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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAVID DARON BARCLAY, Defendant and Appellant.	B173185 (Los Angeles County Super. Ct. No. TA070888)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin and Lance E. Winters, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, David Barclay, appeals from his convictions for single counts of: criminal threats (Pen. Code,[1] § 422); false imprisonment by means of violence (§ 236); assault with a deadly weapon (§ 245, subd. (a)(1)); and unlawful sexual intercourse. (§ 261.5, subd. (c).) Additionally, defendant was convicted of two counts of forcible rape. (§ 261, subd. (a)(2).) In connection with the criminal threats count, the jury found defendant used a firearm. (Former § 12022.5, subd. (a)(1).) Defendant contends that the trial court failed to conduct an adequate hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 124 and the upper term and consecutive sentences were imposed in violation of *Blakely v. Washington* (2004) 542 U.S. __, __-__ [124 S.Ct. 2531, 2536-2542]. We affirm the judgment.

First, defendant argues that the trial court failed to conduct a proper substitution of counsel hearing. We review this contention for an abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1190; *People v. Jones* (2003) 29 Cal.4th 1229, 1245.) After testifying, defendant made a motion to have his attorney relieved. Defendant stated: "I already had in Division E, Department E, told the judge that we would have a conflict of interest, and I've been trying to tell him certain things, get witnesses for me. He has not gotten everything for me." The trial court responded: "Well, he's the lawyer. And as far as which witnesses to call . . . that's up to him to decide." Defense counsel was asked to respond and stated in part: "I've listened to Mr. Barclay on numerous occasions. We've discussed the case, and I've told him he had a very good chance in the case. And I'm not sure why this was brought up. I guess because of the letter the prosecutor had brought him, he was angry that I hadn't had them, I told him I didn't even know they existed, and asked him why he had written them. I guess he forgot to tell me." The trial court responded: "To the extent this is a *Marsden* motion, I haven't heard enough to relieve your attorney." When defendant indicated: "We have a conflict . . . ," the trial court

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1 Unless otherwise indicated, all future statutory references are to the Penal Code.

reiterated: "To the extent this is a *Marsden* motion, meaning to the extent you are asking to relieve Mr. Clark and have another attorney appointed, I haven't heard enough to grant that motion. So it is denied." The trial court did not abuse its discretion in denying defendant's implied request to relieve defense counsel and appoint another attorney based on vague and nonspecific grounds of an unproven conflict of interest and the failure to call unidentified witness who allegedly would have offered nonspecified testimony. (*People v. Smith* (2003) 30 Cal.4th 581, 604-606; *People v. Earp* (1999) 20 Cal.4th 826, 875-876; *People v. Miranda* (1987) 44 Cal.3d 57, 76-77.)

Second, defendant argues he was entitled to a jury trial on the aggravating facts relied upon by the trial court in imposing the upper and consecutive terms. The Attorney General argues this issue has been forfeited because it was not raised in the trial court. We agree. (*United States v. Cotton* (2002) 535 U.S. 625, 628-634; *People v. Sample* (2004) 122 Cal.App.4th 206, 219-221.)

In any event, any error was harmless beyond a reasonable doubt in connection with the upper terms. Defendant's prior convictions and prison terms record were not subject to *Blakely*. (*Blakely v. Washington*, *supra*, 542 U.S. at p. __ [124 S.Ct. at p. 2536]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Defendant's prior record was such that the denial of a jury trial was harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327; see *Summerlin v. Stewart* (9th Cir. 2003) 341 F.3d 1082, 1121.) On July 17, 1992, a Welfare and Institutions Code section 602 delinquency petition was sustained which alleged defendant performed an assault with intent to commit rape. (§ 220.) On November 19, 1993, defendant was found by the juvenile court to have committed a petty theft. (§ 484, subd. (a).) On November 19, 1993, defendant was found by the juvenile court to have violated Vehicle Code section 10851, subdivision (a). On the same date, defendant was found to have committed a petty theft. (§ 484.) Arrested on May 31, 1995, defendant was convicted of receiving stolen property in violation of section 496, subdivision (a) and later sentenced to prison on February 15, 1996. On June 24, 1996, defendant was sentenced to prison for being a

convicted felon in possession of a firearm in violation of section 12021, subdivision (a). On September 26, 2001, defendant was convicted again of being a felon in possession a firearm. On June 9, 2003, defendant was convicted of battery and placed on probation. (§ 243, subd. (e)(1).) Given the uncontradicted evidence of defendant's unrelenting record of criminality, none of which is subject to the *Blakely* jury trial right, the failure to accord him a jury trial right on the other aggravating factors, none of which could be seriously contested, was harmless beyond a reasonable doubt.

Finally, defendant argues that he was entitled to a jury trial on the issue of whether consecutive sentences could be imposed. We disagree. Associate Justice Antonin Scalia set forth the pertinent procedural status of *Blakely* as follows: "[The defendant] pleaded guilty to the kidnap[p]ing of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an 'exceptional' sentence of 90 months after making a judicial determination that he had acted with 'deliberate cruelty.'" (*Blakely v. Washington, supra,* 542 U.S. at p. __ [124 S.Ct. at p. 2534].) In a fashion similar to California's determinate sentencing statutes, Washington law allowed the trial court to impose a sentence within a range of terms. The trial judge was allowed to increase a sentence within a range based upon facts which may not have been the subject of a jury finding or an admission by the accused. The Supreme Court held that when a term greater than the specified statutory *maximum for the offense* was imposed because of a fact not admitted by the accused during the plea process or found to exist by jurors, the defendant's jury trial right as established in *Apprendi v. New Jersey*, *supra*, 530 U.S. at page 490 was violated. (*Id.* at pp. 2536-2538.) Associate Justice Scalia explained: "Our precedents make clear, however, 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.* See *Ring* [*v. Arizona* (2002) 536 U.S. 584, 602 []] ('"the maximum he would receive if punished according to the facts reflected in the jury verdict alone"' (quoting *Apprendi, supra,* at 483 [])); *Harris v. United States* [(2002)] 536 U.S. 545, 563 [] []

(plurality opinion) (same); cf. *Apprendi, supra,* at 488 [] (facts admitted by the defendant). 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [1 J. Bishop, Criminal Procedure, § 87, p. 55 (2d. ed. 1872)] and the judge exceeds his [or her] proper authority.""" (*Blakely v. Washington, supra,* 542 U.S. __, __ original italics, [124 S.Ct. at p. 2537].)

Neither *Blakely* nor *Apprendi* purport to create a jury trial right to the determination as to whether to impose consecutive sentences. Both *Blakely* and *Apprendi* involve a sentence for a single count. The historical and jurisprudential basis for the *Blakely* and *Apprendi* holdings did not involve consecutive sentencing. (*Blakely v. Washington, supra,* 542 U.S. at p. __ [124 S.Ct. at pp. 2534-2536]; *Apprendi v. New Jersey, supra,* 530 U.S. at pp. 476-483, 489-490, fn. 15.) Further, in *Apprendi,* Associate Justice John Paul Stevens explained the jury trial right at issue: "We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.' *Jones* [*v. United States* (1999)], 526 U.S. [227,] 247-248. But practice must at least adhere to the basic principles undergirding the *requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt.*" (*Apprendi v. New Jersey, supra,* 530 U.S. at pp. 483-484, fn. omitted, italics added.) The consecutive sentencing decision does not involve the facts, in Justice Stevens' words, "necessary to constitute a statutory offense." (*Id.* at p. 483.) In fact, the consecutive sentencing decision can only be made once the accused has been found beyond a reasonable doubt to have committed two or more offenses--this fully complies with the Sixth Amendment jury trial and Fourteenth Amendment due process clause rights. Those facts which affect the appropriate sentence within the range of potential terms of incarceration for each *offense* are subject to *Blakely*

and *Apprendi;* this constitutional principle does not extend to whether the sentences for charges which have been found to be true beyond a reasonable doubt shall be served consecutively. In this respect, we are in full accord with the numerous courts that have held that *Apprendi* does not apply to the decision to impose consecutive sentences. (*United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *United States v. Lafayette* (D.C.Cir. 2003) 337 F.3d 1043, 1049-1050; *United States v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *United States v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254-1255; *United States v. Chorin* (3rd Cir. 2003) 322 F.3d 274, 278-279; *United States v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. White* (2nd Cir. 2001) 240 F.3d 127, 136; *United States v. Henderson* (S.D.W.Va. 2000) 105 F.Supp.2d 523, 536-537; *People v. Clifton* (Ill. 2003) 795 N.E.2d 887, 902; *People v. Carney* (Ill. 2001) 752 N.E.2d 1137, 1144-1145; *People v. Wagener* (Ill. 2001) 752 N.E.2d 430, 441; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1232.)

The judgment is affirmed.

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TURNER, P.J.

I concur:

GRIGNON, J.

MOSK, J., Concurring.

I concur and only discuss my views on the sentence under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) as applied by most courts in California. It is obvious that *Blakely* has created much confusion and thus the courts await guidance from the United States Supreme Court and California Supreme Court.

A. *Waiver and forfeiture*

Courts of Appeal have concluded that a failure to object in the trial court does not forfeit a defendant's claim under *Blakely* or *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). (*People v. George* (2004) 122 Cal.App.4th 419, 424 ["In light of this state of the law, George's assertion of a challenge to the imposition of an upper term sentence would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after George's sentencing, George cannot be said to have knowingly and intelligently waived his right to a jury trial"]; *People v. Lemus* (2004) 122 Cal.App.4th 614, 619-620; *People v. Barnes* (2004) 122 Cal.App.4th 858; *People v. Butler* (2004) 122 Cal.App.4th 910 ["Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all"]; *People v. Vaughn* (2004) 122 Cal.App.4th 1363 ["Appellant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial"]; *People v. Fernandez* (2004) 123 Cal.App.4th 137; *People v. Juarez* (Nov. 16, 2004 B165580) __ Cal.App.4th __ [2004 WL 2592776]; *People v. Picado* (Nov. 5, 2004 A102251) __ Cal.App.4th __ [2004 WL 2491804]; *People v. Ackerman* (Nov. 18, 2004 H026899) __ Cal.App.4th __ [2004 WL 2616239]; *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1580-1583; but see *People v. Sample* (2004) 122 Cal.App.4th 206.)

Thus, I believe defendant did not waive or forfeit a *Blakely/Apprendi* claim by failing to raise it in the trial court.

B. *Imposition of consecutive sentences*

I agree with the majority that consecutive sentences do not violate *Blakely*. Thus, no error occurred under *Blakely* with respect to the imposition of consecutive sentences imposed on counts 2, 6, 7, and 8.

C. *Imposition of the upper term*[2]

Under California's determinate sentencing scheme, when a statute provides for three possible prison terms, the court shall impose the mid term unless there are circumstances in aggravation or mitigation. (Pen. Code, § 1170, subd. (b); Cal. Rules of Ct., rule 4.420(a).) If the court finds, by a preponderance of the evidence, aggravating circumstances, then it may impose the upper term. (Cal. Rules of Ct., rule 4.420, subd. (b).) *Blakely*, however, made clear that the "statutory maximum" is the sentence a judge may impose based on facts found by the jury or admitted by defendant. Therefore, if a court imposes the upper term based on facts not found by the jury or admitted by defendant, a *Blakely* violation may have occurred.

"Although an upper term is a 'statutory maximum' penalty in the sense that it is the highest sentence a court can impose for a particular crime, it is not necessarily the 'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*' which is the relevant standard for purposes of applying *Blakely*." (*People v. George, supra,* 122 Cal.App.4th at p. 425; see also *People v. Butler, supra,* 122 Cal.App.4th 910; *People v. Juarez, supra,* 2004 WL 2592776.) In other words, under *Blakely*, "the relevant 'statutory maximum' is not the maximum

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[2] Whether imposition of the upper term violates *Blakely* is currently on review before the California Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182.)

sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely, supra,* at p. 2537.) In California, that statutory maximum is the mid term.

Here, however, the trial court imposed the upper term on counts 2, 3, 5, 6, 7, and 8, citing "the planning, sophistication, the victim was particularly vulnerable considering the age difference, and the defendant does have a prior significant record." Although the criminal record need not be referred to a jury (*Apprendi, supra,* 530 U.S. at pp. 490, 496), the other facts do, and they were neither found by a jury nor admitted by defendant. Thus there was *Blakely* error.

D. *Harmless error*

I agree with the majority that the *Chapman v. California* (1967) 386 U.S. 18, 24 standard applies with respect to *Blakely* errors. (See *People v. Juarez, supra,* 2004 WL 2592776.) Here the court only gave the high term for certain counts. The factors mentioned by the court did not appear to involve any significant issues of fact. For example, there was no dispute over the age of the victim. No mitigating factors were mentioned. In view of the defendant's extensive criminal record as addressed by the majority, I can agree that there is no reasonable doubt that the same sentence would be imposed even if there had been no *Blakely* error.

MOSK, J.