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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

LEE KELLY CLARKE,

Defendant and Appellant.

C049648

(Super. Ct. No. 04F3594)

Defendant Lee Kelly Clarke was placed on probation after pleading no contest to obstruction of an executive officer. (Pen. Code, § 69.) When he later violated the terms and conditions of his probation by resisting arrest and kicking out the rear window of a patrol unit, his probation was revoked and he was sentenced to the upper term of three years in state prison.

On appeal, he contends (1) the court improperly relied on conduct occurring after entry of the plea in imposing the aggravated term, (2) the court's March 30, 2005, minute order requires correction to properly reflect the court's ruling, and

(3) imposition of the aggravated term violated his rights under the Sixth and Fourteenth Amendments and *Blakely*.¹

We shall direct the court to correct its minute order, and shall otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND²

Defendant entered a plea of no contest to obstructing and resisting an executive officer after he attempted to kick the window out of a patrol unit while being transported to the police station in conjunction with an investigation to determine whether he had left the scene of a traffic accident. In exchange for his plea, a remaining count was dismissed with a *Harvey* waiver, and four additional cases pending against him were also dismissed.

The presentence probation report suggested a middle term of two years, but recommended formal probation with specified terms and conditions. The court suspended imposition of sentence for three years and placed defendant on formal probation on the terms and conditions set forth in the probation report, as modified by agreement of the parties.

¹ *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403].

² The underlying facts are not at issue and are therefore only briefly summarized from the probation reports in light of the defendant's entry of a plea of no contest.

Approximately five months later, defendant was involved in another incident with law enforcement officers that resulted in the filing of a petition for revocation of probation alleging that defendant (1) broke out the window of a sheriff's patrol car, (2) resisted arrest, (3) hit a sheriff's deputy, (4) obstructed arrest, (5) made threatening phone calls to a victim and (6) failed to appear for a probation appointment. Defendant denied the allegations.

At the conclusion of the contested probation violation hearing, the trial court found the first, second, and fourth allegations in the petition to be true, and dismissed all remaining allegations. The matter was referred to probation for preparation of a supplemental presentence report.

At sentencing, the court stated that it "read and considered the supplemental report filed by the probation department on April 25th, and based on its contents, [was] tentatively prepared to follow their recommendation." The supplemental report recommended that probation not be reinstated and suggested an aggravated prison term of three years (as opposed to the middle term of two years suggested in the initial probation report), noting that, "due to the defendants [*sic*] performance while on probation, the aggravated prison term appears [to] be more appropriate and will be recommended." After hearing oral argument from counsel, the court denied

reinstatement of probation and sentenced defendant to the aggravated term, citing three factors in aggravation and finding no factors in mitigation.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Defendant contends that the court's imposition of the upper term was improper because it was based, at least in part, on "inappropriate considerations" contained in the supplemental probation report. Specifically, defendant claims the court improperly considered conduct occurring after entry of the underlying plea.

The People argue that defendant forfeited his claim by failing to raise it at the time of sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 351 [lack of a timely and meaningful objection to a criminal sentence results in forfeiture of the claim].) Alternatively, the People argue that the trial court had full sentencing discretion upon the revocation of probation because imposition of sentence was suspended at the time defendant first entered his plea. (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.)

In response to the forfeiture argument, defendant maintains that he preserved his claim because he "requested numerous lesser punishments, including that he receive probation, or the

mitigated term, or midterm," and "argued that the probation department was wrong in recommending the aggravated term." We find those arguments insufficient to preserve the specific claim defendant now proffers on appeal -- that the court inappropriately considered post-offense conduct in imposing the upper term. "[D]efendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable." (*People v. Partida* (2005) 37 Cal.4th 428, 434, citing *People v. Green* (1980) 27 Cal.3d 1, 22.) Because he did not challenge the court's findings on that issue at the sentencing hearing, the claim of error is forfeited. (See *People v. Scott, supra*, 9 Cal.4th 331, 352-353; *People v. de Soto* (1997) 54 Cal.App.4th 1, 8-9.)

In any event, the contention fails on the merits. At the time defendant entered his plea, the court suspended imposition of sentence and placed him on formal probation. Once defendant violated probation, the court had authority to consider all prior conduct in order to determine whether or not to reinstate probation. (*People v. Harris* (1990) 226 Cal.App.3d 141, 145-146 (*Harris*) [court may properly consider defendant's conduct prior to reinstatement of probation].) We can infer from the record that the court did just that when it read and considered the supplemental probation report. Noting that the defendant was

"not able to live within the limits of a grant of probation," the court resolved not to reinstate probation.

Thereafter, in imposing the upper term of three years, *the court appropriately considered factors existing at the time defendant entered his plea*, finding in aggravation the fact that "defendant's prior convictions as an adult or sustained petitions in juvenile proceedings are numerous and have been of increasing seriousness," that defendant was on probation or parole when the crime was committed and that defendant's prior performance on probation or parole was unsatisfactory. We find no error in the court's imposition of the upper term.

II

Defendant next contends, and the People agree, that the court's March 30, 2005, minute order incorrectly reflects that the court found true Counts 1, 2, and 3 of the petition for probation revocation. In fact, the court sustained the allegations in Counts 1, 2, and 4, dismissing all remaining counts, including Count 3. We agree that the minute order is not consistent with the court's order articulated on the record, and we therefore direct the trial court to issue an amended minute order correctly setting forth its ruling.

III

Defendant contends the trial court's imposition of the upper term for Count 1 violated his right to a jury trial under

Blakely and under the Sixth and Fourteenth amendments to the United States Constitution. In doing so, he acknowledges that his claim of *Blakely* error must fail as a result of the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254-1256, and that this court is bound by the ruling in *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Nonetheless, defendant asserts that his claim "remains viable" based on the law of New Jersey and other states. Defendant's claim must fail.

Not only does the holding in *Black* defeat defendant's claim of error, it fails because, as defendant concedes, one of the factors used by the trial court to impose the upper term was the fact that defendant's "prior convictions as an adult or sustained petitions in juvenile proceedings are numerous and have been of increasing seriousness." The rule of *Blakely* does not apply to the use of prior convictions to increase the penalty for a crime. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 455].) Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of other factors, in addition to defendant's prior convictions, to impose the upper term did not violate the rule of *Blakely*.

DISPOSITION

The trial court is instructed to amend its March 30, 2005, minute order to correctly reflect its ruling. In all other respects, the judgment is affirmed.

_____ SIMS _____, Acting P.J.

We concur:

_____ MORRISON _____, J.

_____ HULL _____, J.