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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>PAUL ERIC SHEA,<br>Defendant and Appellant. | A105299<br><br>(Marin County<br>Super. Ct. No. SC130642) |

## I.

Appellant Paul Eric Shea appeals from the 10 year 4 month state prison sentence he received after entering a plea of guilty, with a *Harvey* waiver,[1] to four felonies and one misdemeanor charge. In his opening brief on appeal, appellant claims sentencing error in that the trial court failed to articulate reasons for sentencing appellant to an aggravated term as the principal term (child endangerment, Pen. Code, § 273a, subd. (a))[2], and for ordering him to submit to involuntary AIDS testing without probable cause. After appellant's opening brief was filed, leave was granted allowing appellant to submit a supplemental brief on the question of whether his aggravated sentence should be vacated in light of the recent United States Supreme Court decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*). Respondent has addressed this issue in its brief, as well as also responding to those issues raised in appellant's opening brief.

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1 *People v. Harvey* (1979) 25 Cal.3d 754.

2 All further statutory references are to the Penal Code, unless otherwise stated.

We conclude that the two sentencing errors addressed in appellant's opening brief have been waived because no objection was made below either to the court's articulation of reasons for its sentencing choices, or to the imposition of involuntary AIDS testing. (*People v. Davis* (1995) 10 Cal.4th 463, 551-552; *People v. Scott* (1994) 9 Cal.4th 331, 53.) However, we also conclude that appellant's sentence must be vacated in accordance with *Blakely*. Accordingly, we remand the case for resentencing.

**II.**

**A.**

A criminal complaint was filed by the Marin County District Attorney on or about July 15, 2003, charging appellant with 13 counts: five counts of violation of Health and Safety Code section 11380, subdivision (a) (solicitation of a minor to use or sell a controlled substance), five counts of violation of section 273a, subdivision (a) (child endangerment), and three counts of violation of section 288, subdivision (c)(1) (lewd act upon a child). Thereafter, a six count "1st Amended Complaint" (FAC) was filed on August 21, 2003, charging appellant with violation of three counts of section 273a, subdivision (a) (child endangerment), one count of Health and Safety Code section 11379, subdivision (a) (furnishing a controlled substance), one count of section 288, subdivision (c)(1) (lewd act upon a child), and a misdemeanor count of section 647.6, subdivision (a) (child molestation).

On August 28, 2003, appellant waived a preliminary hearing and entered a guilty plea to the FAC, with a *Harvey*[3] waiver. In so doing, appellant acknowledged that he could be sentenced to state prison for up to 10 years 4 months. These and other constitutional rights were knowingly and voluntarily waived by appellant at the time his plea was taken. Sentencing was set for November 21, 2003.

**B.**

Prior to sentencing, the court ordered and received a report from the county probation department. As to the circumstances that led to the charges against appellant,

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[3] *People v. Harvey*, *supra*, 25 Cal.3d 754.

the report explained that appellant and his young son had moved into the home of appellant's sister and her 14-year-old daughter (appellant's niece) in May or June 2003. While living there, appellant induced his niece to begin taking methamphetamine through injections appellant administered to her. This drug use continued on a daily basis for approximately one month, until appellant's sister told him to move out of the home. During the time he resided in his sister's home, appellant also touched his niece's breasts.

After being told to leave, appellant took up residence at the Fireside Motel in Mill Valley. While there he continued to see his niece on a daily basis. The niece told her mother that she was going to the motel to babysit her younger cousin (appellant's son). However, during these visits, she continued to use methamphetamine with appellant. On several occasions he also fondled her breasts and digitally penetrated her vagina.

The probation report noted that appellant had no prior criminal record. Nevertheless, the report recommended that appellant be denied probation, and that he be sentenced to consecutive midterms (no aggravated terms) for a total aggregate prison term of 8 years 4 months.

Also, prior to sentencing, the court received a pleading from appellant denominated "Sentencing Materials," which included a report of Jules Burstein, Ph.D., an investigator's report of an interview of Emerald Becker, and various letters including those from appellant's family members and his former employer. Supplemental sentencing materials in the form of a "Client Social Evaluation and Recommendation" by Suzanne Dowling, M.S.W. was also submitted by appellant before sentencing. Ms. Dowling's lengthy report ended with a recommendation that appellant be placed on probation and undergo residential drug rehabilitation, and treatment for his sexual misconduct.

At sentencing, the court heard testimony from the niece's father. The niece's mother both testified and read into the record a letter to the court from her 19-year-old son (the niece's brother), who was in Cambodia. Following argument, the court provided the following comments, which appear to be specifically related to the sentencing factors

gleaned from the various reports and letters received, and from the testimony underlying its sentencing choices:

"Clearly, [appellant] is not an appropriate candidate for probation. This is behavior of the most despicable kind imaginable. Probably if you compare it honestly and carefully with behavior of other people, it's worse than the behavior of a lot of people who end up committed to prison for homicide.

"It's just awful behavior, and I'm not even, after having read everything I've read and heard everything I've heard, in agreement that the abuse of the child grows out of methamphetamine addiction, as [the prosecutor] points out. There are other causes, but I've seen an awful lot of methamphetamine addicts, and not very many of them inject methamphetamine into kids.

"So probation is clearly not an appropriate course at this time, and with respect to Count 1, which I find to be the principal term here, the crime is such an appalling, invasive, and predatory crime, that clearly the upper term is the only appropriate term, and the Court so finds."

The court went on to add consecutive terms (calculated at one-third the mid-term) for each of the remaining four felony counts to which appellant pleaded guilty. A sentence of 199 days in county jail for the single misdemeanor court was offset by appellant's custody credits calculated in that amount. Therefore, a total aggregate state prison term of 10 years 4 months was imposed.

This timely appeal followed.

**III.**

**A.**

As noted, appellant's opening brief cited as its first of two sentencing errors the failure of the sentencing judge to articulate proper factors justifying the imposition of the upper state prison term as to the principal term selected (child endangerment). Without question, applicable law requires trial courts to make such findings justifying the imposition of an imposed aggravated, or upper, prison term. (§ 1170, subd. (c); Cal.

Rules of Court, rules 4.406(a) and 4.420(e)[4]; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 678.)

However, it is also without question that claims of error of this type must be preserved by a timely objection in the trial court. (*People v. Davis*, *supra*, 10 Cal.4th at pp. 551-552; *People v. Scott*, *supra*, 9 Cal.4th at pp. 352-353.) No objections of any kind were made by appellant's counsel at the sentencing to the court's imposition of sentence, and therefore, this claim has been waived and will not be entertained for the first time on appeal.

The same is so for appellant's second assignment of error. No objection was made to the imposition of mandatory AIDS testing as part of the sentence. Thus, this claim of error is likewise deemed waived.

**B.**

In his supplemental brief, appellant also claims that his sentence must be vacated because the imposition of the aggravated term for the principal term selected was based on factors for which a jury trial is required under the recent United States Supreme Court decision in *Blakely*, supra, 542 U.S. ___ [124 S.Ct. 2531]).[5] Respondent concedes that if *Blakely* applies to California's determinant sentencing scheme, it applies to this case inasmuch as appellant's appeal was pending at the time of that decision.

In *Blakely*, the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, " '[o]ther than the fact of a prior conviction, any fact that

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[4] All further rule references are to the California Rules of Court.

[5] Appellant does not contend that *Blakely* also applies to the trial court's decision to impose consecutive sentences for the subordinate terms.

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 124 S.Ct. at p. 2536.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "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." (*Id*. at p. 2537, original italics.)

As noted earlier, appellant here had no prior criminal record, and therefore, understandably, the trial court did not rely on a "recidivist" aggravating factor to impose the upper term. Instead, the trial court relied on factors relating to the nature and extent of the crimes themselves to justify imposing the higher term for the principal crime of child endangerment. While the court's pronouncement of sentence is far from a model of clarity, we infer from his rather pointed comments concerning the circumstances surrounding the crimes to which appellant pleaded guilty that the aggravated term was based upon, at least, findings that: the crimes involved a high degree of cruelty, viciousness, or callousness (rule 4.421(a)(1)); the victim was particularly vulnerable (rule 4.421(a)(3)); and appellant took advantage of a position of trust or confidence to commit the crimes (rule 4.421(a)(11)). In relying on these factors, the court violated *Blakely* because the aggravating factors that it articulated (1) did not relate to a prior conviction and (2) were additional findings made by the court rather than by a jury.

Respondent contends that California's sentencing system does not offend *Blakely* at all; that a trial court can impose any one of the three legislatively authorized terms for an offense, including the upper term, without violating a defendant's Sixth Amendment rights. Under respondent's view of this system, all three sentencing options, including the aggravated term, are within the "offense-specific range" which the trial court has discretion to impose. Respondent's argument may have been persuasive before *Blakely* was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but rather the sentence it may impose without making *any additional findings*. (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) Under California law, the maximum

sentence a judge may impose without any additional findings is the middle term. (Pen. Code, § 1170, subd. (b); rule 4.420(c).) Contrary to respondent's view, the issue is not simply one of exercising judicial discretion in sentencing, but whether the exercise of discretion is based on facts not found to be true by a jury, in violation of a criminal defendant's federal constitutional right.

We also reject respondent's contention that appellant forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See § 1170, subd. (b); rules 4.409 & 4.420-4.421.) This futility exception applies as well as to respondent's claim of waiver under state law. (*People v. Scott*, *supra*, 9 Cal.4th 331; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture or waiver doctrines is to "encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors," (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after appellant was sentenced.

Since the *Blakely* court rested its holding on *Apprendi*, we apply the standard of prejudice applicable to *Apprendi* errors, which is the "*Chapman* test." (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Applying that test, we must determine whether the failure to obtain jury determinations as to the aggravating factors discussed above was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S.

18, 24.) Despite the rather fervent comments by the trial judge at sentencing, we are unwilling to find that, beyond a reasonable doubt, a jury would have made findings to support the aggravating factors discussed by the trial court. Thus, those aggravating factors cannot be used to support the trial court's sentencing choice in this case. Since here the only factors articulated by the trial court were *Blakely* factors, we conclude that appellant was prejudiced by the absence of a jury's determination of the factual findings relied on by the trial judge to impose a aggravated prison sentence for the principal term.

Lastly, we reject respondent's argument that the *Blakely* standard was satisfied by appellant's stipulation that there existed factual bases for his guilty plea. In so doing, we point out that appellant's stipulation merely encompassed the elements of the respective charges, and not the factors set out in rule 4.421(a), apparently used to aggravate his sentence.

**III.**

The matter is remanded for resentencing in light of *Blakely*, *supra*, 542 U.S. ___ [124 S.Ct. 2531].

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, J.