

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

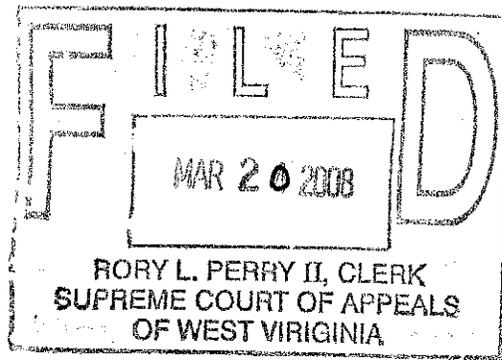
STATE OF WEST VIRGINIA,  
Plaintiff Below – Appellee,

33828

v.

No. 072291

EARL MONTY RUTHERFORD,  
Defendant Below – Appellant.



APPELLANT'S BRIEF

Mark P. Chaksupa, Esq.  
Douglas V. Reynolds, Esq.  
Reynolds & Associates  
703 Fifth Avenue  
Huntington, West Virginia 25701  
(304) 522 – 9200  
(304) 522-9202 FAX

COUNSEL FOR APPELLANT

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INTRODUCTION

Earl M. Rutherford was found guilty by a jury on February 16, 2007, of one count of delivery of a controlled substance, crack cocaine. Mr. Rutherford was sentenced to two to thirty years imprisonment.

Mr. Rutherford's sentence was doubled pursuant to W. Va. Code, 60A-4-408, upon a finding by the trial court that Mr. Rutherford was previously convicted of a prior felony drug offense.

§60A-4-408 permitted the trial judge to double Mr. Rutherford's sentence based upon an alleged prior drug conviction without requiring the prior conviction to be proven to a jury. Further, §60A-4-408 lacks procedural provisions that adequately safeguard Mr. Rutherford's due process rights. The application of W. Va. Code, 60A-4-408, to Mr. Rutherford's sentence deprived Mr. Rutherford of due process.

I.

**KIND OF PROCEEDING AND NATURE OF RULINGS BELOW**

In a criminal complaint dated August 22, 2005, Earl M. Rutherford was charged with possession with intent to deliver a controlled substance, crack cocaine. Mr. Rutherford waived his right to a preliminary hearing on this charge on September 1, 2005, and the case was bound over to the Cabell County Grand Jury. On May 16, 2006, the Cabell County Grand Jury indicted Mr. Rutherford on one count of delivery of crack cocaine, a Schedule II narcotic controlled substance.

Following various pretrial hearings, Mr. Rutherford's trial on this charge began on February 15, 2007. The trial continued through February 16, 2007, when Mr. Rutherford was found guilty as charged in the indictment.

On February 20, 2007, the trial judge held the sentencing hearing. At which time the State argued for an enhanced sentence alleging that Mr. Rutherford was convicted in 1996 of possession with intent to deliver. Counsel for Mr. Rutherford questioned the propriety of enhancing his sentence based upon a prior conviction that was not proven to the jury. Nonetheless, the trial court found that the Mr. Rutherford had a prior felony drug conviction; and, instead of sentencing Mr. Rutherford to an indeterminate one to fifteen year sentence as set by law for his crime, the trial court doubled Mr. Rutherford's sentence to two to thirty years pursuant to §60A-4-408. Mr. Rutherford filed a motion for reconsideration of sentence arguing that the application of §60A-4-408 deprived him of his right to due process, equal protection, and the right to a jury trial as guaranteed under the West Virginia Constitution.

On June 18, 2007, the trial court denied Mr. Rutherford's motion for reconsideration of sentence.

## II.

### STATEMENT OF FACTS

In the complaint filed on August 22, 2005, Mr. Rutherford was accused of selling twenty dollars worth of crack cocaine to an undercover WV State Police Officer on July 6, 2005. Mr. Rutherford was later indicted for this drug sale on May 16, 2006. The indictment returned by the Grand Jury did not contain any allegation that Mr. Rutherford had a prior drug conviction nor was there any reference to §60A-4-408 in the indictment.

After a two day jury trial, Mr. Rutherford was duly found guilty of delivery of crack cocaine as alleged in the indictment. The matter was then set for sentencing on February 20, 2007.

At sentencing, the State alleged that Mr. Rutherford had a prior felony drug conviction and recommended that Mr. Rutherford receive a doubled prison sentence. However, the State did not present a certified copy of any earlier drug conviction nor did the State present any witness or other evidence to show an earlier drug conviction. Counsel for Mr. Rutherford raised the issue whether it was proper to consider any prior conviction with the following statement:

MR. CHAKSUPA (counsel for defendant): As far as the sentence itself, I know that the State is going to request and seek the enhancement based upon a prior conviction. My concern is that, although the state of the law concerning this – at least in the Apprendi case, is that prior convictions are not a matter that has to be submitted to a jury in order for the Court to enhance his sentence. I am troubled by the fact that in any other case in which there would be a subsequent – a conviction for a subsequent act, the prior conviction would be a matter that would be routinely submitted to the jury. Had the Prosecutor sought the recidivist information he would have to prove the prior conviction.

(Sentencing Transcript, pg. 3).

During the trial court's attempt to determine whether a prior drug conviction existed for the purposes of §60A-4-408, the following exchange occurred:

THE COURT: Okay. You don't deny that you have a prior felony drug conviction; do you, Monty? Because I have got your file in front of me showing March the 6<sup>th</sup> of '97 you pled guilty to Indictment No. 96-F-223, which was possession with intent to deliver crack cocaine. And you pled guilty and eventually on November 21<sup>st</sup> of '97 you got a one-to-fifteen year prison sentence. You don't deny that; do you? That you are the same person?

MR. CHAKSUPA: He wishes to stand silent on that.

THE COURT: All right. Well, I have got your picture right here and Social Security number and everything and date of birth all turn out that you are the same person. And Chapter 60A, Article 4, Section 408 provides for second or subsequent offenses that a person can receive a term up to twice the term otherwise authorized for a second conviction, and in addition a fine can be twice the amount. I found – looking at your file I found a letter written by you in 1997 to Judge Cummins, who was the sentencing judge at that time. You were basically asking him for mercy and to reconsider the sentence.

(Sentencing Transcript, pg. 4-5).

Mr. Rutherford was not cautioned by the trial court as to the implication of an admission prior to this verbal exchange. No evidence was presented by either party during sentencing. Following statements from the parties the trial court found that Mr. Rutherford was previously convicted of a felony drug offense and sentenced him to a two to thirty year sentence and fined him three thousand dollars. It is not clear from the record what level of proof the evidence the trial court considered met.

### III.

#### ASSIGNMENT OF ERROR

§60A-4-408 DENIES THE DEFENDANT HIS RIGHT TO DUE PROCESS OF LAW UNDER ARTICLE III, SECTION 10 OF THE CONSTITUTION OF WEST VIRGINIA.

#### IV.

#### POINTS AND AUTHORITIES

1. "The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Syllabus point 1, State v. Mullens, 2007 W.Va. (33073).
2. "Wherever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts." Syllabus point 3, State v. Mullens, 2007 W.Va. (33073).
3. "where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes" State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986), State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994) (Cleckley, J. dissenting).
4. "When a prior conviction constitute(s) a status element of an offense, a defendant may offer to stipulate to such prior conviction(s). If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s). When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant. To the extent that State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994) and its progeny are in conflict with this procedure they are expressly overruled." Syllabus point 3, State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999).

5. "A trial court must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of any alleged prior conviction as a status element and timely requests that the jury consider the issue of prior conviction separately from the issue of the underlying charge. To the extent that our decision in *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999), conflicts with this holding it is hereby modified." Syllabus point 11, *State v. McCraine*, 214 W.Va. 188, 588 S.E.2d 177 (2003).
6. The purpose of W. Va. Code, 60A-4-408 is to deter future criminal behavior and its public policy purpose is to deter future crime. *State v. Adkins*, 168 W.Va. 330, 284 S.E.2d 619 (1981).
7. "A recidivist proceeding is not simply a sentencing hearing, but a proceeding whereby a new criminal status, that of being an habitual criminal, is determined. \* \* \* If an individual is successfully prosecuted as an habitual criminal, a greater penalty than that attaching to the underlying crime is imposed. For these reasons, courts have required substantial due process protection in recidivist proceedings." *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).
8. "[T]he charge of former convictions must be proved with the same degree of certainty as the charge of the substantive offense." \* \* \* Thus, where the issue of identity is contested in a recidivist proceeding, the State must bear the burden of proving identity beyond a reasonable doubt." *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).
9. "[A defendant] does have a significant number of procedural rights as a matter of state law in a recidivist proceeding. \* \* \* For example, under state law, a recidivist defendant has the right to require the State to prove to a jury beyond a reasonable doubt the fact of prior conviction, as well as the identity of the defendant as the person convicted of the predicate

felonies and that the prior convictions occurred one after the other. Appleby v. Recht, 213 W.Va. 503, 583 S.E.2d 800 (2002).

V.

ARGUMENT

**§60A-4-408 DENIES THE DEFENDANT HIS RIGHT TO DUE PROCESS OF LAW UNDER ARTICLE III, SECTION 10 OF THE CONSTITUTION OF WEST VIRGINIA.**

Under, W.Va. Code, 60A-4-401(a)(i), the penalty for a conviction for delivery of crack cocaine, a Schedule II narcotic controlled substance, is imprisonment in a state correctional facility for not less than one year nor more than fifteen years, or fined not more than twenty-five thousand dollars, or both. However, the trial court sentenced Mr. Rutherford to two to thirty years imprisonment and a fine of three thousand dollars under W.Va. Code, 60A-4-408, which provides:

(a) Any person convicted of a second or subsequent offense under this act may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both. When a term of imprisonment is doubled under section 406, such term of imprisonment shall not be further increased for such offense under this subsection (a), even though such term of imprisonment is for a second or subsequent offense.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this act or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(c) This section does not apply to offenses under section 401(c). W.Va. Code, 60A-4-408 (1971).

§60A-4-408 does not include due process protections for anyone subject to its sentencing enhancements. §60A-4-408 does not contain any requirement that a criminal defendant receive

any notice that he may be subject to its enhancement provisions or that any qualifying prior drug conviction be included in the indictment or by separate information. §60A-4-408 also does not contain any provision for a jury or bench hearing where the defendant can contest the existence of a prior drug conviction nor is any particular evidentiary standard specified. This lack of procedural safeguards is in stark contrast to what is set forth in W.Va. Code, 60A-4-406. §60A-4-406 can increase the mandatory period of incarceration prior to parole for felony drug offenses that involve distribution to minors or distribution within one thousand feet of a school. However subsection (c) of §60A-4-406 includes the following procedural safeguards:

(c) The existence of any fact which would make any person subject to the provisions of this section may not be considered unless the fact is clearly stated and included in the indictment or presentment by which the person is charged and is either:

- (1) Found by the court upon a plea of guilty or nolo contendere;
- (2) Found by the jury, if the matter be tried before a jury, upon submission to the jury of a special interrogatory for such purpose; or
- (3) Found by the court, if the matter be tried by the court without a jury.

W.Va. Code, 60A-4-406 (2000).

The absence of these kinds of procedural protections in §60A-4-408 becomes even more glaring when one considers that §60A-4-406 cannot increase the total sentence for a drug conviction while §60A-4-408 can double the total sentence. It is possible to draw a distinction between these two sentence enhancement statutes since §60A-4-406 punishes drug offenses involving minors or schools while §60A-4-408 punishes repeat drug offenses. When one considers the United States Supreme Court's decision in Apprendi, this is not a distinction without meaning. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court set the bright line rule 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." Even though the Court in Apprendi carved out an exception for prior convictions, the West Virginia Supreme Court has often found that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Syllabus point 1, State v. Mullens, 2007 W.Va. (33073).

The present case is one of those instances.

Rather than adopt a blanket rule that all facts that increase a criminal penalty beyond the prescribed statutory limits must be proven beyond a reasonable doubt to a jury, Apprendi preserved an recidivism exception espoused earlier in Almendarez-Torres, 523 U.S. 224 (1998). First, Almendarez-Torres made a distinction between the elements of a criminal offense and "sentencing factors" or "penalty provisions". The U.S. Supreme Court reasoned that prior convictions are not elements of criminal offenses and therefore recidivism provisions should be interpreted as penalty enhancements, not separate crimes. As a result, under the Federal Constitution, prior convictions do not have to be submitted to a jury but can be considered by a judge at sentencing. Second, the Court felt treating a prior conviction as an element would be prejudicial to a defendant because it would require prosecutors to introduce evidence of convictions that may cause a jury to convict on the basis of those prior convictions rather than the evidence of guilt on the charged crime. However, these reasons given for the recidivism exception are not justified under West Virginia law and jurisprudence.

First, the West Virginia Code has numerous offenses in which prior convictions are interpreted as elements. State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986), held that prior DUI convictions are necessary elements of third offense DUI. State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994) (Cleckley, J. dissenting), ruled that prior shoplifting convictions are

necessary elements for felony third offense shoplifting. Accordingly, Cozart and Hopkins held that such prior convictions, if not admitted by the defendant, must be submitted as evidence to the jury. Similarly, prior convictions are treated as elements that must be proven beyond a reasonable doubt to a jury in recidivist proceedings conducted pursuant to §61-11-18 and §61-11-19.

Second, forcing the State to prove prior convictions does not prejudice defendants because of the ability to stipulate the prior convictions or bifurcate the trial into a guilt phase and status phase. State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999), allowed defendants to stipulate to prior convictions or request bifurcating the trial. Later, State v. McCraime, 214 W.Va. 188, 588 S.E.2d 177 (2003), held that “[a] trial court must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of any alleged prior conviction as a status element and timely requests that the jury consider the issue of prior conviction separately from the issue of the underlying charge. To the extent that our decision in State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999), conflicts with this holding it is hereby modified.” McCraime, supra, syl. pt. 11.

Further, whether a prior conviction is considered a penalty provision or an element of a crime is a distinction without meaning in our State’s jurisprudence. Cozart stated “where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes[.]” Cozart, 177 W.Va. at 402, 352 S.E.2d at 153. In his dissent in Hopkins, Justice Cleckley disagreed with the majority’s holding that prior shoplifting convictions are elements of third offense shoplifting. Nonetheless, Justice Cleckley’s argued for the following procedure which foreshadowed the bifurcation procedure in set out in Nichols and McCraime:

“The prior convictions are not elements of the current charge; they are elements of penalty enhancement. The trial in these cases should be bifurcated. The jury should first determine guilt on the underlying charge; and then if, and only if, guilt is found, evidence should be received of the prior convictions for enhancement purposes. This is the way legislative directives operate under our other recidivist statutes. This suggested procedure ensures fairness and avoids Rule 404(b) problems and is the only reasonable way that the DUI and shoplifting enhancement statutes can be construed.”

Hopkins, supra at 496. (citations omitted)

Based on these precedents, whether §60A-4-408 is interpreted as a penalty enhancement provision or as an element of a subsequent drug offense, evidence of any prior drug conviction should have been submitted to a jury and proven beyond a reasonable doubt before Mr. Rutherford's sentence could be enhanced. It runs counter to this significant line of West Virginia cases to allow a judge to determine the existence of prior convictions at sentencing rather than a jury during its deliberations on a defendant's guilt. Therefore, the federal prior conviction exception does not apply as a matter of State constitutional law.

Though prior convictions can be categorized as either a sentencing factor or an element of a crime, prior convictions in the context of a recidivist proceeding under our State's laws are clearly regarded as elements which must be proved to a jury beyond a reasonable doubt. Thus, though a comparison between §60A-4-408 and §60A-4-406 raises significant issues, a more telling comparison can be made between §60A-4-408 and the general recidivist statute, W.Va. Code, 61-11-18. In State v. Adkins, the West Virginia Supreme Court determined that §60A-4-408, like §61-11-18, had the purpose of deterring future criminal behavior. See State v. Adkins, 168 W.Va. 330, 284 S.E.2d 619 (1981). §61-11-18 serves to deter future felony offenses while §60A-4-408 serves to deter future drug offenses. In essence, §60A-4-408 is a narrower version of the general recidivist statute. What is striking that although both these enhancement

provisions have the purpose of deterring future criminal conduct, they are worlds apart in the fashion they achieve their goals.

§61-11-18 is similar to §60A-4-408 in that neither statute contains any procedural language to guide their application. Both statutes are merely a listing of offenses subject to upward enhancement and what those particular enhancements are. However, this seeming deficiency in §61-11-18 is resolved in §61-11-19. §61-11-19 provides the following procedure to determine the application of a §61-11-18 recidivist sentence:

**It shall be the duty of the prosecuting attorney when he has knowledge of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence. Said court shall, before expiration of the term at which such person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction and sentence, or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not. If he says he is not, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impanelled to inquire whether the prisoner is the same person mentioned in the several records. If the jury finds that he is not the same person, he shall be sentenced upon the charge of which he was convicted as provided by law; but if they find that he is the same, or after being duly cautioned if he acknowledged in open court that he is the same person, the court shall sentence him to such further confinement as is prescribed by section eighteen of this article on a second or third conviction as the case may be.**

W.Va. Code, 61-11-19 (2000) (emphasis added).

While the plain language of §61-11-19 clearly provides for procedural safeguards, the West Virginia Supreme Court has made it abundantly clear a defendant has a significant number of procedural rights in a recidivist proceeding as a matter of state law. See Appleby v. Recht, 213 W.Va. 503, 583 S.E.2d 800 (2002).

First, a recidivist hearing is not merely a sentencing hearing like the kind Mr. Rutherford received, but a proceeding where an individual is being prosecuted as a habitual criminal

deserving a greater penalty than what is set for his underlying crime. Thus recidivist proceedings require substantial due process protection. See State v. Vance, 164 W.Va. 216, 262 S.E.2d 423 (1980). Accordingly, the West Virginia Supreme Court has held that a recidivist defendant has the right to require the State to prove to a jury beyond a reasonable doubt the fact of the prior conviction, as well as the identity of the defendant as the person convicted of the prior conviction. See Appleby, supra; Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Assuming for the purpose of argument that Mr. Rutherford did indeed have a valid prior felony drug conviction, the State had the choice of pursuing an enhancement either under §61-11-18 or §60A-4-408. By utilizing §60A-4-408 the State avoided all the strict procedural requirements set out in §61-11-19, but when one considers the comparisons the West Virginia Supreme Court drew between §61-11-18 and §60A-4-408 there should not be any difference in the procedural requirements under both statutes. After all, the Court in Adkins studied §61-11-18 in order to interpret the purpose and application of §60A-4-408. See Adkins, supra. In essence, §60A-4-408 is a drug recidivism statute, not merely a sentencing enhancement. Therefore, Mr. Rutherford was entitled to have the existence of any prior drug conviction as well as his identity as the person previously convicted proven beyond a reasonable doubt.

Further, the lack of formal notice, either by citing §60A-4-408 in the indictment or by formal written notice prior to trial, raises additional due process concerns. There is nothing contained in the indictment or the State's discovery responses that would make Mr. Rutherford definitively aware that he could be subject to a sentence beyond the one to fifteen year sentence set by statute. In all fairness, the State often threatens to enhance as they did in this case. The Appellant concedes that had the State sought an enhanced sentence under §61-11-18 it would not

have to provide any notice prior to Mr. Rutherford's conviction for delivery of a controlled substance. Nonetheless, before any sentence enhancement could be applied under §61-11-19, Mr. Rutherford's would have received the due process protections he did not receive in the present case, a formal written charge alleging the existence of a prior felony and the right to have the State prove the existence of a prior drug conviction beyond a reasonable doubt to a jury.

VI.

CONCLUSION

Mr. Rutherford was indisputably deprived of his right to have the prior conviction that doubled his sentence under §60A-4-408 proven to a jury beyond a reasonable doubt. §60A-4-408 in its present form violates Article III, Section 10 of the West Virginia Constitution. §60A-4-408 should either be struck down as unconstitutional or have procedural protections applied to avoid a conflict with the West Virginia Constitution. Regardless, Mr. Rutherford's sentence was doubled in an unconstitutional fashion. The Petitioner would pray that the Honorable Court grant him a new one to fifteen year sentence or order this matter remanded for sentencing consistent with the West Virginia Constitution.

EARL M. RUTHERFORD,  
By Counsel



Douglas V. Reynolds, Esq. WWSB #9098  
Mark P. Chaksupa, Esq. WWSB #8222  
Reynolds & Associates, PLLC  
703 Fifth Avenue  
Huntington, WV 25701  
(304) 522-9200  
(304) 522-9202 FAX