COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP703-CR **Cir. Ct. No. 2003CF2051**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORNELIUS CONNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cornelius Conner pled guilty to one count of armed robbery, threat of force, party to a crime, contrary to WIS. STAT.

§§ 943.32(2) and 939.05 (2003-04).[1] The court sentenced Conner to four years of initial confinement and four years of extended supervision. Conner argues that his due process rights were violated during sentencing. For the reasons stated below, we disagree, and therefore, affirm the judgment of conviction.[2]

¶2 At both the plea hearing and sentencing, Conner disputed the State's assertion that he was armed with a gun during the robbery. However, Conner admitted that his brother wielded a baseball bat and he grabbed a pool cue during the incident, and on that factual basis, he pled guilty. During its sentencing comments, the court acknowledged the factual dispute as to whether a gun was used during the armed robbery, questioned what standard of proof should apply, and ultimately concluded that it was "entitled to consider these aggravating circumstances, even when there is considerable lack of certainty about their existence, and consider them … in terms of the risk to the community that might exist … [and] in deciding what the severity of the offense is."

¶3 On appeal, Conner contends that the sentencing court could not consider whether a gun was used during the robbery unless that fact was

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The State argues that Conner has not preserved any issue because he did not file a postconviction motion to modify sentence. *See* ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992). Conner did raise this issue prominently during sentencing and the circuit court was given the opportunity to address the issue. Therefore, we will address the merits of Conner's argument. *See* WIS. STAT. § 974.02(2) ("An appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are … issues previously raised.").

Alternatively, the State contends that Conner is estopped from challenging the sentence imposed by the court because it is within the range proposed by Conner's trial counsel. *See* ***State v. Magnuson***, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998). Despite the potential estoppel, we choose to reach the merits.

established beyond a reasonable doubt. He argues that he is entitled to a jury trial on the question of whether a gun was used "because the existence of such a weapon alters the category that [the] behavior falls into, possibly increasing the minimum amount of custody the sentencing court would consider." Conner relies on ***Blakely v. Washington***, 542 U.S. __, 124 S. Ct. 2531 (2004).[3] Conner's reliance is misplaced.

¶4 "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***, 542 U.S. at __, 124 S. Ct. at 2537 (emphasis deleted).

¶5 In this case, Conner pled guilty to armed robbery, threat of force, party to a crime. The statutory maximum sentence for that crime is not affected by the source of the "threat of force," be it a baseball bat, pool cue or a gun. The court was not obligated to find any additional facts prior to imposing sentence, and thus, ***Apprendi*** and ***Blakely*** are not implicated. *See* ***Blakely***, 542 U.S. at __, 124 S. Ct. at 2537 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.") (emphasis in original).

[3] Conner also relies on the opinion of the Seventh Circuit Court of Appeals in ***United States v. Booker***, 375 F.3d 508 (7th Cir. 2004). After briefing was completed in this case, the United States Supreme Court issued its opinion affirming the Seventh Circuit. ***United States v. Booker***, __ U.S. __, 125 S. Ct. 738 (2005).

¶6 Any doubt as to the applicability of ***Blakely*** to Wisconsin's sentencing procedure was resolved by ***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. "[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." ***Id.*** Sentencing guidelines in Wisconsin are not mandatory. *See* WIS. STAT. § 973.017(10). Therefore, no ***Blakely*** violation occurred.

¶7 A sentencing court can consider uncharged and unproven offenses as part of the consideration of the defendant's character. *See* ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The sentencing court is not required to speak to "a formal burden of proof requirement for factual findings which impact on a sentencing." ***State v. Hubert***, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993). The vicious or aggravated nature of the crime is a relevant sentencing factor. *See* ***State v. Borrell***, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992). The court's consideration that a gun might have been used by Conner during the armed robbery did not violate Conner's constitutional rights.

By the Court.—Judgment affirmed.

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