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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSE RAMON SANDOVAL, Defendant and Appellant.	D043748 (Super. Ct. No. SCN132990)

APPEAL from a judgment of the Superior Court of San Diego County, K. Michael Kirkman, Judge. Affirmed in part and reversed in part.

Jose Ramon Sandoval entered a negotiated guilty plea to forcible rape (Pen. Code, § 261, subd. (a)(2))[1] and admitted personally using a deadly weapon. (§ 12022.3, subd. (a).) The court denied a motion to withdraw the guilty plea and sentenced him to prison for 12 years: the eight-year upper term for rape enhanced by the four-year middle term

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1 All statutory references are to the Penal Code.

for weapon use. The court issued a certificate of probable cause. (Cal. Rules of Court, rule 31(d).)[2] Sandoval contends the trial court erred in imposing the upper term. (See *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*).)

FACTS

On August 13, 2001, Sandoval was living in Vista with his common law wife. His wife's cousin lived in the garage. Viewing the record in the light most favorable to the judgment below (*People v. Johnson* (1980) 26 Cal.3d 557, 576), the following occurred. Holding a knife, Sandoval entered the garage and forced his wife's cousin to engage in sexual intercourse with him. Sandoval testified that he and the alleged victim kissed consensually in the garage, but that they did not engage in sexual intercourse.

DISCUSSION

At the sentencing hearing, the trial court stated no factors in mitigation and six factors in aggravation: (1) victim vulnerability (rule 4.421(a)(3)); (2) Sandoval's crimes are numerous and of increasing seriousness (rule 4.421(b)(2)); (3) he has served prior prison terms (rule 4.421(b)(3)); (4) performance on probation has been unsatisfactory (rule 4.421(b)(5)); (5) Sandoval fled to avoid prosecution (rule 4.408(a)); and (6) planning and some level of sophistication was involved in the crime (rule 4.421(a)(8)).

In *Blakely*, the United States Supreme Court held that "'[o]ther 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.'"

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2 All rules references are to the California Rules of Court.

(*Blakely, supra*, 124 S.Ct. at p. 2536, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence is currently under review by the California Supreme Court. (E.g., *People v. Towne,* review granted July 14, 2004, S125677.) Pending resolution of the issue by the high court, we determine whether *Blakely* applies to the situation presented here.

Relying on *People v. Scott* (1994) 9 Cal.4th 331, the People contend Sandoval did not object in the trial court and therefore waived his right to raise any challenge to the upper term on appeal. In *Scott,* the Supreme Court held that to raise a sentencing issue on appeal, objection in the trial court is required in order to facilitate the detection and prompt correction of error, thus reducing the number of appellant claims and preserving judicial resources. (*Id.* at pp. 351, 353.) Common sense does not support application of *Scott's* waiver rule to the novel principle expressed in *Blakely*. Before *Blakely,* there were no published cases hinting that a jury determination and the reasonable doubt standard were applicable to factors in aggravation relied on during sentencing. It is not reasonable to treat failure to object on a ground that does not yet exist as a waiver to challenging that ground on appeal. We thus consider the merits of Sandoval's claim.

In California, the determinate sentencing law requires the trial court to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); rule 4.420(c), (d).) Whether the trial court can properly impose the statutory maximum (or upper term) for a particular crime may depend on facts that are not resolved in the jury verdict or

admitted by the defendant, the standard expressed in *Blakely*. (*Blakely, supra*, 124 S.Ct. at p. 2537l; see *Apprendi, supra,* at pp. 491-497 [state hate crime statute authorizing the imposition of an enhanced sentence based on a judge's finding of certain facts by a preponderance of the evidence violated the due process clause].) As explained in *Blakely*, when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, "it remains the case that the jury's verdict [or a guilty plea] alone does not authorize the sentence," as required to comply with constitutional principles. (*Blakely, supra*, 124 S.Ct. at pp. 2538-2539.) Thus, the question is whether the trial court properly relied on the cited factors as the basis for its decision to impose the upper term.

Here, the trial court stated six aggravating factors as the basis for its decision to impose the upper term: (1) the victim's vulnerability; (2) numerous crimes of increasing seriousness; (3) serving prior prison terms; (4) unsatisfactory performance on probation; (5) fleeing to avoid prosecution; and (6) planning and sophistication. The People do not contest that the factual determinations of (1) the victim's vulnerability and (6) planning and sophistication, go beyond the guilty plea and weapon-use admission and these are factual questions not within the guilty plea or weapon-use admission.

Applying the *Blakely* standard here, we conclude that the trial court was constitutionally entitled to rely on the finding that Sandoval had served prior prison terms as a basis for imposing an upper term sentence. Serving prior prison terms can be established by a review of the court records relating to the prior offenses. Serving prior prison terms does "not [in any way] relate to the commission of the offense, *but goes to*

the punishment only . . . ." (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 244.) Because the finding that Sandoval had served prior prison terms arose out of the prior convictions, we conclude that constitutional considerations do not require this matter be tried by a jury. (See *Apprendi, supra,* 530 U.S. at p. 488; see also *Jones v. United States* (1999) 526 U.S. 227, 233.) Thus, in accordance with the analysis of *Blakely*, the trial court was not required to afford Sandoval a jury trial before relying on this factor as an aggravating factor supporting imposition of the upper term. However, the trial court also found the crime aggravated by the victim's vulnerability, sophistication and planning, and Sandoval fleeing to Mexico after the crime to evade prosecution, factors *Blakely* requires be found true by a jury beyond a reasonable doubt.

The attorney general points out the propriety of a single factor as a basis for imposing an upper term sentence is sufficient to withstand Sandoval's constitutional challenge to the sentence. (Rule 4.420(b); *People v. Osband* (1996) 13 Cal.4th 622, 728, citing *People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.) Further, the probation officer contended here that there were no mitigating circumstances, a contention with which the court implicitly agreed. However, because denial of a jury trial is constitutional error, we must reverse unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) We cannot conclude consideration of the factors *Blakely* require to be found true by the jury was harmless beyond a reasonable doubt.

DISPOSITION

The conviction is affirmed. The sentence is reversed and the matter is remanded for resentencing.

McCONNELL, P. J.

I CONCUR:

McDONALD, J.

IRION, J., Dissenting.

In this case involving a serious crime of violence, forcible rape, with an admitted weapon use, the majority concludes that although the trial court was entitled to rely on Sandoval's prior convictions in aggravating his sentence, it constitutionally erred in its consideration of "the victim's vulnerability"; and Sandoval's "numerous crimes crimes of increasing seriousness"; "serving prior prison terms"; "unsatisfactory performance on probation"; "fleeing to avoid prosecution"; and "planning and sophistication." My colleagues conclude the court's consideration of these factors should have been presented to a jury and, therefore, remand for resentencing is required. I disagree.

In my view, all of the aggravating factors relied upon by the sentencing court are traditional sentencing factors, not elements of the crime or statutory enhancements. As the sentencing factors were not used to impose a sentence beyond that authorized by the California sentencing statutes[1] for the crime and enhancement admitted by Sandoval,[2] no new offense was created requiring any additional jury determination. (*Harris v.*

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1 Necessarily, I also part company with the majority in that I am persuaded, in large measure based on legislative history, that the California determinate sentencing law's tripartite structure is a *true sentencing range* within which judges may make choices, using traditional sentencing factors. (Pen. Code, § 1170, subd. (b); compare Sen. Bill No. 42 (1975-1976 Reg. Sess.) enacted as Stats. 1976, ch. 1139, § 273, operative July 1, 1977' Assem. Amend. to Sen. Bill No. 42 (1977-1978 Reg. Sess.) enacted as Stats. 1977, ch. 165, § 15, effective June 29, 1977.)

2 Parenthetically, I note Sandoval specially agreed that the court, in sentencing, could consider his criminal history and the entire factual background of the case.

United States (2002) 536 U.S. 545, 564-566; *United States v. Booker* (2005) 543 U.S. ___ [125 S.Ct. 738, 749-750; 160 L.Ed.2d 621]; *Almendarez-Torres v. United States* (1998) 523 U.S. 224.) Consequently, I do not view Sandoval's sentence as being constitutionally proscribed.

Intermediate appellate courts throughout California are divided on whether *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 25311; 159 L.Ed.2d 403] (*Blakely*) nullifies California's tripartite sentencing structure. The issue is now under consideration by our Supreme Court, with a decision expected shortly. It is difficult to predict with certainty which way we will ultimately be directed. Because of this, and the clear language in *Harris,* I would not now overturn an upper term sentence on a *Blakely* analysis. When the California Supreme Court speaks to the issue, I would, if then appropriate, fashion consistent relief by way of the writ process. Such a procedure would preserve appellant's right to relief and avoid a possible instance wherein a defendant, appropriately sentenced to the upper term, secures a lower sentence due to the timing of final appellate resolution.

Finally, on this record, I would determine the error, if any, to be harmless. Even if the majority is correct in its analysis of the application of *Blakely* to upper term sentences, Sandoval did not have a right to a jury trial on his prior convictions or the court's use of that factor as a circumstance in aggravation. (*Apprendi v. New* Jersey (2000) 530 U.S. 466; *Blakely*, *supra*, 542 U.S. ___ [124 S.Ct. 25311; 159 L.Ed.2d 403].) Under California law, only a single factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Based on the court's reliance on Sandoval's

prior convictions as a circumstance in aggravation and its determination there were no circumstances in mitigation, I would conclude the error, if any, is harmless.

IRION, J.