

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	) ) ) ) ) )	No. 54614-7-1  ORDER DISMISSING PERSONAL RESTRAINT PETITION
SCOTT CARL SMITH,  _____ Petitioner.		

Following his arrest on June 12, 1980, Scott Smith was convicted of three counts of felony murder in the first degree and two counts of assault in the first degree. Smith has now filed this personal restraint petition arguing that the consecutive life terms he received should be consolidated into one life term under Blakely v. Washington, 542 U.S. \_\_\_, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). To prevail here, however, Smith bears the heavy burden of showing either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 803, 792 P.2d 506 (1990); In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Smith contends his Sixth Amendment right to a jury trial was violated when the sentencing court imposed consecutive rather than concurrent terms of confinement. He relies on Blakely to support his argument. In that case the United States Supreme Court recently held that a defendant's Sixth Amendment right to trial by jury was violated when the trial court imposed a determinate sentence beyond the standard range for the charged offense based on additional findings of fact made by the court. In so doing, it noted that any fact (other than the fact of a prior conviction) that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury," Blakely, 124 S. Ct. at 2536, and that in applying this rule the "statutory maximum" 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." Blakely, 124 S. Ct. at 2537.

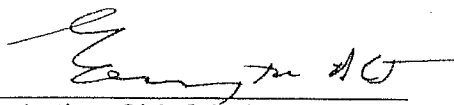
Smith's argument fails because, unlike the situation in Blakely, the verdict in this case did authorize the sentence imposed. Smith was sentenced under the former indeterminate sentencing scheme and received a sentence that was clearly within the trial court's discretion to impose. RCW 9.92.080(3) applies to offenders, like Smith, who committed their offenses before the Sentencing Reform Act of 1981 (SRA) was enacted. The statute directs that, whenever a person is convicted of multiple offenses arising from separate and distinct acts, the sentences imposed shall run consecutively unless the court exercises its discretion by expressly ordering the terms to be served concurrently. Under this statutory scheme, there is a clear preference for consecutive sentences. State v. Wachsmith, 23 Wn. App. 283, 284, 595 P.2d 64 (1979). There is no requirement that the sentencing court enter formal findings of fact to support its exercise of discretion and sentencing choice. Wachsmith, 23 Wn. App. at 286. Under the circumstances, Smith had no legally protected right to concurrent rather than consecutive sentences.

Even Blakely acknowledges that a defendant's right to a jury trial is not violated under an indeterminate sentencing scheme that authorizes a particular sentence without a statement of reasons. The holding in Blakely is therefore inapplicable to the imposition of consecutive sentences under RCW 9.92.080(3). Smith has not shown that the trial court violated his constitutional right to a trial by jury when it ordered him to serve consecutive, rather than concurrent, sentences. Accordingly, the petition should be dismissed.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11

Done this 29 day of September, 2004.

  
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Acting Chief Judge

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