IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

LAVERNE BROWN,

Appellant,

v. Case No. 5D16-1045

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 15, 2017

Appeal from the Circuit Court
for Orange County,
Mark S. Blechman, Judge.

James S. Purdy, Public Defender, and Matthew Funderburk, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kaylee D. Tatman, Assistant Attorney General, Daytona Beach, for Appellee.

EISNAUGLE, J.

Laverne Brown timely appeals from a final judgment and sentence of three years in prison after a jury found her guilty of petit theft, a third-degree felony due to her prior convictions. On appeal, Appellant argues, *inter alia*, that her state prison sentence violates the Sixth Amendment, as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466

(2000), and its progeny, because the jury did not find that she presents a danger to the public under section 775.082(10), Florida Statutes (2015). We find no error and affirm.

Appellant's sentencing scoresheet totaled 16.4 points. At sentencing, Appellant argued that she should not receive a prison sentence and instead requested a nonstate sentence of one year in county jail, followed by probation. The trial court rejected her request, orally finding that she presented a danger to the public, and sentenced her instead to three years' incarceration in state prison. Subsequently, Appellant filed a motion to correct sentencing error, arguing that the trial court erred by failing to make written findings that she presented a danger to the public. The trial court granted her motion, and provided the following written findings:

> 1. Appellant was convicted of two thefts prior to being convicted of theft and trespass in the instant case: (i) in 2014-CF-014390-A-O, Appellant was convicted of possession of antishoplifting or inventory control device countermeasure and petit theft of $100 or more on February 3, 2015, after she stole merchandise from Macy's; and (ii) in 2014-CF-016501-A-O, she was convicted of grand theft third-degree on March 11, 2015, after she stole merchandise from Walmart.
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> 2. She has a pattern of complaining about chest pains when confronted with the thefts, and using her father's illness and demise as an excuse for her criminal behavior.
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> 3. Appellant's convictions in February and March 2015 did not deter her from committing the crimes in the instant case.
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> 4. A probationary sentence would be a waste of resources because the trial court has no confidence that she will stop stealing.
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> 5. Based upon her actions, the trial court finds that Appellant will continue to steal, and is therefore a danger to the community.

Shortly thereafter, Appellant filed a second motion to correct sentencing error, this time arguing that her sentence is unconstitutional because it violates the Sixth Amendment. The trial court denied this motion.

Appellant raises one issue on appeal that merits discussion. She argues that her sentence violates the Sixth Amendment and *Apprendi* because the trial court enhanced her sentence above the statutory maximum based upon the trial court's conclusion that she presented a danger to the public. Section 775.082(10) provides:

> If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

The maximum sentence for an offender convicted of a third-degree felony, like Appellant, is five years in state prison. § 775.082(3)(e), Fla. Stat. (2015). Appellant essentially argues that the first sentence of subsection (10) creates a second, lower statutory maximum for qualifying offenders like her, and that the application of the second sentence by the trial court, in the absence of a jury finding that she is a "danger to the public," is an unconstitutional enhancement above that second statutory maximum.

This argument is without merit. Section 775.082(10), by its clear language, is not an upward departure statute, but rather, provides for mandatory *mitigation* based on two criteria. *See Porter v. State*, 110 So. 3d 962, 963 (Fla. 4th DCA 2013). Pursuant to the statute, an offender is entitled to mandatory mitigation when (1) he or she scores twenty-two points or fewer, unless (2) a nonstate prison sanction could present a danger to the

public. Contrary to Appellant's argument, the two sentences in subsection (10) cannot be read separately to create both a second statutory maximum and a separate enhancement. Rather, they operate together to create an entitlement to mandatory mitigation[1] for those offenders who satisfy both criteria.[2]

A review of the United States Supreme Court's opinions in *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004), helps to illustrate the error in Appellant's argument. In *Apprendi*, the United States Supreme Court held that "[o]ther 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." 530 U.S. at 490. Later, in *Blakely*, Justice Scalia, writing for the majority, explained that to identify the statutory maximum, we need simply look to the punishment authorized by the jury's verdict. 542 U.S. at 303 ("[T]he 'statutory maximum' for *Apprendi* purposes 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*." (citation omitted)). In other words, *Apprendi* is only implicated "[w]hen a judge inflicts *punishment that the jury's verdict alone does not allow*." *Id.* at 304 (emphasis added).

[1] The dissent describes the mandatory mitigation required by section 775.082(10) as a "newfound concept." If the Legislature indeed created an entirely new concept when it adopted section 775.082(10), it had every right to do so.

[2] The dissent proclaims that our decision "emphasizes the Legislature's right to create a 'newfound concept' yet ignores that same Legislature's right to restrict the number and type of individuals being sent to state prison." We cannot agree that upholding both sentences in section 775.082(10), as written by the Legislature, somehow ignores the Legislature's rights.

Apprendi is not implicated here for at least two reasons. First, Appellant's sentence was fully authorized by the jury's verdict and is therefore not above the statutory maximum. In fact, the jury's verdict authorized a sentence of five years in state prison — far more than the sentence Appellant received here. *See* § 775.082(3)(e), Fla. Stat. (2015). Thus, Appellant's three-year sentence is not an upward departure due to judicial fact-finding. Rather, the trial court simply determined that although Appellant met the first factor for mitigation, she did not meet the second.

The essence of Appellant's argument is that she was entitled to the benefit of mitigation based upon her satisfaction of half of the factors adopted by the Legislature. Appellant cannot have it both ways. If she wants the trial court to consider mitigation of her sentence, then she must qualify based on the entire formula — including that she does not present a danger to the public. Otherwise, she is entitled to sentencing pursuant to the statutory maximum of five years' imprisonment just like every other defendant convicted of a third-degree felony. In sum, Appellant's sentence is constitutional because it is well within the five-year maximum sentence authorized by the jury.

Given this reality, the dissent attempts to seize upon other language in *Blakely* to support its position. It is true, as the dissent notes, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303–04 (emphasis in original). However, the jury's verdict authorized the trial court to sentence Appellant to five years in state prison *before* the trial judge considered the additional findings contemplated by section 775.082(10). As Judge Osterhaus has aptly observed, the consideration of a scoresheet itself amounts to judicial fact-finding outside the purview

of the jury, and therefore cannot meet *Blakely*'s definition of a statutory maximum. *See Woods v. State*, 214 So. 3d 803, 816 (Fla. 1st DCA 2017) (Osterhaus, J., concurring in affirmance) ("*Apprendi* and *Blakely* instruct us not to redefine statutory maximums based upon facts found at sentencing, like the scoresheet score here."). Stated differently, the total sentence points reflected in the scoresheet cannot set the statutory maximum because the jury does not determine an offender's score and will rarely make all of the other scoresheet findings. Thus, the dissent's reliance on this language in *Blakely* is misplaced.

The dissent further misconceives *Blakely* insisting that "Justice Scalia rejected the precise argument the majority relies upon to justify affirmance in this case." Specifically, the dissent notes that in *Blakely* the government maintained the statutory maximum was ten years rather than the range of forty-nine to fifty-three months. Yet the distinction here is obvious. In *Blakely*, the defendant's plea authorized a maximum sentence of no more than fifty-three months. The ten-year maximum in that case, in contrast, served to limit any upward departure sentence imposed by the judge above the forty-nine to fifty-three months range. Unlike in *Blakely*, the jury's verdict in this case authorized a sentence well above the one imposed.

Second, we need only consider the way section 775.082(10) operates to confirm that it is a mitigation statute. Section 775.082(10) *never* increases an offender's sentence. Rather, when an offender qualifies, it reduces the sentence from a five-year maximum in state prison to a nonstate sanction. Notably, unlike in *Apprendi* and *Blakely*,[3]

[3] In *Apprendi*, the defendant pled to a second-degree felony punishable by up to ten years' imprisonment. At sentencing, the trial court enhanced the sentence to twelve years, based upon a separate "hate crime" statute after judicially finding that the

if the statute here were struck down as unconstitutional, then Appellant's sentence would stand because it is well within the maximum sentence authorized for the crime she committed. *See, e.g.*, *Woods v. State*, 214 So. 3d 803, 812 (Fla. 4th DCA 2017) (Makar, J., concurring in affirmance) (concluding that "[s]ubsection 775.082(10) is unconstitutional under *Apprendi* and *Blakely*, and the appropriate remedy is to allow for resentencing under the prior version of the sentencing statute."). To be sure, if the trial court unconstitutionally *enhanced* Appellant's sentence above the statutory maximum as Appellant argues, striking the offending statute down *should* result in a lower sentence for Appellant (as in both *Apprendi* and *Blakely*). Yet, here it does not. Thus, we can be certain that section 775.082(10) is a mitigation statute, and not one that unconstitutionally allows an increase in the statutory maximum based upon judicial fact-finding.[4]

Ironically, if section 775.082(10) were struck down, qualifying defendants convicted of third-degree felonies would lose the benefit of mandatorily mitigated sentences — all in the name of protecting their Sixth Amendment rights. But that would make no sense at all. The Sixth Amendment does not protect a defendant from a reduced sentence.

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defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." 530 U.S. at 468-71 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)). Likewise, in *Blakely*, the defendant pled to second-degree kidnapping with use of a firearm which carried a maximum penalty of fifty-three months. 542 U.S. at 299. At sentencing, however, the trial court imposed an "exceptional" sentence of ninety months, based on authorization from a separate statutory provision, after judicially determining that the defendant acted with "deliberate cruelty." *Id.* at 299-300.

[4] The dissent seems to suggest that this observation is a "red herring" because the statute could be applied in a way that requires the jury to find that an offender presents a danger to the public. However, the statute very clearly authorizes the judge to make this finding. We therefore decline the dissent's invitation to rewrite the statute.

AFFIRMED.

PALMER, J., concurs.
COHEN, C.J., dissents with opinion.

COHEN, C.J., dissenting.

The suggestion that Brown's argument is "without merit" would come as a shock to the late Justice Antonin Scalia, who authored Blakely v. Washington, 542 U.S. 296 (2004). The majority's effort to distinguish the facts of this case from those in Blakely is unavailing. The majority blindly seizes upon a concept it labels "mandatory mitigation," relying on Porter v. State, 110 So. 3d 962 (Fla. 4th DCA 2013). That is not a concept found in the constitutional jurisprudence of Apprendi, Ring, or Blakely.[5]

In Blakely, the defendant pleaded guilty to the kidnapping of his estranged wife. 542 U.S. at 298. The events leading to his conviction occurred in Washington State. Id. Blakely's charge constituted a "class B" felony under Washington law, which was punishable by up to 10 years in prison. Id. at 299. However, Washington's Sentencing Reform Act further limited the sentencing range for certain crimes. Id. Blakely's charge of second-degree kidnapping, for example, was subject to a sentencing "standard range" of 49 to 53 months. Id. The Act, similar to section 775.082(10), Florida Statutes (2015), allowed a trial court to impose a greater sentence if the court found "substantial and compelling reasons justifying an exceptional sentence." Id. (citing Wash. Rev. Code. Ann. § 9.94A.120(2)). The Act listed non-exclusive aggravating factors that justified a departure sentence. Id. (citing Wash. Rev. Code Ann. § 9.94A.390). Nonetheless, the justification for a departure sentence was required to be based on "factors other than those which are used in computing the standard range sentence for the offense." Id. (citing State v. Gore,

[5] See Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000).

21 P.3d 262, 277 (Wash. 2001)). This is precisely what section 775.082(10), Florida Statutes, attempts.

The trial court in Blakely imposed a 90-month sentence, outside the standard range set forth in the Act. Id. at 300. The court found that Blakely acted with "deliberate cruelty," one of the statutorily enumerated grounds for a departure sentence in domestic violence cases. Id. (citing Wash. Rev. Code Ann. § 9.94A.390(2)(h)(iii)). As does Brown, Blakely argued on appeal that the "sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." Id. at 301.

Notably, in Blakely, Justice Scalia rejected the precise argument the majority relies upon to justify affirmance in this case. The government argued that the statutory maximum was not the 53 months provided for in the Act but was, instead, the 10-year maximum sentence for class-B felonies. Justice Scalia wrote, apparently not clearly enough, that:

> [T]he "statutory maximum" for Apprendi purposes 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. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When 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.

Id. at 303–04 (citations omitted).

The majority's assertion that "Appellant's sentence was fully authorized by the jury's verdict" is simply untrue. Section 775.082(10) expressly prohibited a state prison

sentence in Brown's case unless and until there was an additional finding that she constituted a danger to the public. Thus, the question is: what facts did Brown's jury find to justify a sentence above that allowed pursuant to section 775.082(10)? The answer is none. The jury found that Brown stole merchandise from Walmart. No more, no less. Blakely did not admit nor did a jury determine that he acted with "deliberate cruelty." Brown did not admit nor did a jury determine that she constituted a "danger to the public."[6] Moreover, Brown's prior convictions were already factored into the sentencing scheme set forth in section 775.082(10), which provides the only sentence a court may impose without the necessity of an additional finding beyond that determined by the jury's verdict.

The majority simply rewrites the statute by stating "an offender is entitled to mandatory mitigation when (1) he or she scores twenty-two points or fewer, unless (2) a nonstate prison sanction could present a danger to the public." This literally turns the statute on its head. Section 775.082(10) requires the court to sentence a qualifying defendant to a non-state sanction unless the court makes an additional finding that the defendant is a danger to the public. The statute does not state that a defendant is subject to the provisions of section 775.082(3)(e) unless the court finds that he or she does not present a danger to the public. The majority effectively creates a presumption for a state prison sentence, unless the offender satisfies both prongs of its "mandatory mitigation" test. Nowhere in the statute are the words "mandatory mitigation" used, nor does the

[6] A jury in the context of Jimmy Ryce Act proceedings determines a variation of future dangerousness. See Westerheide v. State, 831 So. 2d 93, 98 (Fla. 2002) (explaining that defendants in Jimmy Ryce proceedings have the right to trial by jury, and "the Ryce Act requires a jury to find by clear and convincing evidence that the person is a violent sexual predator who has a mental abnormality that predisposes the person to commit sexually violent offenses and that the person is likely to reoffend if not confined in a secure facility").

statute put the burden of proof on the defendant to establish a lack of future dangerousness.[7]

The gravamen of Apprendi is the fundamental role of the jury within the criminal justice system, so cavalierly dismissed by the majority. As articulated by Justice Scalia:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. . . . Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Id. at 305-06 (citations omitted). The majority's reliance on the newfound concept it labels "mandatory mitigation" does not alter the constitutional framework set out in Apprendi and Blakely.

Equally unavailing is the argument that properly applying Blakely would subject Brown to a greater sentence than that imposed by the trial court. That argument is a classic red herring. As recognized in Blakely, the sentencing scheme itself is not unconstitutional. The only issue is how it can be implemented. The answer is straightforward: the "danger to the public" finding must be determined by the jury or be

[7] Ironically, the majority emphasizes the Legislature's right to create a "newfound concept" yet ignores that same Legislature's right to restrict the number and type of individuals being sent to state prison. The Legislature did not create this newfound concept—the court in Porter did. In my view, this Court errs in following a flawed analysis.

capable of determination from the jury's findings. The mechanics are not complicated; the bifurcation of trials is not a new concept to trial courts.[8]

I dissent.

[8] In fact, if Brown had not waived a jury finding as to her prior theft convictions, the trial would have been bifurcated in the first instance. See, e.g., Smith v. State, 771 So. 2d 1189, 1191 (Fla. 5th DCA 2000) ("[I]n seeking a conviction for felony petit theft, the state must specifically allege in the charging document the two or more prior petit theft convictions, the existence of which are not to be disclosed to the jury during the initial trial, and after conviction prove their existence beyond a reasonable doubt in a bifurcated proceeding before the same jury, unless a jury has been waived by the defendant.").