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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>BRUCE LEE SCOTT,</p> <p style="text-align: center;">Petitioner - Appellant,</p> <p>v.</p> <p>RYDER, Deputy Warden,</p> <p style="text-align: center;">Respondent - Appellee.</p>

No. 07-15699

D.C. No. CV-04-00376-MHM

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Mary H. Murguia, District Judge, Presiding

Argued and Submitted April 16, 2009
San Francisco, California

Before: D.W. NELSON, BERZON and CLIFTON, Circuit Judges.

Petitioner-Appellant Bruce Lee Scott challenges his 18-year aggravated sentence for second degree murder. His claim is that his Sixth Amendment rights were violated because the trial judge, and not a jury, found statutory aggravating

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

factors and increased his sentence beyond the presumptive one, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court denied the petition, holding that Scott had procedurally defaulted on the *Apprendi* claim under Ariz. R. Crim. P. 32.2(a)(3).

1. The right Scott seeks to invoke was not clearly established until *Blakely v. Washington*, 542 U.S. 296 (2004), a decision announcing a new constitutional rule of criminal procedure. See *Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005) (holding *Blakely* not retroactive). In *Blakely*, the Court applied *Apprendi* to a Washington statute that allowed a trial judge to impose an “exceptional” sentence upon his own findings that the defendant acted with “deliberate cruelty.” 542 U.S. at 298, 301. The Court held that this procedure violated *Apprendi* because the relevant “statutory maximum” for *Apprendi* purposes was the maximum sentence a judge may impose without finding any additional facts, rejecting the state’s argument that the only relevant maximum under *Apprendi* is the maximum the judge could impose under state law after finding additional facts. *Id.* at 303-04.

Similarly here, Scott was convicted of second-degree murder, carrying a “presumptive” term of 16 years. By statute, the sentence can be increased on a finding of statutory aggravating factors, and Scott’s claim, like *Blakely*’s, is that the Sixth Amendment requires that a jury find these factors. Scott’s claim is, then,

“virtually indistinguishable from the question reviewed by the Supreme Court in *Blakely*. In both cases, the judge imposed a sentence greater than the standard range specified [in the applicable state law] based on findings made by the judge, rather than the jury.” *Schardt*, 414 F.3d at 1032. The *Blakely* rule is “new,” as we explained in *Schardt*, because it was not clear that *Apprendi* alone would have compelled the rule announced by the Court in *Blakely*; as we noted, every circuit court considering the question presented in *Blakely* had reached the opposite conclusion later reached by the Supreme Court. *See id.* at 1035.

2. Scott’s conviction and sentence became final in 2002, when the time for filing a petition for writ of certiorari on direct appeal expired. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). *Blakely* was not decided until 2004. The new rule announced in *Blakely* was therefore not applicable to Scott on habeas. *See Schardt*, 414 F.3d at 1038.

3. Scott maintained at oral argument that because Arizona “Rule 32 of-right” post-conviction relief proceedings are a form of direct appeal, *Blakely* is available to him, because his post-conviction proceedings were not final until 2005, after *Blakely* had been decided. Under the Arizona rules, however, a “Rule 32 of-right proceeding” is only available to “[a]ny person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically

violated based upon a plea of guilty or no contest.” Ariz. R. Crim. P. 32.1. Scott’s post-conviction relief proceedings, however, came after his trial and direct appeals, not after a guilty or no contest plea. It was therefore not a “Rule 32 of-right” proceeding.

AFFIRMED.