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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HERIBERTO SUBELDIA DELGADO,

Defendant and Appellant.

A105927

(Marin County  
Super. Ct. No. SC130238)

Heriberto Subeldia Delgado admitted selling cocaine on four separate dates to an undercover police officer. He timely appeals from a judgment entered on his guilty plea to four counts of violation of Health and Safety Code section 11352, subdivision (a), with admission of a Penal Code section 1203.073 “probation limiting” allegation as to one of the counts. (Health & Saf. Code, § 11352, subd. (a) [sale of controlled substance]; Pen. Code, § 1203.073 [limitation on probation for persons convicted of specified drug offenses].)

Delgado argues his eight-year prison sentence based on the trial court’s imposition of consecutive terms violated *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_, [124 S.Ct. 2531] (*Blakely*). The Attorney General concedes the court erred in ordering Delgado to pay a Marin County police agency \$7,000 in restitution for money the undercover officer paid to Delgado for cocaine, but did not recover. We reverse that portion of the judgment ordering \$7,000 in restitution, but otherwise affirm.

## BACKGROUND

Delgado allegedly sold cocaine to an undercover officer from December 11, 2002 to June 17, 2003. The second amended information included counts based on seven separate cocaine sales during that period. On January 5, 2004, Delgado entered a guilty plea to counts one, two, four and six, each for the sale of cocaine on four separate dates: December 11, 2002; January 8, 2003; February 28, 2003; and May 1, 2003 respectively. He also admitted the truth of the Penal Code section 1203.073 allegation as to count four that he sold 57 grams or more of a substance containing cocaine on February 28, 2003. (Pen. Code, § 1203.073, subs. (a) & (b)(1).) The plea agreement provided for a maximum term of nine years in state prison if he were sentenced consecutively.

On March 5, 2004, the trial court sentenced Delgado to state prison for a determinate term of eight years, computed as follows: four years on count one (the middle term), and three consecutive sentences of one year and four months on counts two, four and six (one-third the middle term).

## DISCUSSION

I. Delgado's Sentence Did Not Run Afoul of *Blakely*.

Relying on *Blakely, supra*, 124 S.Ct. 2531, Delgado contends that when the trial court imposed consecutive terms at his sentencing hearing, it engaged in judicial fact-finding which violated his rights under the Fifth, Sixth, and Fourteenth Amendments. Delgado's *Blakely* argument is based on the rule announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and reaffirmed and extended in *Blakely*: "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." (*Apprendi, supra*, 530 U.S. at p. 490; *Blakely, supra*, 124 S.Ct. at p. 2536.)

We conclude Delgado's sentence does not run afoul of *Blakely* because *Blakely* does not apply to the imposition of consecutive sentences.

A. Delgado Did Not Forfeit His *Blakely* Claim.

The Attorney General contends Delgado forfeited his *Blakely* argument by failing to object when the trial court imposed his sentence, even though *Blakely* had not yet been decided at that time. We conclude he did not forfeit his *Blakely* claim. Sentencing issues arising under *Blakely* implicate the fundamental constitutional right to have a jury determine the facts on which a sentence is based. (*Blakely, supra*, 124 S.Ct. at p. 2543 [“every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment”]; see *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [defendant not precluded from raising for first time on appeal claim asserting deprivation of certain fundamental constitutional rights such as the right to jury trial].) A sentence violating the *Blakely* rule “exceeds [the] proper authority” of the sentencing judge and is “invalid” under the Sixth Amendment to the federal Constitution. (*Blakely, supra*, 124 S.Ct. at pp. 2537-2538.)

For sentencing hearings held after *Blakely*, it might be appropriate to require defendants to preserve their claim for appeal by objecting; that issue is not before us. But for cases such as this one where the sentencing hearing happened before *Blakely* was decided, we believe *Apprendi* objections would have been futile. In any event, we have discretion to consider issues that have not been formally preserved for review. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Smith* (2003) 31 Cal.4th 1207, 1215).

B. No Certificate of Probable Cause Was Necessary.

Delgado admits that he never sought a certificate of probable cause for this appeal. Instead, his notice of appeal, filed before *Blakely* was decided, states he “complains of sentencing error, and appeals only from the sentence imposed.” The Attorney General argues Delgado is consequently precluded from raising his *Blakely* claim because when a defendant agrees to a sentencing range as part of a plea bargain, and receives a sentence within that range, the defendant must obtain a certificate of probable cause before he can challenge the constitutionality of any sentence imposed within the agreed upon range.

We conclude that under *People v. Buttram* (2003) 30 Cal.4th 773 (*Buttram*), no certificate of probable cause was required in this case because Delgado does not challenge his plea's validity in this appeal.

Generally, a defendant may appeal from a judgment entered on a guilty plea only if he or she obtains a certificate of probable cause from the trial court. (Pen. Code, § 1237.5 [no appeal from judgment of conviction upon guilty plea except where (a) defendant has filed statement showing reasonable constitutional, jurisdictional or other grounds going to legality of proceedings and (b) trial court has filed certificate of probable cause for such appeal].) The purpose of this rule is to discourage and weed out frivolous or vexatious appeals challenging guilty pleas. (*Buttram, supra*, 30 Cal.4th at p. 781.)

An exception to the rule is where the appeal is based on “grounds that arose after entry of the plea and do not affect the plea’s validity.” (Cal. Rules of Court, rule 30, subd. (b)<sup>1</sup>.) In determining whether this exception applies, “the critical inquiry is whether a challenge to the sentence *is in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the [certificate of probable cause] requirements of [Penal Code] section 1237.5.” (*Buttram, supra*, 30 Cal.4th at p. 782 [emphasis in original].) An appeal challenging the constitutionality of a specific sentence which was agreed to as part of a plea is in substance a challenge to the “very bargain on which the plea was rendered, and thus [is a challenge to] the validity of the plea itself” such that a certificate of probable cause is required. (*Id.* at p. 776.)

In contrast, an appeal from a sentence imposed pursuant to a plea agreement providing for a maximum sentence or “lid” is not necessarily subject to the certificate of probable cause requirement. The court in *Buttram* reasoned that a plea agreement with “a maximum sentence inherently reserves the parties’ right to a sentencing proceeding in

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<sup>1</sup> At the time Delgado filed his notice of appeal, the substance of rule 30(b) appeared in rule 31(d). There are no significant differences between the current rule 30(b) and the former rule 31(d) for purposes of this appeal. (Cal. Rules of Court, rule 30, Advisory Committee Comment (2004), subdivision (b).)

which (1) as occurred here, they may litigate the appropriate individualized sentence choice within the constraints of the bargain and the court’s lawful discretion, and (2) appellate challenges otherwise available against the court’s exercise of that discretion are retained. An appellate challenge to the exercise of the discretion reserved under the bargain is therefore a [post-plea] sentencing matter extraneous to the plea agreement. Such a claim may rarely have merit, but it does not attack the validity of the plea. For that reason, a probable cause certificate is not required.” (*Buttram, supra*, 30 Cal.4th at p. 777.)

We conclude that Delgado’s challenge in this case is analogous to that of the defendant in *Buttram*, who argued on appeal that the trial court abused its sentencing discretion. Like the defendant in *Buttram*, Delgado pleaded guilty in return for an agreed maximum sentence (nine years) and his agreement included no waiver of his right to appeal sentencing issues. (*Buttram, supra*, 30 Cal.4th at p. 776.) As in *Buttram*, there was no “*specific or recommended* sentence. By agreeing only to a maximum sentence, the parties [left] unresolved between themselves the appropriate sentence within the maximum. That issue [was] left to the normal sentencing discretion of the trial court, [and was] exercised in a separate proceeding.” (*Id.* at p. 785 [emphasis in original].) In this appeal, Delgado challenges the way the trial court exercised its discretion in imposing a sentence *after* he pleaded guilty to four counts of selling cocaine. He does not challenge the plea agreement itself. Under *Buttram*, he need not have obtained a certificate of probable cause.

The Attorney General emphasizes that the court in *Buttram* declined to address the issue of whether a challenge to the constitutionality of a sentence within the bargained range required a certificate of probable cause. In fact, the issue the court in *Buttram* declined to address was the one at issue in *People v. Young* (2000) 77 Cal.App.4th 827 (*Young*) – whether a defendant can attack an agreed *maximum* sentence on the ground that it is unconstitutional (in that case, as cruel and unusual punishment). (*Buttram, supra*, 30 Cal.4th at p. 790.) “By arguing that the maximum sentence is unconstitutional, he is arguing that part of his plea bargain is illegal, and is thus attacking the validity of

the plea. Having failed to obtain a certificate of probable cause, defendant cannot appeal.” (*Young, supra*, 77 Cal.App.4th at p. 832.) The Attorney General asserts that Delgado makes a similar constitutional challenge, characterizing it as “a direct challenge to the constitutionality of the range agreed upon in the plea bargain, which is an attack on the validity of the plea itself.”

But unlike the defendant in *Young*, Delgado does not argue that the agreed maximum sentence is unconstitutional. Indeed, the court did not sentence him to the maximum of nine years. Nor does Delgado argue that his plea’s sentence range was unconstitutional. Instead, he argues the method the court used after entry of his plea to arrive at the sentence – by engaging in judicial fact-finding – was unconstitutional under *Blakely*. Thus, his challenge to the sentence is not, in substance, a challenge to the validity of his plea. (*Young, supra*, 77 Cal.App.4th at p. 832 [critical inquiry is whether challenge to the sentence is in substance a challenge to the validity of the plea].) Consequently, under both *Young* and *Buttram*<sup>2</sup>, Delgado need not have obtained a certificate of probable cause.

Another problem with the Attorney General’s argument is that at the time Delgado filed his notice of appeal, *Blakely* had not yet been decided. Consequently, even if his *Blakely* claim required a certificate of probable cause, he could not have obtained one on that basis. He could not have made “a showing of reasonable grounds to challenge the validity” of his sentence based on a decision that was not yet decided. (*Young, supra*, 77 Cal.App.4th at p. 833; Pen. Code, § 1237.5.) Accordingly, application of the probable cause requirement would not be appropriate in this case.

### C. *Blakely* Does Not Apply to Consecutive Sentences

The issue of whether *Blakely* applies to the imposition of consecutive sentences is now pending before the California Supreme Court. (*People v. Black*, review granted July

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<sup>2</sup> We reach the same conclusion under the other case cited by the Attorney General in support of this argument: *People v. Cole* (2001) 88 Cal.App.4th 850, 868 [constitutional challenge to imposition of maximum term under plea agreement on the ground that maximum term was cruel and unusual punishment was challenge to validity of the plea itself].

28, 2004, S126182.) Currently, there are no California decisions squarely addressing this issue. Nonetheless, we conclude the *Blakely* rule does not apply to the determination in this case to impose consecutive terms.

The “statutory maximum” for *Blakely* 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, supra*, 124 S.Ct. at p. 2537 [emphasis in original].) In this case, the trial court chose to impose consecutive middle terms only after Delgado admitted committing the separate crimes alleged in counts one, two, four and six. No “statutory maximum” is violated if Delgado serves his terms consecutively. (*Id.*) Unlike Penal Code section 1170 (governing imposition of the lower, middle or upper term), the statute governing consecutive sentencing has no provision mandating concurrent terms in the absence of aggravating factors. The statute only mandates concurrent terms as a default, i.e., when the trial court fails to determine whether the terms shall run concurrently or consecutively. (Pen. Code, § 669 [concurrent and consecutive sentences].) The trial court did not fail to make such a determination in this case. Thus, Delgado has no legal right to concurrent sentences “—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.” (*Blakely, supra*, 124 S.Ct. at p. 2540.) Delgado’s consecutive sentences did not implicate the concerns addressed in *Blakely*.

## II. The Attorney General Correctly Concedes the Trial Court Erred in Ordering \$7,000 in Restitution.

During the June 17, 2003 “buy,” the undercover officer paid Delgado \$7,000 for 285.2 grams of cocaine. When other officers then attempted to arrest Delgado, he fled in his truck and threw the money out the window during the chase. The officers never found the money. The trial court ordered Delgado to pay restitution to the Marin County Task Force in the amount of \$7,000. The Attorney General correctly (and admirably) concedes this was error because the task force was not a direct victim of Delgado’s crime under the statute authorizing restitution. (Pen. Code, § 1202.4, subd. (k)(2) [victim entitled to restitution includes governmental agency when it is “a direct victim of a

crime”]; *People v. Torres* (1997) 59 Cal.App.4th 1, 2-5 [law enforcement agency which purchases illegal drugs during criminal investigation is not “direct victim of crime” and thus not entitled to restitution for the cash it spent on the drugs].) We will thus order the trial court to strike this portion of the judgment entered against Delgado.

**DISPOSITION**

The judgment entered March 11, 2004 against Delgado is modified to delete the \$7,000 in restitution to be paid to the Marin County Task Force. As modified, the judgment is affirmed.

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Parrilli, J.

We concur:

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McGuinness, P. J.

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Pollak, J.