

COURT OF APPEALS
DIVISION TWO

NO. 39087-6-II

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STATE OF WASHINGTON

BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAY McKAGUE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT¹

Jay McKague, a homeless man, who received a sentence of life without the possibility of parole following a robbery in which he stole a can of smoked oysters from an Olympia convenience store contends the equal protection guarantees of the state and federal constitutions were violated where is sentenced as a persistent offender with diminished constitutional protections because his recidivism is deemed a sentencing fact, where in other circumstances recidivism is deemed an element.

The State's reply can be distilled to two principle points. First, the State contends no equal protection problem is presented because in one instance the recidivist fact is an element while in the other it is merely a sentencing fact, or in the State's words "a wholly separate sentencing guideline." Brief of Respondent 34-35. Second, the State contends this difference in treatment is rational because while the purpose of the persistent offender classification is public safety, according to the State recidivist elements in other crimes are unrelated to the protection of public safety. The first of these "distinctions" merely illustrates the disparate treatment, while.

¹ Because Mr. McKague believes his remaining issues are adequately addressed in his initial brief, his reply focuses on his equal protection claim alone.

the second is nonsensical and utterly fails to justify that disparate treatment. Mr. McKague's sentence must be reversed.

1. The Legislature has arbitrarily classified recidivist findings as "elements" in some settings and as a sentencing fact in another with lesser due process protection. As set forth in Mr. McKague's prior brief, Washington courts have refused to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury beyond reasonable doubt. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) cert. denied, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001). However, the Supreme Court has also held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

Roswell concerned the recidivist element of communicating with minor for immoral purposes, and specifically its effect of elevating that offense from a misdemeanor a felony. See RCW 9.68A.090. But there are numerous other crimes with similar recidivist elements. Indecent exposure is elevated from a misdemeanor to a felony if a person has prior conviction of the

offense. RCW 9A.88.010(c). Harassment becomes a felony if a person has previously been convicted of a crime of harassment. RCW 9A.46.020(c). Driving Under the Influence becomes felony if person has four prior convictions. RCW 46.61.502(6). Violation of a no-contact order becomes a felony if the person has two prior convictions of the offense. RCW 25.50.110(5). Under Roswell, because they elevate the punishment of the offense, the recidivist fact for each of these crimes is an element which must be proved to a jury beyond reasonable doubt. 165 Wn.2d at 192. But that same constitutional protection is not afforded the recidivist fact in persistent offender cases.

The State's contends this disparate treatment is justifiable because the Legislature has chosen to term the recidivist fact of a persistent offender finding as a sentencing consideration rather than an element. Brief of Respondent at 35. Thus, the State contends, Roswell has no relevance to this case.

Initially, the State expends considerable energy to make the point that the recidivist finding for persistent offender sentencing is neither an aggravating factor nor sentencing enhancement. Brief of Respondent at 34-35. First, Mr. McKague has never contended it

was either. More importantly, the State's preoccupation with the what to call the finding completely misses the point.

"[M]erely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). More recently the Court noted:

Apprendi makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II). The question here is not the term the legislature chooses to describe the recidivist finding, but rather its effect. The crux of the issue is the denial of the constitutional protections in one setting while affording it in another where the effect of the finding is precisely the same.

Having ignored the United States Supreme Court's caution, the State contends the determinative factor is "the statutory inclusion of the prior convictions as an element of the crime which raised it from a misdemeanor to a felony." Brief of Respondent at

36. But the recidivist fact in persistent offender cases operates in precisely the same fashion; elevating Mr. McKague's maximum sentence from 84 months, the top of his standard range,² to life without the possibility of parole. Far from justifying the disparate treatment, the classification of the same fact as an element in one scenario and element in another merely illustrate the disparate treatment.

2. There is no rational distinction between recidivism for purposes of a persistent offender sentence and recidivist "elements" which elevate specific crimes. The State contends the disparate treatment of the recidivist fact in persistent offender cases from that of the recidivist fact of communicating with a minor at issue in Roswell is justified because the purposes of the persistent offender statutes and communication with minor statute are different. Brief of Respondent 38-40. In fact, the purposes for the criminalizing communicating with a minor are also different from the purposes of the numerous other offenses which include recidivist elements, such harassment of DUI. But unlike person facing a persistent-offender allegation, that difference in purpose does not

² Adult Sentencing Guidelines Manual, p.III-43 (2008).

alter the constitutional protections afforded defendants charged with those crimes.

Additionally, Roswell did not term the recidivist fact an element because it served the purpose of protecting children from exploitation. Indeed, requiring the state prove the fact beyond a reasonable doubt to a jury, rather than by a mere preponderance at sentencing, arguably makes that purpose more difficult to achieve. Instead, Roswell concluded it was an element of the crime of communicating with a minor for the simple reason that the recidivist fact elevated the punishment of the offense. 165 Wn.2d at 192,

According to the State, the statute which elevates communicating with a minor for immoral purposes “says nothing about the purpose being to elevate the penalty.” Brief of Respondent at 39. RCW 9.68A.090 is titled “Communication with a minor for immoral purposes – Penalties.” The statute then states two penalties distinguished by a single fact: recidivism. Plainly that distinction exists for single reason, to elevate the punishment. So too, the recidivist elements of other crimes serve to increase punishment.

Conceding this might be so, the State makes the fantastic assertion that while the purposes of a persistent offender finding is to “improve[e] public safety” and to impose harsher sentences on “serious, repeat offenders,” that is not the purpose of the recidivist element in RCW 9.68A.090. Brief of Respondent at 39-40. It is difficult to imagine what purpose a recidivist element might serve if it is not intended to impose harsher sentences upon recidivists and to protect public safety. To be sure, the State has not identified what other purpose those elements might serve.

The recidivist fact here operates in the precise fashion and with the precise purpose as in Roswell. This Court should hold there is no basis for treating the prior conviction as an “element” in one instance – with the attendant due process safeguards afforded “elements” of a crime – and as a mere sentencing fact in another.

B. CONCLUSION

For the reasons above, and those in Mr. McKague's prior brief, the Court must reverse Mr. McKague's conviction of second degree assault. Alternatively, the court must reverse Mr. McKague's sentence and remand for imposition of a standard range sentence.

Respectfully submitted this 11th day of January, 2010.



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STATE OF WASHINGTON,)	
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JAY MCKAGUE,)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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