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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ALAN LEIGHTON,

Defendant and Appellant.

C044502

(Super. Ct. No. 03F033)

A jury convicted defendant Michael Alan Leighton of battery with serious bodily injury (Pen. Code, § 243, subd. (d)),¹ and the trial court sustained an enhancement allegation for a prior prison term (§ 667.5, subd. (b)). The court sentenced defendant to state prison for an aggregate term of five years, consisting of the upper term of four years for the substantive offense and an additional one year for the enhancement. The court's decision to impose the upper term was based on "the vicious and

¹ Undesignated statutory references are to the Penal Code.

unprovoked nature of the assault on the victim" in which defendant "inflicted injuries causing the victim to lose consciousness and requiring suturing of the victim's face."

On rehearing in this matter, counsel argues that defendant's sentence contravenes the recent decision of the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403] (hereafter *Blakely*).² We agree. A brief factual summary will suffice for an understanding of the issue.

FACTUAL BACKGROUND

In the early morning hours of January 1, 2003, defendant ran toward a young man in a gas station parking lot in Weaverville, and they quickly became involved in a fight. There was evidence suggesting defendant was the aggressor. This incident resulted in a charge of misdemeanor battery (§ 242) (count two) that was dismissed before trial on a motion by the prosecutor. (See § 1385.) A short time after the fight, the victim in the current case, his girlfriend, and another woman, stopped at the gas station to get something to eat and some cigarettes. The victim was intoxicated.

² Counsel initially filed a *Wende* brief in this matter, and defendant was permitted to file a pro. per. supplemental brief. (See *People v. Wende* (1979) 25 Cal.3d 436.) This court issued an opinion on July 19, 2004, but counsel subsequently petitioned for rehearing raising *Blakely*, which was decided on June 24, 2004. Because *Wende* review is no longer warranted, this court has stricken the original *Wende* brief and the supplemental pro. per. brief filed by defendant.

Defendant approached the victim as he was walking through the parking lot and said someone had told him (defendant) that the victim had called him "a piece of shit."³ According to the victim, defendant was very close and leaning toward him and he responded by pushing defendant back and saying something to the effect of, "Get out of my way, you fucking asshole." However, the victim's girlfriend did not remember this and thought the victim simply tried to continue walking past defendant. In any case, defendant punched the victim in the face two or more times, causing him to fall down and lose consciousness for a short time.

The victim was taken to the hospital, where for approximately an hour or more he received extensive suturing for two lacerations to his face. A cautery pen was used to stop bleeding from one of the lacerations. A registered nurse who helped treat the victim opined that he also suffered a concussion. Defendant later came to see the victim at home and apologized.

DISCUSSION

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) that other than the fact of a prior conviction, any

³ Apparently, the victim made derogatory remarks about defendant to another person after they met at a campsite the previous spring.

fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. at p. ____ [159 L.Ed.2d at pp. 413-414].)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

Under California's determinate sentencing law, the punishment for most offenses is expressed as a sentence range consisting of an upper, middle, and lower term. The selection of the term to be imposed is made by the trial court, applying the sentencing rules of the Judicial Council. (§ 1170, subs. (a)(3), (b).)

The court "shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b).) The sentencing rules set forth a nonexclusive list of circumstances which may be

considered in aggravation and mitigation. (Cal. Rules of Court, rules 4.408, 4.421, 4.423.) Notably, “[a] fact that is an element of the crime shall not be used to impose the upper term.” (Cal. Rules of Court, rule 4.420(d).)

Together, the Penal Code and the sentencing rules of the Judicial Council create a sentencing scheme in which (1) there is a presumption in favor of the middle term, (2) the presumption can be overcome in favor of the upper term only if at least one circumstance in aggravation is found to be true, and (3) the elements of the offense cannot be considered as aggravating factors.

In most instances, a jury verdict or a defendant’s plea will reflect only the elements of the offense. In such cases, the statutory middle term 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.” (*Blakely, supra*, 542 U.S. at p. ___ [159 L.Ed.2d at p. 413], italics omitted.) Accordingly, imposition of the upper term in such cases falls squarely within the holding of *Blakely*, and the defendant is entitled to a jury trial on facts, other than a prior conviction, used to increase the penalty beyond the statutory maximum that could be imposed based solely on facts reflected by the jury’s verdict or admitted by the defendant.

Here, the trial court’s reason for imposing the upper term was “the vicious and unprovoked nature of the assault on the victim” in which defendant “inflicted injuries causing the

victim to lose consciousness and requiring suturing of the victim's face." One enumerated aggravating factor in the rules of court applies if "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." (Cal. Rules of Court, rule 4.421(a)(1).) The trial court's finding seems to be related to this factor in some respects, and the court appears to have been cognizant of the rule that the enumerated aggravating and mitigating factors in the California Rules of Court are illustrative, not exclusive. (See *People v. Whitten* (1994) 22 Cal.App.4th 1761, 1765-1766; *People v. Charron* (1987) 193 Cal.App.3d 981, 994; Cal. Rules of Court, rule 4.408(a).)

The problem is that the aggravating circumstance or circumstances cited by the trial court were not submitted to the jury and proved beyond a reasonable doubt. And the aggravating facts were not uncontested at trial nor supported by overwhelming evidence. (See *United States v. Cotton* (2002) 535 U.S. 625, 631 [152 L.Ed.2d 860, 868].) Although the victim was seriously injured, the attack was relatively brief and there was evidence the victim might have insulted and pushed the defendant beforehand.⁴ Consequently, the sentence must be reversed and remanded to the trial court.

⁴ There was persuasive evidence that the victim was seriously injured, lost consciousness, and required suturing. But the trial court's finding seems to relate primarily to the circumstances of the attack rather than the serious bodily

Before concluding, however, we note that the People emphasize the rule of *Apprendi* and *Blakely* does not apply where a prior conviction is used to increase the penalty of a crime. (See *Blakely, supra*, 542 U.S. at p. ___ [159 L.Ed.2d at pp. 412-414]; *Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) Further, the People note that defendant had a prior prison term enhancement based on his conviction for two offenses in an earlier case. The trial court's finding that defendant served a prior prison term may be considered an aggravating circumstance in some cases. (See Cal. Rules of Court, rule 4.421(b)(3).) The People do not dispute that this particular aggravating circumstance is inapplicable here because it would be an impermissible dual use of facts to enhance defendant's sentence. (See § 1170, subd. (b).) But the People suggest "use of a prior *prison term* to impose an enhancement still leaves free the fact of the prior *conviction* underlying the prior prison term to use as a circumstance in aggravation."

We need not directly address the People's contentions because the trial court did not cite any aggravating circumstance based on defendant's record. For example, the court did not conclude that defendant's prior convictions "are numerous or of increasing seriousness." (Cal. Rules of Court, rule 4.421(b)(2).) Accordingly, regardless of whether this or

injury to the victim, which in any case was an element of the crime. (See Cal. Rules of Court, rule 4.420(d) [precluding dual use of facts in aggravation].)

some other aggravating factor relating to defendant's record need be proved to a jury, it is not properly at issue here.

The only remaining question is the measure of relief to which defendant is entitled. State and federal double jeopardy protections do not apply to noncapital sentencing determinations. (*People v. Hernandez* (1998) 19 Cal.4th 835, 843; see also *People v. Monge* (1997) 16 Cal.4th 826, 845, cert. granted & affd. *sub nom. Monge v. California* (1998) 524 U.S. 721, 724 [141 L.Ed.2d 615, 621].) Thus, on remand the People must be given the opportunity to charge and prove to a jury one or more aggravating circumstances in support of the upper term. If the prosecutor declines to charge one or more aggravating circumstances or fails to prove such allegations, then the trial court shall resentence defendant exercising its full sentencing discretion. (*People v. Castaneda* (1999) 75 Cal.App.4th 611, 613-614; *People v. Calderon* (1993) 20 Cal.App.4th 82, 88.)

DISPOSITION

The judgment is reversed and remanded to the trial court. Within seven days of the date the remittitur is filed in the trial court, the prosecutor may charge one or more aggravating circumstances to support imposition of the upper term. If the prosecutor elects not to charge any aggravating circumstances,

this matter shall be set for a resentencing hearing to be held
in a manner consistent with this opinion.

_____ BUTZ _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ DAVIS _____, J.