The Newsletter of North Carolina Prisoner Legal Services, Inc. Special Issue - July 2004

NCPLS Access

Blakely v. Washington
U.S. Supreme Court

By Senior Attorney J. Phillip Griffin

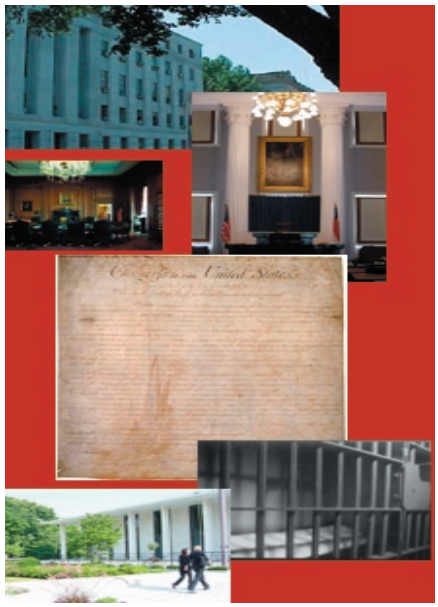
On June 24, 2004, the United States Supreme Court announced its decision in *Blakely v. Washington* (No. 02-1632), a case that will have far-reaching implications for the way criminal defendants are sentenced in North Carolina. This article will review the facts and ruling in that decision, explore its application to North Carolina sentencing law, and speculate on how it will be applied in this state.

The *Blakely* Case

Ralph Blakely was originally charged with first degree kidnapping. He entered into a plea bargain in which he pled guilty to second degree kidnapping involving domestic violence and the use of a firearm. The plea bargain left the sentence up to the judge.

Under Washington law, second degree kidnapping is a class B felony with a maximum sentence of ten years. However, the sentencing law further provided that the "standard range" for sentencing for second degree kidnapping with a firearm is 49-53 months. The judge may impose a longer sentence only upon finding additional, aggravating factors. In Blakely's case, following a hearing, the judge found the aggravating factor of deliberate cruelty, and imposed a sentence of 90 months. Blakely appealed his sentence, arguing that the judge increased his sentence based upon facts Blakely had not admitted and which had not been found by a jury. This, Blakely argued, violated his right under the Sixth Amendment to a trial by jury. The Washington State appellate courts upheld the trial court decision and Blakely petitioned the United States Supreme Court for review.

By a five to four vote, the Supreme Court agreed with Blakely. The opinion for the Court, written by Justice Scalia and joined by Justices Stevens, Souter, Thomas, and Ginsburg, held that a defendant is entitled to a sentence authorized under the law no longer than is supported by the facts he either admitted or that were found by a jury to be true beyond a reasonable doubt.



Without a plea of guilty or a jury finding of the additional aggravating facts, only a sentence within the standard range was authorized by law. The aggravated sentence violated Blakely's right to a jury trial.

North Carolina Sentencing Law

Justice O'Connor dissented. She pointed out that sentencing enhancements based upon facts found by the judge in a sentencing hearing have long been standard practice in a number of jurisdictions, such as the federal system and as well as those of several states, including North Carolina. In fact, the North Carolina structured sentencing process depends upon the very features condemned by the Court in *Blakely*. Under North Carolina's Structured Sentencing Act, there are nine classes of felonies. For the only A-class felony, murder in the first degree, the sentence is either life without parole or death. The determination of which sentence will be imposed rests with the jury, which determines whether there are aggravating factors that require imposition of the death sentence. For each of the remaining classes of felonies, there are three ranges of sentences for each of six prior record levels. NC Gen. Stat. 15A-1340.17(c). The *Blakely* ruling does not require the fact of prior convictions to be determined by a jury, so that aspect of North Carolina's sentencing scheme is not affected by the case. But the North Carolina statute allows the sentencing judge in her discretion to depart from the presumptive range (called the "standard range" in Washington State) if she finds that the presence of additional facts justify a mitigated or aggravated sentence. N.C. Gen. Stat. 15A-1340.16(d)) lists 19 specific aggravating factors, with a twentieth "catch-all:" "Any other aggravating factor reasonably related to the purposes of sentencing." Aggravating factors are to be argued to the judge and proven by the state "by a preponderance of the evidence." NC Gen. Stat. 15A-1340.16(a).

It is readily apparent that, since the *Blakely* decision, a North Carolina defendant may not receive an aggravated sentence without either a trial by jury for the presence of an aggravating factor beyond a reasonable doubt, or the defendant's specific waiver of the right to the jury finding. The terms of a plea bargain may include either an admission of aggravating factors or an agreement that the judge

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may find such factors following a hearing. If there is no such agreement, then the maximum sentence the court may impose is the maximum sentence in the presumptive range for the offense charged.

Where there is no plea bargain and the felony proceeds to trial, the application of *Blakely* is more complicated. In capital trials, juries now receive evidence on aggravating and mitigating factors in a proceeding following a verdict of guilt. There is no provision under current law for the jury to find aggravating factors in a non-capital trial. Holding such bifurcated trials in every felony case would be expensive and time consuming. It is possible that the guilt/innocence and sentencing issues could be tried together, but it is difficult to envision how the trial could be structured to comply with the Rules of Evidence and keep jurors from being confused or distracted by the complexities of their task. Reconciling the Structured Sentencing Act with *Blakey* will be challenging for prosecutors, defense lawyers, and judges alike.

Prospective or Retroactive Application

Generally, new interpretations of constitutional requirements cannot be applied in cases that have already been decided. In state court motions for appropriate relief, and in federal court petitions for habeas corpus, changes in federal Constitutional rules announced after the conviction became final are not ordinarily applied in the defendant's favor. *State v. Zuniga*, 336 N.C. 508 (1994); *Teague v. Lane*, 489 U.S. 288 (1989). A conviction is final when the time for further direct review has expired. *Griffith v. Kentucky*, 479 U.S. 314 (1987). If a conviction is not appealed, it is final when the fourteen day period allowed for the filing a notice of appeal expires. Rule 4(a)(2) N.C. Rules of Appellate Procedure. If a conviction is appealed and the Court of Appeals affirms the conviction, it is final at the expiration of the fifteen day period for filing a notice of appeal or petition in the North Carolina Supreme Court. Rules 14(a), 15(b), N.C. Rules of Appellate Procedure. If the North Carolina Supreme Court either denies review or affirms the Court of Appeals, the conviction is final at the expiration of the ninety day period for filing a petition in the United States Supreme Court. Rule 13.1, United States Supreme Court Rules.

If your conviction is final, *Blakely* probably will not provide grounds for challenging your sentence. There are a few narrow exceptions to the prohibition against applying new rules to final convictions. *Teague v. Lane*, 489 U.S. 288 (1989). But it is very unlikely that the *Blakely* rule will be applied retroactively. On the same day the Court announced its opinion in *Blakely*, it also issued an opinion in *Schriro v. Summerlin*, (No. 03-526) which held that the rule announced in *Ring v. Arizona*, 536 U.S. 584 (2003) would not apply retroactively. The rule announced in *Ring* was that, in capital trials, the jury must find the aggravating factors that support a death sentence. The Court was unwilling to apply the *Ring* decision to a capital defendant whose conviction was final when *Ring* was decided. The decision in *Schriro* would almost certainly foreclose application of the *Blakely* decision to sentences that have become final.

However, in all pending criminal cases, including those where direct review is still available, *Blakely* does apply. Defendants who have received aggravated sentences (sentences in excess of the presumptive range), but who did not either admit the aggravators or waive a jury determination, are entitled to re-sentencing.

Conclusion

This article can only provide general information. Moreover, the *Blakely* decision will have ramifications that are not presently known. If you have questions about how *Blakely* affects your case, you should consult your attorney. If you do not have an attorney, you may write to NCPLS.

State v. Jones - N.C. Supreme Court: Simple Possession of Cocaine is a Felony

By Staff Attorney Ken Butler

On June 25, 2004, the N.C. Supreme Court completed its review of two recent Court of Appeals decisions regarding the status of the crime of simple possession of cocaine. In *State v. Jones*, 161 N.C. App. 60, 588 S.E.2d 5 (2003), and *State v. Sneed*, 161 N.C. App. 331, 588 S.E.2d 5 (2003), the Court of Appeals had held that the crime of possession of cocaine was a misdemeanor. The Supreme Court has now reversed those decisions. *State v. Jones*, No. 591PA03, 2004 N.C. Lexis 671 (N.C., June 25, 2004); *State v. Sneed*, No. 601PA03 (N.C., June 25, 2004).

In *Jones,* the defendant pled guilty to possession with intent to sell and deliver cocaine, and to being an habitual felon. Mr. Jones entered this plea conditionally, with the understanding that he could appeal three issues, including the court's denial of a motion to suppress evidence. The N.C. Court of Appeals determined that, under the statutes and rules governing a criminal defendant's right to appeal, it only had jurisdiction to consider the appeal of the motion to suppress. Since the defendant had bargained for appellate consideration of *three* motions and the court could only address one motion, the defendant could not have received the benefit of his plea bargain. However, before sending the case back to the lower court, the Court of Appeals also addressed the issue of jurisdiction concerning the habitual felon indictment.

Defendant had argued his habitual felon indictment was invalid because one of the three convictions used to classify him as an habitual felon was a conviction for possession of cocaine. According to the law as it existed at the time of the crime:

> "any person who violates G.S. 90-95(a)(3) [possession of a controlled substance] with respect to: . . .[a] controlled substance classified in Schedule II, III, or IV shall be guilty of a misdemeanor. . .." N.C. Gen. Stat. 90-95 (d)(2) (1991). According to N.C. Gen. Stat. 90-90(a) 4., cocaine is a Schedule II controlled substance. N.C. Gen. Stat. 90-90(a) 4, (1991).

State v. Jones, 2003 N.C. App. LEXIS 1984 *12. Thus, the defendant argued that possession of cocaine was a misdemeanor and could not be used as a predicate offense for an habitual felon indictment. The State, on the other hand, noted that N.C. Gen. Stat. 90-95(d)(2) provided that possession of cocaine "shall be punishable as a Class I felony," and argued that this meant that possession of cocaine *was* a felony. After reviewing general principles of statutory construction, including the principle that criminal statutes are to be "strictly construed against the State," the Court of Appeals held that possession of cocaine was a misdemeanor and the defendant's indictment as an habitual felon was defective.

The N.C. Supreme Court granted discretionary review of these cases shortly after their decision in the Court of Appeals, and issued orders staying the effect of the decisions. The Court heard oral arguments on these cases in February and filed its opinion on June 25, 2004.

In addressing how to view the statutes creating the offense and punishments for possession of a Schedule II substance, the Supreme Court stated that:

> When interpreting statutes, our principal goal is to effectuate the purpose of the legislature. When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will. Furthermore, where a literal interpretation of the language of a statute will contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.

State v. Jones, 2004 N.C. Lexis 671, *9 (internal citations and quotations omitted).

The Court reviewed the legislative history of North Carolina's controlled substance and sentencing laws, going back to 1971, in order to find the General Assembly's intent. It was observed that, prior to the 1971 Controlled Substances Act (CSA), possession of cocaine had been a misdemeanor. However, the original language of the CSA suggested that this crime was changed to a felony. Subsequent amendments in 1973 and 1974 provided that possession of a Schedule II substance would be a misdemeanor, unless the quantity exceeded a specified amount. In the case of cocaine, the triggering amount was one gram. Where such quantities were present, "the violation shall be a felony punishable by a term of imprisonment of not more than five years, or a fine of not more than five thousand dollars ($5000), or both in the discretion of the court." *State v. Jones*, 2004 N.C. Lexis 671, *15.

The 1979 enactment of the Fair Sentencing Act resulted in changes to both North Carolina's general sentencing statutes and specific criminal laws. One change was to N.C. Gen. Stat. 90-95(d)(2), which eliminated the language concerning the specific punishments for felony possession of Schedule II substances but simply asserted that such an offense would be "punishable as" a Class I felony. Later amendments removed the one gram limit, which made possession of *any* amount of cocaine a felony. The *Jones* Court further observed that:

> The relevant session law was entitled "An Act to Make the Possession of Any Amount of Cocaine or Phencyclidine *a Felony*." *Id.* (emphasis added). The act's title, making no distinction between a classification for conviction purposes and for sentencing purposes, is further persuasive evidence that the General Assembly intended to classify possession of cocaine as a felony for all purposes.

2004 N.C. Lexis 671, *19.

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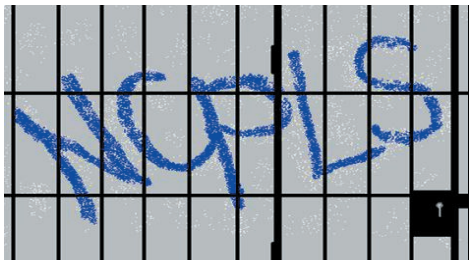

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The Court also took into consideration the fact that it has been the universal practice in North Carolina for nearly 25 years to treat the possession of cocaine as a felony. Despite the fact that controlled substances and sentencing laws have been frequently amended during this period, the General Assembly never acted to demonstrate that this interpretation of the law was incorect. Had the Legislature felt the courts and prosecutors were misinterpreting the statute, the laws could have been amended to make it clearer that possession of a schedule II substance was a misdemeanor.

Nor was the Court swayed by the fact that the N.C. Gen. Stat. 90-95(d)(2) uses the phrase that possession of a Schedule II is "punishable as" a felony. It noted that "[t]he General Assembly routinely uses the phrases 'punished as' or 'punishable as' a 'felony' or 'felon' to classify certain crimes as felonies." *State v. Jones*, 2004 N.C. Lexis 671, *25-26. Furthermore, there are other statutes that use language similar to 90-95(d)(2), classifying an offense generally as a misdemeanor but allowing for elevation to a felony upon the existence of special circumstances. 2004 N.C. Lexis 671, *27-28 (citing N.C. Gen. Stat. 14-56.1 (2003) (providing that anyone who breaks into or forcibly opens a coin- or currency-operated machine "shall be guilty of a Class 1 misdemeanor, but if such person has previously been convicted of violating this section, such person shall be punished as a Class I felon."))

Finally, the Court observed that the *Jones* and *Sneed* opinions reached an opposite decision from another panel of the Court of Appeals which had previously held that possession of cocaine is a felony. *See State v. Chavis*, 134 N.C. App. 546, 555, 518 S.E.2d 241, 248 (1999) (concluding that N.C. Gen. Stat. 90-95(d)(2) "clearly states that the possession of any amount of cocaine is a felony"), *appeal dismissed and disc. rev. denied*, 351 N.C. 362, 542 S.E.2d 220 (2000). The Supreme Court stated that "[i]n so doing, the two panels ignored a well-established rule of appellate law: 'Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.'" *State v. Jones*, 2004 N.C. Lexis 671, *31 (citing *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

Since the initial decisions by the Court of Appeals last year, many North Carolina prisoners have written to NCPLS about the *Jones* and *Sneed* cases. There was a prospect that these decisions might provide some basis for challenging convictions or sentences, particularly in the case of people convicted as habitual felons where cocaine possession was used as a predicate offense. That prospect has been extinguished by the North Carolina Supreme Court's interpretation of the law.