IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 03-10,880**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
MICHAEL McCLOSKEY,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's judgment of sentence docketed on May 18, 2004 and its Order denying the defendant's post sentence motions docketed on July 13, 2004. The relevant facts follow.

The police arrested the defendant and charged him with conspiracy to commit a robbery, a felony in the first degree. A jury trial was held March 9-11, 2004. The jury found the defendant guilty.

In an Order docketed May 18, 2004, the Court sentenced the defendant to incarceration in a state correctional institution for a minimum of 10 years and a maximum of 20 years under 42 Pa.C.S.A. §9714. The Court found that the defendant's conviction for conspiracy to commit a robbery that threatened the victim with immediate serious bodily injury was a crime of violence under Section 9714(g). The Court also found that the defendant had been convicted in 1982 of aggravated assault, which attempted or caused serious bodily injury. See Commonwealth v. Michael McCloskey, No. 81-10,604.

On May 20, 2004, the defendant filed post sentence motions, which raised

several issues including an allegation that the Court misapplied section 9714 when it sentenced the defendant to a 10 to 20 year sentence. The Court denied the post sentence motions in an Order dated July 13, 2004.

The defendant filed a notice of appeal on July 29, 2004. On appeal, the defendant contends that the application of the two strikes provision of 42 Pa.C.S. §9714 in this case violated his right to a jury trial. The defendant relies on Blakely v. Washington, 124 S.Ct. 2531 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000).

The Court finds the defendant's contention does not entitle him to any relief for several reasons. First, the defendant did not assert his right to a jury trial on this sentencing issue until he filed his statement of matters complained of on appeal. Although Blakely was not decided until after the defendant was sentenced, Apprendi was decided well before the defendant's sentencing hearing was held, but the defendant did not raise the issue at the time of sentencing or in his post sentence motions.

Second, the rule set forth in Apprendi and applied in Blakely pertained to the maximum sentence, not the minimum sentence. The United Stated Supreme Court stated in Apprendi: "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, 530 U.S. at 490, 120 S.Ct. at 2362. The jury convicted the defendant of conspiracy to commit robbery, a felony of the first degree. The statutory maximum for a felony of the first degree is 20 years. 18 Pa.C.S.A. §1103. The Court sentenced the defendant to a maximum of 20 years. Therefore, the application of section 9714 did not increase the penalty beyond the prescribed statutory maximum.

The defendant seems to argue that since his minimum of 10 years was more

than he would have received under Pennsylvania's sentencing guidelines, he was entitled to a jury determination that his convictions were crimes of violence. The Court cannot agree. The sentencing structure in Pennsylvania is very different from the Washington sentencing guidelines at issue in Blakely. The Washington guidelines determined the actual maximum sentence a defendant would receive. In Pennsylvania, the judge utilizes the sentencing guidelines to determine the **minimum** sentence a defendant will receive. See 204 Pa.Code §303.9(e)("All numbers in sentence recommendations suggest months of minimum confinement…"). Generally speaking, the only constraints on a judge's discretion in imposing the maximum portion of a defendant's sentence are the rule that the minimum sentence may not exceed one-half the maximum (see 42 Pa.C.S.A. §§9755(b), 9756(b)), and the maximum sentence may not exceed the statutory maximums found at 18 Pa.C.S.A. §1101 et seq. Therefore, the Court finds the Pennsylvania sentencing guidelines are distinguishable from the Washington sentencing guidelines at issue in Blakely. Furthermore, the United States Supreme Court has already held facts that increase a minimum sentence are not subject to the jury trial requirement set forth in Apprendi. Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406 (2002); see also McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411 (1986). The Pennsylvania Superior Court also has rejected a similar claim made under the Pennsylvania Constitution. Commonwealth v. Nguyen, 834 A.2d 1205, 1208-1209 (Pa.Super. 2003); see also Commonwealth v. Green, 849 A.2d 1247, 1249-1252 (Pa.Super. 2004).

Finally, Apprendi and Blakely apply when a fact other than the fact of a prior conviction increase the penalty beyond the statutory maximum. Here, it is the defendant's convictions that trigger the two strikes provision of section 9714.

In conclusion, the Court finds Apprendi and Blakely inapplicable to this case because: (1) the defendant's maximum sentence was not beyond the statutory maximum; (2) there is no right to a jury determination of facts that increase the **minimum** sentence under either the United States Constitution or the Pennsylvania Constitution; and (3) the only facts which increased the defendant's sentence were that his current conviction and his prior conviction were for certain offenses enumerated in section 9714.

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: William Simmers, Esquire (ADA)
Jason Poplaski, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)