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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ERIC SHEA,

Defendant and Appellant.

A105299

(Marin County  
Super. Ct. No. SC130642)

Appellant Paul Eric Shea appeals from the 10 year 4 month state prison sentence he received after entering a plea of guilty, with a *Harvey* waiver,<sup>1</sup> to four felonies and one misdemeanor charge. In his opening brief on appeal, appellant claims sentencing error in that the trial court failed to articulate reasons for sentencing appellant to an aggravated term as the principal term (child endangerment, Pen. Code, § 273a, subd. (a))<sup>2</sup>, and for ordering him to submit to involuntary AIDS testing without probable cause. After appellant's opening brief was filed, leave was granted allowing him to submit a supplemental brief on the question of whether his aggravated sentence should be vacated in light of the United States Supreme Court decision in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). Respondent addressed this issue in its brief, as well as responding to those issues raised in appellant's opening brief.

<sup>1</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise stated.

On January 11, 2005, we filed an unpublished opinion which concluded that the two sentencing errors addressed in appellant's opening brief had been waived because no objection was made below either to the court's articulation of reasons for its sentencing choices, or to the imposition of involuntary AIDS testing. (*People v. Davis* (1995) 10 Cal.4th 463, 551-552; *People v. Scott* (1994) 9 Cal.4th 331, 353.) However, we also concluded that appellant's sentence did violate *Blakely*, and remanded for resentencing. (*People v. Shea* (Jan. 11, 2005, A105299) [nopub. opn.] (*Shea I*).

A petition to the California Supreme Court was subsequently granted, and on September 7, 2005, an order was issued by the Supreme Court transferring the matter to this court with directions to vacate our prior decision, and to reconsider the cause in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), in which that court held there is no constitutional right to a jury trial or proof beyond a reasonable doubt on aggravating factors.

On October 25, 2005, we issued our second opinion in this case, in which we vacated our earlier opinion and, following *Black I*, rejected appellant's *Blakely* claim. (*People v. Shea* (Oct. 25, 2005, A105299) [nonpub. opn.] (*Shea II*).

On February 20, 2007, the United States Supreme Court issued an order granting certiorari, vacating the judgment, and remanding to us for consideration in light of *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [127 S.Ct. 856] (*Cunningham*). (*Shea v. California* (2007) \_\_\_\_ U.S. \_\_\_\_ [127 S.Ct. 1217].)

On May 21, 2007, we issued an order recalling our remittitur in *Shea II*.

On July 19, 2007, our Supreme Court issued decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). We provided the parties the opportunity to file letter briefs discussing the impact of these decisions to this appeal, which we have received, and we have examined the issue once more. Again we conclude that appellant's *Blakely-Cunningham-Black II* claim has merit, and because we cannot conclude that the error was harmless beyond a reasonable doubt, we remand to the trial court with direction to reconsider appellant's sentence.

## BACKGROUND

A criminal complaint was filed by the Marin County District Attorney on or about July 15, 2003, charging appellant with 13 counts: five counts of violation of Health and Safety Code section 11380, subdivision (a) (solicitation of a minor to use or sell a controlled substance), five counts of violation of section 273a, subdivision (a) (child endangerment), and three counts of violation of section 288, subdivision (c)(1) (lewd act upon a child). Thereafter, a six count "1st Amended Complaint" (FAC) was filed on August 21, 2003, charging appellant with violation of three counts of section 273a, subdivision (a) (child endangerment), one count of Health and Safety Code section 11379, subdivision (a) (furnishing a controlled substance), one count of section 288, subdivision (c)(1) (lewd act upon a child), and a misdemeanor count of section 647.6, subdivision (a) (child molestation).

On August 28, 2003, appellant waived a preliminary hearing and entered a guilty plea to the FAC, with a *Harvey* waiver. In so doing, appellant acknowledged that he could be sentenced to state prison for up to 10 years 4 months. These and other constitutional rights were knowingly and voluntarily waived by appellant at the time his plea was taken. Sentencing was set for November 21, 2003.

Prior to sentencing, the court ordered and received a report from the county probation department. As to the circumstances that led to the charges against appellant, the report explained that appellant and his young son had moved into the home of appellant's sister and her 14-year-old daughter (appellant's niece) in May or June 2003. While living there, appellant induced his niece to begin taking methamphetamine through injections appellant administered to her. This drug use continued on a daily basis for approximately one month, until appellant's sister told him to move out of the home. During the time he resided in his sister's home, appellant also touched his niece's breasts.

After being told to leave, appellant took up residence at the Fireside Motel in Mill Valley. While there he continued to see his niece on a daily basis. The niece told her mother that she was going to the motel to baby-sit her younger cousin (appellant's son). However, during these visits, she continued to use methamphetamine with appellant. On

several occasions he also fondled her breasts and digitally penetrated her vagina.

The probation report noted that appellant had no prior criminal record. Nevertheless, the report recommended that appellant be denied probation, and that he be sentenced to consecutive midterms (no aggravated terms) for a total aggregate prison term of eight years four months.

Also, prior to sentencing, the court received a pleading from appellant denominated "Sentencing Materials," which included a report of Jules Burstein, Ph.D., an investigator's report of an interview of Emerald Becker, and various letters including those from appellant's family members and his former employer. Supplemental sentencing materials in the form of a "Client Social Evaluation and Recommendation" by Suzanne Dowling, M.S.W. was also submitted by appellant before sentencing. Ms. Dowling's lengthy report ended with a recommendation that appellant be placed on probation and undergo residential drug rehabilitation, and treatment for his sexual misconduct.

At sentencing, the court heard testimony from the niece's father. The niece's mother both testified and read into the record a letter to the court from her 19-year-old son (the niece's brother), who was in Cambodia. Following argument, the court provided the following comments, which appear to be specifically related to the sentencing factors gleaned from the various reports and letters received, and from the testimony underlying its sentencing choices:

"Clearly, [appellant] is not an appropriate candidate for probation. This is behavior of the most despicable kind imaginable. Probably if you compare it honestly and carefully with behavior of other people, it's worse than the behavior of a lot of people who end up committed to prison for homicide.

"It's just awful behavior, and I'm not even, after having read everything I've read and heard everything I've heard, in agreement that the abuse of the child grows out of methamphetamine addiction, as [the prosecutor] points out. There are other causes, but I've seen an awful lot of methamphetamine addicts, and not very many of them inject methamphetamine into kids.

“So probation is clearly not an appropriate course at this time, and with respect to [c]ount 1, which I find to be the principal term here, the crime is such an appalling, invasive, and predatory crime, that clearly the upper term is the only appropriate term, and the [c]ourt so finds.”

The court went on to add consecutive terms (calculated at one-third the mid-term) for each of the remaining four felony counts to which appellant pleaded guilty. A sentence of 199 days in county jail for the single misdemeanor court was offset by appellant’s custody credits calculated in that amount. Therefore, a total aggregate state prison term of 10 years 4 months was imposed.

This timely appeal followed.

## DISCUSSION

### I.

As noted, appellant’s opening brief cited as its first of two sentencing errors the failure of the sentencing judge to articulate proper factors justifying the imposition of the upper state prison term as to the principal term selected (child endangerment). Without question, applicable law require trial courts to make such findings justifying the imposition of an imposed aggravated, or upper, prison term. (§ 1170, subd. (c); Cal. Rules of Court, rules 4.406(a) & 4.420(e)<sup>3</sup>; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 678.)

However, it is also without question that claims of error of this type must be preserved by a timely objection in the trial court. (*People v. Davis, supra*, 10 Cal.4th at pp. 551-552; *People v. Scott, supra*, 9 Cal.4th at pp. 352-353.) No objections of any kind were made by appellant’s counsel at the sentencing to the court’s imposition of sentence, and therefore, this claim has been waived and will not be entertained for the first time on appeal.

The same is so for appellant’s second assignment of error. No objection was made to the imposition of mandatory AIDS testing as part of the sentence. Thus, this claim of error is likewise deemed waived.

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<sup>3</sup> All further rule references are to the California Rules of Court.

## II.

In his supplemental brief, appellant also claims that his sentence must be vacated because the imposition of the aggravated term for the principal term selected was based on factors for which a jury trial is required under the United States Supreme Court decision in *Blakely, supra*, 542 U.S. 296.

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*, 542 U.S. at p. 303.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 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*, at p. 301.) 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." (*Blakely*, at pp. 303-304.)

We reject respondent's contention that appellant forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. It would be difficult to invoke the forfeiture doctrine here in light of the fact that *Blakely* was decided after appellant was sentenced. Additional analysis is unnecessary in light of our Supreme Court's recent holding that forfeiture would not be found in identical circumstances. (*Black II, supra*, 41 Cal.4th at pp. 810-812.)

We similarly reject respondent's belated claim that we need not reach the issue because defendant did not obtain a certificate of probable cause as required by section 1237. Respondent presents no explanation why this argument was not raised earlier. In any event, it exceeds the scope of our order allowing supplemental briefing "addressing the impact . . . if any" of *Black II* and *Sandoval*.

In *Cunningham*, the United States Supreme Court summarized California’s determinate sentencing law (DSL), and how it fit within the right-to-jury decisions that began with *Apprendi*, *supra*, 530 U.S. 466 and culminated with *Blakely*: “Under California’s DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. . . . [A]ggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum. [Citation.] Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi*’s bright-line rule: Except for 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.’ [Citation.]” (*Cunningham*, *supra*, [127 S.Ct. at p. 868].) “[O]ur decisions from *Apprendi* . . . point to the middle term specified in California’s statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.” (*Id.* at p. \_\_\_\_ [127 S.Ct at p. 871].)

As *Black II* summarized: “[U]nder the line of high court decisions beginning with *Apprendi* . . . and culminating in *Cunningham*, . . . the constitutional requirement of a jury trial and proof beyond a reasonable doubt applies only to a fact that is ‘legally essential to the punishment’ (*Blakely*, *supra*, 542 U.S. at p. 313), that is, to ‘any fact that exposes a defendant to a greater potential sentence’ than is authorized by the jury’s verdict alone (*Cunningham*, *supra*, 549 U.S. at p. \_\_\_\_ [127 S.Ct. at p. 863]). . . . For this reason, we agree with the Attorney General’s contention that as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence . . . does not violate the defendant’s right to jury trial” “regardless of whether the facts underlying those circumstances have been found to be true by a jury.”

“Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not ‘legally entitled’ to the middle term sentence, and the upper term sentence is the ‘statutory maximum.’ ” (*Black II, supra*, 41 Cal.4th at pp. 812-813.)

In *Sandoval*, the court held: “The United States Supreme Court has recognized two exceptions to a defendant’s Sixth Amendment right to a jury trial on an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. First, a fact admitted by the defendant may be used to increase his or her sentence beyond the maximum authorized by the jury’s verdict. (*Blakely, supra*, 542 U.S. at p. 303.) Second, the right to jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction. ([*Blakely*,] at p. 301; see *Apprendi, supra*, 530 U.S. at p. 490 . . . .)” (*Sandoval, supra*, 41 Cal.4th at pp. 836-837.)

Neither of these exceptions is present here. Appellant had no criminal record, so there was no question of a prior conviction. None of the charges to which appellant pleaded guilty contained any special component or allegation that could serve as the required single aggravating factor established “consistently with Sixth Amendment principles.”<sup>4</sup> (*Black II, supra*, 41 Cal.4th at p. 813.) Thus, there is no aggravating factor that made appellant eligible for imposition of the upper term. (*Id.* at p. 812.)

*Sandoval* held that error of this nature is subject to the harmless error test of *Chapman v. California* (1967) 386 U.S. 18. Within the context of *Sandoval*, where there had been a jury trial, the court framed the appropriate analysis as follows: “[W]e must determine whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury’s verdict would have authorized the upper term sentence. . . . [I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably

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<sup>4</sup> We reject respondent’s argument that the *Blakely* standard was satisfied by appellant’s stipulation that there existed factual bases for his guilty plea. In so doing, we point out that appellant’s stipulation merely encompassed the elements of the respective charges, and not the factors set out in rule 4.421(a), apparently used to aggravate his sentence.

would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.” (*Sandoval*, *supra*, 41 Cal.4th at pp. 838-839.)

Our ability to undertake this analysis is hindered by the trial court’s abbreviated statement of reasons for imposing the aggravated term. The court stated that “here, the crime is such an appalling, invasive, and predatory crime, that clearly the upper term is the only appropriate term.” The difficulty is that this statement is not couched in the language of the sentencing rule-guidelines, thus opening up a large measure of speculation. It is possible to interpret the court’s characterization of the offense as including findings that the crimes involved a high degree of cruelty, viciousness, or callousness (rule 4.421(a)(1)); the victim was particularly vulnerable (rule 4.421(a)(3)); and appellant took advantage of a position of trust or confidence to commit the crimes (rule 4.421(a)(11)).<sup>5</sup>

This very uncertainty works against finding the error harmless. Because it is not possible to know precisely what factors the court treated as aggravating, it is virtually impossible to know with what lens the record is to be examined, that is, whether the record will support those factors. An additional difficulty here is the extremely scanty nature of the factual record. Appellant entered his pleas of guilty after waiving his right to a preliminary examination. Thus, the “record,” such as it is, consists in its entirety of the probation officer’s report and the sentencing materials previously described. That is hardly the sort of evidentiary basis for making a confident determination that federal constitutional error is harmless beyond a reasonable doubt.

#### **DISPOSITION**

Our prior opinion in *Shea II* is hereby vacated. The matter is remanded for resentencing in light of *Blakely*, *Cunningham*, and the views expressed herein. Following resentencing, the clerk of the superior court is directed to prepare an amended abstract of judgment, and to forward a certified copy to the Department of Corrections and

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<sup>5</sup> These were among the factors that were discussed—and disputed—by counsel prior to the court’s imposition of sentence.

Rehabilitation. The judgment of conviction is affirmed in all other respects.

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Richman, J.

We concur:

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Kline, P. J.

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Haerle, J.