COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP2259
2004AP2260

Cir. Ct. Nos. 1994CF941012
1994CF941013

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY JAMES BROOKSHIRE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. In these consolidated appeals, Henry James Brookshire, *pro se*, appeals from orders denying a "motion to void excess sentence" and denying his motion for reconsideration. Brookshire contends that

the circuit court imposed an "enhanced sentence" not authorized by law. We conclude that the sentence was proper and that the sentencing court did not violate Brookshire's constitutional rights. We affirm.

¶2 In 1994, Brookshire pled guilty to three counts of armed robbery. On the first two counts, the court imposed consecutive sentences of twelve years and eleven years. On the third count, the court imposed and stayed a twenty-year sentence, and placed Brookshire on eighteen years of probation to be served consecutively to the sentences already imposed.[1]

¶3 With his postconviction motion, Brookshire submitted the sentencing guideline scoresheets that were completed when he was sentenced. Those scoresheets suggest that the sentencing guidelines in existence in 1994 recommended a sentence of seventy-two to eighty-four months. *See* WIS. STAT. § 973.011(2) (1993-94).[2] The court's sentence on each count exceeded the guideline-recommended sentence, and the scoresheets show that the sentencing court believed that several aggravating circumstances existed.

¶4 Relying on ***Blakely v. Washington***, 542 U.S. __ , 124 S. Ct. 2531 (2004), Brookshire contends that the sentencing court could not consider any

[1] Brookshire appealed the judgment of conviction and this court affirmed. ***State v. Brookshire***, No. 1995AP1738-CR, unpublished slip op. (Wis. Ct. App. Apr. 9, 1996). In 2003, the circuit court denied Brookshire's motion for sentence modification based on a new factor. Brookshire appealed and this court affirmed. ***State v. Brookshire***, No. 2003AP2221-CR, unpublished slip op. (WI App June 9, 2004). This latest motion represents Brookshire's third challenge to the sentence. The State contends that the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), defeats Brookshire's latest motion. We decline to apply ***Escalona-Naranjo***. Nevertheless, we reject Brookshire's arguments.

[2] All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

aggravating circumstances unless they were established beyond a reasonable doubt. Because the trial court considered aggravating circumstances that had not been proven beyond a reasonable doubt, Brookshire contends that his federal constitutional right to a jury trial was violated. Brookshire's reliance on ***Blakely***, which invalidated the sentencing guidelines of the State of Washington, is misplaced.

¶5 "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." ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000). 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 v. Washington***, 542 U.S. at __, 124 S. Ct. at 2537 (emphasis omitted).

¶6 In this instance, Brookshire faced a maximum sentence of forty years on each count of armed robbery, then classified as a Class B felony. WIS. STAT. §§ 943.32(2), 939.50(3)(b). The court imposed sentences that were far less than the statutory maximum. Therefore, the principles of ***Apprendi*** and ***Blakely*** are not violated.

¶7 Brookshire asserts that, under the sentencing guidelines, each count "carried a maximum sentence of seven years each." Brookshire is mistaken. The sentence recommended by the guidelines did not become the statutory maximum sentence for that crime. The statutory maximum sentence remained forty years, regardless of the length of sentence recommended by the guidelines. And, while the sentencing court was to "take the guidelines … into consideration" and "state on the record its reasons for deviating from the guidelines," WIS. STAT. § 973.012,

failure to adhere to the guidelines, standing alone, was not error. Rather, the imposition of a sentence greater than indicated by the guidelines was reviewable within the context of whether the court properly exercised its sentencing discretion. *See* ***State v. Speer***, 176 Wis. 2d 1101, 1125-32, 501 N.W.2d 429 (1993). As noted in ***Speer***, "a sentencing court is not bound to impose a sentence within the guidelines. The guidelines are exactly that: a guide, not a mandate." ***Id.*** at 1126.

¶8 In Wisconsin, sentencing guidelines do not alter the statutory maximum sentence and they are not mandatory. Any doubt as to the applicability of ***Blakely*** to Wisconsin's sentencing procedure was resolved in ***United States v. Booker***, __ U.S. __ , 125 S. Ct. 738 (2005). In ***Booker***, the Supreme Court held that "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures" that were invalidated in ***Blakely***. ***Booker***, 125 S. Ct. at 749. The critical similarity between the two systems was "that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." ***Id.*** at 749-50. A sentencing scheme that included "merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts … would not implicate the Sixth Amendment." ***Id.*** at 750.

¶9 Because sentencing guidelines in Wisconsin were advisory and not mandatory, ***Blakely*** is not applicable. When, as in Brookshire's case, the court exercised its sentencing discretion "to select a specific sentence within a defined range," Brookshire "has no right to a jury determination of the facts that the judge deems relevant." *See* ***Booker***, 125 S. Ct. at 750.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).