Filed 10/25/04 P. v. Haynes CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUFUS TYRONE HAYNES, Defendant and Appellant.	A103248 (Napa County Super. Ct. No. CR110387)

Introduction

After the trial court denied his Penal Code section 1538.5 motion to dismiss, defendant Rufus Tyrone Haynes pleaded no contest to the crime of second degree robbery. (Pen. Code, § 211.)[1] The court sentenced defendant to the upper term of five years in state prison. This timely appeal followed. Defendant contends the trial court erred in denying the motion to suppress evidence because he was arrested without probable cause or, in the alternative, that there was no reasonable suspicion to detain him, even if he was not arrested.[2] The People argue here, as they did below, that appellant was detained, not arrested, and that the court properly found the officers had reasonable suspicion to detain him. We agree with the People and therefore affirm.

---

[1] All statutory references are to the Penal Code, unless otherwise indicated.

[2] Defendant challenges only the initial stop and conduct of the stop. He does not argue that the subsequent search of the vehicle went beyond the bounds of a reasonable detention.

Defendant also contends his sentence is unconstitutional and must be reversed pursuant to *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*). We reject defendant's substantive challenge to the judgment. However, we find that the sentencing error that occurred in this case requires us to remand the matter for resentencing.

Facts

The following facts relating to defendant's detention and subsequent arrest were derived from the evidentiary hearing on the motion to suppress evidence. It was stipulated that there was no warrant involved.

On August 23, 2002, at 2:59 a.m., Susan Dizmang, a public safety dispatcher for the City and County of Napa, received a 911 call from Sean Ng[3] that he had just been robbed. Napa public safety dispatcher Beverly Turner immediately broadcast the information to officers in the field as it was reported by Ng. Although she originally broadcast that there was a "home invasion" robbery, she corrected that minutes later to reflect that the robbery took place in a parking lot and that a handgun was involved and a wallet was taken. Initially, the description indicated the suspects were a Black male and a Hispanic male; however, Turner received a revised description at 3:02 a.m. to reflect that both suspects were Black males. She promptly broadcast the revised description. Also broadcast was information that the victim heard a vehicle leave, that one of the two assailants was wearing a dark colored ski cap, and one was wearing a dark colored jacket with dark pants.

Officer Joseph A. Matulich responded to the victim's location at 2622 First Street and spoke with Ng. The parking lot where the robbery occurred was directly adjacent to the First Street onramp to southbound Highway 29.

Officer Brian Campagna knew from his training and his six years experience as a Napa police officer that Highway 29 heading south out of the county was a "corridor of

---

[3] The reporter's transcript erroneously shows the victim's name as "Shawn Ing." We refer to the victim as "Sean Ng" as his name appears in the information.

escape" by people who committed crimes in Napa. Campagna was at the Napa Police Department when he heard the initial report of the robbery. He immediately went to his patrol car, drove down First Street and drove southbound on Highway 29 in order to "cover[] my escape routes." It took him only a minute or two to get onto Highway 29 and he was driving southbound on Highway 29 at 3:00 or 3:01 a.m. Campagna was advised around 3:03 a.m., as he proceeded south, that there was a weapon involved, the suspects were two Black males wearing dark clothing, and that one suspect had a ski mask.

Traffic on Highway 29 was very light that morning. Campagna was driving very fast at between 90 and 100 miles per hour. He looked into vehicles to check out their occupants as he passed. Campagna passed three vehicles before catching up to the car in which defendant and his companions were riding. The first vehicle he passed was a tractor trailer with a white man driving. Next he passed a white van driven by a white person wearing a white shirt. Campagna passed another car with a Hispanic man in dark clothing driving and no other occupants in the car He saw one other vehicle traveling south ahead of him. He proceeded to continue to speed up to try to catch the car, a Pontiac Grand Am. Campagna saw three Black men in the car. The driver and the back seat passenger were both wearing dark clothing. The front seat passenger was wearing a dark red jacket. Campagna decided to stop the Grand Am and detain its occupants. He testified that his decision was "[b]ased on the nature of the crime. It was based on the proximity of where the crime occurred and how close it was to the highway on ramp. The time element, the mileage that it was from where that crime actually occurred to where I caught up to them. And it was based on the description that I had information on at the time." The description was that of "[t]wo Black males wearing dark clothing." Campagna informed Napa Police Officer Thomas Helfrich, who was immediately behind him, of what he had seen and Helfrich turned on his lights and conducted the stop. Campagna took a position on the left-hand side of Helfrich's patrol car when the Grand Am pulled over.

Helfrich testified he also drove toward Highway 29 upon hearing the radio traffic regarding the robbery. He testified that "[m]y training and experience lead me to believe that usually when crimes like this occur in the City of Napa, people head to—tend to head south out of town." Highway 29 is "the primary artery" heading south from Napa County. Helfrich also agreed that it has been his experience and training that it is common for there to be a "drive-away person" who does not actually commit the robbery. He further testified that as Campagna passed the four vehicles on the highway, Campagna would advise Helfrich over the radio of the description of the individuals he observed inside. Campagna told him that the individuals in the Pontiac Grand Am were three Black male adults wearing dark clothing. At that point, Campagna pulled in behind Helfrich and Helfrich turned on the red lights to pull the car over and made the stop. Campagna testified that the vehicle was stopped at approximately 3:09 a.m. Dispatch was told at 3:10 a.m. and 23 seconds that there were three Black males in the Grand Am. The stop occurred approximately nine miles from the First Street onramp.

Several Napa County Sheriff's deputies also heard the radio broadcasts and also arrived at the scene of the stop.

Campagna and Helfrich both testified that they conducted a "high-risk felony stop" for officer safety purposes, because a gun had been used in the commission of the robbery. The occupants of the Grand Am were taken out of the car at gunpoint. At least four officers had their guns trained on the occupants from various directions. Helfrich ordered the driver to throw the keys out of the car. He ordered the driver out of the car. The driver, Shannon White, got out of the car and then was ordered to lift up his shirt, turn around and walk backwards toward Helfrich's patrol car. Helfrich then handcuffed White, while White was standing with his back toward the patrol car. White was placed in the back of one of the patrol units. At the time, White was wearing long dark trousers, blue and white tennis shoes, and a reversible black jacket with the blue and white plaid side showing on the outside. The front passenger, Frederick June Hanneman, was next ordered out of the car. He also was handcuffed and eventually seated in the back of a patrol car. He was wearing dark pants, a white t-shirt, white tennis shoes, and a red

sports jacket with a black interior. A sheriff's officer ordered defendant Haynes out of the right rear passenger seat. He was brought back to the Napa officers, handcuffed and eventually seated in the back of a police car. Defendant was wearing dark trousers, blue athletic shoes with white laces, and a sky blue shirt with "Kaiser Permanente Medical Center Environmental Services San Francisco" on it. According to Campagna, at this time none of the three had been placed under arrest. There was no testimony that any of the three were pat-searched before being put in the patrol cars. The officers handcuffed the three occupants of the Grand Am for officer safety and because the officers did not know if anyone else might be inside the car. They were placed in separate patrol cars to secure them during the search of the car. The doors of the patrol cars could not be opened from the back seat. The three were under police control by 3:18 a.m.

Helfrich and Campagna began searching the Grand Am "[b]ased on the nature of the crime, handgun was involved, for officer safety, to recover and secure the handgun, and also I believed that we had the people responsible for the crime." The search located a black beanie sock hat under the front passenger's seat, a black hat with a Giants emblem in the center console, a black ski mask under the driver's seat, a dark hat and a dark colored handgun (either a BB gun or air gun) inside a toolbox in the trunk of the vehicle, which had been accessed by flipping the rear seat forward from the passenger compartment. The officers reported the gun found approximately 12 seconds after they radioed that the three suspects were secured. At that time the three occupants of the car, including defendant, were placed under arrest.

At 3:26 a.m., Helfrich requested "wants and warrants" on the three occupants of the car. At 3:29 a.m., the officers heard back that White's license had been suspended and revoked. Officer Helfrich testified that he usually, although not always, would arrest persons driving with a revoked license, impound the car and conduct an inventory search.

The trial court denied the motion to suppress, ruling that under the totality of the circumstances there was reasonable cause for a temporary detention and that the detention was reasonably conducted for the time period, given the high risk to officer safety. The court took care to note it did not consider occupants' race, as an isolated

factor, as ethnicity could only be considered in conjunction with other pertinent factors. The court relied upon what Helfrich knew at the time he stopped the vehicle, and concluded that it was a reasonable inference that the perpetrators would proceed south on Highway 29, based upon the fresh dispatch, and the proximity to the crime scene of Highway 29. After viewing the clothing the suspects had been wearing when stopped, the court also found that the colors of the shirts and jackets observed by Campagna were not inconsistent with dark clothing, especially since it was 3:00 a.m. and the "sky blue" shirt would look dark at night and the plaid coat was at least partially dark.

Discussion

I. Motion to Suppress

On review of a trial court's ruling on a motion to suppress, we defer to the trial court's findings of fact, whether express or implied, where they are supported by substantial evidence. But we exercise our independent judgment to determine whether, on the facts found, the police activity was reasonable under the Fourth Amendment or amounted to an unreasonable search or seizure. (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597; see *People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

A. *Reasonable Suspicion Supports the Detention*

"Although police officers may not arrest or search a suspect without probable cause and an exception to the warrant requirement, they may temporarily detain a suspect based only on a 'reasonable suspicion' that the suspect has committed or is about to commit a crime. [Citations.]" (*People v. Bennett* (1998) 17 Cal.4th 373, 386-387.) Police officers may conduct brief investigatory detentions without running afoul of the Fourth Amendment, so long as they "can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) The " 'reasonable suspicion' " standard is "less demanding than probable cause 'not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to

establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.' " (*Id*. at pp. 230-231, quoting *Alabama v. White* (1990) 496 U.S. 325, 330.)

On this record, we must conclude that Campagna and Helfrich each entertained an objectively reasonable suspicion of the defendant and his companions' involvement in the robbery when they made the initial vehicle stop and detention. Within a minute or two of hearing the dispatch, the two officers separately sought to overtake the perpetrators by covering the most likely escape route. That other roads and routes could have been taken by the perpetrators does not undermine these officers' experience and knowledge that southbound Highway 29 was the most likely route in this instance, given the proximity of the First Street onramp and this highway to the crime scene. Officer Campagna testified that he saw only four vehicles during his short pursuit, and that the occupants of the first three vehicles did not fit the description of the robbers. The vehicle he and Helfrich determined to stop was occupied by three Black males, with the driver wearing dark clothing and the front passenger wearing a dark red jacket. Campagna explained his belief that the three subjects fit the description, although only two were encountered by the victim. In both officers' experience, robberies often involve wheelmen or lookouts as well as those who actually confront the victim. Campagna made his decision to stop the vehicle based upon the nature of the crime, the proximity of the crime location to the highway onramp; the time element and the distance he had traveled when he caught up to the suspects, plus the description of the perpetrators as two Black males wearing dark clothing. Campagna also testified he had driven "very fast in order to account for that elapse of time that it took that they may have had a head start to get ahead of me, so I felt that based on where I was and how long it had taken, the time elapsed, that if they had left that area that it would be in approximately that area where I located them."

Helfrich also testified that he made his determination to effect the stop because he believed the occupants of the vehicle were the subjects involved in the robbery "[b]ased upon the color of their clothing and the direction of travel and the time frame in which

this all occurred." He also based his decision upon the description he had overheard on the dispatch, including the perpetrators' race and that they were wearing dark clothing.

Victim Ng heard a vehicle leave the scene. The officers' explanation that southbound Highway 29 was the most likely route in the circumstances for the robbers to have taken, is reasonable. The testimony that the time frame, distance from the scene and speed of the officers caused them to believe the suspect vehicle would be overtaken at about the location they overtook the Grand Am is also reasonable. That of the four vehicles the officers passed in their pursuit, the occupants of the Grand Am were the only ones that matched the description of the assailants in terms of race, dark clothing, and number (at least two, given the experience of the officers that an extra wheelman was often involved in such crimes), also supports the reasonable suspicion that these persons were involved in the robbery of Ng. Moreover, the court's finding that the particular clothing worn by the three was dark or would appear dark at night is a factual finding to which we defer.

The testimony of the officers at the motion to suppress hearing demonstrates they had a reasonable suspicion, based upon articulable facts that the occupants of the Grand Am had committed the robbery. (*People v. Harris* (1975) 15 Cal.3d 384, 389.) This reasonable suspicion was sufficient to allow them to effect a stop and to detain these individuals for further investigation.

B. *Scope of the Detention*

Defendant contends he was arrested, not merely detained, when the police made a show of authority to stop the car in which he was riding, ordered the him out at gunpoint, handcuffed him and placed him in a patrol car that could not be opened from the inside. He contends that this was an "arrest" and could not be supported absent probable cause. We disagree.

An investigative detention must only last for a period of time that is necessary to accomplish its purpose and must be conducted in the least intrusive manner required to confirm or dispel the officer's suspicions. (*People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 82.) "The Supreme Court held that ' . . . the officer may temporarily detain the

offender at the scene for the period of time necessary to discharge the duties that he incurs by virtue of the . . . stop.' " (*People v. Bell* (1996) 43 Cal.App.4th 754, 765, quoting *People v. McGaughran* (1979) 25 Cal.3d 577, 584.) "But '[t]he scope of the detention must be carefully tailored to its underlying justification. [¶] The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. [Citations.] It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.' (*Florida v.* Royer [(1983)] 460 U.S. [491,] 500; [citations].)" (*People v. Soun* (2003) 34 Cal.App.4th 1499, 1516 (*Soun*).) In determining whether an officer's suspicion was reasonable, we examine the totality of the circumstances, while recognizing "that the principal function of an officer's investigation is to resolve often ambiguous-appearing circumstances" so that the officer may promptly determine whether to let the individual " ' "go about his business or hold him to answer charges." ' [Citation.]" (*People v. Loewen* (1983) 35 Cal.3d 117, 129.)

Under the totality of the circumstances, we conclude the officers acted reasonably in the manner in which they ordered the defendant and his companions from the car and secured them in the police vehicles. "The amount of force applied does not necessarily turn a lawful detention into an arrest." (1 Erwin et al., Cal. Criminal Defense Practice (2002) § 10.01, p. 10-6.)

Recently, in *Soun, supra,* 34 Cal.App.4th 1499, the Sixth District held that the procedures by which Soun and his companions were taken into custody satisfied Fourth Amendment requirements and constituted an initial detention. (*Id.* at p. 1520.) Defendant Soun and others riding with him were removed from the car at gunpoint by a

number of officers, forced to lie prone on the ground, briefly pat-searched and then handcuffed and placed in separate patrol cars. They were then transported three blocks from the site of the stop and were held in a parking lot for up to an additional 30 minutes. (*Id.* at pp. 1513, 1517.) The Sixth District held this initial detention to be a temporary detention and concluded that the officers' actions, given the circumstances and what the officers knew, "met the criterion of using the least intrusive means reasonably available under the circumstances." (*Id.* at p. 1519.) Nor was the temporary detention elevated to an arrest by the officers moving the detainees three blocks to a separate parking lot in order to cease blocking the roadway and for officer safety. (*Ibid*.)

In addition to reasonably suspecting that the occupants of the car were assailants who had been involved in a killing, the officer who made the stop testified he knew that the assailants were " 'supposedly armed with a semi-automatic rifle.' " (*Soun, supra,* 34 Cal.App.4th at pp. 1518-1519.) According to the *Soun* court, "[i]n all these circumstances we cannot conclude that the means [Officer] Chew chose to effect the detention elevated the initial detention to the status of a de facto arrest for Fourth Amendment purposes. Chew and his colleagues 'were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.' (*United States v. Hensley* (1985) 469 U.S. 221, 235.)" (*Soun,* at p. 1519.) The court reviewed the particular facts and observed that the circumstances of the stop did not "necessarily require a conclusion that Soun had been arrested rather than simply detained. Courts have, for example, declined in particular circumstances to base a finding of de facto arrest on evidence that the officers stopped the individual at gunpoint (*U.S. v. Alvarez* (9th Cir. 1990) 899 F.2d 833, 838-839), or required him or her to get out of a car (cf. *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 109-111) and lie down on the pavement (*U.S. v. Buffington* (9th Cir. 1987) 815 F.2d 1292, 1300), or handcuffed him or her (*People v. Bowen* [(1987)] 195 Cal.App.3d [269,] 272-274; cf. *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385; *U.S. v. Bautista* (9th Cir. 1982) 684 F.2d 1286, 1289-1290), or placed him or her in a police car (*U.S. v. Parr* (9th Cir. 1988) 843 F.2d 1228, 1231), or transported him or her for legitimate police

purposes short of booking or custodial interrogation (*In re Carlos M., supra,* 220 Cal.App.3d at p. 385; cf. *Florida v. Royer, supra*, 460 U.S. at pp. 504-505; *People v. Harris, supra*, 15 Cal.3d at p. 390 [but transportation impermissible in the circumstances of record]), or held him or her for more than a minimal amount of time (*United States v. Sharpe* (1985) 470 U.S. 675, 686-688 [20 minutes]; *In re Carlos M., supra*, 220 Cal.App.3d at pp. 384, 385 [30 minutes]; *United States v. Place* (1983) 462 U.S. 696, 709-710 ['we decline to adopt any outside time limitation' (although 90 minutes would be too long in this case)]). '[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances. [Citations.]' (*In re Carlos M., supra*, 220 Cal.App.3d at pp. 384-385; cf. *U.S. v. Baron* (9th Cir. 1988) 860 F.2d 911, 914 ['we consider the totality of the circumstances'].)" (*Soun,* at p. 1517.)

In the totality of the circumstances of the instant detention, the actions of the officers were within the proper scope of a temporary, investigative detention. The officers knew that a gun had been involved in the robbery, which had taken place minutes before their pursuit and stop of the vehicle. They could see three persons in the car. In the circumstances, officer safety, as articulated by both Campagna and Helfrich, was a primary concern and their actions in securing the occupants of the vehicle were reasonable. As compared with *Soun*, *supra,* 34 Cal.App.4th 1499, the scope of the detention was far less intrusive. Defendant Haynes and his companions were ordered from the car at gunpoint and were handcuffed, but were not made to lie prone on the ground. Nor were they transported from the location of the stop or made to wait up to an additional 30 minutes at that point. Rather, in this instance, only a few minutes (approximately 10) passed from the beginning of the stop to the point of defendant's arrest after finding the caps and weapons in the Grand Am. In all of the circumstances, and given what the officers knew about the robbery and the use of a gun in that crime, their actions did not exceed the scope of a temporary detention.

C. *Conclusion*

In sum, we conclude that in the totality of the circumstances, the officers reasonably suspected that defendant and his companions had been involved in the robbery. This reasonable suspicion was sufficient to support the temporary investigative detention of the three. In addition, the scope of the detention was reasonably related to the justification for its initiation, given the officers' knowledge that a gun had been used in the very recent crime, their legitimate concerns for officer safety, and the brevity of the detention. Consequently, we need not address the issue of whether the officers had probable cause to arrest defendant at the time they detained him.

II. Sentencing Error

A. *Background*

As noted in our Introduction, the trial court sentenced defendant to the upper term of five years following defendant's plea of no contest to the second degree robbery charge. Defendant did not admit any factor in aggravation, nor did he admit any prior conviction or service of a prior prison term. The trial court imposed this upper term based on its findings of several aggravating factors and no mitigating factors. The aggravating factors identified by the court were: (1) the crime involved violence and the threat of bodily harm; (2) the degree of cruelty and callousness; (3) the physical and emotional injury to the victim; (4) the planning and professionalism and sophistication of the crime; (5) defendant poses a danger to society; (6) "[p]rior convictions have been of increasing seriousness"; (7) defendant "served prior prison terms"; and (8) defendant's prior performance on parole was unsatisfactory. (See California Rules of Court, rule 4.421.[4])

While this appeal was pending, defendant obtained leave of this court to file a supplemental brief alleging a sentencing error based on the United States Supreme Court's recent decision in *Blakely*, supra, 124 S.Ct. 2531. Defendant contends that the

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

trial court violated *Blakely* by imposing an upper term sentence for his robbery conviction.[5]

B. *Error*

In *People v. Butler* (Sept. 27, 2004, A101799) ___ Cal.App.4th ___ [2004 DJDAR 12083] (*Butler*), we described *Blakely* as follows: "In *Blakely,* the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the 'standard range' of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with 'deliberate cruelty.' (*Blakely, supra*, 124 S.Ct. at p. 2537.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2002) 530 U.S. 466, 490 (*Apprendi*) 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." ' (*Blakely, supra,* 124 S.Ct. at p. 2536.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the '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.' (*Id*. at p. 2538.)" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12088].)

Defendant contends that the trial court violated *Blakely* by relying on factors other than the "fact of a prior conviction" itself. Defendant further asserts that *none* of the factors relied upon by the court fell within that narrow "fact of a prior conviction" exception. (*Blakely, supra,* 124 S.Ct. at p. 2536.)

---

[5] Defendant and the People agree that the ruling in *Blakely, supra,* 124 S.Ct. 2531, applies here because the appeal in this case was pending when *Blakely* was decided. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 ["a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"]; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 991.)

Under California's determinate sentencing law, the maximum sentence a judge may impose for a conviction without making additional findings is the middle term. Penal Code section 1170, subdivision (b), provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Furthermore, "[s]election 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." (Rule 4.420(b).) In the present case, the trial court followed these directives; it found eight aggravating circumstances and no mitigating circumstances and that the aggravating circumstances warranted imposing an upper term sentence. Nevertheless, the court violated *Blakely* because *at least five* of the aggravating factors that it articulated (1) did not relate to a prior conviction and (2) involved additional factual determinations made by the court rather than by a jury. (See *Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at. p. 12088].)

"The requirement that a fact which increases a sentence beyond the statutory maximum must be found by a jury does not apply to the fact of a prior conviction. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi, supra*, 530 U.S. at pp. 488, 490; *Blakely, supra*, 124 S.Ct at p. 2536.)" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12089].) Because the fact that defendant had served a "prior prison term" (rule 4.421(b)(3)) necessarily means he suffered a prior conviction and involves no subjective factual determination relating to the defendant's conduct, it fell within the narrow exception recognized by *Blakely*.

We recognize that the prior conviction exception to the *Apprendi* rule has been construed broadly to apply not just to the fact of the prior conviction, but to other issues relating to the defendant's recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.) The two findings that defendant's prior convictions were of increasing seriousness and that his prior performance on parole was unsatisfactory certainly involve defendant's "recidivist conduct" and relate to the fact of a prior conviction. However, we are not persuaded that they fall within the "narrow exception" carved out by the Supreme Court. (*Apprendi, supra,* 530 U.S. at pp. 489-490

[characterizing *Almendarez-Torrez* as a "narrow exception" arising from "unique facts"].) "[I]n some cases, extrinsic facts relating to a recidivist aggravating circumstance may implicate *Apprendi*" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12089]), and the subjective factors involved in finding these two recidivist circumstances appear to involve such extrinsic facts. Although clearly stemming from the fact of a prior conviction or convictions, each of these two aggravating factors requires additional findings which are not only factual, but subjective—that the prior convictions were "of increasing seriousness" and that the defendant's parole performance was "unsatisfactory." These additional facts appear to us to require a jury determination and proof beyond a reasonable doubt. In any event, the trial court's reliance upon five aggravating factors unrelated to the fact of defendant's prior conviction deprived defendant of his federal constitutional right to have a jury determine beyond a reasonable doubt facts legally essential to aggravate his sentence.

In *Butler*, we rejected the People's claim, raised here, that California's sentencing scheme does not violate *Blakely*. We reasoned: "The People contend that California's 'triad' sentencing system does not offend *Blakely* at all; that any one of the three legislatively-authorized terms for an offense, including the upper term, can be imposed by a trial court without violating a defendant's Sixth Amendment rights. Under their view of this system, although there is a 'presumptive mid-term sentence,' the upper term is the statutory maximum sentence, which the trial court has discretion to impose. The People's argument may have been persuasive before *Blakely* was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is 'not the maximum sentence a judge may impose after finding additional facts,' but rather the sentence it may impose without making *any additional findings*. (*Blakely, supra*, 124 S.Ct. at p. 2537.) Under California law, the maximum sentence a judge may impose without any additional findings is the middle term. (Pen. Code, § 1170, subd. (b); rule 4.420.)" (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at pp. 12088-12089].)

In a related argument, the People claim that where, as here, at least one aggravating factor relates to the "fact of a prior conviction," there is no *Blakely* error. They reason as follows: "Under California law, a single aggravating factor is sufficient to render a defendant *eligible* for the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615.) Consequently, where one of the factors found by the court is lawful, the upper term is the statutory maximum in California because it is authorized without the necessity of any other judicial findings. In such cases, a trial court's *additional* judicial findings not reflected in the jury verdict do not raise the sentence *above* the statutory maximum, and *Blakely* is not violated." The People conclude that once the constitutional requirement is satisfied by the finding of the single, lawful factor, the state statutory scheme becomes the only limit on the court's ability to impose an upper term sentence. In effect, the People use the "fact of a prior conviction" exception to raise the prescribed "statutory maximum." Again, the People's argument may have been persuasive before *Blakely.* However, *Blakely* expressly recognizes "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." (*Blakely, supra*, 124 S.Ct at p. 2537.) The "fact of a prior conviction" is not recognized by *Blakely* as a fact increasing the statutory maximum. Rather, it is the single fact that although it "increases the penalty for a crime beyond the prescribed maximum" (*id.* at p. 2536), it nevertheless need not be submitted to a jury and proved beyond a reasonable doubt. The judge may rely upon that fact to increase the penalty beyond the middle term, which is the prescribed statutory maximum sentence here.

As in *Butler*, "[w]e also reject the People's contention that defendant forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims

asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See Pen. Code, § 1170, subd. (b); rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture doctrine is to 'encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors' (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after defendant was sentenced." (*Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at pp. 12088-12089, fn. omitted].)

Thus, we find that the trial court violated *Blakely* by relying on at least five "non-recidivist" factors to impose the upper term. We turn to the question of whether this error prejudiced defendant.

C. *Prejudice*

Since the *Blakely* court rested its holding on *Apprendi*, we shall apply the standard of prejudice applicable to *Apprendi* error which is the "*Chapman* test". (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12089].) Thus, reversal of the sentence is required unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) As noted above, the trial court in this case identified eight aggravating factors to support the upper term sentence. Defendant has successfully challenged at least five of those factors. We cannot say beyond a reasonable doubt that a jury would have made the required findings of these aggravated factors had the matter been submitted to them as *Blakely* requires.

Although *Blakely* error is evaluated under the *Chapman* test, under California law, a single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband, supra,* 13 Cal.4th at p. 728; *Butler, supra,* ___ Cal.App.4th ___ [2004 DJDAR at p. 12089]; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 581; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) Also under state law, " '[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen the lesser sentence had it known that some of its reasons were improper.' (*People v. Price* (1991) 1 Cal.4th 324, 492; see also *People v. Osband*[*, supra*,] 13 Cal.4th [at p.] 728.)" (*Butler*, at p. 12089.) "The statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption.' [Citation.] Thus, the reviewing court may not simply ask whether the imposed sentence would be 'wholly unsupported or arbitrary in the absence of error' but must also reverse where it cannot determine whether the improper factor was determinative for the sentencing court. [Citation.]" (*People v. Avalos* (1984) 37 Cal.3d 216, 233.)

In this case, the trial court relied upon *all* of the factors it articulated. It did not indicate that the prior conviction factor alone would suffice for imposition of the aggravated sentence. On this record, we cannot ascertain whether the five improper factors were "determinative" for the trial court.

D. *Remedy*

Defendant asserts that the appropriate remedy for reversible error is automatic resentencing to the midterm of three years. We disagree. Because the prior prison term factor alone would support imposition of the aggravated term, the court should be allowed the opportunity to exercise its discretion as to whether this factor alone would support the aggravated sentence.

DISPOSITION

The judgment is reversed as to sentence only and the case is remanded to the superior court for resentencing.

____
Kline, P.J.

We concur:

____
Haerle, J.

____
Lambden, J.

A103248, *People v. Haynes*