STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2171

State of Minnesota,
Respondent,

vs.

Julius Barker,
Appellant.

Filed November 4, 2008
Affirmed
Crippen, Judge[*]

Ramsey County District Court
File No. K0-01-1237

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

In this postconviction appeal, appellant Julius Barker seeks to modify his sentence for second-degree unintentional murder. Appellant argues that his sentence violates *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), because the sentencing judge determined he was on probation at the time of the offense, which added a point to the criminal history score used to determine the sentence under the governing guidelines. We affirm.

FACTS

In exchange for appellant's guilty plea on a charge of second-degree unintentional murder, the state agreed to dismiss other charges and seek a sentence of 186 months' imprisonment, which was the upward limit of the presumptive sentence range under the Minnesota Sentencing Guidelines based on appellant's criminal history score. In September 2001, the district court sentenced appellant to 186 months' imprisonment.

Appellant filed a pro se petition for postconviction relief in April 2005, which the district court dismissed. Appellant filed a second pro se petition for postconviction relief in July 2007, requesting a sentence reduction based on *Blakely*. The district court denied appellant's 2007 petition, and this appeal followed.

D E C I S I O N

Appellant challenges the validity of his sentence, arguing that it should be modified because it is based on an invalid criminal history score of two. One of the two criminal history points was a custody status point for being on probation at the time of the

offense. Appellant suggests that his sentence violates *Blakely* because the question of whether he was on probation at the time of the offense was decided by the sentencing judge, not by a jury.

Under *Blakely*, any fact other than a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury" or admitted by the defendant. 542 U.S. at 301, 124 S. Ct. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362 (2000)); *see also* Minn. Stat. § 244.10, subd. 5 (2006) (providing that facts supporting request for an aggravated sentence must be presented to a jury). But we have previously held that decisions regarding custody status points are for the district court because they are "analogous to *Blakely's* exception for the fact of a prior conviction." *State v. Brooks*, 690 N.W.2d 160, 163 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Dec. 13, 2005); *see also* Minn. Sent. Guidelines II.B.2.a (requiring assignment of one custody status point when the defendant committed the offense while on probation following a felony or qualifying gross misdemeanor conviction). Thus, the sentencing judge's assignment of one custody status point, based on an independent determination that appellant was on probation at the time of the offense, did not violate *Blakely*.[1]

Affirmed.

[1] Respondent also contends that *Blakely* does not apply retroactively to appellant's sentence because his sentence was final before that decision was issued. We need not review this argument in light of our conclusion that appellant's argument fails on its merits.