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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SEUNG BUM YANG, Defendant and Appellant.	G033659 (Super. Ct. No. 03NF0701) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald P. Kreber and Richard F. Toohey, Judges. Affirmed in part, reversed in part and remanded.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob and Andrew S. Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Seung Bum Yang was convicted of driving under the influence of alcohol and driving when his blood alcohol was 0.08 percent or more, violations of Vehicle Code sections 23152, subdivisions (a) and (b). His pretrial motions requesting disclosure of peace officer personnel records were denied by the trial court. We conclude the trial court did not abuse its discretion when it concluded there was no discoverable material and refused to disclose the contents of officer personnel files.

Defendant's sentence included revocation of his driving privileges for five years. Vehicle Code section 13352, subdivision (a)(7) provides for a four-year revocation upon a conviction under Vehicle Code section 23152.

We remand the matter so the trial court may engage in the required weighing process for sentencing. The sentence is reversed and the matter is remanded for resentencing consistent with this opinion. In all other respects, we affirm the judgment.

I

FACTS

Buena Park Police Officer Thomas Reyes and Reserve Officer Waldo Miller, were assigned to the Buena Park DUI Task Force at 11:25 p.m. on January 17, 2003, when they observed a vehicle crossing back and forth over the white painted line dividing traffic lanes. The vehicle failed to stop or signal before making a right turn. Reyes observed the clothing worn by both the driver and the front seat passenger. Reyes activated his overhead lights and attempted to conduct a traffic stop. Although the driver looked into his rearview mirror several times, the vehicle did not slow. Both officers illuminated the vehicle with their side spotlights. The vehicle made another right turn into a strip mall and slowed to five miles per hour. Reyes reported the driver dove into the back seat and the passenger jumped into the driver's seat.

Defendant's brother Hak Yang was in the driver's seat when the officers approached the vehicle. Reyes reported he smelled the strong odor of alcohol emitting from Hak Yang's breath, that he had bloodshot, watery eyes and spoke with a thick, slurred speech. Reyes told Hak Yang to exit the vehicle and he did not comply. Reyes opened the door and pulled Hak Yang outside. Defendant was extracted from the backseat. He had an unsteady gait and trouble maintaining his balance. He spoke with a slur and had the odor of alcohol on his breath. His eyes were bloodshot, droopy and watery. He was uncooperative and refused to take the field sobriety test or answer Reyes's questions.

The information alleges defendant violated Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol and Vehicle Code section 23152, subdivision (b), driving when blood alcohol was 0.08 percent or more. A jury found defendant guilty of both counts on February 26, 2004.

It was further alleged that defendant had previously been convicted of violation of Vehicle Code section 23152, subdivision (a) on October 18, 2000. He was on probation at the time of the current offense.

The Honorable Richard F. Toohey found that aggravating factors outweighed the mitigating factors and sentenced defendant to the upper term of three years in prison. "Under 4.421A6, the court would note that the defendant's conduct upon being contacted by the police and subsequent certainly interfered with the judicial process under that sentencing rule. The fact that he — and without question the court having heard this case, particularly in my many years on the bench and as a lawyer, I found the testimony particularly about the reserve officer extremely credible. There's absolutely no question that this defendant switched places with his brother in this court's view. And he — that action and the subsequent process of this case in the court I think falls within that rule." Additionally, the trial court revoked defendant's driving privileges for five years.

Prior to trial, defendant filed a motion for discovery of peace officer personnel records of Reyes and Miller. A sealed declaration of defense counsel was attached to the motion. Counsel for the City of Buena Park opposed the motion on two grounds. First, it objected because it was not given an unredacted declaration. Second, it asserted the redacted declaration it received failed to establish good cause and materiality for disclosure of the records. The Honorable Ronald P. Kreber read and considered the moving, opposing and reply papers and denied the motion after conducting a hearing on August 29, 2003. A few days later, Judge Kreber conducted another hearing and issued another order: "The Court will change [its] ruling which was made on August 29, 2003 in regards to defense's motion re: discovery of peace officer personnel records (Pitchess). The defendant is in custody and his jury trial is set for September 8, 2003. This issue needs to be litigated on its merits and the defendant need not have waived time to get the motion heard. The Court will order the sealed affidavit be released to the Police Officer's Attorney on September 3, a sealed response is ordered by September 4, and the matter will be scheduled for September 5, 2003. The Court will make a removal order for defendant to be present on September 5. If the defense does not want their affidavit released to the Police Officer's attorney, then the clerk in Department C42 should be notified by Tuesday, September 3 9:00 AM, and the order of August 29 will remain in place. It is further ordered that the defense's affidavit will not be shared with members of the Orange County District Attorney's Office, Prosecuting Team in any way. The Law Office representing the City and the police officers will maintain strict security with this affidavit."

The record is unclear with regard to what happened next. Defendant filed a petition for a writ of mandamus on September 2, 2003. He then voluntarily withdrew his petition and this court summarily denied his petition as moot.

Another motion for peace officer personnel records was filed on January 16, 2004 by defendant. Both a redacted declaration and a sealed declaration in support of the motion were filed.

On February 9, 2004, Judge Kreber conducted a hearing on the motion. A sealed minute order was filed on February 11, 2004. Judge Kreber ruled that Reyes's personnel files were ordered submitted for an in camera hearing. A copy of the minute order was given to attorneys for defendant and for the city.

On February 17, 2004, Judge Kreber stated in open court: "The court previously indicated there is good cause by the moving party for the disclosure. The court will inspect the records that are material in this matter. And so the court will have an in camera hearing at this time." The judge then conducted a hearing outside the presence of the district attorney and defense counsel. Sergeant Richard Forsyth was sworn and examined by the court in camera. Forsyth stated he had records for both Reyes and Miller. The court instructed him to look at Reyes's files. Later, the court declined to inquire about Miller's files. The minute order states: "The court after examining files 1 through 9 finds there are no discoverable issues in any of these files. Court orders the transcripts from this hearing to be sealed."

II

DISCUSSION

Peace officer personnel records

Defendant asks this court to review the sealed transcript of the custodian of records after the trial court denied his request under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. In his brief, defendant states the trial court ruled he showed good cause to obtain personnel records concerning the *two* arresting officers. However, while Judge Kreber ruled defendant made a sufficient showing for the court to examine Reyes's

records in camera, nothing in the record before us indicates the court ever made such a ruling about Miller's records.

Peace officer personnel records are confidential and shall not be disclosed except by discovery pursuant to Evidence Code sections 1043 and 1045. The guidelines and motion procedure for such discovery were first established by the California Supreme Court in *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531. "'In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as "*Pitchess* motions" . . . through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. [Citations.]'" (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019.)

The moving party must provide a description of the type of records or information sought and file affidavits supporting good cause for the release of the information. (Evid. Code, § 1043, subd. (b)(2), (3).) "Under section 1043, the moving party demonstrates 'good cause' for the disclosure by simply showing (1) the personnel records are material to the subject matter in the pending litigation, (2) a reasonable belief the governmental agency has the type of information or records sought to be disclosed, and (3) the manner in which the proposed discovery will be used in litigating the matter. [Citations.]" (*Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 105.)

"A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion. [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) We note how important it is for the trial court to make a thorough record of the details of the information it actually is reviewing in order to assure adequate appellate review.

We have reviewed the record to determine whether or not the court abused its discretion in the instant case. Included in the record on appeal are sealed copies of the court's in camera examination of Reyes's files, sealed copies of the court's February 11,

2004 minute order and sealed copies of the unredacted declarations filed with both of defendant's motions.

The record reveals the trial court questioned the custodian of records regarding whether there had been complaints about Reyes and whether Reyes had been disciplined for improper police tactics, excessive or illegal force or lack of credibility.

"Consistent with customary procedure, the records have been made part of the record on appeal but have been sealed, and appellate counsel for defendant have not been permitted to view them. (See Cal. Rules of Court, rule 33.5(b)(2).) As we have done in similar situations (*People v. Samayoa* (1997) 15 Cal.4th 795, 827 (*Samayoa*)), we independently have examined the materials in camera, and conclude that the trial court did not abuse its discretion in refusing to disclose the contents of either officer's personnel files." (*People v. Hughes, supra,* 27 Cal.4th at p. 330.) In the instant case, we have independently examined the materials in camera, and conclude there was no abuse of discretion when the court found there was no discoverable material and refused to disclose the content of police personnel files.

Five-year revocation of driving privileges

Defendant asserts the trial court erred when it revoked his driving privileges for five years. The Attorney General agrees. Vehicle Code section 13352, subdivision (a)(7) provides that a conviction under Vehicle Code section 23152, driving privileges shall be revoked for four years.

Other sentencing issues

After their briefs in this case were filed, the parties were asked to file supplemental briefs regarding two opinions issued by the United States Supreme Court. They disagree about the effect of *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct.

2531] (*Blakely*) and agree that *United States v. Booker* (2005) 543 U.S. __ [125 S.Ct. 738] (*Booker*), has no effect on the instant case.

The Attorney General initially argues defendant forfeited his right to raise the issue of the constitutionality of his sentence by failing to object in the trial court. We disagree. Defendant was sentenced before the Supreme Court's opinion in *Blakely, supra,* 542 U.S. __ [124 S.Ct. 2531] was filed. At that time, it would have been futile for defendant to object to the sentence based on an alleged violation of the Sixth Amendment right to have a jury determine beyond a reasonable doubt all the facts supporting a sentence above the statutory maximum. Moreover, such a fundamental, constitutional claim can be raised for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277.) Defendant did not forfeit his right to raise this argument.

In *Blakely, supra,* 542 U.S. __ [124 S.Ct. 2531], the defendant pleaded guilty to kidnapping, a felony punishable under the Washington sentencing scheme by a term of not more than 10 years. Other provisions provided for a sentence of 49 to 53 months, unless the sentencing court found exceptional circumstances. The finding of exceptional circumstances permitted the court to impose an even longer term. The trial court found the defendant had acted with deliberate cruelty, one of the enumerated exceptional circumstances. Based on the finding of deliberate cruelty, the court imposed an enhanced sentence of 90 months.

The United States Supreme Court, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), held the defendant's "exceptional" sentence violated his Sixth Amendment right to a jury trial because the facts supporting the sentence were neither admitted by the defendant nor found by the jury. (*Blakely, supra,* 542 U.S. at pp. __ [124 S.Ct. at pp. 2536-2538.) "'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. __ [124 S.Ct. at

p. 2536], italics added.) The "statutory maximum" for *Apprendi* purposes means "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Id.* at p. __ [124 S.Ct. at p. 2537].) Accordingly, the Supreme Court invalidated the defendant's sentence. (*Id.* at p. __ [124 S.Ct. at p. 2538].)

The California Supreme Court is currently deciding whether and to what extent the *Blakely, supra,* 542 U.S. __ [124 S.Ct. 2531] decision applies to California's determinate sentencing laws. (*People v. Butler,* review granted December 22, 2004, S129060; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, review granted December 15, 2004, S129050; *People v. Butler* (2004) Cal.App.4th 910, review granted December 15, 2004, S129000; *People v. Barnes* (2004) 122 Cal.App.4th 858, review granted December 15, 2004, S128931; *People v. Lemus* (2004) 122 Cal.App.4th 614, review granted December 1, 2004, S128771; *People v. George* (2004) Cal.App.4th 419, review granted December 15, 2004, S128582; *People v. Sample* (2004) 122 Cal.App.4th 206, review granted December 1, 2004, S128561; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, review granted November 17, 2004, S128417; *People v. Vonner* (2004) 121 Cal.App.4th 801, review granted October 20, 2004, S127824; *People v. Sykes* (2004) 120 Cal.App.4th 1331, review granted October 20, 2004, S127529; *People v. Black,* review granted July 28, 2004, S126182; *People v. Towne,* review granted July 14, 2004, S125677). Review was also granted in an opinion from this court. (*People v. Vu* (2004) Cal.App.4th 1060, review granted February 16, 2005, S130656.)

In the interim, the California Supreme Court discussed *Blakely, supra,* 542 U.S. __ [124 S.Ct. at pp. 2536-2538] and *Apprendi, supra,* 530 U.S. 466, but not in the context of California's determinate sentencing law. In *People v. Betts* (2005) 34 Cal.4th 1039, 1054 (*Betts*), the court held: "A criminal defendant has a constitutional right to a jury trial on all the elements of the crime charged. [Citations.] The right to a jury trial extends to the proof of any fact (except a prior conviction) that increases the

maximum penalty for a crime. [Citations.] A fact that increases the maximum permissible punishment for a crime is the functional equivalent of an element of the crime, regardless whether that fact is defined by state law as an element of the crime or as a sentencing factor. [Citations.]" However, the court distinguished facts relating to a court's jurisdiction from facts relating to the elements of a crime or the imposition of punishment. "The decisions upon which defendant relies [*Blakely* and *Apprendi*] involve factual determinations that establish the level of punishment for which the defendant is eligible. They are inapplicable to the present issue. Because territorial jurisdiction is a procedural matter that relates to the authority of California courts to adjudicate the case and not to the guilt of the accused or the limit of authorized punishment, a jury trial on the factual questions that establish jurisdiction is not required by the federal Constitution." (*Id.* at p. 1054, fn. omitted.)

Assuming, *Betts, supra,* 34 Cal.4th 1039 is suggestive of the court's final resolution of the issue at hand; we forge ahead with its analysis in mind. Penal Code section 1170, subdivision (b), which states, "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." (Italics added.) Pursuant to California Rules of Court, rule 4.420(a), "When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The *middle term shall be selected* unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." (Italics added.) California Rules of Court, rule 4.420(b) states, "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Thus, the

middle term is the maximum penalty the trial court may impose without making additional findings. (*Blakely, supra,* 542 U.S. at p. __ [124 S.Ct. at p. 2537].) The exception to this rule is the court may rely on the fact of a prior conviction, or other circumstances relating to a prior conviction, in the absence of a jury's factual findings. (*Blakely, supra,* 542 U.S. at p. __ [124 S.Ct. at pp. 2536]; *Apprendi, supra,* 530 U.S. at p. 490.)

In *Booker,* the United States Supreme Court considered whether its *Blakely* rationale applied to sentences imposed pursuant to the federal sentencing guidelines.[1] After an analysis of its previous cases, the court again held, as it had in *Blakely* and *Apprendi,* "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Booker, supra,* 543 U.S. at p. __ [125 S.Ct. at p. 756].) Thus, *Booker* effects no change in our analysis of *Blakely, supra,* 542 U.S. __ [124 S.Ct. 2531] and *Apprendi, supra,* 530 U.S. 466. We believe California's determinate sentencing law suffers from the same constitutional defect as the Washington sentencing scheme discussed in *Blakely* and the federal sentencing guidelines discussed in *Booker*. We also agree with the parties that the remedial portion of the *Booker* opinion has no effect on the present appeal and therefore do not address it.

Defendant admitted to the trial judge that within the previous 10 years, he had been convicted of a violation of Vehicle Code section 23152, subdivision (a) within the meaning of Vehicle Code section 23550.5. But relying on *Blakely,* he now argues the trial court erred when it imposed the upper term of three years in prison because the jury,

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[1] *Booker, supra,* 543 U.S. __ [125 S.Ct. 738] is written in two parts. The first part, authored by Justice Stevens, held *Blakely, supra,* 542 U.S. __ [124 S.Ct. 2531], applies to the federal sentencing guidelines. The second part, authored by Justice Breyer, fashioned a remedy for the Court's invalidation of those guidelines.

and not the court, should have found the facts supporting the upper term beyond a reasonable doubt.

Judge Toohey articulated his reasons for imposing the aggravated term, but it is unclear exactly what he meant when he determined that defendant interfered with the judicial process. Nor is it clear whether or not the court would have imposed the high term based solely on the fact of defendant's prior conviction. Therefore, the appropriate remedy is to vacate the judgment, and remand the matter so the trial court can again engage in the required weighing process. For purposes of imposing the upper term, the court may only consider aggravating circumstances permitted by *Blakely* and *Apprendi*.

III

DISPOSITION

The convictions are affirmed. The sentence is reversed and the matter is remanded for resentencing consistent with this opinion. In all other respects, we affirm the judgment.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.