NO. 44951-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM H. ELLISON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 11-1-01768-2

Brief of Respondent

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Table of Contents

Table of Authorities

State Cases

Federal And Other Jurisdictions

Constitutional

Statutes

Rules and Regulations

Other

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has the Washington Supreme Court or the Legislature changed the standard of proof of prior convictions under the Persistent Offender Accountability Act (POAA)?

2. Has the United States or Washington Supreme Court changed the "prior conviction exception" of ***Alemendarez-Torres*** and ***Apprendi*** ?

3. Is "persistent offender" an element of the crime charged, or a sentencing factor?

4. Is the POAA unconstitutional under the Equal Protection clause?

5. Where the trial court heard the defendant's argument and remarks at the time of sentencing, did the court deny the defendant's statutory right to allocution?

6. Where the defendant failed to object in the trial court, did he preserve the allocution issue for review?

B. STATEMENT OF THE CASE.

1. Procedure

On April 26, 2011, the Pierce County Prosecuting Attorney (State) charged the defendant, William Ellison, with one count of rape in the

second degree, two counts of child molest in the third degree. CP 1-2. Because the defendant had two prior convictions for robbery, the State notified him of the potential application of the Persistent Offender Accountability Act (POAA). CP 5.

After motions and amendments, the case went to trial on charges of rape in the second degree, child molest in the first degree, child molest in the second degree, and child molest in the third degree. CP 41-42. The defendant waived his right to a jury trial. CP 67. The court found the defendant guilty of rape in the second degree and child molest in the second degree. CP 74-75.

At sentencing, the State presented certified copies of the defendant's prior judgment and sentences as evidence of the defendant's prior convictions. CP 93-428. The court found that the defendant was a persistent offender. CP 92. The court sentenced him to life in prison without early release. CP 437. The defendant filed a timely notice of appeal. CP 450.

2. Facts[1]

The victim in this case, AME, was born in 1992 and lived with her grandmother since AME was five years old. CP 68, 69. The defendant

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[1] The substantive facts are all taken from the Findings of Fact after Bench Trial. CP 68-75. The Findings and Conclusions are not challenged, nor is error assigned, so they are verities on appeal. *See, e.g.*, ***State v. Lorenz***, 152 Wn.2d 22, 30, 93 P.3d 133 (2004); RAP 10.3(g).

married AME's grandmother in 2000, and came to live with them. *Id.* In 2006, when AME was less than 12 years old, the defendant molested her. CP 69. In 2004, when AME was between 12 and 14 years old, the defendant molested her. CP 70. In 2006, when AME was between 14 and 16 years old, the defendant again molested her. CP 71. In 2008, the defendant forcibly raped AME. CP 72-73.

C. ARGUMENT.

1. FOR A FINDING OF PERSISTENT OFFENDER, THE STATE MUST PROVE PRIOR CONVICTIONS BY A PREPONDERENCE OF EVIDENCE.

a. The State must prove prior convictions under the POAA by preponderance of evidence.

In ***State v. Wheeler***, 145 Wn.2d 116, 121, 34 P.3d 799 (2001), the Washington Supreme Court held that under the POAA, "[a]ll that is required by the constitution and the statute is a sentencing hearing where the trial judge decides by a preponderance of the evidence whether the prior convictions exist." *Accord*, ***State v. Smith***, 150 Wn. 2d 135, 143, 75 P. 3d 934 (2003); ***State v. Manussier***, 129 Wn.2d 652, 682, 921 P.2d 473 (1996). The Court also held that the POAA statute was constitutional; the convictions need not be charged in the information; and the sentence need not be submitted to a jury. ***Wheeler***, at 120. The Court of Appeals has

similarly considered, and followed this holding. *See*, ***State v. McKague***, 159 Wn. App. 489, 246 P.3d 558 (2011); ***State v. Ball,*** 127 Wn. App. 956, 960, 113 P.3d 520 (2005).

b. The "prior conviction exception" and ***Almendarez–Torres v. United States***.

" *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". ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (emphasis added). Criminal history in recidivism statutes is a sentencing factor, not an element of a crime. *See*, ***Almendarez–Torres v. United States***, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). Therefore, the same "plead and prove beyond a reasonable doubt" protections regarding elements do not apply to determining the existence of prior convictions in recidivism sentencing statutes. This has been called the "prior conviction exception". *See*, ***Almendarez–Torres***, *supra.*

The Washington Supreme Court has recognized the practical reason for this rule. In ***Smith***, 150 Wn.2d at 143, the Court followed ***State v. Thorne***, 129 Wn.2d 736, 783, 921 P.2d 514 (1996) in finding that, because "A certified copy of prior judgment and sentence is highly reliable evidence", "prior convictions are not the type of fact for which a jury trial would provide additional safeguards for the defendant." The "fact" of a

prior conviction involves very little fact-finding, as Justice Chambers conceded in his dissent in ***Smith***, 150 Wn. 2d at 158. This makes it unlike the "fact" determination of "deliberate cruelty" in ***Blakely v. Washington***, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), or whether the defendant "brandished" a firearm, the question in ***Alleyne v. United States***, - U.S.-, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013).

It is true that ***Almendarez–Torres*** has been criticized in subsequent opinions in state and federal courts. Justice Thomas has made clear that he would now reach a different result in ***Alemdarez-Torres***. *See*, ***Apprendi***, 530 U.S., at 520-521 and ***Shepard v. United States***, 544 U.S. 13, 27–28, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005)(Thomas, J., concurring in both). However, as the Washington Supreme Court notes, while the United States Supreme Court has had several opportunities to disavow and overrule its decision in ***Alemdarez-Torres***, it has never done so. *See*, ***State v. Jones***, 159 Wn.2d 231, 240, 149 P.3d 636 (2006).

Most recently, in ***Alleyne v. United States***, - U.S.-, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), the United States Supreme Court had another opportunity to address the continued validity of ***Almendarez–Torres***. Justice Thomas wrote the opinion. He did not shrink from overruling two other cases; ***Harris v. United States***, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), and ***McMillan v. Pennsylvania***, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

In ***Alleyne***, the Court again applied ***Apprendi***, stating that "Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt" and "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury". ***Alleyene***, at 2155.

Although Justice Thomas authored the majority opinion, he did not take the opportunity to comment, criticize, or overrule ***Almendarez–Torres***. He mentioned it in footnote 1, only to say that the Court was not revisiting it at that time. 133 S. Ct at 2160 n.1. Nor did Justice Thomas, or other members of the Court, alter or criticize the part of ***Apprendi*** that says "Other than the fact of a prior conviction..."

Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) maintained the ***Apprendi*** exception when it determined that most Washington aggravating factors must be submitted to a jury. But, those involving solely criminal history do not. ***Blakely***, at 301. The Washington Supreme Court recognizes that this exception confirms that prior felony convictions used to support a persistent offender sentence do not need to be proved to a jury beyond a reasonable doubt. ***Wheeler***, 145 Wn.2d at 121; ***State v. Thiefault***, 160 Wn.2d 409, 418, 158 P.3d 580 (2007). Until such time as the United States or Washington Supreme

Courts overrule themselves, the Court of Appeals is bound by the holdings on this issue. *See*, ***State v. Hairston***, 133 Wn.2d 534, 539, 946 P.2d 397 (1997).

All three divisions of the Washington Court of Appeals have also rejected the defendant's argument. *See*, ***State v. Rivers***, 130 Wn. App. 689, 692, 128 P.3d 608 (2005) (Division One), *review denied*, 158 Wn.2d 1008 (2006), *cert. denied*, 549 U.S. 1308 (2007); ***State v. McKague***, 159 Wn. App. 489, 51517, 246 P.3d 558 (Division Two), aff'd, 172 Wn.2d 802, 262 P.3d 1225 (2011); ***State v. O'Connell***, 137 Wn. App. 81, 90–91, 152 P.3d 349 (Division Three), *review denied*, 162 Wn.2d 1007 (2007).

The Court's conclusion in ***Wheeler*** is still true today:

> ***Apprendi*** did not overrule ***Almendarez-Torres***, and no other case has extended ***Apprendi*** to hold that the federal constitution requires recidivism be pleaded and proved to a jury beyond a reasonable doubt. This Court has already addressed these specific issues in ***Thorne***, ***Manussier***, and ***Rivers***[2] and we decline to overrule these cases.

145 Wn. 2d at 124. This Court should similarly reject the defendant's argument.

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[2] ***State v. Rivers***, 129 Wn.2d 697, 921 P.2d 495 (1996).

2. THE FINDING OF "PERSISTENT OFFENDER" IS A SENTENCING FACTOR, NOT AN ELEMENT OF THE CRIME CHARGED.

a. "Persistent offender" is a sentencing factor, not an element of the crime charged.

The Washington Supreme Court has held that "persistent offender" is a sentencing factor, not an element of the crime charged. *See*, ***Wheeler***, 145 Wn.2d at 120. Whether criminal history is an "element" or a "sentencing factor" for the purpose of a persistent offender or recidivist statute is best illustrated by ***Manussier*** and ***State v. Thorne***, 129 Wn.2d 736, 921 P.2d 514 (1996)(abrogated on other grounds by ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004)). Both cases compared the POAA to the former "habitual criminal" statute, former RCW 9.92.080, .090. Under that former statute, the statutory scheme required the State to plead and prove the elements to a jury. *See*, ***Manussier***, 129 Wn. 2d at 681-682; ***Thorne***, 129 Wn. 2d at 778-780. Both cases rejected the argument because the language and requirements of the Sentencing Reform Act (SRA) is different than that of the former "habitual criminal" statute. *Id.*

b. The POAA does not violate the Equal Protection clause.

The Washington Supreme Court has upheld the POAA as constitutional against challenges based on equal protection principles. ***State v. Thorne***, 129 Wn.2d 736, 771-772, 921 P.2d 514 (1996); ***Manussier***, 129 Wn.2d at 674. This argument has been considered and rejected in the Court of Appeals repeatedly. *See, e.g.*, ***State v. Reyes–Brooks***, 165 Wn. App. 193, 206–207, 267 P.3d 465 (2011); ***State v. Williams***, 156 Wn. App. 482, 496–498, 234 P.3d 1174 (2010); ***State v. Langstead***, 155 Wn. App. 448, 453–458, 228 P.3d 799 (2010).

This Court recently discussed this issue again in ***State v. Witherspoon***, 171 Wn. App. 271, 286 P.3d 996 (2012), *review granted* 177 Wn.2d 1007 (2013). There, this Court again conducted an Equal Protection analysis of the POAA under the 14th Amendment to the United States Constitution and Art. I, § 12 of the State Constitution. *Id.*, at 303-305. This Court rejected the defendant's argument, citing ***Thorne***, 129 Wn.2d at 772 and ***Manussier***, 129 Wn.2d at 674.

The defendant challenges the constitutionality of the POAA on Equal Protection grounds. He asserts that his remedy is not resentencing with the State required to prove his criminal history beyond a reasonable doubt, but resentencing within the standard range. App Br. at 14. As in ***Witherspoon***, the defendant argues that there is no rational basis to

distinguish between recidivists whose prior convictions are treated as aggravators for the purposes of sentencing and other recidivists for whom a prior conviction is treated as an element of the current offense. App Br. at 10 ff. As pointed out above, the Supreme Court and the Court of Appeals have rejected Equal Protections challenges to the POAA on several occasions.

Recidivist criminals are not a semi-suspect class and the proper test to apply is the rational basis test, "the most relaxed and tolerant form of judicial scrutiny under the equal protection clause ." *See*, ***Thorne***, 129 Wn. 2d at 771; ***Langstead***, 155 Wn. App. at 454. The purpose of the POAA is to improve public safety by imprisoning the most serious recidivist offenders, a purpose that the Washington Supreme Court has held is a legitimate state objective. ***Manussier***, 129 Wn.2d at 674.

In ***Witherspoon***, this Court was divided regarding some of the issues surrounding the POAA. In ***Witherspoon***, Judge Quinn-Brintnall continued to express her view that prior convictions under the POAA should be proven to a jury beyond a reasonable doubt. 171 Wn. App. at 305-308; *see, also* ***McKague,*** 159 Wn. App. 527 (Quinn-Brintnall, J, dissenting). Judges Hunt and Armstrong continued to follow State and federal precedent. 171 Wn. App. at 315 ff; *see, also* ***McKague***, at 515-517. While this shows an ongoing legal "discussion" regarding factual determination and standard of proof, the Equal Protection issue is now well-settled law. This Court should again reject the argument.

3. THE TRIAL COURT DID NOT DENY THE DEFENDANT'S RIGHT TO ALLOCUTION.

a. The defendant failed to preserve this issue for appeal.

A failure to allow allocution cannot be raised for the first time on appeal. *See* ***State v. Hatchie***, 161 Wn.2d 390, 406, 166 P.3d 698 (2007); RAP 2.5(a). The right of allocution is statutory and not constitutional; thus, defendant's failure to object at trial precludes review. ***State v. Hughes***, 154 Wn.2d 118, 153, 110 P .3d 192 (2005); RAP 2.5(a)(3).

The defendant did not object in the trial court; indeed there were no grounds to do so; because the court did give him the opportunity to address the court. The defendant fails to argue that any of the exceptions listed in RAP 2.5(a) apply. The Court should decline review of this issue.

b. The trial court did hear the defendant's allocution.

A defendant has a statutory right to argue to the sentencing court, or allocute, before the court passes sentence. *See*, RCW 9.94A.500(1). Here, despite the fact that the sentence was mandatory and the court had no power or authority to impose any sentence other than life in prison

without release, the court heard the defendant's statement. The defendant began with a religious song. 5/31/2013 RP 13. His additional remarks are recorded in the following three complete pages of the VRP, until the court interrupted. *Id.*, at 16. The court went on to explain to the defendant that the sentence was mandatory, and the court had no choice but to impose it. *Id.*, at 17-19.

On appeal, the defendant cites no authority for the proposition that the court may not interrupt or limit the defendant's address to the court. In fact, a trial court has the discretion to limit arguments by parties. *See*, ***State v. Wooten***, 178 Wn.2d 890, 897, 312 P.3d 41 (2013). The defendant does not demonstrate that the court abused its discretion. The court committed no error.

D. CONCLUSION.

The defendant is the latest to challenge the constitutionality of the POAA under the 6th and 14th Amendments of the United States Constitution, and Article 1, §22 of the State Constitution. He argues issues that are controlled by well-settled law. The trial court heard the

defendant's argument at sentencing. The State respectfully requests that the judgment and sentence be affirmed.

DATED: April 23, 2014.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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