

CERTIFIED FOR PUBLICATION

NO CHANGE IN JUDGMENT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PEOPLE,

Plaintiff and Respondent,

v.

PETER ESQUIBEL,

Defendant and Appellant.

B165767

(Super. Ct. No. TA065805)

***ORDER MODIFYING OPINION
AND DENYING REHEARING***

THE COURT:

It is ordered that the opinion filed herein on September 28, 2006, be modified as follows.

In the “Procedural Background” section, second paragraph:

Strike:

“With respect to counts 2 through 4, the jury found in the commission of the offenses, appellant personally and intentionally discharged a firearm and that appellant personally used a firearm.”

Substitute:

“With respect to counts 2 through 5, the jury found in the commission of the offenses, appellant personally and intentionally discharged a firearm and that appellant personally used a firearm.”

In the “Procedural Background” section, third paragraph:

Strike:

“plus 20 years to life”

Substitute:

“plus 20 years”

Footnote Three:

Strike:

“The case was then remanded to this court for further consideration in light of *United States v. Booker* (2005) 543 U.S. 220 and *People v. Black* (2005) 35 Cal. 4th 1238, 1257-1261.”

Substitute:

“The case was then remanded to this court for further consideration in light of *People v. Black* (2005) 35 Cal. 4th 1238, 1257-1261.”

In the “Sentencing Errors – Sentence Enhancements” section:

Strike:

“Respondent concedes the sentencing error and upon resentencing the trial court is directed to delete the section 12022.7 enhancement to appellant’s sentence in the new abstract of judgment.”

Substitute:

“Respondent concedes the sentencing error and upon resentencing the trial court is directed to impose and stay the section 12022.7 enhancement to appellant’s sentence in the new abstract of judgment.”

In the “Sentencing Errors – Waiver or Forfeiture of Blakely Error” section:

Strike:

“Appellant argues that his Sixth Amendment right to a fair and impartial jury was violated by the trial court’s imposition of the upper term on both convictions because the terms were based on facts not determined to be true by a jury”

Substitute:

“Appellant argues that his Sixth Amendment right to a fair and impartial jury was violated by the trial court’s imposition of the upper term on count 4 because the term was based on facts not determined to be true by a jury.”

In the “Sentencing Errors – Imposition of the Upper Term” section:

Strike:

“Appellant argues that his Sixth Amendment right to a fair and impartial jury was violated by the trial court’s imposition of the upper term on both convictions because the terms were based on facts not determined to be true by a jury. Appellant contends the upper terms on count 4 must be vacated and the middle term imposed, because the aggravating factors used to justify the upper term in each instance were not found true beyond a reasonable doubt by the jury as required under *Apprendi v. New Jersey* (2000) 530 U.S. 466, as construed in *Blakely v. Washington* (2004) 542 U.S. 296.”

Substitute:

“Appellant argues that his Sixth Amendment right to a fair and impartial jury was violated by the trial court’s imposition of the upper term on count 4 because the term was based on facts not determined to be true by a jury. Appellant contends the upper term on count 4 must be vacated and the middle term imposed, because the aggravating factors used to justify the upper term were not found true beyond a reasonable doubt by the jury as required under *Apprendi v. New Jersey* (2000) 530 U.S. 466, as construed in *Blakely v. Washington* (2004) 542 U.S. 296.”

In the “Disposition” section:

Strike:

“The trial court is ordered to delete the section 12022.7 enhancement and prepare a new abstract of judgment. In all other respects, the judgment of the trial court is affirmed.”

Substitute:

“The trial court is ordered to impose and stay the section 12022.7 enhancement and prepare a new abstract of judgment. In all other respects, the judgment of the trial court is affirmed.”

Defendant and Appellant’s petition for rehearing is denied.

This modification effects no change in the judgment.

COOPER, P. J.

RUBIN, J.

FLIER, J.