IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	H026823
	)	(Santa Clara County
v.	)	Superior Court No.
	)	CC062329)
SHAWN RAMON ROGERS,	)	
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S SUPPLEMENTAL BRIEF

III. WHEN THE COURT IMPOSED AN AGGRAVATED SENTENCE ON THE BASIS OF FACTS IT FOUND WHICH WENT BEYOND THE ELEMENTS OF THE CRIME TO WHICH THE JURY FOUND TRUE, IT VIOLATED HIS CONSTITUTIONAL RIGHT TO JURY TRIAL AS EXPLAINED IN *BLAKELY v. WASHINGTON*.

A. Introduction

In *Apprendi v. United States* (2000) 530 U.S. 466, 490, 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.)

On June 24, 2004, the United States Supreme Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge

may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 2537], emphasis in original.) Under *Blakely*, when the court makes additional findings to justify the imposition of an aggravated sentence, it violates a defendant's constitutional right to a jury trial as set forth in *Apprendi*.

This rule was violated in this case.[1] Appellant Shawn Ramon Rogers was convicted in count one of assault with a firearm (Pen. Code, § 245, subd.

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[1] The United States Supreme Court granted certiorari in *United States v. Booker* (7th Cir. 2004) 2004 U.S. App LEXIS 14223, cert. granted Aug. 2, 2004, No. 04-104 and *United States v. Fanfan* (D. Me. June 28, 2004, No. 03-47 PH), cert. granted Aug. 2, 2004, No. 04-105 concerning whether an enhanced sentence under the United States Sentencing Guidelines violates the right to a jury trial. The California Supreme Court has granted review as to whether imposing the upper term violates the right to a jury trial. As reflected in the court's online database, the Supreme Court granted review in two cases. In one case, the issues are: (1) Can a trial court use facts relating to counts on which a defendant was found not guilty as aggravating factors in determining the appropriate sentence? (2) Does *Blakely v. Washington* (2004) __ U.S. __, 124 S.Ct. 2531, preclude a trial court from making findings on aggravating factors in support of an upper term sentence? (3) If so, what prejudicial error standard applies, and was the error in this case prejudicial? (*People v. Towne* [nonpub. opn.], review granted July 14, 2004, S125677.) In the other case, the issues are: (1) What effect does *Blakely v. Washington* (2004) ___ U.S. __, 124 S.Ct. 2531 have on the validity of defendant's upper term sentence? (2) What effect does *Blakely* have on the trial court's imposition of consecutive sentences? (*People v. Black* (2004) [nonpub. opn.], review granted, July 28, 2004, S126182.) (<http://www.courtinfo.ca.gov/courts/supreme/recent.html.> [as of July 30, 2004].)

(b)).[2] The jury found true that he personally used a firearm (§ 12022.5), he personally inflicted great bodily injury (§ 12022.7), and he committed the crime in furtherance of a criminal street gang (§ 186.22, subd. (b)). (CT 270-274, 288.) The court imposed the upper term for the underlying crime and the upper term for the firearm enhancement, as well as three years for the great bodily injury enhancement and one year for the gang enhancement, for a total of 23 years in prison. (CT 339, 341.) Punishment for the other counts were to be served concurrently.

In justifying the upper terms, the court found three factors in aggravation: "the vulnerability of the victims . . . , the overall conduct of the defendant . . . that he does pose or did pose a danger to society, . . . [and] that the defendant was on probation at the time of the offense." (RT 962; see CT 324 [recommendations of probation office]; Cal. Rules of Court, rule 4.421(a)(3), (b)(1) & (b)(4).)[3] Since appellant never admitted these factors and they were never found true by the jury, their use to impose aggravated terms violated *Blakely*.

This issue can be addressed on appeal. When the Supreme Court announces a new rule, it applies to all criminal cases still pending on direct

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[2] Unless otherwise specified, all further statutory references are to the Penal Code.

[3] All further references to rules are to the California Rules of Court.

review. The lack of an objection below did not waive the issue because counsel could not have anticipated this new rule and because a violation of a defendant's constitutional right to a jury trial can always be raised for the first time on appeal. The error should be deemed structural, requiring automatic reversal, because the facts which justified an aggravated sentence were found true by the wrong entity and under a standard of proof less than beyond a reasonable doubt. Even if the error can be subjected to harmless error analysis, reversal is required because, as described in appellant's opening brief, the appropriate sentence in this case was a hotly contested topic. Consequently, the matter must be remanded for resentencing without consideration of facts the jury did not find true.

B. A Sentencing Court Cannot Impose an Aggravated Sentence Based on Aggravating Factors in Addition to the Facts Admitted by the Defendant in his Guilty Plea or Found True by the Jury.

In *Blakely,* the defendant pled guilty to second-degree kidnaping and admitted a firearm enhancement. Under Washington State sentencing law, second-degree kidnaping was a "class B felony," with an absolute maximum sentence of 10 years. Under the applicable sentencing guidelines, the "standard range" for second-degree kidnaping with use of a firearm was 49 to 53 months. Under Washington law a court could impose a sentence above the standard range if it found compelling reasons for doing so. The statute

provided a non-exhaustive list of aggravating factors which could justify imposing a higher sentence. (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) When a court imposes a sentence above the standard range it must make findings of fact and conclusions of law supporting it. In *Blakely*, the trial court imposed a sentence of 90 months – 37 months above the standard range – after finding Blakely acted with deliberate cruelty, one of the aggravating factors enumerated in Washington's sentencing law. (*Ibid.*)

The Supreme Court held that the imposition of an aggravated sentence based on the court's finding of deliberate cruelty violated *Apprendi*'s rule entitling a defendant to a jury determination of any fact used to impose a greater punishment than the maximum otherwise allowable for the underlying offense. The Supreme Court rejected the state's assertion that the relevant maximum under *Apprendi* was the 10-year cap for a class B felony. Instead, the court decided 53 months – the top end of the standard range – was the statutory maximum because that was the greatest sentence Blakely could receive based solely on the facts admitted by his plea.

> Our precedents make clear [] that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant "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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes

> essential to the punishment,"[citation], and the judge exceeds his proper authority.

(*Blakely, supra,* 124 S.Ct. at p. 2537, emphasis in original.) Based on this reasoning, the court reversed Blakely's sentence:

> Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framer's would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," [citation], rather than a lone employee of the State."

(*Id*., at p. 2543.)

Under *Blakely*, the aggravated sentence imposed in this case is unconstitutional. Under California law, "[w]hen a judgment of imprisonment is to be imposed, the court *shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime*." (§ 1170, subd. (b), emphasis added; accord rule 4.420(a) & (b).) The same rule applies in determining which term to impose for an enhancement. (Rule 4.428(b).) Thus, as in *Blakely*, the sentencing court could not impose a sentence other than the middle term without finding aggravating circumstances beyond the elements inherent in the crime itself. As in *Blakely*, California law also provides a non-exclusive list of aggravating factors the court may rely upon in deciding to sentence a defendant to the upper term (rules 4.421, 4.408(a)), and

the court must make express findings concerning "the ultimate facts deemed to constitute circumstances in aggravation." (§ 1170, subd. (c).)

Under the analysis in *Blakely*, the middle term is the highest sentence which can be imposed based on the jury's verdict or a defendant's plea. This is because any factor which is an element of the crime or the basis for an enhancement cannot be used to justify imposition of an aggravated term. (§ 1170, subd. (b); rule 4.420(c) & (d).) Thus, the aggravating factors which justify imposition of the upper term necessarily involve facts beyond those "*reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) "[T]he jury's verdict alone does not authorize the [aggravated] sentence. The judge acquires that authority only upon finding some additional fact." (*Id.*, at p. 2538.)

Analogously, federal courts have found that *Blakely* applies to imposing enhanced penalties under the United States Sentencing Guidelines. (See, e.g., *United States v. Ameline* (9th Cir. July 21, 2004, No. 02-30326) __ F.3d __ [2004 U.S. App. LEXIS 15452]; *United States v. Booker* (7th Cir. July 13, 2004) __ F.3d __ [2004 U.S. App. LEXIS 14223]; but see *United States v. Pineiro* (5th Cir. July 12, 2004, No. 03-30437) __ F.3d __ [2004 U.S. App. LEXIS 14259].)

The court in this case imposed the aggravated term only after finding three aggravating factors: the victim was vulnerable (rule 4.421(a)(3)), the

defendant's conduct indicated a danger to society (rule 4.421(b)(1)), and the defendant was on (juvenile) probation when the crime was committed (rule 4.421(b)(4)). (RT 962; see CT 324.) The court could not use any fact which was an element of the crime to justify the imposition of the aggravated terms, these facts were necessarily ones in addition to those found true by the jury. The sentence in this case therefore violated *Blakely*.

Although one of the factors in aggravation was that appellant was on probation, the recidivist "exception" does not apply. In *Almendarez-Torres v. United States* (1998) 523 U.S. 224, five justice of the Supreme Court agreed the fact of a prior conviction can be used to enhance a sentence without first presenting the issue to a new jury. (*Id.*, at p. 228.) Justice Clarence Thomas, who voted for the majority in *Almendarez-Torres,* has since stated that he would vote differently if the issue were presented to the Supreme Court again. (*Apprendi, supra,* 530 U.S. at pp. 520-521 (conc. opn. of Thomas, J.).) Thus, a majority of the Supreme Court now agree that *Almendarez-Torres* was wrongly decided. So far, the Court has yet to apply *Apprendi* to recidivist-based sentencing factors, even when the fact of a prior conviction is used to increase the statutory maximum sentence for an offense.

Second, to the extent that the recidivist exception still applies, it has been justified on the ground that the defendant enjoyed a right to a jury trial in the prior case; thus, his right to a jury to determine every fact relevant to

increasing his sentence has been preserved. (*Apprendi, supra,* 530 U.S. at p. 496.) This premise does not exist when the defendant is on juvenile probation and never enjoyed the right to a jury trial in the juvenile court. (See *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194 [prior juvenile adjudication without right to jury trial cannot be used as an enhancement].) Although this court and others have disagreed with *Tighe* (see, e.g., *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 830-834; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1316; see also *United States v. Jones* (3d Cir. 2003) 332 F.3d 688, 696; *United States v. Smalley* (8th Cir. 2002) 294 F.3d 1030, 1033), appellant submits this issue must be revisited in light of *Blakely.*

C. The Issue is not Waived.

"When a decision of [the Supreme] Court results in a 'new rule,' the rule applies to all criminal cases still pending on direct review. [Citation.]" (*Schiro v. Summerlin* (2004) 542 U.S. ___, [2004 S.Ct. 2519, 2522].) Furthermore, the issue is not waived due to the lack of any constitutional objection below. The California Supreme Court explained in *People v. Vera* (1997) 15 Cal.4th 269, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. *A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.*" (*Id*., at p. 276, emphasis added.) Among

the fundamental constitutional rights listed in *Vera* is the constitutional right to jury trial. (*Id*., at pp. 276-277, citing *People v. Holmes* (1960) 54 Cal.2d 442, 443-444; see also, *People v. Saunders* (1993) 5 Cal.4th 580, 589 fn 5 ["Defendant's failure to object [ ] would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial"].)

There is an additional reason a finding of waiver would not be appropriate in this case. Appellate courts will not insist upon an objection in a lower court where it would have been futile at the time. Thus, in *People v. Birks* (1998) 19 Cal.4th 108 the Supreme Court rejected a waiver argument when an issue was presented for the first time on review because the lower court would have been bound to reject any objection based on controlling precedent. (*Id*., at p. 116, fn. 6; see also *People v. Turner* (1990) 50 Cal.3d 668, 703 ["Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]"].)

In this case, an objection that aggravating factors had to be submitted to a jury or admitted by the defendant would have been futile because California law clearly provided that sentencing facts are found by judges, not juries. "[T]he ability of courts to make factual findings in conjunction with the performance of their sentencing functions never has been questioned."

(*People v. Wiley* (1995) 9 Cal.4th 580, 587.)

> [U]nder the provisions of the Determinate Sentencing Act, trial courts are assigned the task of deciding whether to impose an upper or lower term of imprisonment based upon their determination whether "there are circumstances in aggravation or mitigation of the crime," a determination that invariably requires numerous factual findings.

(*Ibid*.)

Since an objection based on *Apprendi* would have been futile, and since the issue involves appellant's fundamental constitutional right to trial by jury, it must be addressed on appeal despite the lack of an objection below.

D. Error Requires Reversal of the Sentence.

When a judge imposes a sentence higher than what the law permits based solely on the jury's verdict or a defendant's admission, the result is structural error requiring automatic reversal. It is structural error because appellant's right to a jury trial was altogether denied as to the findings which added two years to his sentence. As the Supreme Court explained in *Rose v. Clark* (1986) 478 U.S. 570, 578, "Where th[e] right [to a jury trial] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty."

In addition, the error is structural because the judge made its findings under a preponderance of the evidence standard. (See Rule 4.420(b)

["Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence"].) Under *Blakely* it should have applied the beyond a reasonable doubt standard. An error which deprives a defendant of the requirement of proof beyond a reasonable doubt is structural error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Courts have applied the *Chapman v. California* (1967) 386 U.S. 18 harmless error standard to so-called *Apprendi* errors. However, the analysis in those cases cannot be applied to the error in this case. Some have involved the failure to adequately instruct the jury on all elements of an enhancement. (See, e.g., *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 [failure to instruct the jury on the requisite primary activities of a criminal street gang enhancement]; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209-1211 [failure to instruct jury on elements of firearm use].) The failure to instruct on an element of a crime is always subject to harmless error analysis. (*Neder v. United States* (1999) 527 U.S. 1, 9, 18.)

Other courts have found *Apprendi* error harmless because the fact used to enhance a sentence was conceded by the defendant at trial. (See, e.g., *Clark v. State* (2001) 2001 N.D. 9 [621 N.W.2d 576, 581].) Other cases have found *Apprendi* error harmless because the sentence imposed by the court based on the error was still under the statutory maximum. (See, e.g., *United States v. Garcia-Guizar* (9th Cir. 2000) 234 F.3d 483, 488-489.)

None of these circumstances are applicable to this case. The error did not involve a failure to instruct the jury on an element of the offense, but instead a total failure to instruct on the elements necessary to find the aggravating circumstances true. The error *did* result in a sentence which was beyond the maximum which could be imposed based solely on the jury's verdict. Since the wrong entity made the findings, and since it used a lesser standard of proof, the error was structural.

Even if the *Chapman* harmless error standard is found to apply, reversal would be required. There was a wide disagreement as to the sentence appellant should receive. The prosecutor advocated a sentence of at least 30 years. (RT 957-959.) Appellant sought a sentence of about 16 years, which was what the probation department recommended. (RT 959.) The sentencing court found it significant that the jury was not convinced appellant attempted to murder anyone. (RT 960-961.) Witnesses testified at the sentencing hearing how appellant mediated disputes and protected the weak from predators within the system. (RT 918-919, 925-927, 929-930, 931-933; see court exhibits 1and 2.) The court specifically found appellant's young age to be a factor in mitigation. (RT 962.) The court acknowledged it was "a difficult case for me because I was not the trial judge." (RT 960.)

Even in considering the factor in aggravation that appellant was on juvenile probation during the offense, this alone would not lead to a conclusion

that the error was harmless. Although only one factor in aggravation is required to impose the upper term, remand is necessary when the court appears to have relied mostly on factors that were found to be invalid. (See, e.g., *People v. Wallace* (July 26, 2004, S113321) __ Cal.4th __ [2004 cal. LEXIS 6770, *29-*30].) Here, the prosecution and the trial court focused primarily not on appellant's performance on probation (which other than this crime had been quite good), but instead on the violence involved and the apparent vulnerability of the victims. (RT 955-959 [comments by the prosecution concerning the circumstances of the crimes]; 962 [comments by the court].)

Appellant disagreed with the court's characterization of the crimes, that he posed a danger to society or that he attacked victims that were particularly vulnerable:

> [T]he D.A. says that, or he is claiming that I was a menace or whatnot. But where are these statements coming from? What are you basing this on? Are you basing this on my conduct when I was on the Streets? If that's the case, if I had been a menace, you know, I would have a file this thick of criminal history. But I don't. . . . [¶] So I have been incarcerated for about four years. I have not had one physical altercation no trouble at all. . . . [¶] . . . It's apparent that a lot of evidence that the D.A. has had a chance to look at, the statements made by the victims, the contradictory statements that they have made, it's apparent he's not working for the best interest of justice . . . .

(RT 918-919.) Appellant was entitled to have a jury resolve these contentions. Since appellant "contested the [aggravating circumstances]" and has

demonstrated the "evidence [was] sufficient to support a contrary finding[, the reviewing court] should not find the error harmless." (*Neder v. United States* (1999) 527 U.S. 1, 19.)

CONCLUSION

Due to the violation of his constitutional right to a jury trial, appellant respectfully requests that this Court remand his case for resentencing without consideration of the aggravating factors which he did not admit, or for a jury trial where the truth of the aggravating factors which appellant disputes can be decided beyond a reasonable doubt.

DATED: August 13, 2004

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: _____
Jonathan Grossman
Attorney for Appellant
Shawn Ramon Rogers.

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached APPELLANT'S SUPPLEMENTAL BRIEF contains 3617 words.

Executed under penalty of perjury at Santa Clara, California, on August 13, 2004.

_____

Jonathan Grossman