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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DON SIDIC, Defendant and Appellant.	B167344 (Los Angeles County Super. Ct. No. BA226096)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed in part, reversed in part and remanded.

Lora Fox Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R. Duarte, Lawrence M. Daniels and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Don Sidic appeals from judgment entered following a jury trial in which he was convicted of arson of an inhabited structure or property. (Pen. Code, § 451, subd. (b).) Sentenced to prison for eight years and ordered to pay restitution in the amount of $165,410.00 to Farmers Insurance Company and $1,000 to the Park Wellington Condominium Home Owner's Association, he contends the court erred in awarding restitution to the insurance company and in its award of custody credits. We asked the parties to submit supplemental briefing on the application of *Blakely v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 2531 (*Blakely*) to appellant's sentence. For reasons explained in the opinion, we reverse the sentence and restitution order and remand the matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL SUMMARY

The facts are not in dispute and it will suffice to observe that appellant was convicted of arson of a condominium unit he had been leasing at 1131 Alta Loma Road, number 422 in the city of West Hollywood.

Following his conviction, the court conducted a sentencing and restitution hearing. Dean Sperling, counsel for Farmers Insurance Exchange, testified that the Park Wellington Homeowner's Association had an insurance policy with Farmers Insurance Exchange, which insured the common areas of the building at 1131 Alta Loma Road in West Hollywood. That policy was in place on November 16, 2001 and Farmers Insurance Exchange paid $165,410.55 as a result of losses directly attributed to the fire. Additionally, the homeowners' association had a $1,000 deductible so the entire loss was $166,410.55. It was Mr. Sperling's understanding that Safeco was an insurance company that provided other insurance that may or may not have paid out on the loss.

The trial court concluded that in terms of restitution, it appeared to the court that the appropriate amount of restitution owed to Farmers Insurance Exchange was $165,410.00 as well as $1,000 to the homeowners' association that it incurred as a deductible.[1]

Finding the crime involved sophistication, planning, a high monetary loss, and a high degree of cruelty and callousness, the court sentenced appellant to the high term of eight years.

DISCUSSION

I[2]

Appellant first contends the court erred in awarding restitution to the insurance company because the insurance company was not the victim of the crime for purposes of the restitution statute. Penal Code section 1202.4, subdivision (a)(1) provides: "It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime." Subdivision (a)(3) provides in pertinent part that the court "in addition to any

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[1] While the reporter's transcript does not specify the restitution order was pursuant to Penal Code section 1202.4, subdivision (f), the minute order and the abstract of judgment do and the record supports the conclusion that the court was imposing restitution to Farmers Insurance Exchange and the homeowners' association as "actual victim[s]." The record does not support respondent's conclusion the court imposed a nonstatutory restitution award to the insurance company as a condition of future probation.

[2] While appellant failed to object to the restitution order in the trial court, "'when the trial court pronounces a sentence which is unauthorized by the Penal Code that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the . . . reviewing court.' [Citation.]" (*People v. Rowland* (1988) 206 Cal.App.3d 119, 126.)

other penalty. . . shall order the defendant to pay . . . (B) Restitution to the victim or victims . . . in accordance with subdivision (f) . . . ." Subdivision (f) requires the defendant to make restitution as "established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . ." (Pen. Code, § 1202.4, subd. (f).)

"As explained in [*People v. Birkett* (1999) 21 Cal.4th 226, at p. 232] and other cases . . . the victim is the object of the crime. In . . . *Birkett* . . . the direct victims of the crimes were the automobile owners whose vehicles had been stolen to dismantle and sell the parts, and the only involvement of the insurers was to indemnify the owners for covered property losses under their insurance policies . . . ." (*People v. O'Casey* (2001) 88 Cal.App.4th 967, 971.) "'[A]n insurer who has incurred expenses solely by virtue of a contractual duty to indemnify the direct victim is not itself an "object" of the crime and hence not a direct victim. [The insurer] cannot, therefore, be the recipient of a . . . restitution order unless it is itself a direct victim of criminal conduct.' [Citations.]" (*People v. Moloy* (2000) 84 Cal.App.4th 257, 260.)

In contrast, in *People v. O'Casey, supra,* 88 Cal.App.4th at p. 971,where appellant pled no contest to insurance fraud, the insurance company was viewed "as a direct crime victim, where based upon appellant's fraud, [the insurance company] was induced to make payments directly to appellant and to medical providers on appellant's behalf. [The appellate court concluded] the insurance company itself [was] the object of the crime. [Citation.]"

Similarly in *People v. Moloy, supra,* 84 Cal.App.4th at p. 260, Division Three of this court observed that the object of the crime "was to victimize the insurance companies by inducing them to settle false claims."

In the present case, the evidence established that the homeowners' association was the direct victim of the crime and the insurance company became involved only by covering the association for covered property loss under its insurance policy. The trial court erroneously determined that Farmers Insurance Exchange was a direct victim and the order of restitution must be reversed.

II

After briefing was complete in this case, the United States Supreme Court decided *Blakely*, holding that a Washington state sentencing scheme violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).[3] It appears that the holding applies to all cases not yet final when *Blakely* was decided in June 2004. (See *Schriro v. Summerlin* (2004) ___ U.S. ___, ___, 124 S.Ct. 2519.)

We asked the parties to submit supplemental briefing on the application of *Blakely* to this sentence. Appellant contends the sentenced imposed was a violation of the Sixth Amendment of the United States Constitution pursuant to *Apprendi* and *Blakely*. We agree.

The court sentenced appellant to the upper term of eight years for the arson, "because of the crime involving the great violence, the great potential for violence and showing a high degree of cruelty and callousness, because of the sophistication of the planning involved in this case, [and] because of the high monetary value that was in fact destroyed in this case . . . ."

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[3] In *Apprendi*, the Supreme Court held: "Other 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." (*Id*. at p. 490.)

Pursuant to Penal Code section 1170, subdivision (b), "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." The middle term is the maximum sentence the court can impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . ." (*Blakely, supra,* 124 S.Ct. 2531, 2537.) The facts relied upon by the court to impose the upper term were not found true by the jury or admitted by appellant. Under *Blakely*, use of these facts to impose the upper term does not comply with the Sixth Amendment, resulting in an invalid sentence. (*Blakely, supra,* 124 S.Ct. at pp. 2537-2538.)

III

Appellant asserts the trial court erred in its award of custody credits and that he is entitled to a total of 501 days of credit for time in custody, including conduct credits rather than the 447 days awarded. Appellant asserts he was arrested on February 26, 2002 for this offense and sentenced on May 7, 2003.

While respondent agrees that if appellant was arrested on February 26, presentence credits need to be recalculated, respondent also asserts the matter should be remanded to the trial court for a determination of the arrest date and recalculation. In view of the fact that the matter is remanded for resentencing and imposition of a new restitution order, we shall also direct the trial court to recalculate presentence credits from the date of appellant's arrest.

DISPOSITION

The matter is reversed in part and remanded for resentencing, a new restitution order and recalculation of credits in accordance with the views expressed in this opinion; in all other respects the judgment is affirmed.

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EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.