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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PERCY STOCKTON, Defendant and Appellant.	D044141 (Super. Ct. No. SCE230614)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

Percy Stockton entered guilty pleas to reckless driving to evade an officer (Veh. Code, § 2800.2, subd. (a)), grand theft (Pen. Code, § 487, subd. (a)),[1] and burglary (§ 459). He admitted two strike priors (§ 667, subds. (b)-(i)), two prior serious felony

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1 All further statutory references are to the Penal Code unless otherwise indicated.

convictions (§ 667, subd (a)(1)) and serving two prior prison terms (§§ 667.5, subd. (b), 668). The court dismissed one strike prior and sentenced him to a prison for nine years four months: double the three-year upper term for reckless driving to evade arrest with a strike prior, and a consecutive year four months for grand theft with a strike prior (one-third of double the two-year middle term) enhanced by two one-year terms for the prior prison terms. It stayed sentence on the burglary conviction (§ 654). The court denied a certificate of probable cause (Cal. Rules of Court, rule 30(b)).[2]

DISCUSSION

Appointed appellate counsel has filed a brief setting forth the evidence in the superior court. Counsel presents no argument for reversal but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible but not arguable issues: (1) whether Stockton's trial counsel provided effective assistance; (2) whether *Blakely v. Washington* (2004) 542 U.S. __ (124 S. Ct. 2531) (*Blakely*)) applies to the sentence; and (3) assuming *Blakely* applies, whether the trial court erred in imposing the upper term.[3]

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[2] All rule references are to the California Rules of Court.

[3] Because Stockton entered guilty pleas, he cannot challenge the facts underlying the convictions. (§ 1237.5; *People v. Martin* (1973) 9 Cal.3d 687, 693.) We need not recite the facts.

We granted Stockton permission to file a brief on his own behalf. He has not responded. We requested the parties to brief the issue of whether the trial court erred in imposing the upper term for reckless driving to evade an officer absent jury findings beyond a reasonable doubt on the alleged aggravating factors. (See *Blakely*.)

Relying on *Blakely*, Stockton contends the trial court denied him the right to jury findings beyond a reasonable doubt supporting the aggravating factors. The People responded to our request for further briefing on the *Blakely* issue by relying on section 1237.5 and cases represented by *People v. Panizzon* (1996) 13 Cal.4th 68 (*Panizzon*), contending Stockton's appeal is not properly before this court because he did not obtain a certificate of probable cause. In *Panizzon*, the Supreme Court held, "a challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself," and a certificate of probable cause is required. (*Id*. at p. 79.) Here, unlike in *Panizzon*, there was no negotiated sentence and no plea bargain. *Panizzon* is inapposite. Because Stockton is challenging the sentence not his guilty plea, no certificate of probable cause is required. (*People v. Ward* (1967) 66 Cal.2d 571, 574-575.)

The People also briefly contend Stockton waived his right to raise any challenge to the upper term sentence or consecutive sentences by failing to object in the trial court.

In *People v. Scott* (1994) 9 Cal.4th 331, 351, 353 (*Scott*), the Supreme Court held that to raise a sentencing issue on appeal, objection in the trial court is required in order to facilitate the detection and prompt correction of error, thus reducing the number of appellant claims and preserving judicial resources. Common sense does not support

application of *Scott*'s waiver rule to the novel principle expressed in *Blakely*. Before *Blakely,* there were no published cases hinting that a jury determination and the reasonable doubt standard were applicable to factors in aggravation relied on during sentencing. It is not reasonable to treat failure to object on a ground that does not yet exist as a waiver of the nonexistent ground. We thus consider the merits of Stockton's claim.

Although we are displeased with the attorney general's failure to provide the additional briefing on the issue we requested, we will address the merits of Stockton's contention that imposition of the upper term and consecutive terms violated his right to a jury trial.

In *Blakely,* the United States Supreme Court 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*, 124 S.Ct. at p. 2536.) The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence is currently under review by the California Supreme Court. (E.g., *People v. Towne,* review granted July 14, 2004, S125677.) Pending resolution of the issue by the high court, we determine whether *Blakely* applies to the situation presented here.

While imposing sentence, the trial court said:

> "There are no circumstances in mitigation in this case. The aggravating circumstances include your record, the fact that I think — I've struck a strike, which reduces the punishment quite extensively for the overall term, and I think I can use that as a basis for imposition of the upper term; but the — and the fact that the —

> this is the — a felony after you have two strike priors and consequently your conduct is — is becoming more serious and the consequences are more serious; and so the aggravating factors outweigh the mitigating factors. The upper term of three years is selected, and that's doubled for six years."

Stockton argues, in light of *Blakely*, the trial court erred in imposing the upper term without jury findings beyond a reasonable doubt that the crime was aggravated by the prior strike that the court struck and that his conduct was becoming more serious.

In California, the determinate sentencing law requires the trial court to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); rule 4.420(c), (d).) Whether the trial court can properly impose the statutory maximum (or upper term) for a particular crime may depend on facts that are not resolved in the jury verdict or admitted by the defendant, the standard expressed in *Blakely*. (*Blakely, supra*, 124 S.Ct. at p. 2537; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 491-497 (*Apprendi*) [state hate crime statute authorizing the imposition of an enhanced sentence based on a judge's finding of certain facts by a preponderance of the evidence violated the due process clause].) As explained in *Blakely*, when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, "it remains the case that the jury's verdict [or the defendant's admission] alone does not authorize the sentence," as required to comply with constitutional principles. (*Blakely, supra*, 124 S.Ct. at pp. 2538-2539.) Thus, the question is whether the trial court properly relied on the cited factors as the basis for its decision to impose the upper term. Here the trial court struck a serious felony prior conviction in order to avoid imposing a sentence of 52 years to life on the

counts and prior convictions admitted. Under section 1170, subdivisions (a) and (b), and rules 4.406(b)(10), 4.408 and 4.421(a)(7), the trial court, in deciding whether to impose the statutorily authorized upper term, may consider the fact that the convictions and true findings would subject the defendant to a greater punishment than the trial court deems appropriate. Striking the prior strike in order to impose a lesser punishment justifies the trial court's decision to impose the upper term on the count to be sentenced and the remaining allegation. The upper term here based on the stricken prior strike was literally based on a factor Stockton admitted. When the trial court struck the prior strike and imposed the upper term it conducted no impermissible fact-finding. Rather, consistent with section 1170, subdivisions (a) and (b), the court imposed a sentence authorized by the enabling statute and the relevant rule of court. Since the court found no factors in mitigation, this factor in aggravation supported the upper term. It is irrelevant that the trial court also believed Stockton's criminal conduct was becoming more serious.

With regard to the consecutive terms imposed on Stockton's other count we note the issue of whether *Blakely* has any effect on a trial court's imposition of consecutive sentences is also pending before our Supreme Court. (*People v. Black,* review granted July 28, 2004, S126182.)

Under California's determinate sentencing system, when a person is convicted of two or more crimes the court is required to determine whether subsequent terms of imprisonment will run consecutively or concurrently. (§ 669.) Neither *Blakely* nor *Apprendi* arose in the context of sentencing for multiple offenses. The *Blakely* court prohibited the imposition of punishment beyond the prescribed statutory maximum for a

single offense to prevent the state from circumventing the defendant's right to trial by jury by reclassifying elements of an offense as sentencing factors, or by converting a separate crime into a sentence enhancement. (*Blakely, supra*, 124 S.Ct. at pp. 2537, fn. 6, 2539-2540, & fn. 11.) These concerns are not at issue when consecutive sentences are imposed for multiple offenses.

The decision to impose terms consecutively is made only after the jury has found the defendant guilty beyond a reasonable doubt of two or more offenses or the defendant has admitted such guilt, as in this case. By selecting consecutive terms the court is exercising its authorized discretion to decide the defendant shall separately serve each sentence. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000; § 669.) The relevant statutory maximum is the combined punishment for each conviction. The fact that a statutory sentencing scheme involves judicial discretion does not violate the defendant's right to a jury trial. (*Apprendi, supra*, 530 U.S. at p. 481 and cases cited therein.) Only where the defendant has a legal right to a lesser sentence unless additional facts are found, as in *Blakely*, does a Sixth Amendment violation occur. Nothing in California's determinate sentencing system suggests defendants convicted of multiple offenses have a legal right to serve concurrent sentences. Unlike the statutory presumption favoring imposition of the middle term, there is no comparable statutory presumption in favor of either concurrent or consecutive terms for multiple offenses except where consecutive sentencing is statutorily required. (*People v. Reeder* (1984) 152 Cal.App. 3d 900, 923.) A jury verdict finding the defendant guilty (or the defendant's admission) of more than one offense implicitly authorizes a consecutive sentence for each of those offenses. The

defendant does not have a legal right to a lesser sentence, "and that makes all the difference insofar as judicial impingement upon the traditional role of jury is concerned." (*Blakely, supra*, 124 S.Ct. at p. 2540.)

We conclude *Blakely* is inapplicable to California's consecutive sentencing provisions. Therefore, the court's imposition of consecutive sentences was proper.

A review of the entire record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, including the possible issues referred to pursuant to *Anders v. California, supra*, 386 U.S. 738, has disclosed no reasonably arguable appellate issue. Competent counsel has represented Stockton on this appeal.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

I CONCUR:

NARES, J.

I CONCUR IN THE RESULT:

IRION, J.