No. 33659 -- *State of West Virginia v. Joshua Lee Slater*

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OF WEST VIRGINIA

Starcher, Justice, dissenting:

The facts of this case alone are such that it gives one pause to dissent to the majority opinion; however, I am compelled to dissent because I believe it is clear that this case falls within the parameters of the facts discussed in an earlier separate opinion, *State v. Haught*, 218 W. Va. 462, 624 S.E.2d 899 (2005). I continue to be concerned that this Court is not complying with the decisions in two important United States Supreme Court Cases. Therefore, I dissent from the majority opinion because it has again failed to follow the U.S. Supreme Court rulings of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004).

West Virginia law remains inconsistent with federal law. In *Apprendi*, the U.S. Supreme Court 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." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63. In *Blakely*, the Court further defined statutory maximum as "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, 124 S.Ct. at 2537. The holdings of these two cases require the jury, not a trial judge, to make all findings of fact related to sentencing.

The current state of law in West Virginia seems to be in direct opposition, as expressed in Syllabus Point 1 of *State v. Farmer*, 193 W. Va 84, 454 S.E.2d 378 (1994):

> Pursuant to West Virginia's kidnapping 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 ransom, money, or any other concession has been paid

> or yielded for the return of the victim. Because the findings by the trial judge are made solely for the purpose of determining the sentence to be imposed on a defendant and are not elements of the crime of kidnapping, *West Virginia Constitution* art. III, secs. 10 and 14, relating to a defendant's due process rights and right to a trial by jury, are not violated.

As I stated previously, "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 . . . ." *Haught*, 218 W. Va. at 468, 624 S.E.2d at 905 (2005) (Starcher, J., dissenting and concurring). Otherwise, sentences based on trial judge findings of fact and the underlying convictions face the possibility of reversal by a federal court. Id. at 467, 624 S.E.2d at 904.

The majority in *Haught* failed to conform our case law with federal law, and has repeated this error in the instant case. The trial judge found that a concession had been gained, and used this finding to sentence the appellant to life with mercy. The majority states that since the trial court made the finding of fact in relation to sentencing and not the elements of kidnaping, there was no error. It then implies that because a jury could have found any of the enumerated purposes, there was no harm in the trial judge's determination. However, that is not the rule stated in *Apprendi* and *Blakely*. It does not give discretion as to whether a jury could have made the same finding as a trial judge, but only that it did make such a finding. If the jury does not find beyond a reasonable doubt that the appellant gained a concession, *Blakely* dictates that the trial judge cannot make such a finding when sentencing without violating the appellant's Sixth Amendment trial by jury rights. The trial judge in the instant case, by determining a concession was gained, has done just that.

The judge's role in a trial is to make determinations of law; the jury's role is to make determinations of fact. West Virginia's law as it now stands allows a trial judge to invade the

province of a jury and make factual determinations. This is in direct violation of the United States Constitution as articulated in *Apprendi* and *Blakely* and the majority opinion has simply overlooked this issue.

I respectfully dissent.