Petition for Review

Blakely Issue: Imposition of Upper Term

(Non-Recidivist Aggravating Factors Only)

Blakely Issue Not Raised in Court of Appeal

Guilty Plea

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People v. Smith, A102077

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DAVID ALAN SMITH,** **Defendant and Appellant.**	**S0______________** **(Court of Appeal No. A102077)** **(Sonoma County Superior Court No. MCR-408487)**

PETITION FOR REVIEW

TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellant respectfully petitions this Court to review the May 27, 2004, opinion of the Court of Appeal (First Appellate District, Division One), in light of the very recent United States Supreme Court opinion in *Blakely v. Washington* (June 24, 2004, No. 02-1632) ___ U.S. ___ [2004 DJDAR 7581], concerning whether there was a violation of the Sixth Amendment of the United States Constitution when the sentencing court imposed the aggravating term without first submitting the aggravating factors to a jury to determine whether the factors were true beyond a reasonable doubt. Alternatively, appellant requests that this Court transfer

the matter to the Court of Appeal to consider this issue as the opinion in *Blakely v. Washington, supra,* was decided after the expiration of the time in which appellant could file a petition for rehearing in the appellate court. (Cal. Rules of Court, rule 28(b)(4).)[1] The appellate court's opinion is attached to this petition as Appendix A ("App. A").

QUESTION PRESENTED FOR REVIEW

Did the trial court error by imposing the aggravated term for second degree robbery by relying exclusively upon factors not concerning recidivism and failing to have a jury determine whether those factors were true beyond a reasonable doubt?

STATEMENT OF THE CASE

On October 29, 2002, a first amended complaint was filed in Sonoma County Superior Court charging appellant with seven counts of felony robbery (Pen. Code, § 211) along with an allegation that each count constituted a serious and violent felony within the meaning of Penal Code sections 1192.7, subdivision (c), and 667.5, subdivision (c), respectively. (CT 23-24.)[2]

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[1] All further references to rules pertain to the California Rules of Court, unless otherwise specified.

[2] CT = Clerk's Transcript; SD = Secret Documents; RT = Reporter's Transcript, further delineated by date.

On December 19, 2002, pursuant to plea negotiations, appellant pled guilty to four counts of second degree robbery (counts I-IV) in exchange for the dismissal of three counts of second degree robbery (counts V-VII) and a maximum confinement time of 8 years in state prison. (CT 31-35; RT 12/19/02 2, 4.)

On February 7, 2003, appellant filed a motion requesting probation or the mitigated sentence. (CT 47-50.) At the sentencing hearing on February 19, 2003, the court denied appellant's motion requesting probation. (CT 53.) The court also denied appellant's request for the mitigated state prison term. (CT 53.) Instead, the court imposed the upper term for count I (5 years) and consecutive terms for counts II-IV calculated at one-third the midterm (3 years), for a total of 8 years in state prison. (CT 53; RT 2/19/03 at 29-30.) In reaching this decision to impose the aggravated term for count I, the court made the following comments:

> I thought about this a lot and it's the totality of the criminality here that's being sentenced.
>
> The crimes involved were cruel and callous. They're based upon the repeated threats to shoot or kill the tellers and the use of profanities.
>
> The manner in which the crimes were carried out did, although there's been argument on this point, I did find that they did indicate some sophistication in that he used sun glasses, different hats, I guess shaved his mustache for a while, shaved his hair, and then his hair was growing back.

> The defendant has engaged in violent conduct, serious danger to society.
>
> With respect to the factors in mitigation, I do note, because as I've said before that he performed satisfactorily in drug court down in Orange [C]ounty, but certainly the balance goes toward aggravation.

(RT 2/19/03 at 29-30.)

At sentencing, the court further stated that appellant was entitled to a total of 139 days of presentence custody credits, subsequently amended to 140 days of presentence custody credits. (CT 54-55; RT 2/19/03 at 31; Amended Abstract[3].) The court also imposed various restitution fines and ordered appellant to submit blood and saliva samples pursuant to Penal Code section 296. (CT 54-55; RT 2/19/03 at 30-31.)

Appellant filed a timely notice of appeal on March 25, 2003. (CT 56.)

Division One of the Court of Appeal for the First Appellate District issued its opinion on May 27, 2004. (App. A.) Appellant did not file a petition for rehearing.[4]

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[3] The criminal appeals clerk for the Sonoma County Superior Court filed an amended abstract of judgment and served it on all parties on January 15, 2004.

[4] The time for filing a petition for rehearing expired on June 11, 2004, and the decision in *Blakely v. Washington, supra,* issued on June 24, 2004.

STATEMENT OF FACTS[5]

Count I - Robbery

On July 5, 2002,[6] around 6:00 p.m., appellant entered the Bank of America on West Steele Lane in Santa Rosa. (SD 24.) Appellant walked up to bank teller A. Turner and demanded money. (*Ibid*.) Appellant said, "100's, 50's, 20's and I won't shoot you in the head." (*Ibid*.) Appellant repeated the demand as the teller reached for the money and handed appellant $4,119. (*Ibid*.) Appellant hurried to the exit and then ran as he approached the door. (*Ibid*.) A customer in line noted that appellant wore sunglasses and smelled like he had been drinking. (*Ibid*.)

Count II - Robbery

During the late afternoon of August 19, 2002, appellant walked up to bank teller T. Griffith, an employee at the Exchange Bank on Stony Point Road in Santa Rosa. (SD 24.) Appellant stated, "Give me all your money." (*Ibid*.) He also said, "I have a gun. I'm going to blow your fucking head off, give me your money." (SD 25.) She gave appellant $4,350 and he

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[5] All facts were taken from the probation officer's report filed on February 19, 2003, since a preliminary hearing was waived in this guilty plea matter. (SD 24; CT 35.)

[6] Although the probation report states count I occurred on January 5, 2002, it seems the date of the robbery occurred on July 5, 2002, according to the complaint and police report. (CT 10-11, 23.)

quickly left the bank. (*Ibid*.) The teller described appellant as wearing a baseball cap and sunglasses. (*Ibid*.)

Count III - Robbery

Shortly after lunch on September 17, 2002, donning sunglasses, appellant entered Washington Mutual Bank on Guerneville Road in Santa Rosa. (SD 24-25.) He approached bank teller T. Vierra and said, “I have a gun. I want your large bills: 100's, 50's and 20's. No ink packs. Don’t say anything when I leave or be loud. If you do, I’ll blow your head off.” (SD 25.) The teller gave him around $2,140 and appellant left. (SD 25.)

Count IV - Robbery

Around 5:34 p.m. on July 25, 2002, appellant was observed at Bank of America on West Steele Lane in Santa Rosa wearing a baseball hat and sunglasses. (SD 25.) Appellant approached teller R. Killen and said, “Give me your 100's, 50's, and 20's or I’ll shoot you.” (*Ibid*.) He said a second time, “Hurry up or I’ll shoot.” (*Ibid*.) She gave him $2,225 and he said before leaving, “If you give me your dye pack, I’ll shoot.” (*Ibid*.)

NECESSITY FOR REVIEW

This Court should grant review to settle an important question of law regarding the recently decided United States Supreme Court decision, *Blakely v. Washington* (June 24, 2004, No. 02-1632) ___ U.S. ___ [2004

DJDAR 7581], and its impact on California's Determinate Sentencing Law ("DSL"). (Rule 28(b)(1).) The significance of the *Blakely* decision is that it renders unconstitutional portions of California's determinate sentencing scheme, including the provision of Penal Code section 1170, subdivision (b), which authorizes judges, not juries, to make factual findings in connection with aggravating factors used to impose the upper term.

Although this issue was not raised in the appellate court, appellant could not reasonably anticipate the United States Supreme Court's holding in *Blakely v. Washington, supra*. As the *Blakely* case was decided after the time in which appellant could file a petition for rehearing in the appellate court, appellant asks this Court to review the issue. This situation would appear to be an exception to the Court's general policy of not considering an issue unless it was first raised below because one could not foresee the issue. (Rule 28(c); see rule 29(b)(2); *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1145, fn. 2.)

Alternatively, this Court should transfer the matter to the Court of Appeal so that court can have the opportunity to decide the merits of this issue after complete briefing by the parties. (Rule 28(b)(4).) See, for example, *People v. Howard* (1987) 190 Cal.App.3d 41, 45, where this Court granted review and re-transferred the case to the Court of Appeal for

reconsideration in light of an opinion filed by the United States Supreme Court just a few days after the appellate court's opinion.

A. *Blakely* requires that factors used to impose a sentence over the statutory maximum must first be found true beyond a reasonable doubt by a jury.

In *Blakely*, the defendant (after entering a guilty plea) was sentenced to 90 months, 37 months beyond the statutory maximum, on the basis that he acted with "deliberate cruelty." (*Blakely v. Washington, supra,* 2004 DJDAR at 7582.) 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." (*Blakely v. Washington, supra,* 2004 DJDAR at 7582, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) The Court further stated 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.*" (*Ibid.* [emphasis in original].) Stated another way, "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." (*Ibid.* [emphasis in original].)

The statutory maximum for Blakely's conduct was 53 months, but the sentencing court imposed an "exceptional sentence" increasing the sentence to 90 months based on the aggravating factor of deliberate cruelty. (*Ibid*.) Washington law provides for exceptional sentences beyond the standard range if based upon a finding of aggravating factors other than the ones used to impose the standard term. (*Ibid*.) Blakely's sentence to 90 months was beyond the statutory maximum; therefore, the sentencing court erred by imposing that sentence without proof beyond a reasonable doubt and a jury determination of the aggravating factor used to increase his sentence. (*Ibid*.)

Under California's DSL, the maximum sentence a judge may impose without any additional findings is the middle term: "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." (Pen. Code, § 1170(b) [emphasis added]; see also rules 4.420 (a) & (b).) Thus, the statutory maximum term is the middle term since the upper term cannot be imposed absent a finding of additional aggravating factors.

Furthermore, California's "dual use" rule underscores the determination that the middle term is the statutory maximum term here

because the dual use rule prohibits the use of an element of the underlying offense or an enhancement to impose the upper term. (Pen. Code, § 1170(b); rules 4.420 (c) & (d).) Thus, the aggravating circumstances authorizing an upper term are necessarily facts beyond those determined by appellant's guilty plea. Put another way, where the only aggravating circumstances are those which overlap either the offense or any enhancement, the middle term is the "maximum" sentence a defendant may receive. It is only a finding of some additional, non-overlapping aggravating circumstance which can "expose" a defendant to an upper term.

Consequently, under the reasoning of *Blakely* and *Apprendi*, a defendant has a Sixth Amendment right to a jury determination of any such aggravating circumstance used to impose an upper term in California.[7] Additionally, those findings must be subject to a reasonable doubt standard of proof (*Blakely v. Washington, supra,* 2004 DJDAR at 7582), rather than a preponderance standard, as California law currently provides (rule 4.420(b)).

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[7] Even if *Blakely* is interpreted as applying only to aggravating factors that are unrelated to recidivism, all of appellant's aggravating factors concerned non-recidivist factors as discussed below. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi v. New Jersey, supra*, 530 U.S. at 488-490.)

In the present case, the sentencing court found the following aggravating factors to be true: the crimes were cruel and callous (rule 4.421(a)(1)); the manner in which the crimes were carried out indicated sophistication (rule 4.421(a)(8)); and the conduct was violent and a serious danger to society (rule 4.421(b)(1)). (RT 2/19/03 at 29.) The sentencing court also found one factor in mitigation -- that appellant had previously performed satisfactorily on probation (rule 4.423(b)(6)). (RT 2/19/03 at 29-30.)

Most notably, the sentencing court acknowledged that there was disagreement as to whether the crimes were committed in a sophisticated manner, but the court said the facts indicated "some" sophistication. (RT 2/18/03 at 19-20; RT 2/19/03 at 28-29.) As each of the aggravating factors consisted of non-recidivist conduct, appellant was entitled to a jury trial to have the prosecutor prove each factor true beyond a reasonable doubt prior to the court's decision to impose the aggravated term.

B. The state cannot prove the error was harmless.

The disposition in *Blakely* was a remand to the Washington appellate court "for proceedings not inconsistent with this opinion." (*Blakely v. Washington, supra*, 2004 DJDAR at 7585.) The opinion did not address whether the error automatically required reversal of the sentence or was

susceptible to harmless error review. Under either view, reversal is required in this case.

The error is a "structural defect," not amenable to harmless error review, because the wrong entity, the judge rather than the jury, has adjudicated the aggravating factor and has applied the wrong standard of proof. (Cf. *Sullivan v. Louisiana* (1993) 508 U.S. 275.) It's true that the failure to instruct a jury on a single element is subject to *Chapman* harmless error analysis and is not per se reversible. (*Neder v. United States* (1999) 527 U.S. 1; *People v. Flood* (1998) 18 Cal.4th 470.) But in *Neder* and *Flood*, a jury was seated and reached verdicts, and only one element/fact was not decided by the jury because of a mis-instruction. (*Neder v. United States, supra,* 527 U.S. at 4; *People v. Flood, supra*, 18 Cal.4th at 475.)

In this case, no jury at all was seated for appellant's sentencing—which, under *Blakely*, is now better described as a penalty trial—and none of the aggravating facts were decided by a jury. (RT 2/19/03 at 29-30.) Appellant did waive his right to a jury on the substantive offenses, but the entire sentencing "trial" was conducted without a jury and appellant did not waive his right to a jury for that penalty phase. Because appellant was denied a jury verdict on multiple aggravating facts and the

court applied the wrong standard of proof, the error is structural and automatically reversible.[8]

But even if the error is not structural, reversal is required because it was not harmless. This Court and federal courts have held that conventional *Apprendi* errors on enhancements are subject to the *Chapman* standard. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209-1211; *United States v. Garcia-Guizar* (9th Cir. 2000) 234 F.3d 483, 488-489.) Under *Chapman*, the state must prove that the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) But, in the context of an error affecting the right to a jury trial on elements or enhancements, a reviewing court cannot simply ask whether there was "overwhelming evidence" supporting the finding in question. A far more rigorous form of *Chapman* analysis, focusing on what facts the fact-finder necessarily found

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[8] Support for this approach is found by analogizing to the ineffective assistance of counsel context, where a defendant complaining about erroneous advice in connection with his or her acceptance of a plea offer need show only that he or she would have gone to trial but for the bad advice, not that he or she would have prevailed at such trial. (*Hill v. Lockhart* (1985) 474 U.S. 52, 59.) The right to a jury trial is so inviolable that usual notions of harmless error analysis do not apply to it.

in reaching a decision is required in this context. The error, in this context, is not harmless if the omitted element is susceptible to dispute:

> If, at the end of that examination, the [reviewing] court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.

(*Neder v. United States, supra*, 527 U.S. at 19.)

Such is the case here, where appellant argued that the crimes were not criminally sophisticated. (RT 2/18/03 at 19-20; RT 2/19/03 at 28-29.) Certainly wearing a hat and sunglasses inside a bank would not be an unusual sight in today's society. Many non-criminals can be seen wearing a hat and sunglasses inside buildings. The fact that appellant may have cut his hair or shaved his mustache is not that indicative of planning either as the prosecution would have one believe. (RT 2/18/03 at 19-21.) Appellant's conduct occurred over a period of months (from July to October), and was no different from most persons who change their hair styles or clothing attire during a 4-month period. (CT 23-25.)

As defense counsel argued, most people know there are cameras in banks and that sunglasses and a hat are not much of a disguise, contending that appellant's conduct can be better attributed to poor decision making that occurs when one is intoxicated and in need of money to buy more drugs

to stop withdrawal symptoms rather than indicative of sophisticated planning. (RT 2/18/03 at 19.) If appellant's conduct can be considered planning at all, it certainly was not sophisticated. Because the asserted "sophistication" factor was actively "contested" and the evidence was susceptible to conflicting views, the error cannot be deemed harmless under *Neder*.

Additionally, the court found one mitigating factor applicable, but appellant argued that more mitigating factors existed such as: appellant's minimal prior criminal record (rule 4.423(b)(1)); and an admission by appellant of wrongdoing at an early stage of the proceedings (rule 4.423(b)(3)). (CT 48-49.) Therefore, a jury determination on the aggravating factors could change the number of factors in aggravation thereby changing the sentencing court's decision to impose the upper term.

But even under a more traditional *Chapman* analysis, the state cannot prove the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at 24.) As described above, the criminal sophistication factor was suspect. Moreover, another factor considered by the court in this case was that appellant's crimes were "cruel and callous" (RT 2/19/03 at 29), arguably similar to the use of "deliberate cruelty" erroneously considered by the sentencing court in *Blakely* without putting

that factor before a jury. (*Blakely v. Washington, supra,* 2004 DJDAR at 7582.) Since *Blakely* required a remand on that particular factor, surely appellant's case should be remanded for using an almost identical factor without having a jury decide the truth of it beyond a reasonable doubt.

In light of the above, appellant has demonstrated that the question of whether the aggravating factors outweighed the mitigating factors was a close decision. The denial of appellant's right to a jury trial and proof beyond a reasonable doubt was not harmless.

CONCLUSION

Appellant respectfully urges this Court to grant review, or in the alternative, to transfer the matter to the Court of Appeal to allow that court to decide the merits of this issue.

Dated: July 2, 2004

Respectfully submitted,

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Executive Director

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