NO. COA05-850-2

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2007

STATE OF NORTH CAROLINA

v. Buncombe County
No. 01 CRS 7899

LARRY ANTHONY FINNEY

Upon remand from the North Carolina Supreme Court, appeal by defendant from judgment entered 27 July 2001 by Judge Richard L. Doughton in Buncombe County Superior Court.

Roy Cooper, Attorney General, by John P. Scherer II, Assistant Attorney General, for the State.

David G. Belser and Joel B. Stevenson for defendant-appellant.

MARTIN, Chief Judge.

This case comes before us on remand from the North Carolina Supreme Court in order that we may reexamine the issue of sentencing in light of its recent decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, ___ S. Ct. ____, ___ L. Ed. 2d ____ (2007), and *State v. Hurt*, ___ N.C. ___, ___ S.E.2d ___ (2007). Defendant's only argument on appeal is that the trial court erred in increasing defendant's punishment beyond the statutory maximum based upon the court's finding of an aggravating factor that was not submitted to a jury and found beyond a

reasonable doubt. We now reconsider whether the court committed reversible error in light of *Blackwell* and *Hurt*.

Defendant pled guilty to second-degree rape on 28 June 2001. After a sentencing hearing held 23 July 2001, he was sentenced to an aggravated prison term of 92 to 120 months, upon a finding by the trial court that he "took advantage of a position of trust or confidence to commit the offense." The court made this finding without submitting the factor to a jury, based upon defendant's counsel's statement "my client is related to this girl through marriage. . . . She was indeed staying in my client's house over a four-day period." Defendant's statement was supported by his wife's testimony:

> [Witness: Defendant] is [the victim's] step-uncle.
>
> [Counsel:] She was staying with you in your home, along with [defendant], last December?
>
> [Witness:] Right.

Defendant also stipulated to the factual basis for the charge and allowed the district attorney to summarize the facts. Without objection, the district attorney stated that the victim was staying with defendant, her uncle, for four days while her parents were on a cruise.

On 24 June 2004, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), which prohibited courts from imposing a sentence above the

statutory maximum, as determined "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303, 159 L. Ed. 2d at 413. This Court granted defendant a belated appeal by writ of certiorari on 28 March 2005 and issued an opinion remanding the case for a new sentencing hearing. *State v. Finney*, 175 N.C. App. 795, 625 S.E.2d 202 (unpublished, No. COA05-850, 7 February 2006). The North Carolina Supreme Court allowed a petition for discretionary review and remanded the case to this Court for reconsideration.

Defendant argues that the trial court erred under *Blakely* because it failed to submit the aggravating factor to a jury to be found beyond a reasonable doubt. The State contends that the court did not err under *Blakely* because defendant admitted or stipulated to the facts necessary to find the aggravating factor. The State further argues that even if the court did err under *Blakely*, the error was harmless.

The first question presented by defendant's appeal is whether the trial court erred under *Blakely*. The United States Supreme Court in *Apprendi v. New Jersey* stated 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. 466, 490, 147 L. Ed. 2d 435, 455 (2000). This holding was clarified in *Blakely*, where the Court wrote "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." *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413. With regard to a defendant's admission, the North Carolina Supreme Court further held that "a judge may not find an aggravating factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable." *Hurt*, ___ N.C. at ___, ___ S.E.2d at ___. This language suggests that when defense counsel admits the necessary facts for the aggravating factor, such a finding is not *Blakely* error. However, even though *Hurt* suggests that defendant's admission in the present case may be sufficient to comply with the requirements of *Blakely*, it does not address an underlying issue raised in the briefs for this case, which is whether defendant's stipulation to the factual basis of his plea could serve as a waiver of jury trial under the circumstances of the case. A criminal defendant's waiver of the constitutional right to a jury trial "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 756 (1970). In the present case, defendant did not know his rights under *Blakely* at the time he made the admission because *Blakely* had not yet been decided. With respect to this issue, this Court held:

> Since neither *Blakely* nor *Allen* had been decided at the time of defendant's sentencing hearing, defendant was not aware of his right to have a jury determine the existence of the aggravating factor. Therefore, defendant's stipulation to the factual basis for his plea was not a "knowing [and] intelligent act[] done with sufficient awareness of the relevant

> circumstances and likely consequences." We hold that defendant did not knowingly and effectively stipulate to the aggravating factor, nor waive his right to a jury trial on the issue of the aggravating factor.

State v. Meynardie, 172 N.C. App. 127, 131, 616 S.E.2d 21, 24 (2005) (citation omitted) (alterations in original), *disc. review allowed*, 361 N.C. 176, 640 S.E.2d 391 (2006). This holding suggests, as noted in our earlier opinion in this case, that defendant's admission in this case would not satisfy the requirements of *Blakely*. Importantly, however, the North Carolina Supreme Court granted a petition to review *Meynardie* on this point of law and has not yet issued an opinion in the case.

Without resolution of the issue in *Meynardie*, it is impossible to determine whether *Blakely* error occurred in the case; nevertheless, we reach the conclusion that the sentence must be upheld under either possible outcome. If the trial court's action was not *Blakely* error, then the court did not err, and we uphold the aggravated sentence. If, to the contrary, the trial court's action was *Blakely* error, then we apply the *Neder* test for harmless error. *See Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458. "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)).

The evidence in this case, as articulated by the district attorney, the defendant's attorney, and the defendant's wife, was that defendant was the victim's uncle by marriage and that the victim was staying with defendant for a period of four days when the incident occurred. Furthermore, these facts were uncontroverted, and any rational fact-finder would have found them beyond a reasonable doubt. Accordingly, any error that may have occurred is harmless.

No error.

Judges BRYANT and GEER concur.

Report per Rule 30(e).