

No. A108205

In the Court of Appeal
Of the State of California
First Appellate District
Division 5

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

TARI C. JOHNSON
Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Appeal from
Alameda County Superior Court Case No.C148138
The Honorable Thomas Reardon

FIRST DISTRICT APPELLATE PROJECT
In association with

PAUL KLEVEN (SB# 95338)
LAW OFFICE OF PAUL KLEVEN
1604 Solano Avenue
Berkeley, CA 94707
(510) 528-7347

Attorneys for Appellant
Tari Johnson

TABLE OF CONTENTS

STATEMENT OF APPEALABILITY 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 7

 I. INTRODUCTION AND SUMMARY OF ARGUMENT 7

 II. ALTHOUGH CALIFORNIA COURTS HAVE APPROVED OF *CRUZ* WAIVERS AS A LEGITIMATE PART OF THE PLEA BARGAINING PROCESS, THERE IS NO AUTHORITY FOR THE PROCEDURE FOLLOWED BY THE TRIAL COURT IN DETERMINATION THAT MR. JOHNSON VIOLATED THE WAIVER 9

 III. THE TRIAL COURT VIOLATED MR. JOHNSON S DUE PROCESS RIGHTS BY FINDING A *CRUZ* WAIVER VIOLATION BASED SOLELY ON THE RESULTS OF A PRELIMINARY HEARING 13

 IV. THE TRIAL COURT FURTHER VIOLATED MR. JOHNSON S DUE PROCESS RIGHTS BY SENTENCING HIM TO THE AGGRAVATED TERM 18

 V. THE TRIAL COURT S IMPOSITION OF THE AGGRAVATED TERM VIOLATED MR. JOHNSON S SIXTH AMENDMENT RIGHTS UNDER *BLAKELY* 23

 VI. IN THE EVENT THE COURT FINDS THAT MR. JOHNSON HAS WAIVED HIS RIGHT TO CHALLENGE THE IMPOSITION OF THE AGGRAVATED TERM, HE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL 25

CONCLUSION 28

CERTIFICATE OF COUNSEL 28

TABLE OF AUTHORITIES

CASES:

| | |
|--|-----------------|
| <i>Blakely v. Washington</i> (2004) 124 S.Ct. 2531 | 23-25 |
| <i>Chapman v. California</i> (1967) 386 U.S. 18 | 17, 25 |
| <i>Goldberg v. Kelly</i> (1970) 397 U.S. 254 | 15 |
| <i>McKinney v. Rees</i> (9 th Cir. 1993) 993 F.2d 1378 | 17 |
| <i>Neder v. United States</i> (1999) 527 U.S. 1 | 25 |
| <i>People v. Black</i> review granted July 28, 2004, S126182 | 24 |
| <i>People v. Butler</i> review granted December 14, 2004, S129000 | 24 |
| <i>People v. Buttram</i> (2003) 30 Cal.4th 773 | 7 |
| <i>People v. Cash</i> (2002) 28 Cal.4th 703 | 27 |
| <i>People v. Coddington</i> (2000) 23 Cal.4th 529 | 26 |
| <i>People v. Coleman</i> (1975) 13 Cal.3d 867 | 15, 16 |
| <i>People v. Cruz</i> (1988) 44 Cal.3d 1247 | 2, 9-11, 13, 15 |
| <i>People v. Gonzalez</i> (2003) 31 Cal.4th 745 | 21 |

| | |
|--|----------------|
| <i>People v. Jensen</i> | |
| (1992) 4 Cal.App.4th 978 | 11, 12 |
| <i>People v. Ledesma</i> | |
| (1987) 43 Cal.3d 171 | 26 |
| <i>People v. Legault</i> | |
| (2002) 95 Cal.App.4th 178 | 12 |
| <i>People v. Masloski</i> | |
| (2001) 25 Cal.4th 1212 | 11 |
| <i>People v. Picado</i> | |
| review granted January 19, 2005, S129826 | 24 |
| <i>People v. Pierce</i> | |
| (1995) 40 Cal.App.4th 1317 | 19 |
| <i>People v. Pope</i> | |
| (1979) 23 Cal.3d 412 | 26 |
| <i>People v. Scott</i> | |
| (1994) 9 Cal.4th 331 | 16, 19, 20, 22 |
| <i>People v. Slaughter</i> | |
| (1984) 35 Cal.3d 629 | 15 |
| <i>People v. Towne</i> | |
| review granted July 14, 2004, S125677 | 24 |
| <i>People v. Zuniga</i> | |
| (1996) 46 Cal.App.4th 81 | 21, 22 |
| <i>Strickland v. Washington</i> | |
| (1984) 466 U.S. 668 | 26, 27 |
| <i>United States v. Booker</i> | |
| (2005) 125 S.Ct. 738 | 25 |
| <i>Whitman v. Superior Court</i> | |
| (1991) 54 Cal.3d 1063 | 14 |

STATUTES, RULES & CONSTITUTION:

| | |
|--|---------------|
| California Constitution, Article I, § 15 | 26 |
| California Rules of Court, rule 4.410 | 24 |
| California Rules of Court, rule 4.420 | 19, 20 |
| California Rules of Court, rule 4.421 | 20 |
| California Rules of Court, rule 30(b)(4)(B) | 1, 3, 7 |
| Health and Safety Code § 11352(a) | 2 |
| Health and Safety Code § 11357(b) | 2 |
| Health and Safety Code § 11359 | 1, 18 |
| Penal Code § 18 | 18 |
| Penal Code § 866 | 14 |
| Penal Code § 872(b) | 14 |
| Penal Code § 1170(b) | 9, 18, 19, 24 |
| Penal Code § 1192.5 | 9-11 |
| Penal Code § 1203.72 | 16 |
| Penal Code § 1237.5 | 2, 7 |
| Penal Code § 12022.1 | 1 |
| United States Constitution, Fourteenth Amendment | 15 |
| United States Constitution, Sixth Amendment | 9, 24, 26 |

STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment including sentencing of the defendant, and is appealed pursuant to California Rules of Court, rule 30(b)(4)(B), as set forth in the Notice of Appeal filed on October 22, 2004.

STATEMENT OF THE CASE

On June 29, 2004, the District Attorney filed a Complaint in Alameda County Superior Court Case No. 500270 (ultimately No. 148138), alleging that appellant Tari C. Johnson had violated Health and Safety Code section 11359 by possessing marijuana for sale on June 28, 2004, and further alleging that the offense had occurred while Mr. Johnson was released on bail on his own recognizance in another matter, Case No. 497852, in violation of Penal Code section 12022.1. ((Clerk s Transcript On Appeal (CT) 1¹.)

Pursuant to a plea bargain, Mr. Johnson pled no contest to the possession for sale charge in Case No.

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

500270/148138 on August 17, 2004, with the understanding that he would receive 5 years probation and do no jail time. (CT 2-9, 28.) The plea was subject to a so-called *Cruz* waiver, pursuant to *People v. Cruz* (1988) 44 Cal.3d 1247, 1254 n. 5. (CT 3, 5, 7-8.) The court dismissed Case No. 497852. (CT 9.)

Prior to sentencing, Mr. Johnson was arrested and, following a preliminary hearing, held to answer in another matter, Case No. 148355, for alleged violations of Health and Safety Code sections 11352, subdivision (a), and 11357, subdivision (b). (CT 17; Reporter's Transcript of Proceedings (RT) 35.)

On October 15, 2004, after reviewing the transcript of the September 21, 2004 preliminary hearing in the other matter, the trial court in the instant case found that Mr. Johnson had violated the *Cruz* waiver. (CT 17-18.) The court sentenced him to the aggravated term of three years in state prison, with credit for time served of 134 days, and dismissed the other matter. (CT 15, 18-19.)

Mr. Johnson timely appealed pursuant to section

1237.5 and California Rules of Court, rule 30(b)(4)(B).
(CT 21, 25.)

STATEMENT OF FACTS

According to the probation officer's report, Berkeley police officers were conducting undercover narcotics surveillance in the 1500 block of Prince Street at around 9:40 on the evening of June 28, 2004. (CT 29.) The officers observed Mr. Johnson break away from a group of five adult males in front of a house, walk to the end of the driveway and retrieve a small object from a paper bag. An officer arrested Mr. Johnson after he returned to the group and handed the object to one of the other members. (CT 29.) The paper bag contained 16 cellophane bags of suspected marijuana. (CT 29.)

Mr. Johnson was searched following his arrest, and had a total of \$380 on him at the time. (CT 29.) While acknowledging wrongdoing and that he had made mistakes, Mr. Johnson told the probation officer that he had been set-up by the police. (CT 30, 32.)

According to the Reporter's Transcript of the

Preliminary Hearing in Case No. 148355 [Docket No. 501904B], Berkeley Police Officer Daniel Montgomery was conducting surveillance around Russell and California Streets in Berkeley on the afternoon of August 20, 2004. (RT 2-3.)

After one to two hours, (RT 13), at approximately 3:25 in the afternoon, the officer observed a man later identified as Mr. Henderson enter the area from the south, accompanied by a Mr. Golson. (RT 4, 14-15, 23.) The officer did not know Mr. Henderson, but he knew Mr. Golson from several prior contacts in the area, and possibly from a prior arrest. (RT 4, 15-16.)

Although he had been using binoculars during the surveillance, Officer Montgomery observed the following exchange with his unaided eyes, from an undisclosed location. (RT 16-20.) While Mr. Golson waited nearby, Mr. Henderson approached Mr. Johnson, who had just walked into the area from an unknown direction along with another man, Chiga Ngumezi. (RT 4, 13-15.) Mr. Henderson handed Mr. Johnson some paper money. (RT 4,

24-25.)² Mr. Johnson received the money with his right hand and, with his left hand, gave Mr. Henderson a wrapped piece of suspected cocaine base, which Mr. Henderson put in his mouth. (RT 4-5.)

Mr. Henderson immediately left the area, moving south. (RT 26-27.) While the officer was observing Mr. Henderson leave, he lost sight of Mr. Johnson, who left in another, unknown direction. (RT 26-27.) Officer Montgomery did not mention this in his police report. (RT 29.)

Approximately ten to fifteen minutes later, after he had located Mr. Johnson walking southbound from Oregon and California Streets toward Russell Street, Officer Montgomery used a walkie-talkie to alert officers to arrest the buyer, Mr. Johnson and Mr. Ngumezi, who was accompanying Mr. Johnson. (RT 21-23, 26-28, 31.)

Two officers stopped Mr. Henderson and recovered a piece of suspected cocaine base from his mouth. (RT 6.)

² The court sustained an objection as to the amount of money exchanged after it was determined that the officer had no personal knowledge of the denomination. (RT 25.)

One of them, Officer Chu, advised Officer Montgomery of the recovery, and weighed, tested and booked the suspected cocaine base into evidence. (RT 7-10.)

Officer Montgomery also observed two other officers stopping Mr. Johnson and placing him in custody. (RT 10-11.) One of them, Officer Kaplan, advised Officer Montgomery that he had smelled marijuana on Mr. Johnson, who reached into his pants and gave the officer a bag of suspected marijuana. (RT 10-11.) Officer Kaplan advised Officer Montgomery that he had weighed, tested and booked the suspected marijuana into evidence. (RT 11-13.) No rock cocaine was found on Mr. Johnson. (RT 31.)

The surveillance ended shortly after Mr. Johnson's arrest. (RT 30-31.)

Defense counsel stipulated for purposes of the Preliminary Examination only that exhibits identified by Officer Montgomery as the suspected cocaine base and marijuana had been tested and determined to be the suspected substances. (RT 33-34.)

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

At the August 17, 2004 hearing on the plea bargain, the Deputy District Attorney indicated that the plea was subject to a *Cruz* waiver. (CT 5.) A plea agreement form signed by Mr. Johnson that day indicated that the promised sentence could be withdrawn if he failed to report to the Probation Department, failed to appear for sentencing, or commit[ted] a new crime between now and the sentencing date. (CT 3.) The form also indicated that, even if he received a different sentence, he would have no right to withdraw his plea. (CT 3.)³

The trial court stated during the hearing that the agreement was dependent upon Mr. Johnson reporting to Probation, attending the sentencing, and stay[ing] out of trouble between now and when you re sentenced. (CT

³ The form further indicated that, as in any other guilty plea, (Penal Code § 1237.5), Mr. Johnson was giving up the right to appeal. (CT 3.) In this case, however, Mr. Johnson is not challenging the validity of the plea itself, and is simply raising issues regarding proceedings held subsequent to the plea for the purpose of determining ... the penalty to be imposed. *People v. Buttram* (2003) 30 Cal.4th 773, 784; California Rules of Court, rule 30(b)(4)(B); CT 21.)

7-8.) If he failed to comply, the court indicated he could be sentenced to up to three years in state prison. (CT 7-8.)

Mr. Johnson did meet with the Probation Department, and the officer recommended probation, identifying one circumstance in aggravation that Mr. Johnson was on probation at the time of the offense and two mitigating circumstances that Mr. Johnson had an insignificant record of criminal conduct, and that he had voluntarily acknowledged wrongdoing at an early stage. (CT 32.)

Mr. Johnson also attended his sentencing on October 15, 2004, where he learned for the first time that the court was finding him in violation of that Cruz waiver, based upon the new arrest and the finding of the Magistrate at the preliminary hearing in the other matter, Case No. 148355. (CT 17.)

Defense counsel promptly objected that Mr. Johnson was entitled to a hearing where a preponderance of the evidence standard would apply, noting that the burden was only probable cause at the preliminary hearing. (CT 17-18.) The court rejected that argument, and without

any statement of facts or reasons, sentenced Mr. Johnson to the aggravated term of three years in state prison.

(CT 18.)

This court should reverse the sentence against Mr. Johnson, because the trial court's finding that he had violated the Cruz waiver based on a preliminary hearing was in violation of his due process rights, amounting to punishment by peremptory judicial fiat. *People v. Cruz* (1988) 44 Cal.3d 1247, 1253.)

Even assuming the trial court could properly find Mr. Johnson in violation and ignore the plea agreement, there was no basis for imposing the aggravated term, and the sentence violated section 1170, subdivision (b), and the Sixth Amendment.

II. ALTHOUGH CALIFORNIA COURTS HAVE APPROVED OF CRUZ WAIVERS AS A LEGITIMATE PART OF THE PLEA BARGAINING PROCESS, THERE IS NO AUTHORITY FOR THE PROCEDURE FOLLOWED BY THE TRIAL COURT IN DETERMINATION THAT MR. JOHNSON VIOLATED THE WAIVER

Plea bargaining is an accepted practice in our criminal justice system, specifically endorsed by the California Legislature in Penal Code section 1192.5.

(*People v. Cruz* (1988) 44 Cal.3d 1247, 1249.) Under the statutory scheme, a defendant cannot be sentenced on the plea to a punishment more severe than that specified in the plea, but the court must inform the defendant that it may withdraw its approval of the plea at sentencing, in which case:

the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.

(§ 1192.5.)

After entering a plea, the defendant in *Cruz* failed to appear at sentencing. When he was finally apprehended and brought before the court for sentencing, the trial court refused to abide by the plea, sentencing him to a more severe punishment. (*Cruz*, 44 Cal.3d at 1249.)

The Supreme Court held that, despite his failure to appear at sentencing, the defendant had a right to withdraw his plea under section 1192.5, (*Cruz*, 44 Cal.3d at 1253.) The Court noted, however, that a fully-advised defendant could expressly waive his or her rights under section 1192.5, such that if the defendant willfully fails to appear for sentencing the trial court

may withdraw its approval of the defendant's plea and impose a sentence in excess of the bargained-for term. (*Cruz*, 44 Cal.3d at 1254 n.5.)

Appellate courts have approved the use of so-called *Cruz* waivers as long as the maximum additional punishment for non-appearance was specified at the time of the plea and so constituted a part of the plea.

(*People v. Masloski* (2001) 25 Cal.4th 1212, 1222-24.)

If the additional term imposed by the trial court is within the maximum sentence specified in the plea the defendant has no right to withdraw the plea, and the trial court's failure to advise the defendant of the right to withdraw, as required by section 1192.5, is therefore of no consequence. (*Masloski*, 25 Cal.4th at 1223-24.)

On the other hand, if the trial court simply announced a penalty for failure to return which materially altered the plea bargain, the appellate courts have held that imposition of the higher sentence violated the defendant's due process rights. (*Masloski*, 25 Cal.4th at 1221; *People v. Jensen* (1992) 4

Cal.App.4th 978, 980-81, 984.)

In the typical case, there is no dispute as to whether the defendant has violated a *Cruz* waiver he or she simply failed to appear at sentencing. Although some trial courts have expanded the scope of the *Cruz* waiver to include conduct other than the failure to appear at sentencing, there is apparently no authority regarding the procedure to be followed to establish a violation for such other conduct.⁴

In this case, although Mr. Johnson appeared at his sentencing, the trial court based its finding of violation on allegations regarding other conduct that was forbidden in the *Cruz* waiver. (CT 3, 7, 17-18.) As explained in Section III, this procedure violated Mr. Johnson's right to due process.

⁴ The defendant in *People v. Legault* (2002) 95 Cal.App.4th 178, 180, for example, admitted he had violated the *Cruz* waiver by possessing drug paraphernalia, and while the *Cruz* waiver in *Jensen*, 4 Cal.App.4th at 980-81, encompassed other conduct, the only violation claimed was the defendant's failure to appear at sentencing.

III. THE TRIAL COURT VIOLATED MR. JOHNSON'S DUE PROCESS RIGHTS BY FINDING A CRUZ WAIVER VIOLATION BASED SOLELY ON THE RESULTS OF A PRELIMINARY HEARING

Ironically, the trial court's decision to find Mr. Johnson had violated the *Cruz* waiver because a magistrate had held him to answer in another case is contrary to the rationale followed by the California Supreme Court in arriving at its initial decision in *People v. Cruz* (1988) 44 Cal.3d 1247.

In condemning the peremptory imposition of additional punishment for a defendant's failure to appear for sentencing, the Supreme Court noted:

The imposition of an additional or enhanced sentence for a separately chargeable offense without the benefit of trial on that charge, and in the absence of a knowing and intelligent waiver, is clearly offensive to the principles of due process.... [A] defendant who ... fails to appear without justification is subject to punishment upon conviction of the separate offense of a willful failure to appear ..., not by peremptory judicial fiat.

(*Cruz*, 44 Cal.3d at 1253.)

This is not a typical *Cruz* case in which there is no doubt that the defendant has violated the waiver by failing to appear at sentencing. While Mr. Johnson

might be subject to punishment due to the charges in Case No. 148355, he has not been convicted of any separate offense, nor has he admitted committing any such offense.

There has been no trial. There was no notice that the preliminary hearing in a separate case could be used to establish a violation of his *Cruz* waiver in this one, and there was no reason for Mr. Johnson to believe that the preliminary hearing in Case No. 148355 would serve the function of a sentencing hearing in this case.

The sole purpose of a preliminary hearing is to establish whether there exists probable cause to believe that the defendant has committed a felony. (Penal Code § 866, subd.(b).) Under section 872, subdivision (b), probable cause may be established by hearsay evidence from a police officer, (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063), and there are strict limits on the type of evidence a defendant can produce. (§ 866, subd. (a).)

Unlike a jury adjudicating a defendant's guilt, the magistrate conducting a preliminary hearing:

does not decide whether defendant committed the crime, but only whether there is some

rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.

(*People v. Slaughter* (1984) 35 Cal.3d 629, 637 (emphasis added).)

Based on a decision that had simply determined there was a possibility that Mr. Johnson had committed a separate offense, the trial court here refused to honor the agreed-upon sentence of probation and, over defense counsel's objection, sentenced Mr. Johnson to state prison. (CT 17-18.) This extraordinary additional punishment was imposed without the benefit of trial ... by peremptory judicial fiat, and in violation of Mr. Johnson's right to due process under the Fourteenth Amendment. (*Cruz*, 44 Cal.3d at 1253.)

A fundamental requisite of due process is the meaningful opportunity to be heard and to explain one's actions.

(*People v. Coleman* (1975) 13 Cal.3d 867, 873, citing *Goldberg v. Kelly* (1970) 397 U.S. 254, 267-68.)

As *Coleman* explained in the context of a probation revocation hearing:

A probationer, moreover, is not limited to denying or defending against a charged violation of the conditions of his probation. Even where a violation is proven or admitted,

a probationer has a due process right to explain any mitigating circumstances and argue that the ends of justice do not warrant revocation.

(*Coleman*, 13 Cal.3d at 873.)

Defendants typically enjoy similar rights at a sentencing hearing, where they are supposed to have ample opportunity to influence the court's sentencing choices. (*People v. Scott* (1994) 9 Cal.4th 331, 350.) After receiving the required probation report, which sets out what sentence is likely to be imposed and the reasons therefor, (*Scott*, 9 Cal.4th at 350; § 1203.72), the defendant can file a statement challenging the information in the report and, at the sentencing hearing itself, can present [r]elevant argument and evidence. (*Scott*, 9 Cal.4th at 350; § 1204.)

In effect, the trial court here denied Mr. Johnson his right to a sentencing hearing. The probation report made no mention of a possible *Cruz* violation, and recommended probation as agreed upon in the plea. (CT 32.) There was certainly no opportunity to present mitigating evidence at the preliminary hearing in Case No. 148355, and no reason for Mr. Johnson to believe he

should attempt to do so. At the sentencing hearing itself, the trial court simply stated its intention to find Mr. Johnson in violation based on the preliminary hearing and, after listening to defense counsel's objection to that procedure, immediately pronounced sentence. (CT 17-18.)

Unlike the typical case involving a *Cruz* waiver, where there is no doubt that the defendant failed to appear at sentencing, in this case the trial court found a violation where there was only a possibility that Mr. Johnson had violated the waiver. Under the circumstances, the trial court's refusal to honor the plea agreement violated Mr. Johnson's right to due process. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.)

This constitutional error was not harmless beyond a reasonable doubt under the standard set out in *Chapman v. California* (1967) 386 U.S. 18, 24. At this point, it is impossible to say what evidence would be introduced in Mr. Johnson's defense at an actual trial regarding the charges in Case No. 148355, or whether the

prosecution would be able to establish Mr. Johnson's guilt in that matter even in the absence of defense evidence. Assuming the prosecution could establish that Mr. Johnson had committed the other offense, he would still be allowed to present evidence and argument in mitigation at a sentencing hearing in this case, which the procedure followed by the trial court precluded.

IV. THE TRIAL COURT FURTHER VIOLATED MR. JOHNSON'S DUE PROCESS RIGHTS BY SENTENCING HIM TO THE AGGRAVATED TERM

Even if the trial court could properly find Mr. Johnson had violated the *Cruz* waiver, it erred in sentencing Mr. Johnson to the aggravated term of three years. The trial court failed to provide any facts or reasons in support of imposing the upper term, and there was no basis for imposition of that term. (CT 17-18.)

In this case, Mr. Johnson pled guilty to violating Health and Safety Code section 11359, which is punishable by imprisonment for 16 months, two years, or three years. (§ 18.) Section 1170, subdivision (b) requires the sentencing court to order imposition of

the middle term, unless there are circumstances in aggravation or mitigation of the crime. California Rules of Court, rule 4.420(a), similarly mandates imposition of the middle term unless otherwise justified.

If the court elects to impose a term other than the middle term, both the statute and the rule require the court to set forth on the record the facts and reasons for the departure. (§ 1170, subd. (b); Rule 4.420(e).) It has been observed that, The most fundamental duty of a sentencing court is to state reasons justifying the sentencing choices it makes. (*People v. Pierce* (1995) 40 Cal.App.4th 1317, 1321.)

In this case, the trial court failed to set forth any fact or reason for imposing the aggravated term of three years, in clear violation of section 1170, subdivision (b) and Rule 4.420. (CT 17-18.)

When there is a reasonable probability of a more favorable sentence in the absence of error, the court under such circumstances should remand for resentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 355.) In this

case, there is a reasonable probability of a more favorable sentence, because the probation report had identified only one aggravating factor and two mitigating factors, even though by the time it was prepared Mr. Johnson had been arrested on the separate charge. (CT 29, 32.) Imposition of the upper term must be based on evidence introduced at the sentencing hearing, (Rule 4.420(c)), and there was no evidence of any other aggravating factors, as set forth in Rule 4.421.

The prosecution may contend that Mr. Johnson waived any objections to sentencing by failure to object at the time. (*Scott*, 9 Cal.4th at 353.) But as the Supreme Court indicated in *Scott*:

[T]here must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today's decision. This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices.

(*Scott*, 9 Cal.4th at 356.)

Courts following *Scott* have determined that due

process does not require the trial court to provide some type of tentative decision prior to the sentencing hearing itself. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752-55; *People v. Zuniga* (1996) 46 Cal.App.4th 81, 84.)

The parties are given an adequate opportunity to seek such clarifications or changes if, at *any time* during the sentencing hearing, the trial court describes the sentence it intends to impose and the reasons for the sentence, and the court thereafter considers the objections of the parties before the actual sentencing. The court need not expressly describe its proposed sentence as tentative so long as it demonstrates a willingness to consider such objections.

(*Gonzalez*, 31 Cal.4th at 752 (emphasis in original).)

While *Gonzalez* stated that the appropriate procedure would be for the trial court to announce a proposed sentence and its reasons for the sentence, and then offer the defendant an opportunity to state objections, the Court found no violation of due process in that case because the defendants had in fact objected, and the court had considered those objections. (*Gonzalez*, 31 Cal.4th at 755.)

In this case, Mr. Johnson was denied a meaningful

opportunity to object to the sentence, which is the fundamental requisite of due process. *Zuniga*, 46 Cal.App.4th at 558.) The court only allowed objections to its initial statement that it intended to find Mr. Johnson in violation of the *Cruz* waiver. Once the court imposed the aggravated term without providing any reason for that sentence it did not give Mr. Johnson or his counsel any opportunity for further objection. (CT 17-18.)

In addition, and contrary to most cases, (*Scott*, 9 Cal.4th at 350; *Zuniga*, 46 Cal.App.4th at 559), the probation report in this case had provided no advance indication of the likely sentence or the reasons for that sentence, further interfering with Mr. Johnson's right to a meaningful opportunity to object.

Given the absence of any fact or reason for imposing the aggravated term, it is reasonably probable that Mr. Johnson would obtain a more favorable sentence if the trial court had not erred. (*People v. Watson* (1956) 46 Cal.2nd 818, 836.)

V. THE TRIAL COURT'S IMPOSITION OF THE AGGRAVATED TERM VIOLATED MR. JOHNSON'S SIXTH AMENDMENT RIGHTS UNDER *BLAKELY*

Imposition of the aggravated sentence not only violated Mr. Johnson's due process rights, but also his Sixth Amendment right to trial by jury under *Blakely v. Washington* (2004) 124 S.Ct. 2531, 2537-38. In *Blakely*, 124 S.Ct. at 2535-36 which also involved a plea bargain, the trial court had imposed a sentence beyond the standard range, and beyond the prosecution's recommendation.

The United States Supreme Court determined that the sentence was invalid because it was beyond 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*, 124 S.Ct. at 2537 (emphasis in original).) The relevant maximum sentence is the maximum [the judge] may impose *without* any additional findings and, since [t]he judge in this case could not have imposed the exceptional ... sentence solely on the basis of the facts admitted in the guilty plea, (*Blakely*, 124 S.Ct. at 2537), that sentence violated the

defendant's Sixth Amendment rights.

As in *Blakely*, the trial court here could not sentence Mr. Johnson to the aggravated term based on the facts brought out in the plea agreement. Although the probation report noted Mr. Johnson's probationary status as an aggravating factor, it also noted two circumstances in mitigation. (CT 32.) The only plausible reason for imposing the aggravated term was the separate charge in Case No. 148355, which Mr. Johnson has not admitted, and of which he has not been found guilty by a jury.

Since the trial court could only impose the aggravated term based on a finding of aggravating factors that has neither been admitted nor determined by a jury, (§ 1170, subd. (b); Rule 4.410), the maximum sentence that could be imposed on Mr. Johnson was two years. (*Blakely*, 124 S.Ct. at 2537.)⁵ The Supreme

⁵ As the court is well aware, the issue of *Blakely*'s applicability to California's sentencing law is currently pending before the California Supreme Court. (*People v. Picado*, review granted January 19, 2005, S129826 and *People v. Butler*, review granted December 14, 2004, S129000, action on both of which is deferred pending disposition of *People v. Black*, review granted July 28, 2004, S126182, and *People v. Towne*, review

Court's more recent decision in *United States v. Booker* (2005) 125 S.Ct. 738, 750-52, 755-56, which struck down a federal sentencing scheme that, like California's sentencing law, allowed judges to impose harsher sentences within a broad range established by statute, reinforces the conclusion that California law is governed by *Blakely*.

Applying once again the *Chapman* standard, (*Neder v. United States* (1999) 527 U.S. 1), the court cannot determine beyond a reasonable doubt that a jury would find Mr. Johnson guilty of the separate charge in Case No. 148355, because there has been no trial on those issues, and the only finding before the court is the magistrate's determination of a possibility that Mr. Johnson committed a crime.

VI. IN THE EVENT THE COURT FINDS THAT MR. JOHNSON HAS WAIVED HIS RIGHT TO CHALLENGE THE IMPOSITION OF THE AGGRAVATED TERM, HE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Although Mr. Johnson believes that he is entitled

granted July 14, 2004, S125677.

to challenge the imposition of the aggravated term on this appeal, if the court determines that he has waived that right he has been denied the effective assistance of counsel.

A criminal defendant has the right to reasonably effective assistance of counsel under both the Sixth Amendment and Article I, section 15 of the California Constitution. ((*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

While reviewing courts should avoid second-guessing counsel's informed choice among tactical alternatives, *People v. Pope* (1979) 23 Cal.3d 412, 424), an appellate court can determine that the defendant has been denied the effective assistance of counsel if there can be no satisfactory explanation for the counsel's action. *People v. Coddington* (2000) 23 Cal.4th 529, 652.)

In this case, there can be no tactical basis for trial counsel's failure to raise an objection to the trial court's imposition of the aggravated term and to

the trial court's failure to state any reasons for its sentence. While trial counsel did properly object to the court's decision to find Mr. Johnson in violation of his *Cruz* waiver, he did not object further once the court imposed the sentence. (CT 17-18.)

In the event that this court decides Mr. Johnson has waived his objections to the aggravated term, he has suffered prejudice due to the ineffective assistance of counsel in that he was erroneously sentenced to the aggravated term, and is entitled to relief on that basis. (*Strickland*, 466 U.S. at 693-94; *People v. Cash* (2002) 28 Cal.4th 703, 734.)

CONCLUSION

For all the above reasons, the court should vacate the sentence imposed upon Mr. Johnson and remand the case for further proceedings.

DATED: March 22, 2007

LAW OFFICE OF PAUL KLEVEN

by: _____
PAUL KLEVEN
Attorney for Appellant
Tari C. Johnson

In association with
First District Appellate Project

CERTIFICATE OF COUNSEL

I certify that this brief contains 4739 words, as calculated by my WordPerfect 11 word processing program.

PAUL KLEVEN