

COVER ARTICLE

The *Blakely* Fix: New Tennessee law restores judicial discretion in criminal sentencing

By David L. Raybin

"The disposition and treatment of those who commit crimes and have to be punished therefore is always a delicate and difficult question. It should be a source of genuine satisfaction to the people of Tennessee that we have discovered and have in successful operation a system that comes as near solving that perplexing problem as any that has yet been tried."

— Gov. James Beriah Frazier (1903)

"The Task Force charged with making Tennessee's criminal sentencing guidelines conform with the Supreme Court ruling has come up with what I think is a very practical, common-sense solution that leaves discretion in the hands of the judges and keeps intact the structure that we have developed in our state."

— Gov. Phil Bredesen (March 4, 2005)

Introduction

On June 7, Gov. Phil Bredesen signed into law remedial legislation that restores a judge's ability to impose the full range of sentences in criminal cases. Because the statute takes effect immediately this article was drafted to provide a timely guide to the new procedures. The full text of the *Blakely*-compliant amendments to the Sentencing Reform Act of 1989 (widely known as "the *Blakely* fix") appears at <http://www.tba.org/news/pc0353.pdf>.

One of the hallmarks of our system of jurisprudence is the incremental development of the law by appellate courts — a process that is less than perfectly predictable. This is demonstrated by a string of United States Supreme Court cases that altered our understanding of the role of the trial court to find facts that could increase a sentence beyond the statutory mandated minimum,[1] which struck down the mandatory provisions of the federal sentencing guidelines, is the latest in a line of recent Supreme Court cases expanding the reach of the Sixth Amendment Jury Trial Clause.[2]

Blakely concerns statutes that entitle a defendant to a penalty no higher than a designated sentence unless certain specified findings of facts are made. Typically these "findings of fact" involve a determination of often-contested enhancements that justify — and under some schemes require — a greater sentence above the legislatively mandated, designated sentence. *Blakely* made clear that these enhancements could no longer be determined by a judge but were the province of a jury as required by the Sixth Amendment.

It is the concept of "entitlement" that dictates an inquiry as to whether the statutory scheme creates an entitlement to a specific designated sentence in the absence of additional fact-finding. The designated sentence may be the minimum sentence point in a range, as in Tennessee, or it may be the lesser of two sentencing ranges, as in Washington state. It is also immaterial if enhancement to greater points in the range is mandatory such as the federal system, or discretionary, such as the departure ranges in Washington state. The important thing is that none of the laws in the *Blakely/Booker* line of cases allowed a sentence any higher than the designated sentence (or range) without additional judicial findings.

Under the Tennessee Sentencing Reform Act of 1989 a defendant was entitled, as a matter of law, to a sentence at the presumptive, statutory minimum for all but Class A felonies (and then at the mid-range) when he or she began the sentencing hearing. In the absence of proof of enhancement factors at the end of the hearing, the defendant was still entitled to the presumptive sentence.

It is true that the 1989 Tennessee statutes certainly did not mandate an increased sentence. The question however was not what sentence was required but what the statute forbids. Under any of the sentencing structures examined in the recent string of Supreme Court cases, whenever a higher sentence is forbidden, absent a finding of fact (other than prior conviction), that fact must be admitted by the defendant or established to a jury beyond a reasonable doubt.

As long as Tennessee's statutes designated sentences above which judges were not permitted to go without additional fact-finding, Tennessee did not have an advisory guidelines system. Instead, it had a system with the very same constitutional flaw that the U.S. Supreme Court found in *Blakely*, *Ring* and *Apprendi*, and in the federal guidelines prior to the court's remedial fix in *Booker*. It mattered not that the Tennessee enhancement factors were less rigid than the federal "point system" or that the Tennessee judge had the discretion to impose the minimum notwithstanding the enhancement factors. The Tennessee defendant had an entitlement to the statutory presumptive sentence and the Sixth Amendment cases prohibited enhancement factors from increasing the sentence unless found by a jury. Thus, non-prior-conviction-related enhancement factors could not apply to the sentences imposed under the 1989 Sentencing Reform Act. The judge was effectively limited to the presumptive sentence.

In light of the obvious defect in our law the governor appointed a task force of judges, attorneys, and government officials to recommend legislation to remedy our statutes. The proposal – called the *Blakely* fix – was accepted by the Governor and has just become law.

A. The central premise of the 2005 legislation

The new legislation makes no changes to the existing sentencing ranges of punishment that are determined by the number and types of prior convictions. What has changed is the manner of fixing the length of sentence within the range.

Booker confirmed that removing all entitlements to a specific sentence "determinate starting point," beyond which a judge could not go without additional fact-finding, renders a sentencing guidelines system advisory and thus constitutional. To achieve this goal, the new Tennessee legislation removes the prior rule, that absent an enhancement, a judge may not impose a sentence that exceeds the presumptive sentence at the bottom of the range (or in the middle of the range for Class A felonies). Now the judge may sentence anywhere within the appropriate range and defendant is not entitled to the minimum as a matter of law. There is, however, a subtle but important "entitlement" that remains and that *Booker* allows.

Booker found unconstitutional the mandatory sentence calculation provisions of the federal statute. Sheared of the mandatory language, the entire federal sentencing system then became advisory. The only remaining "entitlement" however was that the federal judge was still required to consider all the factors but sentencing within statutory ranges was now discretionary and there was no presumptive starting point. The new Tennessee legislation proposed by the Governor's Task Force similarly allows for sentencing guidelines but also requires the judge to consider the advisory guidelines, but, as noted, does not contain any mandatory entitlement to a minimum sentence. This, then, is a sentencing system that retains our familiar advisory guidelines, which should pass constitutional muster.

This central premise of the 2005 remedial legislation is reflected in the following emphasized portions of *Tenn. Code Ann.* § 40-35-210 as amended:

- a. At the conclusion of the sentencing hearing, the court shall first determine the appropriate range of sentence.
- b. To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:
 1. The evidence, if any, received at the trial and the sentencing hearing;
 2. The presentence report;
 3. The principles of sentencing and arguments as to sentencing alternatives;
 4. The nature and characteristics of the criminal conduct involved;

5. Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
 6. Any statistical information provided by the administrative office of the court as to sentencing practices for similar offenses in Tennessee; and
 7. Any statement the defendant wishes to make in the defendant's own behalf about sentencing.
- c. The court shall impose a sentence within the range of punishment determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:
1. The minimum sentence within the range of punishment is the sentence which should be imposed because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications.
 2. The sentence length within the range should be adjusted as appropriate by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.
- d. The sentence length within the range should be consistent with the purposes and principles of this chapter.
- e. When the court imposes a sentence, it shall place on the record either orally or in writing what enhancement or mitigating factors it considered, if any, as well as the reasons for the sentence in order to ensure fair and consistent sentencing.
- f. A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, and the record of prior felony convictions filed by the district attorney general with the court as required by § 40-35-202(a).

The heart of the 2005 legislation is contained in this passage: "In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines." This is clearly the post-*Booker* federal formulation that creates a guideline system mandating that the judge consider specific guidelines. This formulation is critical since it assures that all judges will use an identical process of arriving at a sentence without creating an entitlement to a presumptive sentence or, for that matter, any specific sentence.

The next two critical passages are: "(1) The minimum sentence within the range of punishment is the sentence which should be imposed because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications," and "(2) The sentence length within the range should be adjusted as appropriate by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114."

These two sentences look superficially similar to our old presumptive minimum sentence and the previous method of application of enhancement and mitigating factors. These new provisions were intentionally drafted to mirror the former statute but without the entitlement to a mandatory, presumptive minimum or mid-range sentence. As explained in the introduction to this article, it is an entitlement to a specific mandatory sentence that triggers the Sixth Amendment when judicial fact-finding is necessary to increase the sentence above the mandatory figure. The new statute contains no such requirement that avoids the flaws in statutory schemes condemned by the federal courts. Tennessee's history of sentencing reform did not begin in 1989. Rather, the legislative history dates back to the Sentencing Reform Act of 1982. The 1982 sentencing provisions contained our now-familiar "ranges," determinate sentences, and judicial sentencing. Previously, we had indeterminate sentences imposed by a jury.

The 1982 law was landmark legislation but what was missing from the scheme was the notion of a "starting point" in the sentencing process.[3] Sentencing practices became totally disparate because the 1982 law was enacted without the benefit of prison population projections and other tools to assess the impact of such a major sentencing alteration. It was, quite simply, a shot in the dark. Within a few years our prisons were filled to capacity, producing riots that destroyed millions of dollars of property. Our Department of Correction was under the thumb of a federal master.[4] The governor was forced to call the General Assembly into Special Session in 1985 to solve the prison problem.

Among other reforms enacted in 1985, the General Assembly created the Tennessee Sentencing Commission that drafted the 1989 Sentencing Reform Act. The 1985 statutory mandates are contained within the 1989 law. *Tenn. Code Ann.* § 40-35-102(5) recognizes that “state prison capacities and the funds to build and maintain them are limited.”

Presumptive sentencing was the cornerstone of the 1989 law. This doctrine promoted far greater uniformity of sentencing since, if everyone started at the same place, there was a much better chance that everyone would end at a similar place. Presumptive sentencing is no longer possible in this post-*Blakely* world. But because of its critical importance, the 2005 Task Force proposal continues to provide that the minimum sentence is the appropriate “starting point” albeit in an “advisory” way.

To avoid “sentence creep” the new Act also provides that the Administrative Office of the Courts will begin maintaining statistics as to sentencing practices in Tennessee. While designed to assist trial and appellate judges in assessing sentences in individual cases, a solid statistical base will also alert us to local jurisdictions that drastically deviate from the norm. Presumably, such deviations can be promptly remedied before we once again reach a state of crisis.

B. Enhancement factors

In light of the repeal of the presumptive sentence concept, the enhancement factors have been modified. The primary alteration is in the introductory language to amended *Tenn. Code Ann.* § 40-35-114, which now provides: “If appropriate for the offense and if not themselves an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant’s sentence.” It can be seen that this provision mirrors the earlier statute that an enhancement factor may not be utilized if it is also an essential element of the crime.[5]

The introductory sentence to the enhancement factor’s statute also requires that the judge consider the enhancement factors but makes the factors “advisory” in nature. This is in keeping with the *Booker* doctrine that a trial judge can be made to consider a number of factors as long as the judge is not bound by the factors themselves. In short, this is another instance of having a uniform sentencing procedure so that all judges go through the same process of arriving at a sentence. The final alteration to the enhancement factor statute was a rewording of many of the factors themselves. The task force took the opportunity of this revision process to modify some of the language of the prior factors to make them clearer and more consistent. In general, however, the enhancement factors are similar to prior law.

C. Appellate review

The Act makes two alterations to *Tenn. Code Ann.* § 40-35-401 and *Tenn. Code Ann.* § 40-35-402, which are the statutes governing sentencing appellate review. First, the previous ground for appeal that the “enhancement and mitigating factors were not weighed properly” has been deleted from the brace of appellate review statutes. Given that the trial court no longer “weighs” these factors, there is no longer a necessity of having this process reviewed on appeal.

The defense and state appellate review provisions both now contain a new ground for appeal that the “sentence is inconsistent with the purposes of sentencing set out in § 40-35-102 and 40-35-103.” Arguably, this has always been the law given that appellate courts frequently cite to these purposes in sentencing reviews. However, it is entirely appropriate for this ground to be expressly stated in the statutes since the sentencing purposes and considerations have taken on a greater significance given that they are part of the required sentencing process under this new act.

Under the federal sentencing system, as revised in *Booker*, a federal judge has the discretion to impose any “reasonable” sentence as high as the statutory maximum penalty for the offense of conviction as long as the judge considers the guidelines and designates statutory factors. The standard for appellate review under the federal system is also one of “reasonableness.” The Tennessee Task Force opted to retain our stronger standard of appellate review which is de novo with a presumption that the determinations made by the trial court are correct. This important appellate standard ensures the possibility of greater uniformity of sentencing throughout Tennessee. In the final analysis, appellate review is what enforces the sentencing structure crafted by the legislature.

D. Alternative sentencing and probation eligibility

The new act contains two important provisions addressing alternative sentencing and probation eligibility. The first alteration is an amendment to *Tenn. Code Ann.* § 40-35-102(6), which rewrites that provision in its entirety:

6. A defendant who does not fall within the parameters of subdivision (5) and who is an especially mitigated or standard offender convicted of a Class C, D or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider but is not bound by this advisory sentencing guideline.

The original language of *Tenn. Code Ann.* § 40-35-102(6) created a “presumption” that an individual was a favorable candidate for alternative sentencing options for those convicted of Class C, D or E felonies. Because alternative sentencing options might dictate the length of the sentence (such as split-confinement options) there was a concern that this “presumption” might create a constitutionally suspect entitlement. To avoid even the possibility of a Sixth Amendment flaw, the “presumption” was altered to a required “consideration” that is “advisory.” This formulation is identical to the advisory sentencing guideline that mandates consideration of the minimum sentence without the corresponding “presumption.”

The new legislation also amends *Tenn. Code Ann.* § 40-35-303(a) by increasing the eight-year probation eligibility cap to 10 years, which is a significant improvement. Trial judges will now have greater flexibility in permitting a defendant to be on probation where a longer sentence is justified by other factors. The new act retains the identical exclusions from probation eligibility for certain extremely serious offenses.

E. Modifications to range determinations

The new act does not alter the procedures for sentencing into higher ranges. Defendants will continue to receive a sentence in the higher ranges depending on the number and types of prior convictions with one minor alteration. Prior law under *Tenn. Code Ann.* §§ 40-35-106(b)(4), 40-35-107(b)(4) and 40-35-108(b)(4) contained a “24-hour exception” to the range determination. Multiple non-violent felonies committed within the same 24-hour period were counted as a single prior conviction. Thus, an auto burglary and the separate theft of a purse in the vehicle were to be considered as a single prior conviction. The new act makes some minor changes to the “24-hour exception” in *Tenn. Code Ann.* §§ 40-35-106(b)(4), 40-35-107(b)(4), and 40-35-108(b)(4) which are now identically worded as follows:

Except for convictions whose statutory elements include serious bodily injury, bodily injury or threatened serious bodily injury or bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four (24) hour period constitute one (1) conviction for the purpose of determining prior convictions.

The prior “24-hour exception” not only required that the offenses occur within 24 hours but that the multiple felonies must also have been “part of a single course of conduct.” Arguably the 24-hour exclusion was too subjective with the added “single course of conduct” concept and thus the concept was eliminated as a limitation on the 24-hour exception, which effectively works in favor of the defendant.

In addition, prior law looked to the defendant’s “acts resulting in bodily injury or threatened bodily injury to the victim or victims” that dictated those felonies which would count as a separate crime of violence even though committed in the same 24 hours. The new formulation does not depend on subjective “acts,” but looks instead to objective “statutory” elements in determining whether the offense involves “serious bodily injury or threatens serious bodily injury to the victim or victims.”

F. Community corrections

Community corrections is a probation-like program designed for serious felony offenses.[6] If the defendant violates the terms of his or her community corrections program, the court may remove the defendant from participation in the program in a proceeding similar to the revocation of probation. Revocation of community corrections differs from the revocation of regular probation in that, in the case of community corrections, the “court may resentence the defendant to any appropriate

sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community-based alternative to incarceration.” [7] Given that the defendant is subject to a greater sentence than he or she originally received, this “resentencing” is unquestionably a sentencing determination subject to the *Blakely* requirements. Accordingly, the act amends the community corrections’ revocation procedure to the extent that “resentencing shall be conducted in compliance with § 45-35-210.” This amendment conforms the “resentencing” for community corrections sentences to the general sentencing provisions for felony offenders. Thus, the resentencing provision of community correction complies with the dictates of *Blakely*.

G. Effective date provisions and retroactivity The act contains specific provisions regarding the effective date and limited retroactivity:

SECTION 18. This act shall apply to sentencing for criminal offenses committed on or after the effective date of this act. Offenses committed prior thereto shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after the effective date of this act for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of this act by executing a waiver of such defendant’s ex post facto protections. Upon executing such a waiver, all provisions of this act shall apply to the defendant.

SECTION 19. This act shall have no application to sentencing for persons convicted of murder in the first degree which shall be governed by the provisions of §§ 39-13-202–39-13-208.

SECTION 22 This act shall take effect upon becoming a law, the public welfare requiring it and shall apply as provided in section 18.

Unlike many criminal statutes that are designed to take effect on July 1 or even Jan. 1 of the following year, this act takes effect immediately. Because the act is more than “just” procedural and alters (by potentially increasing) the potential punishment, it must apply only prospectively. Any other formulation would constitute an ex post facto law, which is absolutely prohibited by the federal and (our more strongly interpreted) Tennessee Constitutions. In light of these constitutional limitations the act applies only to crimes committed on or after the effective date.

The prospective application of this act is similar to the old Class X law and the 1982 sentencing law, which both applied only to crimes committed on or after the effective date of those statutes. The 1989 law was retroactive because there was an effective decrease in sentence lengths but for those defendants whose sentences were increased by the 1989 law the previous laws applied because of ex post facto concerns. Things got to the point where the judge had to figure sentences twice and then impose the lower sentence.[8] Thus, the new act applies only prospectively.

The act contains an exception to the prospective-only rule for those defendants who wish to opt into the provisions of the Act. This probably will occur for those defendants who desire to take advantage of the 10-year probation eligibility provision. However, if a defendant desires to elect to be sentenced under the provisions of the act the defendant must execute a waiver of his or her ex post facto protections. If there is such a waiver, then “all provisions of this act shall apply to the defendant.” In other words the defendant cannot pick and chose which portions of the act will apply. Lastly, the act contains a specific provision that the act has no application to death penalty cases, which continue to be governed by other statutes. Thus, the act applies to all felony offenses other than murder in the first degree.

H. Repealer provisions and severability clause

The act contains a number of repealer provisions that are necessary because of the transfer of the “hidden enhancement” factors from the specific statutes to the list of enhancement factors contained in newly drafted *Tenn. Code Ann.* § 40-35-114. The act also contains a standard severability clause. These provisions are not reproduced in this article.

Conclusion

The 2005 act was necessary in light of the Supreme Court's *Blakely* decision. *Blakely* is a continuation of judicial precedent made clearer by hindsight, yet the application of this decision to each state's sentencing structure must be resolved on a case-by-case basis, which depends on an interpretation of the intricacies of the sentencing laws of each jurisdiction.

In truth, it was not until *Blakely* that lawyers in Tennessee began immediately raising Sixth Amendment sentencing issues because of the obvious similarity of Washington law to our state. Gov. Bredesen should be commended for immediately creating a task force to propose remedial legislation. The recommendation of the task force is now law and applies to all felony cases where the crime was committed after the effective date of the act. The new legislation strikes a middle ground between a totally advisory system and a rigid bifurcated hearing where the jury determines the existence of enhancement factors. This compromise retains much of our prior procedure without the constitutional flaws.

The act does not address consecutive sentencing. It was the consensus of the task force that *Blakely* only reaches a sentence for a specific criminal offense rather than impacting consecutive sentences for multiple offenses. As of the publication of this article, no Tennessee court has held that *Blakely* applies to consecutive sentencing under Tennessee law.

The act does not impact misdemeanors which are governed by *Tenn. Code Ann.* § 40-35-302. Although otherwise entitled to the same considerations under the Sentencing Reform Act of 1989, unlike a felon, a misdemeanor is not entitled to the presumption of a minimum sentence.[9] Thus, *Blakely* has no application to misdemeanor sentencing in Tennessee.

The 1989 Sentencing Reform Act contained an unforeseeable flaw that — in light of *Blakely* and *Booker* — limited a judge's ability to impose the full range of sentence in criminal cases. The new act remedies that defect while still retaining a significant measure of controlled discretion necessary for fair and uniform sentencing in Tennessee.

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Notes

1. *United States v. Booker*, 125 S. Ct. 738 (2005)
2. See generally, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("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."); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that "[c]apital defendants, no less than noncapital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); *Blakely v. Washington*, 124 S.Ct. 2531, 2537 (2004) ("Our precedents make clear, however, that 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.");
3. *State v. Moss*, 727 S.W.2d 229 (Tenn. 1986).
4. See *State v. Smith*, 735 S.W.2d 859 (Tenn. Crim. App. 1987).
5. See, *State v. Jones*, 883 S.W.2d 597 (Tenn. 1994).
6. See generally, *State v. Estep*, 854 S.W.2d 124 (Tenn. Crim. App. 1992).
7. *Tenn. Code Ann.* § 40-36-106(e)(4).
8. See, *State v. Pearson*, 858 S.W.2d 879 (Tenn. 1993), and *State v. Dunn*, 901 S.W.2d 398 (Tenn. Crim. App. 1985). See also *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446 (1987) (application of revised sentencing guidelines to petitioner, whose crimes occurred before their effective date, violated ex post facto clause).
9. *State v. Seaton*, 914 S.W. 2d 129 (Tenn. Crim. App. 1995).

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