

64176-0

64176-0

NO. 64176-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GREGORY E. STEEN,

Appellant.

2011 OCT 29 PM 2:47

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA C. INVEEN

BRIEF OF RESPONDENT

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A. ISSUES

1. Where only a liberty interest is at issue, equal protection requires no more than a rational basis for a legislative classification; the classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. The legislature, which has the power to define criminal conduct, has chosen to deter such conduct in some instances by making prior offenses "elements" of a greater crime, resulting in a requirement that the prior offenses be proved to a jury beyond a reasonable doubt. The legislature has chosen to treat recidivism in general differently; when the prior conviction does not change the current crime of conviction, but has only the effect of increasing the punishment, the prior conviction may be found by the court by a preponderance of the evidence. Does this sentencing scheme rest upon a rational basis?

2. The United States Supreme Court has excepted "the fact of a prior conviction" from those sentencing factors that must be proved to a jury beyond a reasonable doubt. Washington courts have repeatedly recognized this distinction, and have found it valid under the Washington Constitution as well. The trial court found that Steen had two prior "strikes" in addition to his current

convictions for Robbery in the First Degree. Did the trial court properly sentence Steen as a persistent offender without resorting to a jury to determine his prior convictions beyond a reasonable doubt?

B. STATEMENT OF THE CASE

Defendant Gregory Steen was charged by information and amended information with five counts of Robbery in the First Degree, with the fifth count including a firearm allegation. The State alleged that, between May 14 and June 2, 2008, Steen committed five bank robberies in the greater Seattle area, the last one at gunpoint. Police apprehended Steen after the fifth robbery, following a high-speed chase. CP 1-10, 28-30. The State gave notice of its belief that this was Steen's third "strike." CP 9.

Steen testified at his jury trial. He admitted that he had a prior conviction for Robbery in the Second Degree from 1992, and four convictions for that crime from 1996. RP (7-28-09) 966-67. Steen also admitted to all of the currently-charged bank robberies, blaming the crimes on his drug addiction. RP (7-28-09) 978-1014.

Steen's attorney argued in closing that Steen did not use force or fear to obtain the money; rather, the tellers turned the

money over to Steen at his direction because that was what they were trained to do. RP (7-29-09) 1159. The jury found Steen guilty as charged. CP 100-05.

At the sentencing hearing, the State presented the testimony of a latent fingerprint examiner to link Steen to his two prior "strikes." RP (9-18-09) 1180-95. The State also presented certified copies of the Judgments for Steen's two prior "strikes." Ex. 2, 4.¹ Steen objected to these exhibits on relevance grounds, arguing that there was no proof that the prior convictions belonged to him. RP (9-18-09) 1196-97. The court overruled these objections, and admitted the exhibits. Id. Steen did not raise either an equal protection challenge or a due process challenge to the Persistent Offender Accountability Act ("POAA"). The trial court imposed the mandatory sentence of life imprisonment without possibility of parole, pursuant to the POAA. RP (9-18-09) 1201-02; CP 255-65; RCW 9.94A.030(29)(o), 9.94A.030(34)(a), 9.94A.570.

¹ The 1992 Judgment and Sentence was for a single count of Robbery in the Second Degree. Ex. 4. The 1996 Judgment and Sentence was for four counts of Robbery in the Second Degree. Ex. 2.

C. ARGUMENT

This Court recently rejected these same arguments in State v. Langstead, 155 Wn. App. 448, 228 P.3d 799 (2010).² The Court should again reject them here. Moreover, Steen waived these claims by testifying at his trial, under oath, that he had convictions for Robbery in the Second Degree from 1992 and 1996. In any event, any error in failing to require proof beyond a reasonable doubt of Steen's convictions, under either of the theories argued in this brief, is harmless beyond a reasonable doubt on these facts.

1. STEEN'S RIGHT TO EQUAL PROTECTION OF THE LAW WAS NOT VIOLATED WHEN THE TRIAL COURT FOUND THE EXISTENCE OF HIS PRIOR "STRIKES" BY A PREPONDERANCE OF THE EVIDENCE RATHER THAN PROOF BEYOND A REASONABLE DOUBT.

Steen argues that, because the legislature has made prior convictions an element of certain specified crimes, thus requiring proof beyond a reasonable doubt of those prior convictions, his right to equal protection of the law was violated where his own prior "strikes" were found by the sentencing court by a preponderance of the evidence in sentencing him as a persistent offender. This claim

² A petition for review is pending in Langstead under No. 84741-0.

does not withstand careful scrutiny. While a prior conviction that the legislature has made an element of a crime must be proved to a jury beyond a reasonable doubt, the legislature has a rational basis to treat recidivism differently for sentencing purposes.

Under the Equal Protection Clause of the Fourteenth Amendment, as well as article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. State v. Thorne, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). "No equal protection claim will stand unless the complaining person can first establish that he or she is similarly situated with other persons." State v. Handley, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990); accord State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006) ("When evaluating an equal protection claim, we must first determine whether the individual claiming the violation is similarly situated with other persons.").

Persons on trial for a crime and persons being sentenced after having been convicted of a crime are not "similarly situated" with respect to the law. A person charged with a crime may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). A person already convicted of a crime and facing sentencing for that crime has no similar right to have his prior convictions proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000) ("*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.*") (italics added). Because Steen, at his sentencing, was not similarly situated with persons on trial for a crime, the inquiry under his equal protection claim should end.

Even if Steen could clear this first hurdle, his equal protection claim nonetheless would fail. Courts employ three different levels of scrutiny in determining whether the right to equal protection has been violated: 1) strict scrutiny, when a classification affects a suspect class or a fundamental right; 2) intermediate scrutiny; or 3) rational basis. Thorne, 129 Wn.2d at 771. A statutory classification that implicates physical liberty only is not subject to intermediate scrutiny unless it also affects a semisuspect class. Id. Recidivist criminals are not a semisuspect class; thus, the proper test to apply where only a liberty interest is

asserted is the rational basis test. Id.; State v. Manussier, 129 Wn.2d 652, 673-74, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997).

The rational basis test is a deferential one: a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. Thorne, 129 Wn.2d at 771. The legislature has broad discretion to determine the public interest, as well as the measures necessary to protect that interest. Id. The legislature has the specific power to define criminal conduct and assign punishment for such conduct, subject to constitutional constraints. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

The rational basis test requires only that the means employed be rationally related to a legitimate State goal; the means need not be the best way of achieving that goal. Manussier, 129 Wn.2d at 673. The burden is on the challenging party to show that the classification is purely arbitrary. Thorne, 129 Wn.2d at 771.

The Washington Supreme Court focused on a prior conviction that was an element of the charged crime in State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008). In that case, the court addressed RCW 9.68A.090(1), under which a person who

communicates with a minor for immoral purposes is ordinarily guilty of a gross misdemeanor; however, under RCW 9.68A.090(2), if the defendant has previously been convicted of a felony sexual offense, he is guilty of a class C felony. Roswell, 165 Wn.2d at 190. Observing that confusion had arisen at oral argument concerning whether the prior conviction was an aggravating factor or an element of the charged crime, the court clarified:

[A] prior sexual offense conviction is an essential element that must be proved beyond a reasonable doubt. The prior conviction is not used to merely increase the sentence beyond the standard range but *actually alters the crime that may be charged*.

Roswell, 165 Wn.2d at 190, 192 (italics added).

The legislature has chosen to elevate other non-felony crimes to felonies if the defendant has previously been convicted of closely related conduct. See, e.g., RCW 9.68A.090(2) (elevating Communicating With a Minor For Immoral Purposes from a gross misdemeanor to a felony if defendant was previously convicted of a felony sexual offense); RCW 25.50.110(5) (elevating Violation of a Domestic Violence Court Order from a gross misdemeanor to a class C felony if defendant has at least two prior convictions for violating such an order). These prior convictions, which serve as elements of the crime and thus must be proved to a jury beyond a

reasonable doubt, are closely connected in nature to the crimes that they elevate, and actually change the nature of the crime currently charged.³

By contrast, Steen would still be guilty of the same crimes of Robbery in the First Degree whether or not the State proved the prior convictions that establish him as a persistent offender. This is because, under the Sentencing Reform Act of 1981 ("SRA"), the legislature has chosen to use prior convictions purely for recidivist purposes, generally counting all felonies of any nature in calculating the punishment for the current conviction. RCW 9.94A.525. And under the persistent offender provisions of the SRA, the legislature has chosen to punish those offenders who have committed a crime classified as a "most serious offense," and have been convicted on at least two separate occasions of prior "most serious offenses" (regardless of the nature of the "most serious offense") more harshly, with a sentence of life without possibility of parole. RCW 9.94A.030(34), 9.94A.570.

³ Offenders convicted of Unlawful Possession of a Firearm, where it is based on a prior felony conviction, are also distinguishable from recidivists like Steen, in that there would be no crime at all if not for the prior conviction. RCW 9.41.040(1), (2); see Langstead, 155 Wn. App. at 456.

The fact that the legislature has chosen to handle these situations differently is not irrational. Making specific crimes more serious by reason of specific, related prior crimes evinces a legislative intent to deter repeat offenses of a specific nature by making subsequent violations more serious. Increasing the punishment for felonies in general, and for certain "most serious offenses" in particular, by taking recidivism into account, reflects a different, more generalized legislative choice to protect the public.

Steen's equal protection argument, taken to its logical conclusion, would invalidate not only the POAA, but the sentencing scheme of the SRA in general – all prior convictions would have to be treated as "elements" of the current crime and proved to a jury beyond a reasonable doubt. The Washington courts have in general rejected such claims. See In re Personal Restraint of Stanphill, 134 Wn.2d 165, 175, 949 P.2d 365 (1998) (no equal protection violation when legislature changed its view of criminal punishment, resulting in offenders being subject to different punishment schemes); State v. Ross, 152 Wn.2d 220, 240-41, 95 P.3d 1225 (2004) (same); Manussier, 129 Wn.2d at 672-74 (POAA passes rational basis test and thus does not violate federal or state equal protection clauses).

Recently, in State v. Langstead, this Court rejected the same equal protection arguments that Steen now makes. 155 Wn. App. at 453-57. This Court should similarly reject the arguments in the present case.

Moreover, by testifying under oath at his trial that he had convictions for Robbery in the Second Degree in 1992 and 1996, Steen waived the right to have the jury decide beyond a reasonable doubt whether the prior strikes existed. Cf. Blakely v. Washington, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004) (defendant waives right to have jury find sentencing factors beyond a reasonable doubt when he stipulates to those facts).

In any event, any error was harmless beyond a reasonable doubt. Error of constitutional magnitude is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). Had the issue of Steen's prior strikes been put to his jury, even in a bifurcated proceeding, the jury would necessarily have found, based on Steen's own testimony, that Steen had the requisite prior strikes to qualify him as a persistent offender.

2. NEITHER DUE PROCESS NOR THE RIGHT TO A JURY TRIAL PRECLUDED THE TRIAL COURT FROM DETERMINING THAT STEEN HAD TWO PRIOR CONVICTIONS THAT QUALIFIED AS "STRIKES."

Steen contends that his federal constitutional rights under the Sixth and Fourteenth Amendments, to a jury trial and to proof beyond a reasonable doubt, were violated when the trial court, rather than a jury, found the existence of his two prior "strikes." These arguments have repeatedly been rejected by Washington courts.

The relevant line of cases begins with Apprendi v. New Jersey, supra. In that case, the United States Supreme Court held that "[o]ther 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." 530 U.S. at 490 (italics added). Despite this explicit language, defendants argued that Apprendi conferred a right to a jury trial in persistent offender sentencings; i.e., that the State must prove the relevant prior convictions to a jury beyond a reasonable doubt. State v. Wheeler, 145 Wn.2d 116, 119, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002). The Washington Supreme Court rejected this argument: "Unless and until the

federal courts extend *Apprendi* to require such a result, we hold these additional protections [charging prior "strike" convictions in an information and proving them to a jury beyond a reasonable doubt] are not required under the United States Constitution or by the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW." *Id.* at 117.

Subsequently, in State v. Smith, the Washington Supreme Court addressed these same issues under the Washington Constitution, article I, sections 21 and 22, in another POAA case. 150 Wn.2d 135, 139, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004). The court first reaffirmed its holding in Wheeler under the federal constitution. *Id.* at 143. Then, after a full Gunwall⁴ analysis, the court rejected the claim that the Washington Constitution requires a jury trial for determining prior convictions at sentencing. *Id.* at 156. See also In re Personal Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt.").

⁴ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Steen relies on the United States Supreme Court's decision in Blakely v. Washington, *supra*. In Blakely, the Court extended the right to a jury trial and proof beyond a reasonable doubt to facts that elevate a sentence above the standard range. 542 U.S. at 303-04. But the Washington Supreme Court has rejected the arguments that Steen now makes, even in light of Blakely. In State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007), another POAA case, the defendant cited Blakely as well as Apprendi in support of his argument that he had a right to a jury determination of a prior conviction. Citing Lavery, Smith and Wheeler, the court reiterated: "This court has repeatedly rejected similar arguments and held that *Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt." Thiefault, 160 Wn.2d at 418.

Based on this unbroken line of cases rejecting the argument that Steen makes in this case, this Court should hold that Steen did not have a right to a jury determination on proof beyond a reasonable doubt of the prior convictions that constituted his first two "strikes." The trial court properly made this determination.

This Court recently rejected this same due process argument in Langstead, 155 Wn. App. at 452-53. The Court should similarly reject the argument in this case.

Moreover, for the same reasons set out in § C.1., supra, Steen waived any due process right to have a jury find his prior "strikes" beyond a reasonable doubt, when he testified under oath at his trial that his prior convictions for Robbery in the Second Degree existed. In any event, in light of Steen's testimony at trial, any error in not proving Steen's prior "strikes" to his jury was harmless. See § C.1., supra.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Steen's sentence as a persistent offender.

DATED this 29th day of October, 2010.

Respectfully submitted,

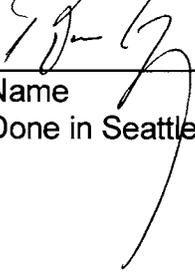
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Sarah M. Hrobsky**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. GREGORY EFRIM STEEN**, Cause No. **64176-0-I**, in the Court of Appeals for the State of Washington, Division I.

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



Name
Done in Seattle, Washington

10-29-10
Date