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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,
v.
MARTIN T. KING,
Defendant and Appellant.

A107957

(Alameda County
Super. Ct. No. 134856)

Defendant Martin T. King was on probation for a drug offense and violated probation by committing another drug-related crime. The trial court revoked probation and sentenced defendant to the upper term of five years. Defendant contends the court imposed the upper term in violation of *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403] (*Blakely*). We disagree and affirm the sentence. We agree with defendant, and the Attorney General concedes, that a second $200 restitution fine must be stricken.

I. FACTS

On February 9, 1999, the People filed an information charging defendant with possessing cocaine for sale (Health & Saf. Code, § 11351.5).[1] The information also alleged that defendant committed the offense within 1,000 feet of a school (§ 11353.6, subd. (b)) and had suffered two prior convictions—one for selling narcotics. Defendant

[1] Subsequent statutory citations are to the Health and Safety Code.

had been arrested after police saw him hiding 5.35 grams of rock cocaine under the rear steps of a house.

On March 19, 1999, defendant pleaded no contest to the cocaine charge pursuant to a plea bargain. The People dismissed the allegations of proximity to a school and the prior convictions. On April 16, 1999, the trial court placed defendant on probation for five years.

On March 28, 2000, the People filed a petition to revoke probation, alleging defendant possessed marijuana for sale. On May 2, 2000, the trial court modified probation to include a one-year jail term.

On March 9, 2004, the People filed a second revocation petition, alleging that defendant was selling marijuana. At a contested hearing, police officers testified that defendant sold marijuana to an undercover police officer in a "buy/bust" operation. The trial court found that defendant had violated his probation.

On August 10, 2004, the trial court revoked probation and sentenced defendant to the upper term of five years for possessing cocaine for sale. In imposing the upper term, the court presumably relied on the two factors in aggravation specified in the probation report: (1) that the commission of the crime showed planning, sophistication, or professionalism, and (2) that defendant was on probation when he committed the original offense in 1999.

The trial court noted defendant's recidivism, commenting that defendant had a supportive family and could have received an education, but "didn't seek any help for [his] situation" and "kept reoffending" because of "the lure of the street." The court admonished defendant: "This is your second probation revocation. You've been told . . . to stay away from this drug situation, and you keep going back. And evidently, you didn't take this whole thing very seriously. So you're going to be sentenced to the maximum of five years in state prison."

II. DISCUSSION

Defendant contends his sentence violates *Blakely* because the aggravating factors were neither admitted by defendant nor found true by a jury beyond a reasonable doubt.

We disagree because recidivist factors are not governed by *Blakely*, and the trial court relied on a valid, persuasive aggravating factor based on recidivism.[2]

We need not discourse at length on the much discussed issue of *Blakely* and its impact on the California sentencing scheme. *Blakely* held 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,* 159 L.Ed.2d at p. 412, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) The phrase "statutory maximum" for *Blakely* and *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.]" (*Blakely, supra,* 159 L.Ed.2d at p. 413, italics in original.) Thus, *Blakely* prohibits the use of any judicially determined fact, other than recidivism, to increase a sentence beyond the statutory maximum.

Numerous California Court of Appeal decisions involving aspects of *Blakely* are pending before the California Supreme Court. We are familiar with those decisions, none of which are citable because of the grants of review. But we agree with those decisions which held that *Blakely* applies to the California determinate sentencing scheme, and prohibits the imposition of an upper term based on nonrecidivist aggravating factors which have neither been admitted by the defendant, nor determined by a jury.[3]

Here factor (2) is clearly based on recidivism, and thus is not invalid under *Blakely*. A sentencing court retains the power to determine the fact of a prior conviction. The finding that defendant was on probation when he committed his offense posits the

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[2] We reject the Attorney General's argument that defendant has waived his *Blakely* claim. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.)

[3] On January 12, 2005, the United States Supreme Court reaffirmed *Blakely* in a decision involving the federal sentencing guidelines. (*U.S. v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738].)

existence of a prior conviction. The court pointedly commented that defendant kept "going back" to commit drug offenses. From the probation report the court was well aware that defendant was on probation when he committed the 1999 offense that resulted in the aggravated sentence and had been given many chances to turn his life around. Defendant concedes that recidivism "might be" an exemption to *Blakely*.

One valid, persuasive factor is sufficient to expose a defendant to the aggravated term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Here the trial court relied on the valid factor involving recidivism. And defendant has shown a pattern of reoffending. When he committed the 1999 cocaine offense he had two prior convictions and was on probation. He was placed on probation but reoffended, and jailed for one year. Then he reoffended again. As the trial court found, defendant could not resist the "lure of the street." Under these circumstances the aggravated term is proper.

The Attorney General concedes that the second $200 restitution fine must be stricken.

III. DISPOSITION

The second restitution fine, imposed when the trial court sentenced defendant to state prison, is stricken. The trial court is ordered to prepare an order so reflecting. In all other respects the judgment is affirmed.

____
Marchiano, P. J.

We concur:

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Stein, J.

____
Margulies, J.