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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID T. MELLO,

Defendant and Appellant.

D043073

(Super. Ct. No. SCE225670)

APPEAL from a judgment of the Superior Court of San Diego County, William J. McGrath, Judge. Affirmed in part, reversed in part and remanded.

A jury convicted David T. Mello of three counts of possessing methamphetamine (meth) (Health & Saf. Code, § 11378; counts 1, 3 & 8), two counts of maintaining a place where narcotics are sold (Health & Saf. Code, § 11366; counts 2 & 4), two counts of possessing a firearm (Pen. Code,¹ § 12021, subd. (a)(1); counts 5 & 9), one count of resisting an officer (§ 69; count 6), one count of transporting meth (Health & Saf. Code,

¹ All further statutory references are to the Penal Code unless otherwise specified.

§ 11379, subd. (a); count 7) and one count of evading a peace officer with reckless driving (Veh. Code, § 2800.1; count 10.)² The jury found Mello had been armed with a firearm during the commission of the count 3 offense (§ 12022, subd. (c)). Mello admitted he had been out on bail during the commission of counts 3 through 9 (§ 12022.1, subd. (b)).

The trial court sentenced Mello to a total prison term of 13 years and 8 months, consisting of a three-year upper term on count 3, the upper term of five years for the related firearm enhancement, and two years for the on-bail enhancement, plus a consecutive eight months (1/3 the midterm) on count 1 and a consecutive year on count 7 (1/3 the midterm) plus two years for the related on-bail enhancement.

Mello appeals, contending his upper term sentences must be vacated pursuant to the United States Supreme Court's recent decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531; 159 L.Ed.2d 403] (*Blakely*). We conclude resentencing in light of *Blakely* is required.

FACTS

This case arises out of three consolidated informations charging Mello with crimes stemming from three incidents in 2002: (1) a search of his home in June; (2) searches of his home and business in October; and (3) a car chase followed by searches of his home and business in December.

² The jury found Mello not guilty of an alleged battery upon a peace officer under count 11.

During the June 2002 search, San Diego Sheriff's deputies found 206 grams of meth, a large number of plastic baggies, a digital scale, and around \$12,000 in cash. The searches in October revealed pay-owe sheets which seemed to be related to the distribution of drugs, around \$12,000 in cash, meth, marijuana, valium pills, hypodermic needles, a digital scale, two rifles, several handguns, and ammunition.

The December car chase ensued after Mello was pulled over by sheriff's deputies and became agitated when the deputies noticed a brown paper bag on his car floor while detaining his passenger to process an outstanding warrant. When Mello was subsequently stopped, arrested and searched, deputies found 1.19 grams of meth in his pocket but the brown bag from the car was gone. Deputies later found an empty brown paper bag next to three plastic bags containing about 112 grams of meth on the shoulder area of the highway where the chase had taken place. When Mello's home and office were then searched, deputies found two handguns, .34 grams of meth, packaging materials, and scales.

A jury trial followed, during which Mello was convicted of counts 1 through 10. At sentencing, the judge imposed upper terms on all the counts and an upper term on the firearm enhancement, stating:

"I have considered as to count 3 both factors in mitigation and in aggravation as are set forth in the probation report. [¶] Those in mitigation that I believe apply would be one only, and that is that the defendant did satisfactorily complete his parole on prior cases. [¶] In aggravation, the planning and sophistication and professionalism of these crimes, or this crime, including drugs, guns, lots of money, and surveillance cameras are substantial circumstances in aggravation as is [California Rules of Court Rule] 4.421(b)(2), he does have numerous prior convictions, many of which are felonies.

[¶] As to count 3 therefore, the court finds the circumstances in aggravation outweigh those in mitigation and the court will impose the upper term. [¶] As to all remaining counts, the court has performed the same analysis and finds that the upper term would be appropriate, although all remaining counts will either be subject to one-third the midterm term or 654 treatment."

DISCUSSION

The United States Supreme Court recently held in *Blakely, supra*, 124 S.Ct. 2531, that a trial court may not increase a defendant's sentence beyond the standard range for the charged offense based on the court's own factual findings because such additional factfinding violates the defendant's Sixth Amendment right to trial by jury. Mello contends that pursuant to *Blakely*, the trial court's imposition of upper terms on counts 2, 3, 4, 5, 6, 8 and 9 must be vacated, as well as the imposition of the upper term on the firearm enhancement for count 3. Mello does not contest the imposition of consecutive sentences on counts 1, 3 and 7.³

The attorney general responds that Mello has waived any claim of sentencing error because he failed to challenge the propriety of the upper terms in the proceedings below, and that even if *Blakely* applies, any error was harmless because at least one of the aggravating factors relied upon by the court was proper.

³ The issue of whether *Blakely* has any effect on a trial court's imposition of consecutive sentences is pending before our Supreme Court. (*People v. Black* (review granted July 28, 2004, S126182) (*Black*).)

I

WAIVER

With regard to the waiver issue, this court recently rejected similar arguments brought by the attorney general as brought here. (*People v. George* (2004) 122 Cal.App.4th 419 (*George*); *People v. Lemus* (2004) 122 Cal.App.4th 614 (*Lemus*)). In *Lemus*, we pointed out that prior to *Blakely* it was well established in California law that there was no constitutional right to a jury trial in connection with the imposition of an upper term sentence. Thus, any argument to the contrary made by Mello at the time of sentencing undoubtedly would have been rejected because *Blakely* had not yet been decided.

Further, like the appellant in *Lemus*, Mello vigorously advocated for a lesser sentence at the trial level. In his statement of mitigation, Mello urged the court to view his actions in light of his many personal problems, including his drug addiction, the recent loss of his home, vehicles, and personal property, and the fact that he was embroiled in a custody battle over his son. "Under the circumstances, it would be unreasonable to find that [Mello] abandoned a constitutional challenge of which he was unaware." (*Lemus, supra*, 122 Cal.App.4th at p. 620.)

II

APPLICATION OF BLAKELY

Mello argues the trial court imposed upper terms based on its own findings that 1) his crimes involved planning, sophistication, and professionalism, and 2) that Mello had numerous prior convictions. Whether *Blakely* precludes a trial court from finding

aggravating facts independent of a jury is an issue currently under review by the California Supreme Court in *People v. Towne* (review granted July 14, 2004, S125677) and *Black, supra* (review granted July 28, 2004, S126182.) Nevertheless, this court has analyzed the issue in *George* and *Lemus* and concluded that "[b]ecause the maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies."⁴ Thus, the question becomes whether the trial court could properly rely on any of the cited factors as the basis for its decision to impose the upper term without violating *Blakely*." (*George, supra*, 122 Cal.App.4th at p. 425; *Lemus, supra*, 122 Cal.App.4th at p. 621.)

"In accordance with *Blakely*, the Constitution requires a jury trial on any fact that 'the law makes essential to the punishment' other than the fact of the defendant's prior conviction. [Citation.]" (*George, supra*, 122 Cal.App.4th at p. 426; *Lemus, supra*, 122 Cal.App.4th at p. 621.) Applying that standard to this case, it is clear the court was entitled to rely upon Mello's prior convictions for the selection of the upper term sentence,⁵ but was not at liberty to find Mello's crimes involved planning, sophistication and professionalism. Because at least one of the trial court's aggravating factors would

⁴ We note the differing viewpoint of our colleagues regarding the applicability of *Blakely* to California's determinate sentencing structure as set forth in the majority of *People v. Wagener* (2004) 123 Cal.App.4th 424, and respectfully disagree for the reasons set forth in *George* and *Lemus*.

⁵ Mello's argument that this factor was improper because he had only been arrested twice previously and that one of the cases was dismissed is not supported by the record. The probation report reflects that at the time Mello was charged in this case, he had been convicted of four misdemeanors and three felonies.

necessitate a jury trial under the holding of *Blakely*, we must evaluate whether the error was harmless.

The attorney general argues the trial court could have imposed the upper term solely on the finding that Mello had numerous prior convictions and thus any error regarding the remaining aggravating factor was harmless. Under California law, it is true that the finding of a single aggravating factor is sufficient to impose the upper term, so long as that factor outweighs any circumstances in mitigation. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) "However, assuming without deciding, that resentencing is only required if it 'is not reasonably probable that a more favorable sentence would have been imposed in the absence of error [citations],' we cannot conclude that the elimination of [one of only two aggravating] factors would not have made a difference in the court's sentencing decision here." (*George, supra*, 122 Cal.App.4th at pp. 426-427 citing *People v. Osband* (1996) 13 Cal.4th 622, 728.)

Accordingly, the trial court's imposition of upper term sentences must be vacated and the case remanded for resentencing.

DISPOSITION

The judgment is reversed as to the sentence on counts 2, 3, 4, 5, 6, 8 and 9, and the matter is remanded for resentencing in a manner consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.