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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. THOMAS JAMES SLATER, Defendant and Appellant.	C055031 (Super. Ct. No. CM025384)

Defendant Thomas James Slater entered a negotiated plea of no contest to one count of receiving stolen property (Pen. Code, § 496) and admitted a prior prison term enhancement (*id.*, § 667.5, subd. (b)) in exchange for dismissal of three other charges. At the time of the plea, defendant acknowledged the maximum term of imprisonment the court may impose would be four years. The court thereafter denied probation and sentenced defendant to state prison for four years.

Defendant appeals, contending imposition of the upper term based on factors not determined by a jury beyond a reasonable

SEE DISSENTING OPINION

doubt violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution. However, because defendant failed to obtain a certificate of probable cause, we conclude this contention is not properly before us. We therefore dismiss the appeal.

FACTS AND PROCEEDINGS

In light of defendant's no contest plea, the facts are taken from the probation report.

Sometime between 4:30 and 10:30 p.m. on June 5, 2006, the home of 86-year-old Robert M. was burglarized and approximately $30,000 in cash was taken. Robert M. had known defendant for 14 years and had given him small amounts of money. He believed defendant knew where he kept his money.

On July 20, the police searched defendant's residence and discovered 500 rounds of ammunition. Defendant later admitted having recently stored firearms at his house. On a second search of defendant's residence, officers found counterfeit $50 and $100 bills and three envelopes containing 241, $20 bills, $8,000, and 30, $100 bills. A witness told deputies defendant told him he had taken the cash from Robert M.

Defendant was charged with theft from an elder or dependent adult (Pen. Code, § 368, subd. (d)), receiving stolen property (*id.,* § 496, subd. (a)), possession of a firearm by a felon (*id.,* § 12021, subd. (a)(1)), and possession of ammunition by one prohibited from possessing a firearm (*id.,* § 12316, subd.

(b)(1)). The complaint was thereafter amended to add an enhancement for a prior prison term (*id.,* § 667.5, subd. (b)).

Defendant entered a negotiated plea of no contest to the single charge of receiving stolen property and admitted the enhancement in exchange for dismissal of the other charges. At the time, defendant acknowledged that, as a result of the plea, he could be sentenced to a maximum sentence of four years.

At sentencing, defendant objected to imposition of the upper term on the receiving stolen property charge on the basis of *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*). The court nevertheless imposed the upper term of three years for receiving stolen property plus an enhancement of one year for the prior prison term, for a total of four years. The court cited the following reasons for choosing the upper term: the victim was particularly vulnerable, the crime involved great monetary value, defendant took advantage of a position of trust, defendant's prior convictions are numerous, defendant served a prior prison term, defendant was on probation when he committed the offense, and defendant's performance on parole was unsatisfactory.

DISCUSSION

Defendant contends the trial court violated his rights under the Sixth Amendment to the United States Constitution by imposing the upper term based on facts not submitted to the jury and proved beyond a reasonable doubt.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), 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." (*Id*. at p. 490 [147 L.Ed.2d at p. 455].) In *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*), the Supreme Court applied *Apprendi* to a state court sentence. (*Blakely,* at p. 303 [159 L.Ed.2d at p. 413].) In *Cunningham,* the Supreme Court applied *Apprendi* and *Blakely* to California's determinate sentencing law (DSL) and held that by assigning to the trial judge the authority to find the facts that expose a defendant to an upper term sentence, the DSL violates the defendant's Sixth and Fourteenth Amendment rights. (*Cunningham, supra,* 549 U.S. at p. ___ [166 L.Ed.2d at p. 864], overruling on this point *People v. Black* (2005) 35 Cal.4th 1238, vacated in *Black v. California* (Feb. 20, 2007) 549 U.S. ___ [167 L.Ed.2d 36].)

The People contend defendant's *Cunningham* claim is not cognizable on appeal because he failed to obtain a certificate of probable cause. They argue defendant acknowledged as part of his plea that the maximum penalty the court may impose is four years and, therefore, his challenge to that sentence is a challenge to the plea itself. We agree.

When a defendant enters a plea of guilty or no contest, he may not challenge the validity of the plea on appeal unless he "has sought, and the trial court has issued, a certificate of

probable cause 'showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.'" (*People v. Emery* (2006) 140 Cal.App.4th 560, 562; see Pen. Code, § 1237.5.) Only two types of issues may be raised without a certificate of probable cause: "(1) search and seizure issues for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*People v. Panizzon* (1996) 13 Cal.4th 68, 74-75.)

Normally, issues regarding sentencing decisions fall within this second category and may be raised without a certificate of probable cause. However, "'a challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself' and thus requires a certificate of probable cause." (*People v. Shelton* (2006) 37 Cal.4th 759, 766 (*Shelton*).)

In *Shelton, supra,* 37 Cal.4th 759, the defendant entered into a plea agreement providing for dismissal of four of six felony counts in return for the defendant's plea of no contest to the remaining two counts. The parties further agreed the defendant would be sentenced to state prison for a term not to exceed three years and eight months, a term less than the maximum that could otherwise have been imposed. The defendant was thereafter sentenced to state prison for three years and eight months.

The defendant appealed without obtaining a certificate of probable cause, arguing his prison sentence violated Penal Code section 654, the statutory prohibition against double punishment. The high court held the defendant was required to obtain a certificate of probable cause, because the issue raised was effectively an attack on the validity of his plea. The court explained that a negotiated plea agreement is a form of contract to be interpreted according to general contract principles. (*Shelton, supra,* 37 Cal.4th at p. 767.) Applying those principles, the court explained: "[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term." (*Id.* at p. 768.) A defendant may thereafter raise a claim that the court abused its discretion in failing to impose a sentence less than the agreed-upon lid. However, a claim that the court lacked the legal authority to impose the lid is a challenge to the plea itself and is precluded without a certificate of probable cause.

In *People v. Bobbit* (2006) 138 Cal.App.4th 445 (*Bobbit*), this court applied *Shelton* to a *Blakely* claim raised without a certificate of probable cause. The defendant had entered into an agreement whereby he pleaded no contest to two offenses and admitted a prior serious felony conviction in exchange for dismissal of other charges and a sentencing lid of 12 years and

eight months. The trial court thereafter sentenced him to the maximum, which included the upper term for one of the offenses. (*Bobbit*, at pp. 447-448.)

We dismissed the appeal, explaining the plea agreement was a mutual acknowledgement that the trial court had legal authority to impose the sentence. (*Bobbit, supra,* 138 Cal.App.4th at p. 447.) We concluded: "[T]he plea agreement did not preserve, either at sentencing or on appeal, the issue that the court did not have the authority to impose an upper term sentence in the absence of a jury finding of one or more aggravating circumstance(s). Without a certificate of probable cause, the appeal must be dismissed." (*Id.* at p. 448, fn. omitted.)

Although *Shelton* and *Bobbit* were decided before *Cunningham*, there is nothing in the latter decision that would bring those state court decisions into question. In *Cunningham*, the United States Supreme Court concluded that "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham*, *supra*, 549 U.S. at p. __ [166 L.Ed.2d at p. 876], fn. omitted.) In other words, the question is whether, at the time of sentencing and before the trial court makes any additional findings, the defendant was properly subject to an upper term sentence. If so, the trial court may consider any relevant factor in deciding whether to impose the sentence. As explained by the State Supreme Court in *People v. Black* (2007) 41 Cal.4th 799 (*Black*

II): "[S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Id.* at p. 813.) According to the court: "[I]mposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id.* at p. 816.)

In *Bobbit*, we concluded a defendant is properly subject to an upper term sentence by virtue of his agreement to an upper term lid as part of the overall plea agreement. Where a defendant has agreed to a sentencing lid, he has effectively admitted the existence of one or more factors making him eligible for the upper term. In effect, the defendant has waived any Sixth Amendment rights associated with imposition of a sentence up to the agreed maximum.

Defendant contends the present matter does not involve a negotiated plea with a stipulated sentence or sentencing lid. He argues the four-year term specified in the plea form he signed was not a sentencing lid but the maximum that could be imposed for the offense and enhancement at issue. He cites

Shelton, *supra*, 37 Cal.4th at p. 768, where the state high court observed: "[T]he specification of a maximum sentence or lid in a plea agreement normally implies . . . a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term."

We disagree with the premise underlying defendant's argument that a sentencing lid cannot be a term of a plea agreement if it is the maximum term that may be imposed for the offense or offenses on which the defendant pleaded guilty or no contest. A defendant charged with four offenses might enter into a plea agreement permitting him to plead guilty to one offense with a maximum punishment of six years in exchange for dismissal of the other three charges and a sentencing lid of six years. Another defendant charged with the same four offenses might enter into a plea agreement permitting him to plead guilty to two offenses with a maximum punishment of eight years in exchange for dismissal of the other two charges and a sentencing lid of six years. There is no reason in law or logic why the two should be treated differently for purposes of enforcement of the sentencing lid or the requirement of a certificate of probable cause.

For the same reason, we also reject defendant's assertion the plea agreement in this matter did not involve a sentencing lid. As explained in *Shelton*, a negotiated plea agreement must be interpreted in accordance with general contract principles. (*Shelton, supra,* 37 Cal.4th at p. 767.) At the time the plea agreement was presented to the court, defendant acknowledged the

maximum term he might receive on the plea would be four years. In exchange for the plea, the prosecution dismissed three other charges. If defendant had been tried and convicted on all four charges, he would have faced a much greater sentence than the four years he received. Under these circumstances, it may be inferred the parties understood the four-year maximum was a term of the agreement and, hence, defendant agreed to be subject to a maximum sentence of four years in exchange for avoiding the risk of an even greater punishment. By entering into the negotiated agreement, defendant was deemed to have admitted that the facts and the law would support a four-year term, subject only to a proper exercise of judicial discretion at the time of sentencing.

DISPOSITION

The appeal is dismissed.

HULL, J.

I concur:

NICHOLSON, Acting P.J.

ROBIE, J.

I respectfully dissent.

Relying on *People v. Shelton* (2006) 37 Cal.4th 759 (*Shelton*) and *People v. Bobbit* (2006) 138 Cal.App.4th 445, the majority concludes that for defendant to challenge on appeal the trial court's imposition of the upper term sentence for receiving stolen property, he had to obtain a certificate of probable cause. I disagree. In my view, for the reasons stated below, neither *Shelton nor Bobbit* are applicable to this case. Accordingly, I would not dismiss this appeal, but would consider it on its merits.

Defendant's sole argument on appeal is that the trial court violated his Sixth Amendment right to a jury trial -- as recognized in *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] -- by imposing an upper term sentence based on findings not made by a jury. The People contend this argument amounts to a challenge to the validity of defendant's plea and cannot be considered on appeal without a certificate of probable cause. As I will explain, the People are mistaken.

"Penal Code section 1237.5 provides that a defendant may not appeal 'from a judgment of conviction upon a plea of guilty or nolo contendere' unless the defendant has applied to the trial court for, and the trial court has executed and filed, 'a certificate of probable cause for such appeal.'" (*Shelton*, *supra*, 37 Cal.4th at p. 766.) Despite this broad statutory language, the Supreme Court has recognized two types of issues that may be raised on appeal from a guilty or no contest plea

without a certificate of probable cause: "issues relating to the validity of a search and seizure, for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m), and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*People v. Buttram* (2003) 30 Cal.4th 773, 780.)

While the phrasing of the second exception to the requirement of a certificate of probable cause might suggest that *any* sentencing issue can be raised on appeal without a certificate, that is not the case. Rule 8.304(b)(4)(B) of the California Rules of Court clarifies that a defendant need not obtain a certificate of probable cause if the appeal is based on "[g]rounds that arose after entry of the plea *and do not affect the plea's validity*." (Italics added.) Thus, to the extent what appears to be merely a sentencing issue actually amounts to a challenge to the validity of the plea, that issue cannot be raised on appeal without a certificate of probable cause.

This principle is exemplified by *Shelton*, where the Supreme Court concluded that a challenge to the trial court's legal authority to impose a "lid" sentence pursuant to a plea agreement required a certificate of probable cause. (*Shelton*, *supra*, 37 Cal.4th at p. 763.) In *Shelton*, the defendant agreed to "plead no contest to two counts--stalking in violation of a protective order . . . and making a criminal threat . . .--for which [the] defendant would be sentenced to a prison term not to exceed three years and eight months." (*Id.* at pp. 763-764.) At the time of the plea, the court explained that the defendant

could "'argue for something less than three years and eight months,'" but would receive a prison sentence. (*Id.* at p. 764.)

At the sentencing hearing, "[d]efendant's attorney argued that the multiple punishment prohibition of Penal Code section 654 applied to the two counts to which defendant had pleaded no contest because '[t]he threat occurred at the time of the stalking and is also one of the elements of the stalking.'" (*Shelton*, *supra*, 37 Cal.4th at p. 764.) Notwithstanding this argument, the trial court imposed the middle term of three years on the stalking charge and a consecutive eight-month term on the criminal threat charge. (*Id.* at pp. 764-765.)

On review, the Supreme Court decided that defendant needed a certificate of probable cause to "raise on appeal his claim of trial court sentencing error under Penal Code section 654." (*Shelton*, *supra*, 37 Cal.4th at pp. 763, 766.) The court reasoned "that inclusion of a sentence lid implies a mutual understanding and agreement that the trial court has authority to impose the specified maximum sentence and preserves only the defendant's right to urge that the trial court should or must exercise its discretion in favor of a shorter term." (*Id.* at p. 763.) "Because the plea agreement was based on a mutual understanding (as determined according to principles of contract interpretation) that the court had authority to impose the lid sentence, defendant's contention that the lid sentence violated the multiple punishment prohibition of Penal Code section 654 was in substance a challenge to the plea's validity and thus

required a certificate of probable cause, which defendant failed to secure." (*Shelton*, at p. 769.)

Three months after *Shelton*, in *People v. Bobbit*, *supra*, 138 Cal.App.4th at page 445, a panel of this court applied the reasoning in *Shelton* to a challenge to "the trial court's authority to impose an upper term sentence in light of *Blakely v. Washington* (2004) 542 U.S. 296, [159 L.Ed.2d 403, 124 S.Ct. 2531]" -- the decision that preceded *Cunningham*. (*Bobbit*, at p. 447.) In *Bobbit*, the defendant "pled no contest to one count of sale of cocaine [citation] and one count of offering to sell cocaine [citation] and admitted that he had suffered a prior serious felony conviction," subject to "a sentencing lid of 12 years and eight months." (*Ibid.*) The trial court sentenced the defendant to the lid, apparently by using an upper term sentence. (*Ibid.*) On appeal, this court concluded that because "the plea agreement did not preserve, either at sentencing or on appeal, the issue that the court did not have the authority to impose an upper term sentence in the absence of a jury finding of one or more aggravating circumstance(s)," the appeal had to be dismissed because the defendant did not obtain a certificate of probable cause. (*Id.* at p. 448.)

Relying on *Bobbit* and *Shelton*, the People argue here -- and the majority agrees -- that defendant's challenge to the imposition of the upper term sentence requires a certificate of probable cause. I do not agree.

Contrary to the majority opinion (maj. opn., p. 8), defendant contends and I agree that in this case there was

neither a "lid" nor a stipulated sentence. As part of his plea, the defendant initialed an item on the plea form that provided "I understand that I may serve this maximum sentence as a result of my plea: four (4) years in state prison . . . ." In response to an inquiry from the court whether he understood the penalties and consequences of the plea by initialing the form defendant responded, "Yes, sir."

Shelton simply does not apply in this case, where there is neither a "lid" nor a stipulated sentence. Defendant is not challenging the plea's validity. In this case, the defendant's argument is that the trial court violated his Sixth Amendment rights by imposing the upper term sentence *based on aggravating circumstances that did not pertain to any prior convictions and that were not admitted by him or found by a jury*. As in this case, "[W]hen the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was 'part of [the] plea bargain.' [Citation.] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself." (*People v. Buttram, supra,* 30 Cal.4th. at p. 786, italics omitted.)

For the foregoing reasons, I would address defendant's appeal on its merits.

ROBIE, J.