20CA0237 Peo v Kenney 02-18-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA0237
Teller County District Court No. 19CR17
Honorable Scott A. Sells, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Krystal Jean Kenney,

Defendant-Appellant.

SENTENCE VACATED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE PAWAR
Richman and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 18, 2021

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¶ 1 Defendant, Krystal Jean Kenney, appeals the aggravated three-year sentence the district court imposed following her guilty plea to one count of tampering with physical evidence. Because the district court erroneously sentenced Kenney outside the presumptive maximum term, we vacate Kenney's sentence and remand the case for resentencing.

I. Background

¶ 2 Kenney agreed to plead guilty to one count of tampering with physical evidence, a class six felony, in exchange for her sworn testimony in a separate homicide case against defendant Patrick Frazee. The maximum presumptive sentence for a class six felony is eighteen months in the custody of the Department of Corrections (DOC). § 18-1.3-401(1)(a)(V)(A), C.R.S. 2020. Under section 18-1.3-401(6), a court may sentence a defendant to up to twice the maximum term if it finds aggravating circumstances.

¶ 3 Kenney's written plea agreement listed the elements of tampering with physical evidence and stated that she had been advised of and understood her constitutional rights, but that she was "expressly waiv[ing] [her] right to trial by jury on all issues." The agreement also acknowledged that

> [t]he potential sentence would be a sentence to the [DOC] in the range of 1 year to 18 months or up to 3 years in the aggravated range, community corrections or probation. The actual sentence will be open to the Court. . . . If the Court finds extraordinary aggravating circumstances apply, . . . the possible penalties include a sentence to the [DOC] for a term greater than the presumptive range . . . to double the maximum term, making a term as long as 3 years.

Kenney admitted to the following factual basis in the agreement: "I learned that a crime had been committed by Patrick Frazee. I knew that law enforcement would be investigating that crime. I moved the victim's cell phone with the intent to impair the phone[']s availability in the investigation. I had no right to move the victim's cell phone."

¶ 4 At the plea hearing, the judge further advised Kenney about the potential for an aggravated sentence:

> THE COURT: Thank you. If the Court found that there were aggravated factors, your sentence could be up to three years. Do you understand that?
>
> MS. KENNEY: Yes, Your Honor.
>
> THE COURT: Okay. And that's another issue that needs to be determined at sentencing. Any questions about that?
>
> MS. KENNEY: No, Your Honor.

¶ 5 When the judge asked Kenney for a factual basis for her guilty plea, Kenney made the following admission:

> I learned that Patrick Frazee had committed a homicide on approximately November 22nd, 2018, in Teller County. I knew that law enforcement would be investigating that case. I took the victim's cell phone with the intent to impair the phone's availability in the investigation. I had no right or authority to move the victim's cell phone. And that occurred between November 24th and November 25th in Teller County.

¶ 6 The district court then found that Kenney entered a knowing and voluntary plea with a factual basis and that "this is an open sentence."

¶ 7 Before sentencing, Kenney filed an objection to aggravated sentencing under *Blakely v. Washington*, 542 US. 296 (2004), which holds that a trial court may aggravate a defendant's sentence only under certain circumstances. In its response, the State argued that, because certain of those circumstances were met, the sentencing range should be at the district court's discretion. At sentencing, the district court heard additional argument on sentence aggravation and ruled that, within its discretion, "I could sentence her to an open sentence anywhere from probation up to

three years." Ultimately, the district court sentenced Kenney to three years in the custody of DOC, twice the maximum presumptive term. The district court based the aggravated sentence on a number of factual considerations related to Kenney's involvement in the Frazee homicide case.

¶ 8 On appeal, Kenney contends that her aggravated sentence is unconstitutional because the district court violated her constitutional rights under *Blakely*.

II. Standard of Review and Applicable Law

¶ 9 We review constitutional challenges to sentencing determinations de novo. *Villanueva v. People*, 199 P.3d 1228, 1231 (Colo. 2008).

¶ 10 "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." *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

¶ 11 Under *Apprendi* and *Blakely*, a district court may sentence a defendant in the aggravated range based on four types of facts: (1) facts found by a jury beyond a reasonable doubt, as reflected in

the jury's verdict; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant has stipulated to judicial factfinding for sentencing purposes; and (4) facts regarding prior convictions. *Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005). The first three types of facts are referred to as "*Blakely*-compliant" facts, and the fourth type is referred to as "*Blakely*-exempt" facts. *Id.*

III. Analysis

¶ 12 Here, it is undisputed that Kenney's sentence was not based on *Blakely*-exempt facts because she did not have any prior convictions. Further, neither Kenney nor the State contends that the facts used to aggravate her sentence qualify as the first type of *Blakely*-compliant facts — those found by a jury beyond a reasonable doubt, as reflected in the jury verdict. We therefore restrict our analysis to an examination of whether Kenney's sentence was properly imposed based on (1) facts found by the judge after Kenney stipulated to judicial factfinding for sentencing purposes or (2) facts Kenney admitted.

A. Kenney Did Not Stipulate to Judicial Factfinding

¶ 13 At sentencing, the judge stated that, in aggravating Kenney's sentence, he considered her oral admission at the plea hearing —

her confession to learning that Frazee "had committed a homicide" — to be a "significant part" of the sentencing decision. But the judge went on to explain why he felt the factual basis was an understatement of Kenney's actions. The judge described in detail Kenney's involvement in the homicide perpetrated by Frazee and described Kenney's actions as "cold, calculated, cruel, devoid of any compassion for human life."

¶ 14 Based on these findings, the district court sentenced Kenney in the aggravated range of twice the maximum presumptive sentence.

¶ 15 Indeed, the facts the district court used to aggravate Kenney's sentence are disconcerting. However, the district court made findings establishing the majority of these aggravating facts on its own. And, under *Lopez*, in order for these facts to be *Blakely*-compliant, Kenney must have stipulated to judicial factfinding for sentencing purposes. 113 P.3d at 723.

¶ 16 Neither Kenney's signed written plea agreement nor the district court's oral plea advisement included such a stipulation. In fact, although the original plea agreement provided that "[t]he Defendant further stipulates to the existence of extraordinary

aggravating circumstances that would allow this Court to sentence in the aggravated range," the State agreed to remove this stipulation from the plea agreement.

¶ 17 Lacking evidence of Kenney's explicit stipulation to judicial factfinding, the State contends on appeal that, based on principles of contract interpretation, Kenney implicitly stipulated to judicial factfinding. As part of the district court's advisement, it asked Kenney, "If the Court found that there were aggravated factors, your sentence could be up to three years. Do you understand that?" And Kenney replied, "Yes, Your Honor." The State asserts that Kenney's agreement to the district court's use of "[i]f the Court found" can be "reasonably understood as [Kenney] stipulating to judicial fact-finding for sentencing purposes." But, as the supreme court concluded in *Villanueva*, a defendant cannot implicitly stipulate to judicial factfinding:

> [T]he People argue Villanueva "implicitly" stipulated to judicial fact finding when he requested probation because, by that act, he accepted the trial court's continuing jurisdiction. This argument is contrary to the well-established tenet that a waiver is an *intentional* relinquishment of a *known* right or privilege. Waiver of the fundamental right to a jury trial may not be presumed.

199 P.3d at 1236 (citations omitted).

¶ 18 We therefore conclude that Kenney did not stipulate to judicial factfinding for sentencing purposes, and the court erred by relying on non-*Blakely*-compliant facts to aggravate her sentence. *See Lopez*, 113 P.3d at 723.

B. Kenney's Admission Was Also Not *Blakely*-Compliant

¶ 19 The only aggravating fact the court relied on that it did not independently find is Kenney's admission during her plea hearing that she had learned that Frazee "committed a homicide."

¶ 20 "*Blakely* provides defendants the right to jury trial on all facts that are not included in a jury verdict or *essential to a guilty plea*." *People v. Isaacks*, 133 P.3d 1190, 1194 (Colo. 2006) (emphasis added). Kenney pleaded guilty to tampering with physical evidence, and her plea agreement listed the elements:

> (1) That the defendant[;]
>
> (2) in the State of Colorado, at or about the date and place charged[;]
>
> (3) believing that an official proceeding was pending or about to be instituted, and acting without legal right or authority[;]

(4) unlawfully and feloniously destroyed, mutilated, concealed, removed, or altered physical evidence[;]

(5) with intent to impair its verity or availability in the pending or prospective official proceeding.

¶ 21 Kenney's plea required that she "believe[ed] that an official proceeding was pending or about to be instituted," but it did not require that she knew or believed the official proceeding pertained to a homicide. Therefore, Kenney's admission that she knew Frazee had committed a homicide was not a fact *essential* to her guilty plea. *See id.*

¶ 22 Because Kenney's admission was not a fact essential to her guilty plea, it still must be a *Blakely*-compliant fact in order for the court to use it to aggravate her sentence. *See id.* But admissions by a defendant may only be used to aggravate a sentence if the defendant "knowingly, voluntarily, and intelligently waives" her jury-trial rights with respect to those facts. *Id.* at 1194-95. "Absent such a waiver, the judge may not use the admission against the defendant and cannot sentence the defendant to an aggravated term." *Villanueva*, 199 P.3d at 1233. We therefore turn to whether Kenney waived her right to have a jury determine the admitted fact.

¶ 23 Kenney contends that nothing contained in her plea agreement or said at the plea hearing indicates that she expressly waived this right. The State argues that the factual basis for Kenney's guilty plea qualifies as a waiver because a guilty plea inherently serves as the voluntary, knowing, and intelligent relinquishment of a defendant's right to require the prosecution to prove the charges to a jury beyond a reasonable doubt. Consistent with our supreme court's holdings, we reject the State's argument.

¶ 24 First, we note that "*Blakely* holds that the guilty plea is not an implied admission of facts for the purpose of aggravated sentencing." *Lopez*, 113 P.3d at 726-27. Additionally, the supreme court in *Villanueva* precisely defined what constitutes a waiver of a defendant's *Blakely* rights:

> [I]n order for a defendant to validly waive [her] right to have a jury determine the facts supporting an aggravated sentence, the record must, at a minimum, reflect that the court advised the defendant of that right and the consequences of surrendering it, and that the defendant nevertheless chose to waive it. . . . In order for an advisement and concomitant waiver at an original sentencing to be proper, a court should inform the defendant of [her] right to have a jury determine aggravating facts beyond a reasonable doubt. *The advisement must specifically inform the*

> *defendant of this right, not merely of the right to a jury trial on the issue of guilt.*

Villanueva, 199 P.3d at 1236 (emphasis added).

¶ 25 Here, like in *Villanueva*, the court did not "specifically inform" Kenney in the plea hearing or at sentencing of her right to have "a jury determine aggravating facts beyond a reasonable doubt." The court advised her that she would be "giving up some significant, substantial constitutional rights" by pleading guilty, including the right to have a jury determine all issues of guilt beyond a reasonable doubt. The court also told Kenney that she could receive a sentence of up to three years if the *court* found aggravating factors. But nothing in the record reflects "at a minimum" that (1) the court advised Kenney of her *Blakely* rights and the consequences of waiving them, and (2) Kenney nevertheless chose to waive them. *See id.*

¶ 26 Accordingly, we conclude that Kenney's admission was not *Blakely*-compliant, and the district court therefore erred by aggravating Kenney's sentence based on the admission.

IV. Conclusion

¶ 27 We vacate Kenney's sentence and remand the case to the district court for resentencing in the presumptive range. *See Isaacks*, 133 P.3d at 1196 ("The proper procedure for an appellate court to follow upon finding *Blakely* error is to remand the case to the trial court for resentencing within the presumptive range.").

JUDGE RICHMAN and JUDGE LIPINSKY concur.