

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,
Plaintiff and Respondent,

v.

ARTURO PRIETO,
Defendant and Appellant.

2d Crim. No. B172963
(Super. Ct. No. VA065206)
(Los Angeles County)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held: "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." Recently, the Supreme Court clarified that the "statutory maximum" for purposes of this rule 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 v. Washington* (2004) ___ U.S. ___, ___ [124 S.Ct. 2531, 2537] (*Blakely*).) Thus, "[w]hen 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,' . . . and the judge exceeds his proper authority." (*Ibid.*)

At issue in this case is whether a full strength consecutive sentence for a violent sex offense under Penal Code section 667.6, subdivision (c)¹ is punishment

¹ All statutory references are to the Penal Code.

beyond the "statutory maximum" for purposes of *Apprendi* and *Blakely*. We conclude it is not, and therefore hold that the factors relied upon by the court to support this sentencing choice need not be submitted to the jury and proved beyond a reasonable doubt.

BACKGROUND

Appellant Arturo Prieto met Kimberly A. while she was out with a friend at a nightclub. Kimberly accompanied appellant to a motel room he had rented so she could use the bathroom. When she finished using the bathroom, appellant grabbed her, pinned her to the bed, and stuck his fingers in her vagina. After pulling down his own pants and forcing her to fondle him, he attempted to place his penis in her vagina. He was interrupted when Kimberly's friend came to the door. Kimberly called 911 from the front office of the motel and reported the sexual assault.

A jury convicted appellant of forcible penetration with a foreign object and attempted forcible rape as a lesser included offense of rape. (§§ 289, subd. (a)(1), 664/261, subd. (a)(2).) The trial court imposed a six-year prison sentence, consisting of the three-year lower term on the forcible penetration count and the three-year middle term on the attempted rape count.

Under section 1170.1, subdivision (a), consecutive sentences under the determinate sentencing law are ordinarily limited to one-third the middle term for the offense. The three-year term on the penetration count was authorized by section 667.6, subdivision (c), which establishes an exception to this general rule and permits a court to impose a full strength consecutive sentence for enumerated violent sex offenses (including forcible penetration under section 289) ". . . whether or not the crimes were committed during a single transaction." (§ 667.6, subd. (c).) A court that elects to sentence a defendant under the harsher provisions of section 667.6, subdivision (c) must state reasons for doing so. (Cal. Rules of Court, rule 4.426(b); *People v. Belmontes* (1983) 34 Cal.3d 335, 347.)

We affirmed appellant's convictions in an appeal from the original judgment, but remanded the case for resentencing because the trial court did not state

reasons for imposing a full strength consecutive sentence on the digital penetration count. On remand, defense counsel asked the court to impose concurrent rather than consecutive sentences. The court declined to do so and again imposed the three-year middle term on the attempted rape count and a fully consecutive three-year lower term on the digital penetration count. It stated that it was imposing consecutive sentences because the crime involved great violence and acts of callousness and the victim was particularly vulnerable due to her isolation in a hotel room. (Cal. Rules of Court, rules 4.425(b), 4.421(a)(1) & (3).) It further stated that it was electing to impose a full strength sentence under section 667.6, subdivision (c) because the crimes involved separate acts of violence. (Cal. Rules of Court, rules 4.426(b), 4.425(a)(2).)

DISCUSSION

Appellant contends that under *Apprendi* and *Blakely*, he was entitled to a jury determination of the factors used by the court to impose sentence under the harsher provisions of section 667.6, subdivision (c). He claims the case must again be remanded because the imposition of a full strength consecutive sentence without a jury determination of the predicate facts violated his federal constitutional rights to due process of law and trial before a jury. Appellant alternatively argues that the factors on which the court relied to impose the full strength sentence were not supported by substantial evidence. We reject these claims.

A. Waiver

Preliminarily, we consider the Attorney General's argument that appellant's claim has been waived because defense counsel did not object to the sentence imposed on *Apprendi* or *Blakely* grounds. The waiver doctrine applies to claims involving the trial court's failure to properly make or articulate discretionary sentencing choices, but does not restrict our ability to consider and correct a sentence which is unauthorized by law. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354.) A sentence is unauthorized "where it could not lawfully be imposed under any circumstance in the particular case." (*Id.* at p. 354.) Appellant's claim that the court could not lawfully sentence him under section 667.6, subdivision (c) without requisite jury findings is effectively an argument that a

component of his sentence could not lawfully be imposed by the court under any circumstance. (Compare *People v. Garza* (2003) 107 Cal.App.4th 1081, 1091.) We will treat the issue as one concerning an unauthorized sentence and will consider it on its merits.

B. *Apprendi* and *Blakely*

Appellant claims that his sentence violated the principles of *Apprendi* because the court relied on factors not submitted to the jury to impose a sentence that exceeded the statutorily specified maximum penalty. We conclude that a sentence imposed under section 667.6, subdivision (c) does not increase the maximum penalty for the crime and does not implicate *Apprendi* or *Blakely*.

The defendant in *Apprendi* was convicted of possessing a firearm, a crime that carried a sentence of 5 to 10 years under New Jersey law. State law also allowed the sentencing court to increase the sentencing range to 10 to 20 years if it determined by a preponderance of the evidence the crime had been committed with the intent of intimidating an individual or group because of race, gender, ethnicity or the like. (*Apprendi, supra*, 530 U.S. at pp. 468-469.) The trial court determined that this "hate crime" enhancement applied and sentenced the defendant to 12 years in prison, a term that exceeded by two years the maximum term that would have been available for firearm possession absent the hate crime finding. (*Id.* at pp. 469-473.)

The Supreme Court held the *Apprendi* defendant's right to due process was violated when the court imposed a sentence exceeding the statutory maximum for the offense established by the jury's verdict. After reviewing the historical importance of trial by jury and proof beyond a reasonable doubt, it concluded "[t]he historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlights the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." (*Apprendi, supra*, 530 U.S. at pp. 482-483.) It distilled the rule that with the exception of enhancements based

on the fact of a prior conviction, any fact not admitted by the defendant that increased the punishment for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.)

In its recent decision in *Blakely*, the Supreme Court clarified that the "statutory maximum" referred to in *Apprendi* "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely, supra*, ___ U.S. at p. ___ [124 S.Ct. at p. 2537].) The defendant in *Blakely* pled guilty to second degree kidnapping with a firearm, which was designated a class B felony under Washington state law. The maximum sentence for any class B felony was 10 years imprisonment. The punishment for second degree kidnapping with a firearm was a "standard range" of 49 to 53 months imprisonment, but the judge could impose a sentence above this range if he or she found "substantial and compelling reasons justifying an exceptional sentence." (*Id.* at p. 2535.) The trial court in *Blakely* found such reasons and imposed an exceptional sentence of 90 months--a term that exceeded the standard range for a second degree kidnapping but was less than the 10-year maximum for all class B felonies.

The Supreme Court concluded that the sentence imposed in *Blakely* violated *Apprendi* because the defendant was sentenced to a term above the 53-month maximum of the standard range based on facts that were not admitted in the plea or found true by a jury beyond a reasonable doubt. The court rejected an argument that the 10-year limit on sentences for class B felonies should be considered the statutory maximum for *Apprendi* purposes. "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.'" (*Blakely, supra*, ___ U.S. at p. ___ [124 S. Ct. at p. 2537].)

In this case, appellant was convicted by the jury of forcible penetration under section 289, subdivision (a)(1), which carries a penalty of three, six or eight years.

Section 667.6, subdivision (c) provides that the sentence imposed for this crime may be "full, separate, and consecutive" to any other sentence. The jury's verdict on the penetration count established every fact necessary to trigger the applicability of section 667.6, subdivision (c); unlike the constitutionally invalid enhancements in *Apprendi* and *Blakely*, no fact other than the conviction itself needed to be established.² A full strength consecutive sentence under section 667.6, subdivision (c) does not violate *Apprendi* because it does not exceed the maximum penalty authorized by the verdict itself; rather, a full strength consecutive term *is* the maximum statutory penalty.³

As appellant observes, the trial court was required to state reasons for electing to sentence him under section 667.6, subdivision (c). The court "is to be guided by the criteria listed in rule 4.425 [affecting decision to impose concurrent or consecutive sentences], which incorporates rules 4.421 and 4.423 [circumstances in aggravation and mitigation], as well as any other reasonably related criteria" (Cal. Rules of Court, rule 4.426(b).) Appellant argues that the court could not impose a full strength consecutive sentence unless the sentencing factors utilized by the court to impose that sentence were found true by the jury beyond a reasonable doubt. Again we disagree.

² In contrast, section 667.6, subdivision (d) makes full strength consecutive sentences mandatory when the defendant is convicted of two or more enumerated violent sex offenses against different victims or against the same victim on separate occasions. Appellant was only convicted of one such offense, so subdivision (d) does not apply to his case. We need not determine whether *Apprendi* requires a jury determination of the additional circumstances necessary to trigger the mandatory provisions of section 667.6, but we note that at least one court of appeal has held that *Apprendi* does *not* apply to subdivision (d) findings. (See *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1232.)

³ Appellant was sentenced to the lower three-year term on the digital penetration count. Although the court made this sentence fully consecutive to the sentence on the attempted rape count, as authorized by section 667.6, subdivision (c), appellant's aggregate sentence was only six years, the same as it would have been if the court had imposed the middle term on the digital penetration count and run the sentence on the attempted rape concurrently. The parties do not discuss whether this circumstance alone is sufficient to rebut appellant's *Apprendi* claim.

A defendant who is convicted of a qualifying sex offense in addition to some other crime is on notice that by virtue of his conviction, the statutory maximum he may be subjected to on that count is a full strength consecutive term. Although the court should consider factors enumerated in the Rules of Court when exercising its discretion in this regard, section 667.6, subdivision (c) does not establish any type of statutory preference for or against a full-strength consecutive sentence, and no fact beyond the fact of conviction is essential to the imposition of a full strength sentence. *Apprendi* and *Blakely* do not apply.

C. Validity of Sentencing Factors

Appellant argues that assuming the court had the power to impose a full strength consecutive sentence under section 667.6, subdivision (c) without jury findings, the factors on which it relied to impose such a sentence in this case were unsupported by the evidence. Defense counsel did not object on this specific ground in the trial court and the claim has been waived on appeal. (*People v. Scott, supra*, 9 Cal.4th at p. 353.)

We would also reject the argument on the merits. The court relied on two factors in aggravation to impose consecutive rather than concurrent sentences: that the crime involved great violence and acts of callousness and that the victim was particularly vulnerable due to her isolation in a hotel room. (Cal. Rules of Court, rules 4.425(b), 4.421(a)(1) & (3).) It relied on a separate factor in aggravation to impose a full strength sentence under section 667, subdivision (c): that the crimes involved separate acts of violence. (Cal. Rules of Court, rules 4.426(b), 4.425(a)(2).) Each of these factors was supported by the record.

As to the circumstance of great violence and callousness, the evidence at trial showed that appellant suddenly attacked an unsuspecting woman whom he had just met. In addition to the force employed to commit the sexual acts themselves, he pushed the victim onto the bed, held her down, and grabbed her by the throat when she attempted to scream. As to the vulnerability factor, appellant separated his victim from the friend she was with that night by offering her the use of a bathroom in his motel room. It was only when she was alone with him in the room that he began the assault. Finally, the

digital penetration and attempted rape were distinct physical acts and the court was fully justified in concluding that they amounted to separate acts of violence. We will uphold the trial court's sentencing choices when, as here, they are supported by substantial evidence. (*People v. Downey* (2000) 82 Cal.App.4th 899, 917.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

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