
NO. 072291

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

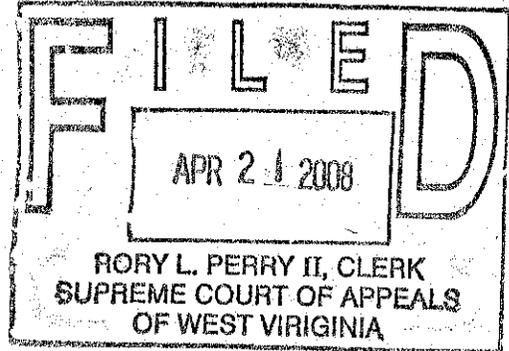
STATE OF WEST VIRGINIA,

Plaintiff below – Appellee,

v.

EARL MONTY RUTHERFORD,

Defendant below – Appellant.



BRIEF OF THE APPELLEE,
STATE OF WEST VIRGINIA

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**BRIEF OF THE APPELLEE,
STATE OF WEST VIRGINIA**

I.

INTRODUCTION

This is not a case about guilt or innocence; a jury found the Appellant guilty of delivery of crack cocaine and his counsel conceded at sentencing that:

First of all, I think that the diligence of the Prosecutor, as well as the rulings of the Trial Court, as well as the zealouslyness of defense counsel combined to create a fair trial for my client and that after asserting his trial right he was convicted by a jury of his peers. Therefore, having – deserves punishment.

(App. 0090, pp. 2-3.)

The only issue raised on appeal is whether West Virginia Code § 60A-4-408, which permits a court to double a drug offense sentence where the defendant has a prior drug conviction, is constitutional. The Appellant concedes that § 60A-4-408 meets federal constitutional standards,

Apprendi v. New Jersey, 530 U.S. 466 (2000),¹ but argues that the statute denies him due process of law under West Virginia Constitution, art. III, §10.

II.

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

The Appellee agrees with the Appellant's recitation of the relevant procedural facts of the case.

III.

STATEMENT OF FACTS

The Appellee agrees with the Appellant's recitation of the relevant facts of the case, but notes that the concluding line of this portion of the Appellant's brief, "[i]t is not clear from the record what level of proof the evidence the trial court considered met . . .," seems to be a red herring.

First, there was ample proof before the trial court that the Appellant had a prior conviction:

1. The court had before him the Appellant's file, which showed a guilty plea on March 6, 1997 to delivery of crack cocaine, Indictment No. 96-F-223;
2. The file contained the Appellant's picture, date of birth and social security number;
and
3. The file contained a letter from the Appellant to Judge Cummings, seeking reconsideration of the 1997 sentence.

Second, the Appellant did not contend at sentencing, and does not contend on appeal, that the information about his prior conviction was wrong.

¹*“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.”* 530 U.S. at 489 (emphasis supplied).

IV.

ASSIGNMENT OF ERROR

West Virginia Code § 60A-4-408 does not deny the Appellant his right to due process of law under West Virginia Constitution, art. III, §10, either facially or as applied.

V.

POINTS AND AUTHORITIES

The Appellant's Points and Authorities are all established principles of law, but they do not apply to this case.

1. Without question, there are instances in which this Court has determined that our Constitution requires higher standards of protection than that afforded by the United States Constitution. Syl. Pt. 1, *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007) (prohibiting police from sending an informant into the home of another under the auspices of the one-party consent to electronic surveillance provisions of West Virginia Code § 62-1D-3(b)(2)). Significantly, in *Mullens* the Court surveyed authority from other jurisdictions and found that half of the courts addressing the precise issue raised had rejected the federal constitutional standard governing electronic surveillance in the home of a suspect without a warrant. In the instant case, the Appellant doesn't point to a single case in which any court has found the *Apprendi* exception to fall below state due process guarantees.

2. Similarly, it is hornbook law that whenever an act of the Legislature can be construed as to avoid a conflict with the Constitution, the Court will adopt such a construction. Syl. Pt. 3, *State v. Mullens, supra*. In the instant case, however, the statute at issue is not unconstitutional; and even

if it were, the so-called "construction" urged by the Appellant would be a wholesale revision and reform of the law.

Courts may not reform statutes to correct perceived inadequacies. What the circuit court did was not a construction of the statute, but was, in effect, an enlargement of the statute so that what was omitted, either by design or inadvertence, could be included within its scope. To supply these omissions by way of statutory construction transcends the judicial function.

State ex rel. Allen v. Stone, 196 W. Va. 624, 630, 474 S.E.2d 554, 560 (1996).

3. Appellant's Points 3, 4 & 5 are all citations of cases involving crimes where a prior conviction is a status element of an offense, i.e., second or third offense shoplifting or second or third offense DUI. In the instant case, a prior conviction is not an element of the offense of which the Appellant was convicted; it merely permits enhancement of his sentence pursuant to West Virginia Code § 60A-4-408.

4. Without question, the purpose of West Virginia Code § 60A-4-408 is deterrence of future crime. *State v. Adkins*, 168 W. Va. 330, 284 S.E.2d 619 (1981) (prohibiting enhancement based on an offense committed *after* the conviction sought to be enhanced). Presumably, that is why the trial judge below enhanced the Appellant's sentence; the 1997 conviction and sentence do not seem to have caught his (the Appellant's) attention or caused him to modify his behavior.

5. Appellant's Points 7, 8 & 9 all deal with our recidivist statute, West Virginia Code § 61-11-18. The fact is that the recidivist statute is completely different from the sentence enhancement provisions of West Virginia Code § 60A-4-408, all as set forth in the argument portion of this brief.

VI.

ARGUMENT

The Appellant's argument with respect to West Virginia Code § 60A-4-408 is that the statute fails to provide what he deems to be necessary procedural protections, specifically: notice in the indictment that a sentence enhancement may be sought; a jury or bench hearing where the defendant can contest the existence of a prior conviction; and an evidentiary standard to be applied. We will discuss these claims seriatim.

A. Notice in the Indictment of Intent to Enhance

Inasmuch as the decision to enhance a sentence pursuant to West Virginia Code § 60A-4-408 is wholly discretionary with the court, it is difficult to fathom what difference it would make if the prosecutor gave notice in the indictment of intent to ask for enhancement in the event of a conviction. Even the recidivist statute – upon which the Appellant otherwise relies – does not require such advance notice. Rather, a recidivist information is filed, if at all, after conviction and before sentencing. W. Va. Code § 61-11-19. *See State ex rel. Mounts v. Boles*, 147 W. Va. 152, 159, 126 S.E.2d 393, 398 (1962) (“recidivist statute in this state does not require notice to the accused prior to trial on the substantive offense”).

The Appellant refers to due process concerns because “. . . nothing contained in the indictment . . . would make [the Appellant] definitively aware that he could be subject to a sentence beyond the one to fifteen year sentence set by statute.”² Nothing in this Court's precedents remotely suggests that a defendant must be put on notice by the State, at the time of indictment, of all possible

²Appellant's Brief at 14.

penalties flowing from his criminal acts. Rather, it's up to the defendant's lawyer to let him know what the penalties may be.

Additionally, the enhancement provision of West Virginia Code § 60A-4-408 is discretionary with the court, not with the prosecuting attorney. The prosecutor can announce all he wants that he intends to seek enhancement; the fact is that the court, and only the court, will decide whether enhancement is to be applied.

B. Jury Trial on the Prior Convictions

The Appellant first argues that prior convictions that form the basis for enhancement under West Virginia Code § 60A-4-408 should be submitted to a jury and proved beyond a reasonable doubt because “. . . the West Virginia Code has numerous offenses in which prior convictions are interpreted as elements.” (Appellant's Brief at 10.) The problem is that the Appellant wasn't convicted of any of those offenses; he was convicted of distributing crack cocaine. Without question, a prior conviction isn't an element of such distribution. Rather, it's a factor that may permit sentencing enhancement, the one such factor specifically excepted from the bright-line rule of *Apprendi v. New Jersey*, 530 U.S. 466, 489 (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.

(Emphasis supplied.)

Cf. Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (“under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (*other than a prior conviction*) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt”) (emphasis supplied).

The Appellant next argues that forcing the State to prove prior convictions would not prejudice defendants, because they (defendants) could either stipulate the convictions or bifurcate the trial. This is entirely beside the point, since the issue is whether due process requires the State to prove prior convictions, not how to ameliorate the potential prejudice that could ensue.

The Appellant cites no West Virginia cases or post-*Apprendi* cases from any jurisdiction standing for a proposition that, contrary to *Apprendi*, due process requires the State to prove prior convictions where those convictions are not an element of the offense. In this regard, the Appellant's brief contains the following statement at p. 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* [*State v. Cozart*, 177 W. Va. 400, 352 S.E.2d 152 (1986)] 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.

The Appellant's statement, based on language from a footnote in the *Cozart* case (the actual issue in *Cozart* was admissibility of evidence that the defendant had refused to take a breathalyzer test), is highly misleading. The Court was simply addressing whether the defendant was entitled to a bifurcated proceeding in a second or third offense DUI case.

With respect to Justice Cleckley's dissent in *State v. Hopkins*, 192 W. Va. 483, 453 S.E.2d 317 (1994), which is otherwise the only support for Appellant's position, Justice Cleckley did not squarely address the due process issue. Rather, his concern was the necessity for bifurcation in cases where prior convictions would be admissible before a jury, 192 W. Va. at 495, 453 S.E.2d at

329, concluding that bifurcation “. . . ensures fairness and avoids Rule 404(b) problems. . . .” 192 W. Va. at 496, 453 S.E.2d at 330.³

The Appellant next argues that because prior convictions are elements in a recidivist proceeding brought pursuant to West Virginia Code § 61-11-18, they should be construed to be elements of West Virginia Code § 60A-4-408 as well because the latter is just a “narrower version” of the former. This contention will not withstand scrutiny, inasmuch as this Court recently noted the distinct differences between the recidivist statute and the enhancement statute in *State ex rel. Daye v. McBride*, No. 33101 (W. Va., June 27, 2007):

The Uniform Controlled Substances Act, W. Va. Code, 60A-4-408 (1971), provides *a lesser, and discretionary, enhancement* in any case involving a repeat drug offender. Furthermore, *the judge, not the prosecuting attorney*, makes the enhanced sentencing decision under this drug offense statute. The statute applies to both misdemeanor and felony offenses. It does not require the filing of an information by the prosecuting attorney.

In contrast, the general habitual offender statute is utilized only in cases where *the totality of a criminal defendant's criminal history makes a mandatory sentence of life imprisonment an appropriate punishment*. The procedural provisions of the general habitual criminal offender statute, W. Va. Code, 61-11-19 (1943), require the filing of an information by the prosecuting attorney within certain time limits, and the defendant has a right to a jury trial with attendant procedural safeguards.

(Emphasis supplied.)

In light of *Daye*, the Appellant's reliance on the twenty-seven year old case of *State v. Adkins*, 168 W. Va. 330, 284 S.E.2d 619 (1981), requires little comment. The only relevant pronouncement in *Adkins* was that both § 61-11-18 and § 60A-4-408 have a deterrent purpose.

³Although this Court has never accepted Justice Cleckley's position that prior convictions are not elements of second or third offense DUI or shoplifting, it came around to his way of thinking with respect to bifurcation. *State v. McCraine*, 314 W. Va. 188, 588 S.E.2d 177 (2003).

The Appellant also argues that a comparison between West Virginia Code § 60A-4-408 and West Virginia Code § 60A-4-406 “raises significant issues,”⁴ although he never specifies exactly what these issues might be. Both statutes are absolutely consistent with *Apprendi*, since prior convictions are excluded from the *Apprendi* bright-line test while everything else is included. West Virginia Code § 60A-4-408 permits enhancement based solely upon prior convictions, while § 60A-4-406 permits enhancement based upon the age of the defendant, the age of the person to whom the defendant distributed a controlled substance, and/or the proximity of the drug deal to a school, college or university. Therefore, § 60A-4-408 does not require submission of prior convictions to a jury, while § 60A-4-406 requires that “[t]he existence of any fact which would make any person subject to the provisions of this section . . . [be] clearly stated and included in the indictment or presentment . . . and . . . (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.”

Finally, the Appellant’s real argument – it’s not directly made but it’s there nonetheless – is that Justices Scalia and Thomas, who considered the *Apprendi* rule to be too narrow, had it right. The linchpin of the Scalia/Thomas position is their assertion that “. . . a crime includes every fact that is by law a basis for imposing or increasing punishment . . .,” 530 U.S. at 506, a “traditional understanding . . . [that] continued well into the 20th century. . . .” 530 U.S. at 518.

There are three problems with the Scalia/Thomas position. First, it garnered only two votes; indeed, four members of the *Apprendi* Court believed that the case was wrongly decided, period.

⁴Appellant’s Brief at 12.

Second, it is a backward-looking discourse into ancient treatises and cases; the most modern authority cited was from 1895,⁵ and 20th century jurisprudence is notable by its absence. As noted in the dissent:

Justice Thomas' collection of [19th century] state court opinions is therefore of marginal assistance in determining the original understanding of the Fifth and Sixth Amendments. While the decisions Justice Thomas cites provide some authority for the rule he advocates, they certainly do not control our resolution of the *federal constitutional* question presented in the instant case and cannot, standing alone, justify overruling three decades worth of decisions by this Court.

530 U.S. 529 (emphasis in original). Third, and somewhat astonishingly, Justices Scalia and Thomas equivocated with respect to capital cases (!), writing that “[w]hether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.” 530 U.S. at 523. Again as noted in the dissent:

Justice Thomas gives no specific reason for excepting capital defendants from the constitutional protections he would extend to defendants generally, and none is readily apparent.

530 U.S. at 539.

C. Evidentiary Standard

The Appellant complains, as an apparent fallback argument, that “. . . 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 . . .,” and that it is thus “. . . not clear from the record what level of proof the evidence the trial court considered met.”⁶

⁵1 J. Bishop, *New Criminal Procedure* (4th ed. 1895).

⁶Appellant's Brief at 4, 5.

Actually, it is quite clear what the court was considering, and it was conclusive. The court had before him:

1. The Appellant's criminal history as set forth in his file,
2. Which showed a prior felony drug conviction in the same county,
3. And contained the Appellant's photograph, date of birth, and social security number,
4. Together with a letter from the Appellant to Judge Cummings, asking for a sentence reduction.

What would a certified copy of the conviction have added to this? And, more importantly, does the Appellant seriously claim that the court would not have considered any evidence showing that the information in the file was wrong? Without question, the Appellant's level of proof argument is without merit.

VII.

CONCLUSION

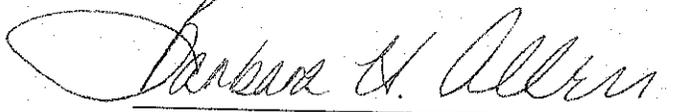
For all of the reasons set forth in this brief and apparent on the face of the record, the Appellant's conviction (which is not at issue) should be affirmed and his sentence should stand.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Plaintiff below – Appellee,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

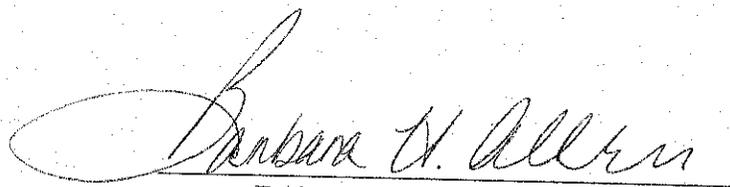


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of the Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 21st day of April, 2008, addressed as follows:

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