

FILED

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Starcher, J. dissenting, in part, and concurring, in part:

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I dissent from the legal holdings in the majority opinion, because they are contrary to the 6th Amendment of the *United States Constitution*, as articulated by the United States Supreme Court.

The majority opinion in the instant case could be invalidated by a federal court. West Virginia prosecutors and circuit judges who do not ensure that *all* sentence-related findings are made *by a jury*, including those relevant to kidnaping sentences, are “asking for” the reversal of those sentences, and possibly their underlying convictions. Defense counsel who do not object to judge-made findings relating to sentencing are creating good grounds for a ineffective assistance claim.

I concur in upholding the defendant’s sentence in the instant case, however, because he did not properly preserve the issues raised on appeal.

Defendant Haught was convicted of kidnaping, for which he was sentenced to life with mercy, and convicted of domestic battery, for which he received a one-year sentence to run concurrently. The “life with mercy” sentence means that Haught will be eligible for parole consistent with the provisions of *W.Va. Code*, 62-12-1, *et seq.*

W.Va. Code, 61-2-14a(a) [1999] provides that in a conviction for kidnaping, if the victim has been “returned, or is permitted to return, alive, without bodily harm having

been inflicted upon him or her, . . . the punishment shall be confinement by the division of corrections for a definite term of years not less than ten nor more than thirty.”

In the instant case, the trial judge found that this statutory clause did not apply to Haught and imposed a higher sentence, because the victim did have “bodily harm” done to her. The specific question of whether or not the victim suffered “bodily harm” during the kidnaping was not put to the jury; the judge made this finding of fact on his own.

The United States Supreme Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004) would suggest that a *jury* must make the finding that bodily harm was inflicted on the victim; otherwise the statutory sentencing scheme is a violation of *Blakely*. Haught argues that *W.Va. Code*, 61-2-14a(a) violates the 6th Amendment and *Blakely* because the statute requires the trial judge to make certain findings of fact if the jury returns a guilty verdict with a recommendation of mercy.

Actually, contrary to Haught’s argument, the statute does not require that the trial judge make these findings. Instead, the statute is silent and does not specify who should make the findings.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the U.S. Supreme Court ruled that, “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.” In *Blakely, supra*, the Supreme Court clarified its holding in *Apprendi*, with regard to the meaning of “statutory maximum.” In *Blakely* the Court said “Our precedents make clear, however, 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.*” 542 U.S. 303.

Our Court should, in accordance with *Blakely*, have clarified that *W. Va. Code*, 61-2-14a(a) does not violate a defendant’s 6th Amendment jury trial rights so long as a *jury* finds the facts necessary for determining the sentence, not a judge (unless this right is knowingly waived by the defendant).

Current West Virginia law is out of step with the holdings of *Apprendi* and *Blakely*. In Syllabus Point 1 of *State v. Farmer*, 193 W. Va. 84, 454 S.E.2d 378 (1994) our Court explicitly permitted a judge to make findings of fact for sentencing purposes in kidnaping cases:

Pursuant to West Virginia’s kidnaping statute set forth in W.Va. Code § 61-2-14a [1965], *a trial judge, for purposes of imposing a sentence on a defendant. . . has the discretion to make findings* as to whether a defendant inflicted bodily harm on a victim and as to whether ransom, money or any other concession has been paid or yielded for the return of the victim.
. . .

Blakely and *Apprendi* directly prohibit this type of fact finding by a judge. *Farmer* must be overruled.

Was there an enhancement beyond the statutory maximum sentence in the instant case? *Blakely* and *Apprendi* speak to the ability of a judge to use factual findings to *enhance* a defendant’s sentence, and do not speak to a judge’s use of mitigating factors to *decrease* a defendant’s sentence. The rule of *Apprendi* and *Blakely* may be most easily understood in the following way: “the practical impact of [*Blakely*] is that any fact found

or taken into account by a judge which increases a sentence beyond that which could have been determined solely on the jury verdict must have been presented to and found by a jury or admitted by the defendant.” *U.S. v. Giluardo-Parra*, 340 F.Supp.2d 1243, 1245 (D.Utah 2004).

The wording of *W.Va. Code*, 61-2-14a(a) makes it difficult to apply the language in *Blakely* and *Apprendi*. Rather than starting with a minimum sentence, and then outlining the findings of fact that can be used to enhance that sentence, the language of *W.Va. Code*, 61-2-14a(a) begins with the maximum sentence and then describes the findings of fact that can be used to reduce the sentence. *W.Va. Code*, 61-2-14a(a) speaks in terms of reductions rather than enhancements, the result is the same; it is only the process that is different.

Thus, as long as a *jury* makes the findings necessary for a court to sentence a defendant under *W.Va. Code*, 61-2-14a(a), then the statute does not violate a defendant’s 6th Amendment rights. But if a finding of fact, made for the purpose of sentencing under *W.Va. Code*, 61-2-14a(a), is found by a judge and not by a jury, then the defendant’s 6th Amendment rights are violated.

In the instant case, the trial judge found that Haught had inflicted “bodily harm” on the victim, and thus that Haught was not eligible for the reduced definite sentence of ten to thirty years; instead he was sentenced to life with mercy.

Should Haught’s conviction be reversed and a new trial granted? I am satisfied that this sentence was imposed in violation of 6th Amendment rights and *Blakely*. However,

neither Haught nor his counsel objected to the judge's instructions to the jury. The instructions did not ask the jury to make a determination of whether or not "bodily harm" had occurred to the victim – this was reserved for and made by the judge following the verdict. In fact, counsel for the defendant actually relied on *Farmer* for the proposition that the jury did not need to make such a factual finding.

Finally, federal courts around the country, including those in West Virginia, have held that *Blakely* is *not* retroactive to cases on collateral appeal. *See Simpson v. U.S.*, 2005 WL 1076534 (N.D.W.Va., 2005). The sentencing hearing in the instant case occurred on May 17, 2004, and *Blakely* was decided on June 24, 2004. The rule in *Blakely*, therefore, does not extend to the instant case. The defendant is not entitled to a new trial.

Based on the foregoing, I concur, in part, and dissent, in part.