

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

DAVID BECSEY
Zeigler Cohen & Koch
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FERID OGRESEVIC,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0607-CR-556

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary L. Miller, Judge
Cause No. 49G05-9507-CF-100692

June 7, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

In 1996, Ferid Ogresevic (“Ogresevic”) pleaded guilty in Marion Superior Court to Class A felony voluntary manslaughter and was sentenced to serve fifty years. Ogresevic has filed a belated appeal of his sentence arguing that the trial court improperly relied on certain aggravating circumstances in violation of Blakely v. Washington, and that his fifty-year sentence is inappropriate in light of the nature of the offense and the character of the offender. Concluding that Ogresevic may not raise a retroactive Blakely claim and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

On July 19, 1995, Ogresevic kicked Sara Green (“Green”) repeatedly causing her to lose consciousness. He later took Green to the hospital where she died from blunt force trauma to her head and abdomen. The State charged Ogresevic with murder. On January 31, 1996, Ogresevic agreed to plead guilty to Class A felony voluntary manslaughter.

On March 22, 1996, a sentencing hearing was held. The court found the following aggravating circumstances: that Ogresevic was on probation for operating a vehicle while intoxicated at the time of this offense, “that he did have a prior primarily unreported history of violence against the same victim,” the “vicious” nature of the offense, and his attempt to cover up his involvement in the offense. Tr. p. 64. The trial court considered Ogresevic’s “environment in Bosnia and in his life before coming to this country” as a mitigating circumstance. Id. The court determined that the aggravating circumstances outweighed the mitigating circumstance and sentenced Ogresevic to serve fifty years in the Indiana Department of Correction.

In 2001, Ogresevic filed a petition for post-conviction relief, but moved to dismiss that petition in 2005. On May 15, 2006, Ogresevic filed a petition for permission to file a belated notice of appeal. The trial court granted his petition and this appeal ensued.

I. Ogresevic's Blakely Claim

Ogresevic argues that the trial court relied on aggravating circumstances “made impermissible under Blakely. This resulted in Mr. Ogresevic receiving an erroneous enhanced maximum sentence.” Br. of Appellant at 3. In response, the State asserts that Ogresevic cannot raise a retroactive Blakely claim.

The rule announced in Blakely v. Washington¹ “applies retroactively to cases pending on direct review or not yet final at the time that the Blakely decision was announced.” Robbins v. State, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005) (citing Smylie v. State, 823 N.E.2d 679, 687 (Ind. 2005)); Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005). Although a criminal defendant may have the option to pursue a belated appeal under Post-Conviction Rule 2(1), his or her case is final for the purpose of retroactivity when his right to pursue a timely appeal lapses.² See Robbins, 839 N.E.2d at 1199.

In this case, Ogresevic was sentenced on March 22, 1996. Therefore, his right to pursue a timely appeal lapsed over eight years prior to the Supreme Court's decision in Blakely. Moreover, Ogresevic's belated direct appeal, which was filed in 2006, was not

¹ 542 U.S. 296 (2004).

² But see Gutermuth v. State, 848 N.E.2d 716, 726 (Ind. Ct. App. 2006), trans. granted, opinion vacated (“In Gutermuth's case, the availability of appeal via Post-Conviction Rule 2(1) had not yet been exhausted when Blakely was announced, and therefore Blakely must be given retroactive effect.”) Boyle v. State, 851 N.E.2d 996 (Ind. Ct. App. 2006), trans. pending; Medina v. State, No. 71A03-0604-CR-163 (Ind. Ct. App. Nov. 29, 2006), trans. pending; Moshenak v. State, 851 N.E.2d 339 (Ind. Ct. App. 2006), trans. pending.

pending at the time that Blakely was decided. For these reasons, we conclude that Blakely does not apply retroactively to Ogresevic's appeal of his 1996 sentence, and therefore, his claims under Blakely must fail.

II. Inappropriate Sentence

Ogresevic also argues that his fifty-year maximum sentence is inappropriate in light of the nature of the offense and the character of the offender. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

Concerning the nature of the offense, we observe that Green was kicked repeatedly resulting in numerous injuries to her face, chest, arms, back and abdomen. Tr. pp. 56-57. These injuries included a laceration of Green's liver, a hemorrhage in the pancreas, and a six-inch by four-inch hematoma on the surface of her liver. There was also hemorrhaging in Green's cranial vault. Tr. p. 57. The trial court described this as a "vicious" offense, and the evidence before us supports that characterization.

Turning to Ogresevic's character, we observe that prior to the commission of this offense, Ogresevic had beaten Green several times, which resulted in bruising to her face and chest and a ruptured ear drum. Tr. pp. 36-37. In addition, although Ogresevic's prior criminal history is minor, he was on probation for operating a vehicle while intoxicated when he committed this offense.

For all of these reasons, we conclude that Ogresevic's fifty-year maximum sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

The rule announced in Blakely does not apply retroactively to Ogresevic's belated appeal of his 1996 sentence. Moreover, his fifty-year sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

NAJAM, J., concurs.

MAY, J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

FERID OGRESEVIC,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0607-CR-556
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

MAY, Judge, dissenting.

I must respectfully dissent. I believe *Blakely* applies to this case, as Ogresevic’s “availability of appeal” was not exhausted when *Blakely* was announced. Ogresevic’s sentence was enhanced based on aggravating circumstances he did not admit and that were not found by a jury beyond a reasonable doubt. We should therefore remand for resentencing.

I agree with those decisions that hold *Blakely* applies in certain cases where permission to file a belated appeal has been properly obtained. We recently so held in *Gutermuth v. State*, 848 N.E.2d 716 (Ind. Ct. App. 2006), *pet. for trans. granted, decision vacated*.

In *Smylie*, the State asserted Smylie had forfeited his right to challenge his sentence under *Blakely* by failing to object on Sixth Amendment grounds at sentencing.

The Court noted *Blakely* was decided while Smylie’s case was pending on direct appeal, and held: “[b]ecause *Blakely* radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent, we conclude that it represents a new rule of criminal procedure.” 823 N.E.2d at 687. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The Smylie court accordingly concluded:

First, as a new rule of constitutional procedure, we will apply *Blakely* retroactively to all cases on direct review at the time *Blakely* was announced. Second, a defendant need not have objected at trial in order to raise a *Blakely* claim on appeal inasmuch as not raising a *Blakely* claim before its issuance would fall within the range of effective lawyering. Third, those defendants who did not appeal their sentence at all will have forfeited any *Blakely* claim.

823 N.E.2d at 690-91.

The Indiana sentencing scheme that ran afoul of *Blakely* was in use when Ogresevic was sentenced in 1996. Ogresevic moved in 2006 for a belated appeal, which motion we granted. A case is “final” when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied. *Griffith*, 479 U.S. at 321 n.6. As Ogresevic properly obtained permission to file a belated appeal, his “availability of appeal” was not “exhausted” when *Blakely* was announced, and therefore *Blakely* should be given retroactive effect.

I would remand to the trial court with instructions to afford the State an election to prove additional aggravating circumstances to a jury. Should the State forgo this

election, the trial court could reconsider the appropriate sentence based on properly found aggravators and mitigators.³ See *Trusley v. State*, 829 N.E.2d 923, 927 (Ind. 2005).

³ The trial court found as a mitigating circumstance that Ogresevic's "environment in Bosnia and in his life before coming to this country served as a negative influence," (Tr. at 64), and it found one proper aggravator, *i.e.*, that Ogresevic was on probation for drunk driving when he killed Green.

Probationary status need not to be proven to a jury beyond a reasonable doubt before it can be considered in aggravation. *Neff v. State*, 849 N.E.2d 556, 560 (Ind. 2006). But the extent, if any, to which a sentence should be enhanced based on an individual's criminal history turns on its weight, as measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability. *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). For example, a criminal history comprised of a prior conviction of operating a vehicle while intoxicated may be a significant aggravator at a sentencing for a subsequent alcohol-related offense, but does not command the same significance at a sentencing for murder. *Id.*

Duncan's criminal history included convictions of misdemeanor driving under the influence, felony disrupting public services, and Class C misdemeanor contributing to the delinquency of a minor. Our Supreme Court found that criminal history did not justify an enhanced murder sentence. Nor could Ogresevic's twenty-year sentence enhancement be justified solely by his criminal history in light of the "number of prior convictions and their gravity . . . [and] dissimilarity to the present offense." *Id.*