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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Appellant,

v.

BENNY LEON, JR.,

Defendant and Respondent.

C068005

(Super. Ct. No.
CRF03243)

After the United States Court of Appeals for the Ninth Circuit ruled that defendant Benny Leon, Jr.'s 11-year upper term state prison sentence for voluntary manslaughter (Pen. Code § 192, subd. (a); statutory references that follow are to the Penal Code unless otherwise stated) had resulted from prejudicial *Blakely* error (*Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*)), the trial court modified the sentence from 11 years to the middle term of six years. The People appeal contending the trial court erred in believing the

federal courts had curtailed its discretion to re-impose an upper term. We remand for resentencing.

FACTS AND PROCEEDINGS

Defendant has requested that we take judicial notice of our opinion in his direct appeal, case No. C047003. In response, we ordered the appellate record from that case incorporated by reference into the present record.

Our statement of facts is taken from our opinion in the direct appeal.

Defendant and the victim, Rosalie Reyes, lived together in a Marysville apartment at the time of the offense. On the evening of April 2, 2003, their acquaintance, Antonio L., accompanied them to a home on Highway 113. While there, Antonio overheard Reyes tell defendant something about money he had borrowed from her. Defendant left. Ten minutes later, defendant telephoned Antonio and informed him that defendant would not be able to return to pick them up because "some group of gangbangers confronted him about something."

Approximately 40 minutes after defendant departed, Amber M. drove Antonio and Reyes back to defendant's apartment. The trio arrived around 1:00 a.m., got out of the car and approached the door. Reyes, who apparently had no key, knocked on the apartment door but received no answer. Reyes began "kicking, knocking, cussing," and yelling at the door. There was still no answer, so Reyes moved to a window where she knocked and yelled some more. Reyes then placed a call on Amber's cellular

telephone. Antonio heard a telephone ringing inside the apartment. Amber overheard Reyes say into the phone "[o]pen the front door." Then Reyes returned the phone to Amber. Antonio heard footsteps inside walking toward the door.

Defendant opened the door, looked outside, saw Amber and nodded at her. Defendant told Reyes to "[g]et the 'F' in here" as if he were trying to hurry her. He also said something to the effect she was making too much noise. As Reyes started into the apartment, defendant nudged her into the doorjamb and a shot was fired.

Reyes fell to the floor and defendant reached down to pick her up. Defendant told Reyes to get up and to stop "playing around." He was screaming and hysterical and exclaimed that he had shot her. While holding Reyes in his arms, defendant said, "[d]on't die. I love you. I'll change."

Antonio entered the house, grabbed a telephone and called 911. Then he picked up a handgun from the floor and threw it over a fence. Police later recovered the handgun.

The bullet from the single gunshot struck Reyes in the neck and she died as a result of the wound. The gun had been fired from a distance of zero to six inches. A firearms expert testified at trial that the weapon used by defendant had a trigger pull of 11.5 to 12 pounds, whereas a typical firearm has a trigger pull of three to seven pounds. The handgun was in working order at the time.

A jury acquitted defendant of first degree murder while lying in wait (§§ 187, 190.2, subd. (a)(15)) and second degree

murder, convicted him of voluntary manslaughter, and found that he used a firearm in the commission of the offense (§ 12022.5, subd. (a)).

The probation report listed three circumstances in aggravation. (Cal. Rules of Court, rule 4.421(a); further references to rules are to the California Rules of Court.) First, the "crime involved great violence and a high degree of cruelty, viciousness, and callousness. The defendant shot the victim in her throat. The means of death was internal arterial bleeding and asphyxiation. Additionally, the victim did not initially die. The victim had to suffer [through] drowning on her own blood for several minutes." (See rule 4.421(a)(1).)

Second, the probation report stated the "victim was particularly vulnerable in that she was attempting to enter the residence she shared with the defendant. The defendant exited a non-lit apartment, while victim attempted to enter from a lit porch." (See rule 4.421(a)(3).)

Third, the probation report stated the "manner in which the crime was carried out indicates planning and sophistication. The defendant waited several minutes inside the un-lit apartment, before opening the door and shooting the victim, who was outside in a lighted area. The defendant held the loaded 380 caliber semi-automatic handgun to the victim's neck and pulled the trigger. The handgun was loaded with hollow point ammunition, which is designed to cause the maximum amount of damage to living tissue." (See rule 4.421(a)(8).)

The trial court (Judge Curry) sentenced defendant to state prison for the upper term of 11 years plus 10 years for firearm use. In denying defendant probation, the trial court stated: "[Rule 4.]414(a)(3), [defense counsel] urges that the victim was not vulnerable, that it was an unintentional act on the Defendant's part. The jury found no evidence of planning or lying in wait, having acquitted him of first degree [murder]. The People urge, in fact, *she was vulnerable, and Court believes that she was. Given the basic facts that she is standing in a small area outside the door of the apartment, it is well lit, based on the believable evidence. [Defendant] is inside a dark apartment. Given the time of day, this occurred without artificial light being on in the apartment when he opened the door. The victim is totally visible. He is basically invisible because of the difference.*" (Italics added.)

Subsequently, in imposing the upper term of imprisonment, the trial court adopted two of the three suggested circumstances in aggravation, stating: "Again, under [rule 4.]421(a)(1), Court believes it is true. The crime does involve great violence, high degree of cruelty, viciousness and callousness. Mechanism of death has nothing to do with that finding. And to the extent Probation has recommended that, the Court does not adopt that portion of it. [¶] Under [rule 4.]421(a)(3), she was particularly vulnerable for all the reasons that I stated as I was going through the [rule 4.]414 analysis." The court added that the aggravating factors greatly outweighed defendant's lack of prior record or any other mitigating factor.

In his direct appeal to this court, defendant claimed his sentence violated *Blakely* because the upper term was improperly based on facts (violence, cruelty, viciousness and callousness; and particular vulnerability) neither submitted to the jury nor proved beyond a reasonable doubt. Under compulsion of the then-recent decision in *Black I*, we rejected the contention (*People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), vacated sub nom. *Black v. California* (2007) 549 U.S. 1190 [167 L.Ed.2d 36]; see *People v. Black* (2007) 41 Cal.4th 799 (*Black II*)). (*People v. Leon* (Aug. 11, 2005, C047003) [nonpub. opn.]..)

Thereafter, defendant filed a federal habeas petition reasserting his *Blakely* contention. The United States District Court for the Eastern District of California found that our application of *Black I* was contrary to United States Supreme Court precedent but concluded the error was harmless. The habeas petition was denied and defendant appealed.

In November 2010, the Ninth Circuit remanded the matter to the federal district court with instructions to grant the petition for writ of habeas corpus on the *Blakely* sentencing issue. (*Leon v. Kirkland* (Nov. 17, 2010, No. 09-15696) [nonpub. opn.]..) In doing so, the Ninth Circuit concluded that “[t]he manner that the victim was attacked in this case is analogous to being attacked from behind. None of the characteristics that California courts have used to support a finding of particular vulnerability are present here.” Therefore, the Ninth Circuit had “grave doubt” that a jury would have found beyond a reasonable doubt that the victim was particularly vulnerable.

On December 13, 2010, the District Court granted habeas relief, ordering that defendant be released from custody unless the State of California elected to retry or resentence him.

At resentencing in March 2011, the sentencing court (Judge Smith) remarked that Judge Curry had adopted the recommended findings of viciousness and vulnerability but had rejected the finding of planning and sophistication. Judge Smith commented that, like Judge Curry, he believed the victim "was particularly vulnerable. Unfortunately, the Ninth Circuit Court of Appeals does not agree with that conclusion. And had I been in Judge Curry's position a number of years ago at the original sentencing, I would have made that same finding. I believe she was particularly vulnerable, but the Ninth Circuit has said no. And they seem to be saying, as a matter of law, she was not particularly vulnerable, which I believe takes it out of my hands. [¶] And I have read and reread the order of the United States District Court Judge that deals with the error at the time of sentencing. And I'm of the opinion that the District Court's order granting the writ precludes this Court from imposing the upper term for voluntary manslaughter. I think it's justified, but I believe that the order from the Federal District Court precludes this Court from imposing the upper term. [¶] . . . Specifically, it reads 'The trial court made a sentencing error of constitutional magnitude when it imposed the upper term for voluntary manslaughter.' It doesn't say that the trial court erred in finding the victim particularly vulnerable. If they had said that, I think we'd have a different situation.

But what was said is it was constitutional error to impose the upper term. [¶] So I believe that I'm constrained by the Federal Court rulings, and I believe that it is the requirement of this Court to select another term. And since I believe the upper term is actually justified, I will go no lower than the mid term of six years on the voluntary manslaughter conviction."

Judge Smith went on to state reasons justifying the upper term of 10 years on the firearm enhancement. Thus, Judge Smith imposed an aggregate term of 16 years. Judge Smith did not state whether he agreed with Judge Curry's decision as to viciousness and callousness.

We note that the relevant 2010 amendment to section 2933 does not entitle defendant to additional conduct credit because he was committed for a serious felony. (§ 1192.7, subd. (c)(1); former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

DISCUSSION

I

Appealability

Before considering the Attorney General's argument on its merits, we consider defendant's contention that this appeal is not authorized by section 1238 and must be dismissed.

"The prosecution in a criminal case has no right to appeal except as provided by statute. [Citation.] "The Legislature has determined that except under certain limited circumstances the People shall have no right of appeal in criminal cases. [Citations.] . . . [¶] The restriction on the People's right

to appeal . . . is a substantive limitation on review of trial court determinations in criminal trials." [Citation.]

"Appellate review at the request of the People necessarily imposes substantial burdens on an accused, and the extent to which such burdens should be imposed to review claimed errors involves a delicate balancing of the competing considerations of preventing harassment of the accused as against correcting possible errors." [Citation.] Courts must respect the limits on review imposed by the Legislature "although the People may thereby suffer a wrong without a remedy." [Citation.]' [Citation.]" (*People v. Alice* (2007) 41 Cal.4th 668, 680, quoting *People v. Williams* (2005) 35 Cal.4th 817, 822-823.)

Section 1238, subdivision (a) provides in relevant part that "[a]n appeal may be taken by the people from any of the following: [¶] . . . [¶] (6) An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense."

The People contend the appeal is authorized by section 1238, subdivision (a)(6), because the trial court's order, made after judgment, "reduced the punishment imposed" from an aggregate 21 years to 16 years.

Defendant counters that "[h]ere, the Ninth Circuit Court of Appeals vacated the original sentence and judgment and ordered that a new sentence and judgment be imposed." Thus, defendant reasons that the resentencing was "the imposition of sentence, a judgment," not an order after judgment. (*People v. Rivera* (1984) 157 Cal.App.3d 494, 498 (*Rivera*).)

Contrary to defendant's argument, neither the Ninth Circuit nor the federal district court purported to vacate the May 2004 judgment; instead, they gave state officials the options of releasing defendant from custody, retrying him, or resentencing him. While releasing or retrying defendant evidently would have required the vacation of both the judgment of conviction and the sentence, resentencing allowed the final judgment of conviction to remain in place. State officials opted to modify the sentence only.

Defendant relies on *Rivera* but that reliance is misplaced. In *Rivera*, the People argued that the matter before the court was appealable by the People because it was an order after judgment affecting the substantial rights of the parties. But the court held "an order did not issue. The court recalled Rivera's initial sentence and commitment and 'resentenced' him as if he 'had not been sentenced previously.' (§ 1170, former subd. (f)(1) [now subd. (d)].) The resentence became the sentence and thus the judgment. [Citation.]" (*Rivera, supra*, 157 Cal.App.3d at p. 497.)

Here, in contrast, the trial court did not purport to apply a statute similar to section 1170, subdivision (d), which authorizes the recall of an extant sentence and resentencing "in the same manner as if he or she had not previously been sentenced." Rather, the court stated "this resentencing here today need not address the issue of the term for the use of the firearm." The court could not, and would not, have so stated

had it believed that it was proceeding as if defendant "had not previously been sentenced." (*Ibid.*)

Because this was not, in effect, an initial "imposition" of sentence, we reject defendant's contention that the appeal is barred by section 1238, subdivision (a)(10), which allows an appeal from the "imposition of an unlawful sentence . . . except that portion of a sentence imposing a prison term which is based upon a court's choice that a term of imprisonment (A) be the upper, middle, or lower term."

Contrary to defendant's argument, section 1238, subdivision (a)(10), does not "bar[] all appeals base[d] on the choice of term," even though otherwise authorized by section 1238, subdivision (a). Subdivision (a) provides several alternative grants of authority for a People's appeal; no alternative takes away what another grants. We thus conclude that the People's appeal is properly before us.

II

The Trial Court's Exercise of Discretion

The People contend the trial court erred by failing to exercise its discretion to select an appropriate term of imprisonment from the three possible terms. Defendant does not dispute the error but argues it is harmless because the 16-year term "was appropriate given the facts of this case and did not result in an injustice to the people." We agree that there was error and conclude that it was not harmless.

As noted, Judge Smith relied on the federal district court's finding that "the trial court made a sentencing error of

constitutional magnitude when it imposed the upper term for voluntary manslaughter." Thus, Judge Smith believed he was "constrained by the Federal Court rulings" to "select another term."

The People contend the trial court "was unaware of its discretionary sentencing powers after the federal courts granted habeas relief on the *Blakely-Cunningham* claim." (See *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856].) The People note that, following the March 2007 amendment to the Determinate Sentencing Law (DSL), the middle term is no longer the "statutory maximum" for *Apprendi* purposes. (See § 1170, subd. (b); *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435].) Thus, the upper term may be imposed without violating the constitutional principles of *Apprendi*, *Blakely*, and *Cunningham*. The federal court orders did not prohibit application of the amended DSL or otherwise limit the trial court's sentencing discretion. To the extent it believed that its discretion was so limited, the trial court erred. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 854-857; *People v. Jones* (2009) 178 Cal.App.4th 853, 866.)

We next consider whether the trial court's error was prejudicial. We find that, upon resentencing, an upper term sentence might, upon the trial court's discretion, be based on the other aggravating factor originally found by Judge Curry. Thus, the court's failure to exercise its discretion was not harmless. However, nothing we say here should be understood as

an expression of our belief as to how the trial court should resolve the issue on remand.

The Ninth Circuit did not purport to disapprove the other aggravating circumstance ("great violence, cruelty, viciousness and callousness") found true by Judge Curry. Rather, the Ninth Circuit noted that the finding had not been relied on by the federal district court and had not been fully briefed in the federal appeal; thus, the court expressed no opinion as to whether Judge Curry had appropriately found it to be true.

On this record, the trial court could find callousness in that, even if defendant was entitled to possess a loaded firearm in his home as his counsel argued, defendant had sufficiently been put on notice--both by the telephone call and by his observation of Reyes upon opening the door--that the "gangbangers" were not present and no reason for an armed conflict existed. Escalating his and Reyes's prior argument about money into an armed confrontation at the doorstep demonstrated an utter disregard for the safety and well-being of Reyes and her companions.

In *People v. Gutierrez* (1992) 10 Cal.App.4th 1729 the appellate court found a high degree of cruelty, viciousness, and callousness where the defendant stalked and pursued his victims for several blocks while riding a motorcycle. (*Id.* at pp. 1735-1736.) The court noted this "expos[ed] the passengers, other drivers, and pedestrians to the dangers of a traffic accident." (*Ibid.*)

Here, keeping a firearm at the ready *after* receiving the telephone call and *after* observing Reyes (as opposed to "gangbangers") at the threshold exposed Reyes and her companions to the dangers of a firearm incident even *before* defendant evidently elected to fire the weapon under circumstances constituting voluntary manslaughter. The trial court could find that this showed even less regard for the safety of Reyes and her companions than the defendant had shown in *Gutierrez*. At resentencing, the trial court would be entitled, albeit certainly not compelled, to find that the offense involved a high degree of callousness.

DISPOSITION

The judgment is vacated and the matter is remanded for resentencing consistent with this opinion.

_____ HULL _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MAURO _____, J.