IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 9, 2004

STATE OF TENNESSEE v. GREGORY L. LOFTON

Appeal from the Criminal Court for Davidson County
No. 98-A-473 Steve Dozier, Judge

No. M2003-01102-CCA-R3-CD - Filed January 13, 2005

OPINION ON PETITION TO REHEAR

In July of 1999, the appellant, Gregory Lofton, was convicted by a jury of two counts of aggravated sexual battery and two counts of sexual battery, for which he received an effective twelve (12) year sentence. The trial court sentenced the appellant to ten (10) years on each count of aggravated sexual battery and one (1) year on each count of sexual battery. The trial court ordered the appellant to serve the two ten-year sentences concurrently and ordered the two one-year sentences to be served consecutive to each other and consecutive to the concurrent ten-year sentences, for an effective sentence of twelve (12) years. On September 7, 2004, this Court entered an opinion affirming the appellant's conviction and sentence. See State v. Gregory L. Lofton, No. M2003–01102-CCA-R3-CD, 2004 WL 2002435 (Tenn. Crim. App. at Nashville, Sept. 7, 2004). In that delayed appeal, the appellant challenged the trial court's failure to instruct the jury on the lesser-included offense of assault and the trial court's improper use of enhancement and mitigating factors. The appellant subsequently filed a petition to rehear arguing that in light of Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531 (2004), this Court should reconsider its decision regarding the enhancement factor used in sentencing the appellant. Finding the position well-taken, we granted the petition to rehear and now determine that, in light of Blakely, the appellant's two ten-year sentences for each count of aggravated sexual battery should be modified to the presumptive sentence of eight (8) years. The remainder of the appellant's sentence should remain unchanged, that is, the appellant is now sentenced to two concurrent eight-year sentences for aggravated sexual battery and two one-year sentences for sexual battery to be served consecutive to each other and consecutive to the two sentences for aggravated sexual battery for a total effective sentence of ten (10) years. Accordingly, the portion of the previous opinion of this Court affirming the appellant's sentence for the two convictions for aggravated sexual battery is vacated. All other portions of this Court's previous opinion are affirmed.

Analysis

The appellant herein was convicted of aggravated sexual battery, a Class B felony. Tenn. Code Ann. § 39-13-504(b). As a Range I, Standard Offender, the applicable sentencing range is "not less than eight (8) nor more than twelve (12) years." Tenn. Code Ann. § 40-35-112(a)(2). Thus, the trial court should have started with the presumptive sentence of eight (8) years, enhanced the sentence within the range for any enhancement factors, and then reduced the sentence within the range for any mitigating factors. The trial court in this case imposed a sentence of ten (10) years on each count of aggravated sexual battery based on the application of the statutory enhancement factor found in Tennessee Code Annotated section 40-35-114(16), that the "defendant abused a position of public or private trust." Tenn. Code Ann. § 40-35-114(16).

The appellant now argues because factor (16) was neither admitted by the appellant nor related to a prior conviction as required by Blakely, this Court must reduce the appellant's sentence. The State counters that any sentencing challenge available to the appellant under Blakely is now waived because the appellant did not properly object at sentencing or raise the issue on direct appeal or in his appellate briefs. Further, the State argues that any error by the trial court in applying enhancement factors is harmless beyond a reasonable doubt.

Prior to the release of Blakely, in order to determine a defendant's sentence, a trial court started at the presumptive sentence, enhanced the sentence within the range for existing enhancement factors, and then reduced the sentence within the range for existing mitigating factors in accordance with Tennessee Code Annotated section 40-35-210(e). No particular weight for each factor is prescribed by the statute; the weight given to each factor is left to the discretion of the trial court as long as it comports with the sentencing principles and purposes of our code and as long as its findings are supported by the record. See State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995). This Court has recently recognized that Blakely "calls into question the continuing validity of our current sentencing scheme." State v. Julius E. Smith, No. E2003-01059-CCA-R3-CD, 2004 WL 1606998, at *4 (Tenn. Crim. App. at Knoxville, July 19, 2004); see also State v. Michael Wayne Poe, No. E2003-00417-CCA-R3-CD, 2004 WL 1607002, at *9 (Tenn. Crim. App. at Knoxville, July 19, 2004).

In Blakely, the Supreme Court determined that the "statutory maximum" sentence for Apprendi[1] 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." 542 U.S. at ___, 124 S. Ct. at 2537. In other words:

[1] In Apprendi v. New Jersey, 530 U.S. 466 (2000), 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." Id. at 490. In Ring v. Arizona, 536 U.S. 584, 587 (2002), the Court applied Apprendi to hold that because Arizona conditioned eligibility for the death penalty upon the presence of an aggravating fact that was not an element of first degree murder, the Sixth Amendment guaranteed the defendant a right to a jury determination of that fact.

> [T]he 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. Blakely involved the sentencing scheme of the State of Washington where the criminal code establishes maximum sentences for felonies according to the class of felony. Washington also has presumptive sentencing ranges based on the seriousness level of the offense and the offender's criminal history. In Washington, a judge is permitted to impose a sentence above the presumptive range when there exists "substantial and compelling reasons justifying an exceptional sentence." Blakely, 542 U.S. at ___, 124 S. Ct. at 2535. A judge may impose an exceptional sentence utilizing one of these "reasons" illustrated in the Sentencing Reform Act only if it is not already taken into account in the calculation of the presumptive range.

Blakely pled guilty to second-degree kidnapping with a firearm. As a class B felony, it was punishable by a sentence of up to ten (10) years. The Sentencing Reform Act of Washington, however, specified a presumptive range of 49 to 53 months. The sentencing judge imposed an exceptional sentence of 90 months on the ground that the defendant had acted with "deliberate cruelty," a statutorily enumerated ground for upward departure. The Supreme Court ultimately determined that Washington's sentencing procedure violated the defendant's Sixth Amendment right to a trial by jury. Id. 542 U.S. at ___, 124 S. Ct. at 2538.

The State contends that the appellant has waived any Blakely issue because he failed to raise it in the trial court. The United States Supreme Court has stated that "when a decision of this court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." Schriro v. Summerlin, ___ U.S. ___, 124 S.Ct. 2519, 2522 (2004). The State argues that Blakely does not establish a new rule but merely clarifies the rule announced in Apprendi v. New Jersey, 530 U.S. 366 (2000). In support of its argument, the State notes that the Supreme Court stated in Blakely that "this case requires us to apply the rule we expressed in Apprendi." Blakely, 542 U.S. at ___, 124 S. Ct. at 2536.

A case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government." Van Tran v. State, 66 S.W.3d 790, 810-11 (Tenn. 2001) (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)). In other words, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301.

The defendant in Apprendi was convicted of multiple offenses, including second degree possession of a firearm for an unlawful purpose. 530 U.S. 466 (2000). New Jersey state law prescribed a sentence of five (5) to ten (10) years for a second degree offense, but a hate crime statute in effect at the time provided that a judge could enhance the defendant's sentence above the maximum in the range if the crime was racially motivated. Pursuant to the statute, the trial court in

Apprendi sentenced the defendant to twelve (12) years, two (2) years above the range. The United States Supreme Court reversed, determining 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." Id. at 490.

The argument advanced by the State herein is that the rule in Blakely merely extends the rule previously announced in Apprendi. However, in Graham v. State, 90 S.W.3d 687, 692 (Tenn. 2002), our supreme court held that the noncapital sentencing procedure in this state complied with Apprendi, saying:

> In Apprendi, the United States Supreme Court reviewed a New Jersey provision that allowed a judge to impose a sentence exceeding the statutory maximum for an offense if the judge finds, by a preponderance of the evidence, that the offense constituted a hate crime. The [Tennessee] Supreme Court struck the provision down, holding that due process requires that "any fact, other than a previous conviction, used to enhance a sentence above the statutory maximum must be: (1) charged in the indictment, (2) submitted to the jury, and (3) proven beyond a reasonable doubt." State v. Dellinger, 79 S.W.3d 458, 466 (Tenn. 2002) (quoting Apprendi, 530 U.S. at 476, 120 S. Ct. 2348). However, the Court emphasized that the judge still retains his discretion to consider all enhancing and mitigating factors "within the range prescribed by the statute." Apprendi, 530 U.S. at 481, 120 S. Ct. 2348 (emphasis added).

The appellant herein received two ten-year sentences, a sentence within the statutory maximum for aggravated sexual battery as a Range I standard offender. Accordingly, the trial court was well within its discretion and statutory authority to consider enhancing factors for the purpose of sentencing without the assistance of the jury. Thus, Apprendi provides no relief to the appellant.

This Court has acknowledged that Blakely "extended Apprendi's holding that, under the Sixth Amendment, a jury must find all facts used to increase a defendant's sentence beyond the statutory maximum." See State v. Charles Benson, No. M2003-02127-CCA-R3-CD, 2004 WL 2266801, at *8 (Tenn. Crim. App. at Nashville, Oct. 8, 2004). In so doing, this Court went on to state that:

> [N]othing in Apprendi suggested that the phrase "statutory maximum" equated to anything other than the maximum in the range. To the contrary, the United States Supreme Court stated the issue in Apprendi as "whether the 12-year sentence imposed . . . was permissible, given that it was above the 10-year maximum for the offense charged in that count." 530 U.S. at 474, 120 S. Ct. at 2354. We also note that the Supreme Court has considered the retroactive effect of the holding in Ring v. Arizona 536 U.S. 584, 592-93, 122 S. Ct. 2428, 2435 n.1, 153 L. Ed. 2d 556 (2002), as a new rule for capital cases even though it was based on Apprendi. See Schriro, ___ U.S. at ___, 124 S. Ct. at 2525-27. . . . We conclude that Blakely alters

> Tennessee courts' interpretation of the phrase "statutory maximum" and establishes a new rule in this state . . ..

Id. at *9. We concluded that the denial of the right to a jury trial could not be harmless error as argued by the State even if Blakely did not establish a new rule, because absent a written waiver of the right to a jury trial, "it must appear from the record that the defendant *personally* gave express consent [to waive a jury trial] in open court." Id. at *9 (quoting State v. Ellis, 953 S.W.2d 216, 221 (Tenn. Crim. App. 1997)). The same analysis applies herein. The record in this case contains neither a written waiver of the right to a jury trial nor an express waiver from the appellant.

The trial court herein applied enhancement factor (16) on the basis that the appellant was both a police officer and step-father and "clear" in his testimony that "he acknowledges that he abused that position [of public or private trust]." We believe that the trial court's application of this factor violates Blakely. See State v. Bobby Northcutt, No. M2003-02805-CCA-R3-CD, 2004 WL 2266798, at *7-8 (Tenn. Crim. App. at Nashville, Oct. 7, 2004) (concluding that trial court's application of enhancement factor (16) violated Blakely where the enhancement factor was not submitted to or found by a jury or admitted by the defendant).

Because the trial court erred in sentencing the appellant, we will review his sentence de novo with no presumption of correctness. We have determined that the trial court improperly applied enhancement factor (16) in violation of Blakely. Thus, we modify the appellant's sentence to the presumptive sentence for a Range I, Standard Offender convicted of a Class B felony, eight years. See Tenn. Code Ann. § 40-35-112(a)(2). Thus, we modify the appellant's sentence from ten (10) years to eight (8) years for each count of aggravated sexual battery. The appellant does not challenge his sentence on the two counts of sexual battery or the trial court's decision to order consecutive sentencing. Nevertheless, we note that the trial court sentenced the appellant to the presumptive minimum sentence for the two convictions for sexual battery as the range for a Range I offender for a Class E felony is not less than one (1) nor more than two (2) years. Tenn. Code Ann. § 40-35-112.

Conclusion

Accordingly, the portion of the previous opinion of this Court affirming the appellant's sentence for aggravated sexual battery is vacated. The appellant's sentences for the two convictions for aggravated sexual battery are modified to eight (8) years. The sentences for the two counts of sexual battery are affirmed. The manner of the service of the sentence as imposed by the trial court is affirmed, giving the appellant an effective ten (10) year sentence. The remainder of this Court's opinion affirming the appellant's convictions is affirmed.

JERRY L. SMITH, JUDGE