No. 44951-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM H. ELLISON,

Appellant.

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

REPLY BRIEF OF APPELLANT

SARAH M. HROBSKY
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A. ARGUMENT

1. Mr. Ellison's right to due process was violated when he was sentenced as a persistent offender, in the absence of proof beyond a reasonable doubt that he had two prior convictions for a "most serious offense."

Mr. Ellison had the due process right to proof beyond a reasonable doubt that he had two prior convictions for a "most serious offense." The simple "fact" of prior convictions did not increase Mr. Ellison's punishment above the standard range; rather, it was the determination that the prior convictions were for a "most serious offense" that elevated the punishment. RCW 9.94A.030(37); RCW 9.94A.570. The Due Process Clause guarantees an accused the right to proof beyond a reasonable doubt of every fact essential to punishment, including any fact relied upon to increase punishment above the maximum sentence otherwise available for the crime charged. U.S. Const. amend. XIV; *Deschamps v. United States*, __ U.S. __, 133 S.Ct. 2276, 2285-86, 186 L.Ed.2d 438 (2013); *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490-92, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Here, the court's oral ruling and written Findings of Fact and Conclusions of Law Supporting Persistent Offender Declaration/Sentence are devoid of any reference to the quantum of proof relied upon by the court to support its determination that Mr. Ellison had

two prior convictions for a most serious offense. In the absence of a finding beyond a reasonable doubt the prior convictions were for a "most serious offense," the sentence to a term of life without the possibility of parole pursuant to the Persistent Offender Accountability (POAA) was imposed in violation of Mr. Ellison's constitutional right to due process.

The State does not address the quantum of proof necessary to find the prior convictions were for a "most serious offense." Rather, the State argues the POAA requires only a judicial determination by a preponderance of the evidence that a defendant has two prior convictions. Br. of Resp. at 4-7. This argument, based on the "prior conviction exception" of *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), ignores the POAA requirement of proof not only two prior convictions, but also proof that those prior convictions were for a "most serious offense." Therefore, this issue is not controlled by *Almendarez-Torres* and its progeny. The State's argument to the contrary should be disregarded.

Because the State did not prove beyond a reasonable doubt Mr. Ellison had two prior convictions for a most serious offense, this matter should be remanded for sentencing within the standard range.

2. Mr. Ellison's right to meaningful allocution was violated when the court, abruptly and without explanation, cut short his pre-sentence statement and proceeded to sentencing.

In violation of Mr. Ellison's right to allocution, the court allowed Mr. Ellison to make a statement for only a few minutes before, without warning or explanation, the court interrupted him, thanked the victim's grandmother for appearing, and proceeded to impose a sentence of life without the possibility of parole. 5/13/13 RP 16-17. In Washington, a defendant has the statutory right to allocution that should be scrupulously and unequivocally acknowledged. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 337, 6 P.3d 573 (2000); RCW 9.94A.500(1). When a court violates a defendant's right to allocution, the proper remedy is remand for a new sentencing hearing before a different judge. *State v. Aguillar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1999).

This issue is properly before this Court. Mr. Ellison immediately protested when he realized the court was not going to let him finish his statement:

> THE DEFENDANT: I don't get to speak anymore?
> THE COURT: No.
> THE DEFENDANT: I don't get to say anything?
> [DEFENSE COUNSEL]: Apparently not.
> THE DEFENDANT: Wow. I don't get to say nothing?

5/13/13 RP 19. The State's assertion that Mr. Ellison did not object is refuted by the record. *See* Br. of Resp. at 11.

The State misplaces reliance on *State v. Wooten*, 178 Wn. App. 890, 312 P.3d 41 (2013). *See* Br. of Resp. at 12. In *Wooten*, the trial court prevented defense counsel from making irrelevant and confusing arguments to the jury during closing argument. 178 Wn.2d at 897. Because *Wooten* does not address whether a court can abruptly cut short a defendant's allocution, it is does not pertain to the issue *sub judice*.

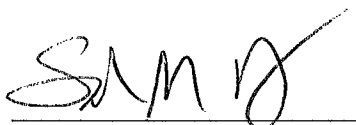
The statutory right to allocution applies to all cases, even where the defendant faces as mandatory sentence. *See, e.g., State v. Snow*, 110 Wn. App. 667, 669, 41 P.3d 1233 (2002) (POAA does not violate right to allocution even though nothing a defendant says can mitigate the mandatory sentence). Here, Mr. Ellison retained the right to allocution, even though he was facing a mandatory sentence as a persistent offender. The trial court's violation of that right requires remand for resentencing before a different judge.

B. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Ellison requests this Court reverse his sentence of life without the possibility of parole and remand for sentencing within the standard range, or, alternatively, remand for sentencing before a different judge.

DATED this 1st day of May 2014.

Respectfully submitted,



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	)	
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