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Court of Appeals  
Division I  
State of Washington

NO. 72852-1-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY L. BRINKLEY,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

In deciding whether a defendant is a persistent offender, can a sentencing judge consider the dates of the prior offenses and convictions?

## **II. STATEMENT OF THE CASE**

On December 1, 2011, Kenny Easley came to the property where the defendant, Jeffrey Brinkley, was living. Mr. Easley intended to collect a drug debt. With an accomplice, the defendant dragged Mr. Easley to a basement and threatened him with a gun. They robbed him of money, a car, a firearm, jewelry, and drugs. As a result of these acts, a jury found the defendant guilty of first degree robbery, second degree kidnapping, and second degree assault. CP 45-47.

At sentencing, the State submitted certified copies of two prior judgments. The first was a King County conviction of first degree robbery. According to the judgment, the robbery was committed on March 30, 1996. The defendant pleaded guilty on May 30. The judgment was filed on July 1. 2 CP 111-17.

The second judgment was a Spokane County conviction for second degree robbery and second degree assault. According to the judgment, these crimes were committed on November 26,

1998. The defendant pleaded guilty on January 29, 1999. The judgment was filed that same day. 2 CP 99-109.

The defendant was sentenced in the present case on January 25, 2013. The court sentenced him as a persistent offender to life imprisonment on each charge. 1 CP 58-68. On appeal, this court determined that the assault conviction constituted double jeopardy. It therefore vacated that conviction and remanded for resentencing. The court rejected challenges to the other two convictions. No issue concerning persistent offender sentencing was raised. 1 CP 44-55.

On remand, the defendant argued that he was entitled to a jury finding of facts necessary to establish his status as a persistent offender. 1 CP 28-43, 19-46; 11/21/14 RP 3-5. The court held that these arguments were foreclosed by precedent. 11/21/14 11-12. It amended the judgment to show dismissal of the assault count. The life sentences on the other two counts were left in effect. 1 CP 16-18.

### **III. ARGUMENT**

#### **THE “PRIOR CONVICTION” EXCEPTION OF APPRENDI ENCOMPASSES FACTS “INTIMATELY RELATED” TO THOSE CONVICTIONS.**

The defendant claims that his sentencing as a habitual criminal violated the rule of Apprendi: “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, 491, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The defendant argues that he could not be sentenced as a persistent offender without a jury trial with regard to his prior convictions.

Similar claims have been consistently rejected by Washington courts:

[I]t is settled law in this state that the procedures of the [Persistent Offender Accountability Act] do not violate federal or state due process. Neither the federal nor state constitution requires that previous strike offenses be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence.

State v. Witherspoon, 180 Wn.2d 875, 893 ¶ 37, 329 P.3d 888 (2014). Any change in this rule would have to come from the Washington or U.S. Supreme Court, not this court.

The U.S. Supreme Court has not required jury trials with respect to “the fact of a prior conviction.” Apprendi, 530 U.S. at 491; Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This “prior conviction” exception arises from Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The court noted there that recidivism is “a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.” The court found no constitutional requirement for jury findings with respect to recidivism. Id. at 243-44. The Washington persistent offender statute is a recidivism statute, which falls within this rationale.

The defendant nonetheless argues that persistent offender sentencing requires consideration of more than the “fact of conviction.” Specifically, persistent offender sentencing requires that the prior convictions follow a particular sequence:

“Persistent offender” is an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions ... of felonies that under the laws of this state would be considered most serious offenses ...; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the

other most serious offenses for which the offender was previously convicted...

RCW 9.94A.030(38).

To determine whether a person is a persistent offender under this definition, the court must determine the dates of the prior *convictions* – to see if they preceded the commission of the current offense. The court must also determine the date of one of the prior *offenses* – to see if it followed the date of the other prior *conviction*. In the present case, all of these facts are set out in the prior judgments. Those judgments include the dates of both the prior offenses and the convictions. 2 CP 99, 111. The defendant argues, however, that it is constitutionally impermissible for the sentencing court to consider those dates.

This defendant's argument is based on a highly restrictive view of the "prior conviction" exception. The Washington Supreme Court has not adopted that view. This is clear from State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006). That case involved a statute that increases the offender score for crimes committed while on community supervision. The defendants claimed that they were entitled to jury determinations of that issue. They argued that the "prior conviction" exception did not encompass facts that were



merely “related” to a prior conviction. Id. at 237 ¶ 10. The court rejected this argument:

[T]he prior conviction exception encompasses a determination of the defendant's probation status because probation is a direct derivative of the defendant's prior criminal conviction or convictions and the determination involves nothing more than a review of the defendant's status as a repeat offender. In this regard, the community placement conclusion does not implicate the core concern of Apprendi and Blakely—that is the determination does not involve in any way a finding relating to the present offense conduct for which the State is seeking to impose criminal punishment and/or elements of the charged crime or crimes. To give effect to the prior conviction exception, Washington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts intimately related to the prior conviction such as the defendant's community custody status.

State v. Jones, 159 Wn.2d 231, 241 ¶ 16, 149 P.3d 636 (2006).

The same reasoning applies here. Determining whether a defendant is a persistent offender “involves nothing more than a review of the defendant's status as a repeat offender.” To make this determination, the court is entitled to consider “facts intimately related to the prior conviction,” such as the dates of the conviction and the underlying offense. Consideration of these facts does not involve any finding related to the present offense. A sentencing

court is entitled to review the prior judgments to determine those facts.

Courts in other jurisdictions have reached similar conclusions. The Illinois Appellate Court considered an identical issue in People v. Rivera, 362 Ill. App. 3d 815, 841 N.E.2d 532 (2005), review denied, 218 Ill. 2d 553, 850 N.E.2d 812 (2006). That case involved a statute providing an enhanced sentence if the offender had two prior felony convictions. As under the Washington statute, the felonies had to follow a specific sequence: the second felony had to be committed after conviction on the first, and the third (current) felony had to be committed after conviction on the second. Id., 362 Ill. App. 3d at 817, 841 N.E.2d at 533, quoting former 730 Ill. Comp. Stat. § 5/5-5-3(c)(8).

The defendant in Rivera raised the same arguments as in the present case. He claimed that the dates and sequence of the prior convictions fell outside the "prior conviction" exception. Rivera, 362 Ill. App. 3d at 817, 841 N. E.2d at 534. The court rejected this argument. It held that the findings required by the sentencing statute "are intertwined with recidivism and distinct from the elements of the underlying offense such that the fall under the exception recognized in Apprendi." Id. at 820, 841 N. E.2d at 536.

The Louisiana Court of Appeals reached a similar result in State v. Smith, 913 So.2d 836 (La. App. 2005), review denied, 972 So.2d 1159 (La. 2008). A Louisiana statute provided enhanced sentences for “quadruple offenders.” Under the statute, a prior conviction could be counted only if it was committed within 10 years after the expiration of the maximum sentence for the previous conviction. The defendant argued that this factual issue had to be determined by a jury. The court rejected this argument, holding that the issue fell within the “prior conviction” exception of Apprendi. Id. at 839-40.

Other courts have considered statutes that required prior offenses committed on different occasions. That determination can turn on the dates of the offenses. Numerous courts have held that these dates fall within the “prior conviction” exception of Apprendi. E.g., United States v. Elliott, 703 F.3d 378 (7th Cir. 2012), cert. denied, 133 S. Ct. 2359 (2013); United States v. Grisel, 488 F.3d 844, 847 (9th Cir.), cert. denied, 552 U.S. 970 (2007); United States v. Thompson, 421 F.3d 278, 281-83 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); Commonwealth v. Gordon, 596 Pa. 231, 251, 942 A.2d 174, 186 (2007), cert. denied, 553 U.S. 1024 (2008).


In short, both the “prior conviction” exception is not limited to the bare fact of the conviction itself. Rather, it encompasses “facts intimately related to the prior conviction.” Jones, 159 Wn.2d at 241 ¶ 16. As courts in other jurisdictions have recognized, these facts include the dates of the prior convictions and the offenses that led to them. In the present case, these dates established that the defendant was a persistent offender.

#### IV. CONCLUSION

For these reasons, the judgment and sentence should be affirmed.

Respectfully submitted on July 29, 2015.

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THE STATE OF WASHINGTON,

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DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 29<sup>th</sup> day of July, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to: Jennifer M. Winkler; Eric J. Nielsen, Nielsen, Broman & Koch, [winklerj@nwattorney.net](mailto:winklerj@nwattorney.net); [nielsene@nwattorney.net](mailto:nielsene@nwattorney.net); [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net).

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29<sup>th</sup> day of July, 2015, at the Snohomish County Office.



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