

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent.

vs.

Richard Angelo McFee,

Appellant.

RESPONDENT'S BRIEF

**OFFICE OF THE MINNESOTA
STATE PUBLIC DEFENDER**

BENJAMIN J. BUTLER
Assistant State Public Defender
2221 University Avenue S.E., Suite 425
Minneapolis, MN 55414-3230
Telephone: (612) 627-6980
Attorney Registration No. 314985

ATTORNEYS FOR APPELLANT

MIKE HATCH
Minnesota Attorney General

SUSAN GAERTNER
Ramsey County Attorney

BY: MITCHELL L. ROTHMAN
Assistant Ramsey County Attorney
50 West Kellogg Blvd., Suite 315
St. Paul, Minnesota 55102-1657
Telephone: (651) 266-3221
Attorney Registration No. 182394

ATTORNEYS FOR RESPONDENT

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LEGAL ISSUES

1. Is Appellant's sentence invalid under Blakely v. Washington, 542 U.S. 296 (2004), when judicial factfinding was used to create a criminal history score and Appellant received a presumptive sentence pursuant to the Minnesota Sentencing Guidelines?

Trial court: Ruled in the negative.

Authority

Blakely v. Washington, 542 U.S. 296 (2004)

State v. Allen, 706 N.W.2d 40 (Minn. 2005)

State v. Brooks, 690 N.W.2d 160 (Minn. Ct. App. 2004), rev. granted and stayed (Minn. Mar. 15, 2005), stay vacated and rev. denied (Minn. Dec. 15, 2005).

State v. Shattuck, 704 N.W.2d 131 (Minn. 2005)

STATEMENT OF THE CASE AND FACTS

Appellant Richard Angelo McFee was charged in Ramsey County District Court by a Complaint and Warrant dated June 22, 2004, with one count of Terroristic Threats, in violation of Minn.Stat. § 609.713, subd. 1 (2004). Appellant pleaded guilty as charged before the Honorable Edward J. Cleary on October 4, 2004, with the understanding that he would receive the presumptive guidelines sentence [PT 2].¹

Judge Cleary sentenced Appellant on November 17, 2004. Appellant objected on Sixth Amendment grounds to the use of a juvenile offense point and custody status point in the calculation of his criminal history score [ST 2, 4-8].² Appellant did not question the basis for finding that he had a juvenile offense point and custody status point [ST 7-8]. The trial court denied Appellant's motion, ruling that Blakely v. Washington, 542 U.S. 296 (2004), did not apply to use of either point in the calculation of Appellant's criminal history score [ST 11].

Appellant was adjudicated guilty of Terroristic Threats and sentenced to the custody of the Commissioner of Corrections for an executed term of 30 months [ST 27]. This was the presumptive sentence for an offender with a criminal history score of six [ST 26].

The Court of Appeals affirmed Appellant's sentence in an unpublished opinion filed August 23, 2005. Appellant's petition for review was granted on October 26, 2005.

¹ "PT" refers to the indicated pages of the transcript of Appellant's guilty plea. Page one of the transcript states incorrectly that the plea was entered on October 27, 2004.

² "ST" refers to the indicated pages of the November 17, 2004, sentencing transcript.

ARGUMENT

I. The procedure used to sentence Appellant did not violate the Sixth Amendment.

Appellant's criminal history score at sentencing was six, based in part on a custody status point and a juvenile offense point. Appellant does not challenge the validity of the custody and juvenile points or the accuracy of the criminal history score. Instead, he contends that under Blakely v. Washington, 542 U.S. 296 (2004), a jury must find beyond a reasonable doubt the existence of the custody and juvenile points. Appellant raises a constitutional question that the Supreme Court reviews de novo. State v. Shattuck, 704 N.W.2d 131, 135 (Minn. 2005).

A. Blakely does not apply to findings required to determine a presumptive sentence.

Blakely 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 the jury, and proved beyond a reasonable doubt.” 542 U.S. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). For Blakely purposes, the “prescribed statutory maximum” is the presumptive guidelines sentence. Shattuck, 704 N.W.2d at 141 (citing Blakely, 542 U.S. at 303).

A presumptive sentence is determined, in part, by the offender's criminal history score. Minn. Sent. Guidelines II.C. Custody status points and prior juvenile offenses are used to compute the criminal history score. Id. at II.B, II.B.2, II.B.4. Indeed, the concept of a presumptive sentence is meaningless without a criminal history score. State v.

Brooks, 690 N.W.2d 160, 163 (Minn. Ct. App. 2004), rev. granted and stayed (Minn. Mar. 15, 2005), stay vacated and rev. denied (Minn. Dec. 15, 2005). Blakely and Shattuck recognize that in the sentencing context a defendant's Sixth Amendment rights to notice and jury trial come into play only after the presumptive sentence has been identified and a greater penalty is being considered. Those rights simply do not apply to findings required to determine the presumptive sentence.

This Court's recent decision in State v. Allen, 706 N.W.2d 40 (Minn. 2005), adopts this analysis. Allen held that the Sixth Amendment is not violated by judicial findings regarding custody status. Id. at 48. Allen recognized that the criminal history score, including the custody status point, is a prerequisite for determining the Apprendi-Blakely statutory maximum. Id. at 47. Allen's reasoning is not limited to determinations regarding custody status. It applies with equal force to all components of the criminal history score. The Blakely jury trial right does not apply until the criminal history score has been calculated and the presumptive sentence identified.

Blakely's limited scope corresponds with how a criminal history score is calculated. Factfinding regarding the components of criminal history is radically different in kind from the sentencing-related factfinding to which the Sixth Amendment applies. Official court records establish the facts used to determine criminal history: custody status and prior convictions and adjudications. Such records have "conclusive significance." Shepard v. United States, --- U.S. ---, 125 S.Ct. 1254, 1262 (2005) (distinguishing findings drawn from prior judicial records and findings subject to Apprendi). Thus, judicial review of official records does not implicate the Sixth

Amendment. Shepard, 125 S.Ct. at 1257; State v. Leake, 699 N.W.2d 312, 325 (Minn. 2005).

The Sixth Amendment applies at sentencing when a subjective judgment regarding the defendant's personal characteristics or the nature of the defendant's conduct is required. For example, when an upward departure is at stake, a jury must find intent or motive, Apprendi, 530 U.S. at 492-95; a pattern of prior misconduct, State v. Henderson, --- N.W.2d ---, 2005 WL 3211517, *5 (Minn. 2005); lack of amenability to treatment, Allen, 706 N.W.2d 40, 47 (Minn. 2005); whether an offense was committed with force or violence, Leake, 699 N.W.2d at 324 (Minn. 2005); or whether the offender poses a danger to public safety, State v. Grossman, 636 N.W.2d 545, 551 (Minn. 2001). None of these considerations are proved with official records alone. They require instead the characterization of past behavior or exploration of the offender's psyche. When subjective factfinding of this kind becomes necessary, the Sixth Amendment requires jury involvement.

Findings regarding custody status or the existence of pertinent adult convictions or juvenile adjudications, on the other hand, do not require the exercise of judgment or weighing of conflicting evidence. The principles underlying Apprendi and Blakely are not served by asking a jury to confirm the contents of official court records.

B. No constitutional purpose will be advanced by extending Blakely to factfinding regarding Appellant's juvenile record.

Appellant contends that Blakely applies to findings regarding an offender's juvenile record. His position is not supported by this Court's recent decision in Allen,

which recognized that Blakely does not apply to the process used to identify a presumptive sentence. Appellant's argument depends on an unreasonably restrictive interpretation of the Apprendi-Blakely exception for prior convictions and ignores the broad role recidivism traditionally has played in sentencing decisions.

The "prior conviction" exception originated in a footnote to the majority opinion in Jones v. United States, 526 U.S. 227 (1999):

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

526 U.S. at 243 n.6. Slightly reworded, this language became the holding in Apprendi, 530 U.S. at 490, and what the U.S. Supreme Court termed "the rule" in Blakely. 542 U.S. at 301.

The Supreme Court was asked in Jones to decide whether serious bodily injury, the basis for an enhanced maximum sentence under the federal carjacking statute, was an offense element the government had to plead and prove to a jury beyond a reasonable doubt or merely a sentencing factor for the trial court to consider. 526 U.S. at 230-32. The footnote containing the "prior conviction" language was intended to explain the majority's view that the government's interpretation of the statute might be unconstitutional. Id. at 243 n.6.

Jones held, as a matter of statutory construction, that serious bodily injury was an element, to be charged by indictment, submitted to the jury, and proved beyond a reasonable doubt. Id. at 251-52. In the course of its discussion, the Jones majority

examined and distinguished Almendarez-Torres v. United States, 523 U.S. 224 (1998), decided one year earlier.

At issue in Almendarez-Torres was the interpretation of a federal criminal statute prohibiting once-deported aliens from returning to the United States without special permission. 523 U.S. at 226. The statute authorized a prison term of up to two years in ordinary cases and a maximum term of 20 years if the initial deportation “was subsequent to a conviction for an aggravated felony.” Id. The question presented was whether Congress had intended the aggravated felony clause to define an element of a separate 20-year offense or whether the clause merely established a factor the sentencing court could use to increase punishment beyond the usual two-year maximum. Id. at 228.

Almendarez-Torres held that the clause was a penalty provision. Id. at 235. This interpretation was founded on the Court’s recognition that recidivism “is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.” Id. at 243. The Constitution, the Court explained, does not require the legislature to treat recidivism as an element of the offense. Id. at 239.

One year later, Jones characterized the holding in Almendarez-Torres as having “rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment.” 526 U.S. at 249. For the Jones majority, the “repeated emphasis on the distinctive significance of recidivism” in Almendarez-Torres left no doubt that the Court in that case regarded recidivism as

potentially distinguishable for constitutional purposes from other facts that might be used to enhance a criminal sentence.³ Id. at 249.

Two lessons may be drawn from this brief review of the origins of Blakely's "prior conviction" exception. First, for Sixth Amendment purposes, recidivism is different. Facts concerning recidivism per se need not be charged formally, presented to a jury, or proved beyond a reasonable doubt. Second, in none of the seminal cases was the U.S. Supreme Court asked to explain what "prior conviction" means. The role of adult felony convictions in sentencing was central in Almendarez-Torres, but the concept of recidivism includes more than the offender's record of felony convictions. Webster's Third New International Dictionary 1895 (1993) (defining recidivism as "repeated relapse into criminal or delinquent habits").

³ Appellant questions the continued vitality of Almendarez-Torres and the "prior conviction" exception. Appellant's Brief at 12 n.7. It is not correct that either "is on the verge of being overruled." Id. Almendarez-Torres remains good law.

Justice Thomas, a member of the Almendarez-Torres majority, writing for himself in Shepard, urged reconsideration of Almendarez-Torres. 125 S.Ct. at 1263-64 (Thomas, J., concurring). It is clear that Justice Thomas believes that judicial factfinding regarding prior convictions violates the Sixth Amendment. Id. at 1264.

Justice Scalia shares Justice Thomas's view that prior convictions affecting the defendant's sentence were proved beyond a reasonable doubt to the jury in most American jurisdictions in the 19th and early 20th centuries. Apprendi, 530 U.S. at 501-02 (Thomas, J., concurring); Almendarez-Torres, 523 U.S. at 259 (Scalia, J., dissenting). He has stated, however, that the historical practice does not necessarily mandate a constitutional rule that juries decide the existence of prior convictions. Id. at 260.

In any event, this Court should not speculate whether the current U.S. Supreme Court would require that all measures of recidivism, including prior adult convictions, be submitted to a jury and proved beyond a reasonable doubt. It is unlikely that the U.S. Supreme Court would eliminate the "prior conviction" exception after featuring it so prominently in Blakely and United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 756 (2005), and referring to it in Shepard v. United States, --- U.S. ---, 125 S.Ct. 1254, 1262 (2005).

In sum, there is no reason to think that “prior conviction” must be construed literally, just as “statutory maximum” for Blakely purposes is not given its literal meaning. Allen shows that “prior conviction” refers to more than adult criminal convictions. The procedural guarantees mentioned in Jones and Apprendi (notice, jury trial, proof beyond a reasonable doubt) are relevant in the context of adult criminal prosecutions, but are not essential characteristics of a “prior conviction.” The nature of fact to be found and the reliability of the factfinding process determine whether something is a “prior conviction” for Apprendi and Blakely purposes.

Like custody status, the fact of a juvenile adjudication can be determined by reviewing official court records. Similarly, a juvenile adjudication either does or does not exist. The factfinder called upon to determine whether an offender has a pertinent adjudication is not required to weigh conflicting testimony or subjective evidence. Asking a jury to find whether a juvenile adjudication exists would serve no useful purpose.

The proceedings that result in juvenile adjudications are just as reliable as the adult criminal process. Accurate factfinding in our legal system does not require the involvement of a jury. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (plurality opinion). “The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function.” Id. at 547.

Petitioned juveniles are afforded the right to adequate notice of charged offenses, Application of Gault, 387 U.S. 1, 33-34 (1967); the right to counsel, id. at 41; the right to remain silent, id. at 55; and the right to confront and cross-examine adverse witnesses, id.

at 57. The same reasonable doubt standard applies in adult and juvenile proceedings. In Re Winship, 397 U.S. 358, 364 (1970). Identical rules of evidence are used at trial. Minn. R. Juv. P. 13.04. Juveniles may compel testimony and the production of documents. Minn. R. Juv. P. 26.01. In short, juvenile adjudications are recorded in fundamentally fair proceedings. Certainly, having a jury find that an adult defendant's criminal history includes a juvenile adjudication would not add to the reliability of the process that produced the adjudication.

The procedural safeguards applicable in juvenile proceedings have persuaded many courts in other jurisdictions that the "prior conviction" exception includes juvenile adjudications. United States v. Burge, 407 F.3d 1183, 1191 (11th Cir. 2005), cert. denied, --- U.S. ---, 126 S.Ct. 551; United States v. Jones, 332 F.3d 688, 696 (3rd Cir. 2003), cert. denied, 540 U.S. 1150 (2004); United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002), cert. denied, 537 U.S. 1114 (2003); Nichols v. State, 910 So.2d 863, 865 (Fla. Ct. App. 2005); Ryle v. State, 819 N.E.2d 119, 123 (Ind. Ct. App. 2004), transfer granted (May 6, 2005); State v. Hitt, 42 P.3d 732, 740 (Kan. 2002), cert. denied, 537 U.S. 1104 (2003); State v. Mounts, 122 P.3d 745, 747 (Wash. Ct. App. 2005); State v. Weber, 112 P.3d 1287, 1294 (Wash. Ct. App. 2005). Most recent published decisions have reached this conclusion. Burge, 407 F.3d at 1190.

As Appellant points out, a number of foreign jurisdictions have ruled that Blakely applies to juvenile adjudications because juveniles do not have a constitutional right to jury trial. Published decisions include United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001); Pinkston v. State, 836 N.E.2d 453, 460 (Ind. Ct. App. 2005); and State v.

Brown, 879 So.2d 1276, 1288 (La. 2004), cert. denied, --- U.S. ---, 125 S.Ct. 1310 (2005). Other courts have reached the same conclusion on different grounds. State v. Montgomery, 825 N.E.2d 250, 254 (Ohio Ct. App. 2005), appeal allowed by 830 N.E.2d 344 (Ohio 2005) (ruling that juvenile adjudications are not “prior convictions” under Blakely because adjudications are not criminal convictions); State v. Harris, 118 P.3d 236, 245-46 (Or. 2005) (concluding that appropriate balance of authority between judge and jury requires submission of prior adjudications to jury).

Like Appellant, these cases ignore the fact that Blakely applies only when the defendant is threatened with an upward departure from a previously-identified presumptive sentence. None of the cases supporting Appellant’s position suggest that under the Sixth Amendment a jury must confirm the validity of a prior juvenile adjudication. The cases only require a jury finding that a prior adjudication was recorded. Such a finding is a mere formality, given the nature of the evidence the jury will be asked to address.

Appellant also argues that juvenile adjudications do not come within the “prior conviction” exception because they are not criminal convictions; equating the two, Appellant claims, would violate the purposes underlying the juvenile justice system. Appellant’s Brief at 17-22. Although it is certainly true that juvenile adjudications are not convictions, it is not inconsistent or improper to consider them to the extent permitted by the guidelines when calculating an adult offender’s criminal history score. The constitutionality of using adjudications to compute criminal history is not in doubt. State v. Little, 423 N.W.2d 722, 724-25 (Minn. Ct. App. 1988), rev. denied (Minn. Jul. 6,

1988). The issue is not how juvenile adjudications should be classified. The question is whether any constitutional purpose is served by requiring the state to prove to a jury beyond a reasonable doubt that an adjudication exists, when that fact can easily be determined by referring to official court records.

Allowing a sentencing judge to find the existence of a juvenile adjudication is entirely consistent with the purpose of the juvenile justice system. The Legislature has stated:

The purpose of the laws relating to children alleged or adjudicated to be delinquent is to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior.

Minn.Stat. § 260B.001, subd. 2 (2004). Extending Blakely to factfinding regarding an offender's juvenile adjudications would do nothing to further this rationale. The nature and purpose of the juvenile process do not support extension of Sixth Amendment protections to findings regarding the existence of juvenile adjudications.

CONCLUSION

Appellant's sentence should be affirmed. The jury trial right announced in Blakely v. Washington applies only to facts that may justify punishment beyond the presumptive guidelines sentence, not to the findings necessary to calculate a presumptive sentence. Because factfinding regarding criminal history is based on official court records, the values underlying the Sixth Amendment right to jury trial would not be served by requiring jury findings regarding components of the criminal history score. The nature and purpose of the juvenile process does not support extension of Blakely to factfinding regarding the existence of juvenile adjudications.

Respectfully submitted,



Mitchell L. Rothman
Assistant Ramsey County Attorney
50 West Kellogg Blvd., Suite 315
St. Paul, Minnesota 55102
Telephone: (651) 266-3221
Attorney Registration No. 182394

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ATTORNEY FOR RESPONDENT