

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

APPELLANT PRO SE:

MARVIN DALE CASTOR
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

THOMAS D. PERKINS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MARVIN CASTOR,)

Appellant-Petitioner,)

vs.)

STATE OF INDIANA,)

Appellee-Respondent.)

No. 89A01-0609-PC-405

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Peter Haviza, Judge
Cause No. S286-1933-CR

November 7, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Marvin Castor appeals the post-conviction court's denial of his "Motion to Reconsider," which challenged the validity of his conviction for murder and the propriety of his sixty-year sentence. Appellant's App. p. 5-8. To the extent that we are able to discern Castor's arguments, he claims that the denial of the motion to reconsider violated his "rights to have due process and equal protections of laws, etc.," and maintains that his sentence must be reduced in accordance with the rule announced in Blakely v. Washington,¹ because he had "the right to have a jury approve [the aggravators]." Id. Concluding that Castor's motion to reconsider was properly denied, we affirm the judgment of the post-conviction relief court.

FACTS

The facts, as reported in Castor's initial direct appeal, are as follows:

In May 1986, Castor was an employee of the Sugar Creek Resort, located near Greenfield, Indiana. Sugar Creek Resort was affiliated with a business entity generally referred to as Collett Ventures. Castor was a salesman and "contract closer" for Sugar Creek Resort. Castor's brother, Gerald Castor, also was an employee of Sugar Creek Resort, working in the capacity of a collections manager. On May 5th, Castor, his brother Gerald, and one Mark Barmes reviewed documents which Gerald had obtained from Collett Ventures. The three concluded that such documents indicated that the employer was engaged in defrauding lending institutions and, after much discussion concerning the course of action to be taken with this damaging information, Castor determined that he would approach his employer in order to request \$250,000 in exchange for this information. Barmes, who was studying to become a paralegal, told Castor in substance that this plan was illegal in that it constituted blackmail. After being told that Castor was going to proceed with the plan, Barmes withdrew and participated no further.

On May 6th, Castor, in a meeting with Bill Collett, Jr., his superior at Collett Ventures, demanded payments of \$30,000 and \$250,000 in exchange for the alleged damaging information that he had garnered from the company's

¹ 542 U.S. 296 (2004).

records. After Castor left his office, Collett reported this extortion attempt to the Hancock County Sheriff's office which, in turn, reported it to the Federal Bureau of Investigation. The next day, May 7th, the FBI recorded telephone conversations between Castor and Collett Ventures during which Castor stated that he believed that Collett Ventures had sent "hit men" to his house and intended to injure him. Castor also stated that he was "armed to the teeth" and that these "hit men" would not intimidate him. Throughout those phone conversations, Collett Ventures, through two representatives, informed Castor that there were no "hit men" after him, but that his extortion attempt had been reported to the police. Additionally, during those phone conversations, Castor and Collett Ventures' representatives discussed amounts, methods and locations for payment of the money Castor demanded.

Castor presented evidence that after his meeting with Collett on May 6th, two men had been reported looking for him at his house and that he later determined that his house had been broken into and ransacked. It is undisputed that on the evening of May 6th Castor and his brother Gerald purchased a box of shotgun shells, a .357 Smith & Wesson handgun, and a .22 revolver. Early the next morning, on May 7th, Castor purchased ammunition for the .357 Smith & Wesson handgun and, after loading it, placed it in his briefcase which he kept next to him in the cab of his pickup truck. Throughout the day of May 7th, Castor and the two representatives of Collett Ventures continued to discuss, by telephone, the arrangements for the payment of money by Collett Ventures to Castor. They finally agreed to a time and place for the exchange of money and documents.

As agreed, at approximately noon on May 8th Castor, in his pickup truck, and Gerald, in his automobile, waited at an Amoco station on State Road 9 immediately north of Interstate 70 for Bill Collett, Jr., to pay the money demanded by Castor. While Castor was waiting at the station inside of his truck, Malcolm Grass, a Hancock County deputy sheriff, and other FBI law enforcement personnel arrived in several different cars to arrest Castor and his brother for extortion. None of the law enforcement personnel were in uniform and all arrived in unmarked automobiles. The automobile in which Malcolm Grass was riding, as a front seat passenger, was driven so that it was nose-to-nose with Castor's truck, thereby blocking Castor's escape route. Grass and the driver of his car pulled their weapons and exited their vehicles. Castor exited his truck with the .357 Smith & Wesson revolver in his hand. Grass and Castor faced each other from a distance of approximately five feet. The witnesses' accounts vary as to when and with what force the law enforcement officers announced that they were either police or FBI. One officer, driving another unmarked car several feet away, wore a hat with the letters FBI on it. According to all of the witnesses, this was the only visual identification that

any of the law enforcement personnel were, in fact, law enforcement personnel.

Almost immediately, as Grass and Castor faced each other, Castor fired at least two and possibly three bullets at Grass as Grass and Castor retreated behind their respective vehicles. Castor ultimately fired all five rounds of ammunition from his gun. Although Grass did not return Castor's fire, the FBI agents on the scene did. Castor ultimately surrendered and stated to the arresting FBI agents that he believed that they were "hit men." Ballistics and autopsy later determined that Grass died from one of Castor's ricochet bullets which struck him in the head. The State charged Castor with murder and asked for the death penalty because the victim of the murder was a law enforcement officer who was acting in the course of duty.

At trial, the State adduced evidence that the victim and others had announced themselves as law enforcement officers before Castor shot. Additionally, the State presented two witnesses who testified that, while they were incarcerated with Castor in jail, he admitted to them that he recognized Malcolm Grass as a law enforcement officer at the time of the shooting. Based on this evidence, the State contended that Castor knew that he was shooting at a law enforcement officer.

On the other hand, Castor defended his action at trial on the basis of a mistake of fact and self-defense. Castor contended that he believed that Collett Ventures was a "Mafia" organization and that, after his conversation with Bill Collett on May 6th, two hit men were flown to Greenfield in order to harm Castor and his family. Castor further contended that at the time of the shootout with the plainclothes police officers in unmarked cars, he thought that he was shooting at such hit men and, therefore, was acting in self-defense.

Castor v. State, 587 N.E.2d 1281, 1283-85 (Ind. 1992) (Castor I). Castor was convicted of murder, and the trial court entered an order determining that Castor should be executed. Id. at 1283.

On appeal, Castor challenged the propriety of the conviction, raising a number of evidentiary errors. Castor also claimed that he was improperly sentenced to death in violation of the United States and Indiana Constitutions. Our Supreme Court affirmed Castor's conviction but reversed the death sentence. Id.

On remand, the trial court determined that Castor was competent and conducted a new sentencing hearing. The trial court found three aggravating factors: (1) substantial risk that Castor will commit another crime of the same magnitude as murder; (2) Castor knew Grass was a law enforcement officer acting in the course of duty when he was murdered; and (3) Castor was in need of correctional and rehabilitative treatment that could best be provided by long-term commitment to a penal facility. The trial court found only one mitigating factor—no history of criminal activity. Concluding that the aggravating factors outweighed the single mitigating factor, the trial court sentenced Castor to a term of sixty years. Castor appealed the sentence and our Supreme Court affirmed, holding that “a sixty-year sentence for murdering a law enforcement officer . . . was not manifestly unreasonable.” Castor v. State, 754 N.E.2d 506, 509 (Ind. 2001) (Castor II).

On February 20, 2003, Castor filed a “motion for reduction of sentence,” claiming that his sentence was erroneous. Appellant’s App. p. 2. The trial court did not make a specific ruling until July 10, 2006, when it denied the motion. That same day, the trial court denied additional motions that Castor had filed, including a “Motion for Correction of Erroneous Sentence,” that had been filed on September 2, 2005, and a “Superseding Motion to Correct Errors” that Castor had filed on January 20, 2006. Id. at 2.

On August 11, 2006, Castor filed the Motion to Reconsider—the subject of this appeal—alleging that his sentence must be reduced under Blakely because there was “no jury involvement to hear aggravating grounds for sentence enhancement beyond 40 yr. Maximum.” Id. at 6. In that same motion, Castor claimed that his conviction must be set

aside because he had been denied due process of law and that he “believed that persons coming after him were Mafia and he was just defending himself, . . . and the [FBI] agent[s] . . . manufactured a cover up . . . and defrauded the jury.” Id. at 2. On August 15, 2006, the post-conviction court denied the motion to reconsider, and Castor now appeals.

DISCUSSION AND DECISION

While Castor is now contending that his conviction and sentence must be set aside, we note that the appropriate mechanism to present those challenges is through a petition for post-conviction relief. Moreover, a motion to correct a sentence is limited to errors that are apparent on the face of the judgment. Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). Indeed, “Indiana case law has long emphasized that the preferred procedure is by way of a petition for post-conviction relief.” Id.

In his appellate brief, Castor refers to alleged “fraud and foul play” and “exposure of serious felony crimes” on the part of the “legal system in Wayne County” in support of his arguments. Appellant’s App. p. 3-4. Obviously, such allegations extend far beyond both the face of the judgment and the record. Castor also requests that the propriety of his conviction must be reviewed again even though our Supreme Court addressed both issues in his initial appeal. Castor I, 587 N.E.2d at 1281. Moreover, even after Castor was resentenced, he directly appealed the new sentence. Castor II, 754 N.E.2d at 506.

Our Supreme Court has observed that if an issue was known and available but not raised on direct appeal, the issue is procedurally foreclosed. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). Moreover, if an issue was raised and decided on direct appeal, it is

res judicata. Id. The claims that Castor is now raising with regard to the validity of his conviction were either available to him and not raised, or they were raised and rejected. Hence, the post-conviction court properly denied Castor's request for relief on this basis.

We further note that with regard to Castor's sentencing claim, even if Castor had raised a Blakely claim in the proper fashion, his reliance on Blakely in support of his request for a reduced sentence is misplaced. Our Supreme Court recently explained the holding in Blakely as follows:

“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, 530 U.S. at 490, 120 S.Ct. 2348). However, the Court clarified that “the ‘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.” Id. at 303, 124 S.Ct. 2531. The Court further explained, “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.” Id. at 303-03, 124 S.Ct. 2531.

Anglemyer v. State, 868 N.E.2d 482, 486-87 (Ind. 2007). It has also been determined that the rule announced in Blakely is only applicable to cases that were not yet final when Blakely was decided. Smylie v. State, 823 N.E.2d 679, 690-91 (Ind. 2005).

In this case, it is apparent that Castor's sentence was final in 2001 upon completion of his direct appeal of the new sentence. Castor II, 754 N.E.2d at 509. Hence, Castor is not entitled to relief because his sentence had already become final before Blakely was decided in 2004. Smylie, 823 N.E.2d at 690-91; see also Gutermuth v. State, 868 N.E.2d 427, 434-35

(Ind. 2007) (holding that because a defendant's case is "final" when the time for filing a timely direct appeal has expired, Blakely does not apply retroactively in belated appeals).

In essence, even if Castor had presented his claim in the proper manner, i.e., by way of a petition for post-conviction relief, his claim would be barred because his sentence had already become final prior to the decision in Blakely. For these reasons, we conclude that motion to reconsider was properly denied.

The judgment of the post-conviction court is affirmed.

MAY, J., and CRONE, J., concur.