammy Chung Ryu. We mention this because, at the sentencing hearing, trial counsel (apparently unaware of the jury waiver) purported to preserve Jones' "Blakely right to object to the imposition of high term" -- and neither the prosecutor nor the trial court pointed out that the issue was moot.

DISPOSITION

The judgment is affirmed.

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VOGEL, Acting P.J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.