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S.C. SUPREME COURT

State Of South Carolina
In The Supreme Court

Certiorari To Spartanburg County
Hon. J. Derham Cole. Circuit Court Judge

Kelly E. Bruton.

Petitioner.

vs.

State Of South Carolina.

Respondent.

2019-001739

Pro Se Brief

Question Presented

Does South Carolina Code Ann. Sec. 16-11-311(A)(1) A-D(2)(3)(B) (Cum. Supp. 19) authorize a court to impose punishment above an otherwise mandatory statutory limit only if it finds a particular kind of aggravating fact. Subject to the holding of Apprendi v. New Jersey, that other than fact of prior conviction, any fact that increases penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, or admitted by defendant, and or, proven beyond a reasonable doubt, applies to any of section 16-11-311 aggravating facts to increase sentence?

1) Identification of statutory maximum does not turn on whether legislature intended to evade Apprendi?

2) Apprendi defines a statutory maximum as the harshest statutory sentence that may be imposed based on Guilty verdict?

3) Neither the "illustrative" nor the "Qualitative" nature of section 16-11-311 enumerated aggravating factors removes them from the purview of Apprendi?

The Apprendi court in 2000, held that a fact that increases the maximum Penalty a defendant faces for a crime is an element of that crime, and a defendant has a right to have a Jury find that fact beyond a reasonable doubt. A sentence longer than what is authorized for the offense of conviction, based on a Judge's determination that a fact is Probably true, violates the Sixth Amendment right to a Jury finding of every element, said the Supreme Court. In Alleyne v. United States, 133 S.Ct. 2151 (2013) the court overruled a 2002 decision in which it had refused to extend Apprendi's Princi-Ple to facts that only increase minimum Sentence.

But in every one of its many decisions applying Apprendi, the court has carefully steered around statutes that raise Punishment ranges for Prior offenders. It has done this by consistently including in each declaration of the Apprendi Rule an exemption for the Particular fact of Prior conviction. Yet none of the many cases stating the Apprendi rule have actually involved a recidivist Penalty, so the exception remains dicta. Similarly, the Alleyne decision included a footnote explaining that the court declined to revisit the exception because the Parties had not contested it. Alleyne, id at 2160, N.1.

A separate controversy is whether the Process for imposing these Penalties violates the Constitution. Specifically, when a statute increases the range of Punishment for Prior offenders above that available for first offenders, lower courts have relied upon Supreme Court Precedent in holding that the Prior conviction may be treated as a sentencing factor, determined only after conviction, with no formal notice, by a Judge who finds it more likely than not. But this shouldd, and likely will change. There is no adequate Justification for denying the accused his right to notice and Proof

beyond a reasonable doubt to a Jury of the fact of Prior conviction if that fact raises the range of Punishment he faces.

First, the historical record, so crucial to the court in all Apprendi cases, does not support exempting Prior convictions from the Apprendi rule. As for charging Practice, in the late 1700's, there appear to be no decisions departing from the common law rule that required the initial charge to allege any Prior offense that increased Punishment. Courts continue to follow the rule throughout the nineteenth century, except for a handful of states that opted to Permit Prior convictions to be alleged after conviction of the charged offense if those Prior offenses had not been alleged in the intial charging instrument and a defendants first offender status was debunked in Prison.

Eventually, in Graham v. West Virginia, 224 U.S. 616 (1912). the Supreme Court addressed this alternative Procedure. After Graham Pleaded Guilty to larceny and was sentenced to five Years in Prison, he was charged in a separate information, of having been convicted twice before. A Jury found that allegation Proven beyond a reasonable doubt, and he was resentenced to life in Prison. The Graham court reasoned that this approach was reasonable for the state to deal with those recognized as former offenders only after they were admitted to Prison and concluded that omitting the Prior offense allegation from the initial indictment was not a federal constitutional Problem, reiterating that state's need not use indictments at all. Graham, id at 627. Hurtado v. California, 110 U.S. 516 (1884)

But this departure from the common law rule affected no more than a handful of state's until 1912 and was not followed in the federal courts where the Bill Of Rights was fully applicable. See, Heffernan v. United States, 50 F.2d 554 (3d Cir. 1931). Such a limited development is nothing like the

the established historical Practices that have influenced the Court in its Prior Apprendi decisions. As for the right to have a Jury decide Prior-offense status, that was the law in virtually every federal and state Jurisdiction. See. Spencer v. Texas, 385 U.S. 554 (1967)

Nor should Policy arguments keep the exception alive. Some Justices worry that allowing a Prosecutor to Prove Prior convictions that raise the sentence range in Jury trials like other elements would be unfair to defendants. See. Almendarez-Torres v. United States, 523 U.S. 224, 234-35 (1998); Old Chief v. United States, 519 U.S. 172 (1997). This could be a serious dilemma for defendants, as research has shown that Jurors will "infer Guilt directly from the existence of Prior convictions. See, Nancy King, Juries and Prior Convictions: Managing the Demise of the Prior Conviction exception to Apprendi (2013)

Although this was not the original reason for the Supplemental information Procedure when first adopted in Virginia and Massachusetts, it later became one of its most Popular Justifications. See. Tyson v. Hening, 136 S.E.2d 832 (VA. 1964) But the risk that courts will be unable to manage Jury Prejudice Given the need to Prove a Prior conviction is not a constitutional Problem, depriving a defendant of the right to notice and Proof beyond a reasonable doubt of an element clearly is. In Spencer v. Texas, the defendant, who had received timely notice and a Jury trial on the Prior conviction allegations, argued that due Process required states to abandon one-stage habitual offender trials and use bifurcated Proceedings. Spencer court disagreed, ruling that:

> "The common-law Procedure for applying recidivist statutes... which requires allegations and Proof of Past convictions in the current trial, is, of course, the simplest and best-known Procedure."
>
> Spencer, id at 563-66

Spencer court was "unwilling" to mandate that states change this basic process. Although several Justices in Spencer expressed the belief that bifurcation is the better approach. Spencer, id at 585 (citing: Lane v. Warden. 320 F. 2d 179 (4th Cir. 1963)). the court reasoned that: "Its Patent that Jurors would be likely to find a man Guilty of a narcotics violation more readily if aware that he has had Prior illegal association with narcotics... Such a Prejudice would clearly violate the standards of impartiality required for a fair trial" Lane, id at 185[2]

Petitioner avers that contrary to respondent argument, a bifurcated trial under section 16-11-311(2) would realistically satisfy my confrontation rights, and allow Petitioner to challenge Prior convictions before Jury during Sentencing Phase of trial. Because much of the information that is relevant to my Sentence, such as the two Prior convictions of burglary, has no relevance to my question of Guilt. and is extremely Prejudicial to a fair determination of this question. App. Pg '66-68)

During Sentencing Phase, the Prejudicial effect of this evidence is removed and State Precedents do not in any way help respondent. For the statute here involves a sentencing factor which is Prior burglary that exist and needs to be Proven in order to Prove commission of Present conviction. Washington, id.. The sentencing factor at issue here recidivism is a traditional, if not the most traditional basis for, increasing my sentence. See, State v. McAbee, 67 S.E.2d 418 (1951)[Consistent with this approach, the court said long ago that state need not allege a Prior conviction, in the indictment or information which alleges the elements of the underlying crime even though conviction was necessary to bring case within statute. See, State v. Buedelle, 515 S.E.2d 525 (1999).

Based upon Ring, Apprendi and Burdette, my analysis is derived from the very distinct nature of the issue, and fact that recidivism does not relate to commission of the offense. "But Goes To Punishment Only" and then may it eventually be decided. See. Graham v. West Virginia, 224 U.S. 616 (1912); Burdette, id at 528.. State Precedents have deviated from this view and holds the constitution requires recidivism be deemed as an "Element" of my offense. marks an abrupt departure from longstanding tradition of treating recidivism as Going to Punishment only. See. Oyler v. Boles, 368 U.S. 448 (1962).

Thus, if the basis for Graham's holding was accepted, one must then conclude that recidivism must be tried to a Jury and found beyond a reasonable doubt. Graham's reasoning, was that recidivist Proceedings, an accused is not held to answer for an offense. Since recidivism Goes to Punishment only. Graham, id at 624..

South Carolina legislative intent in enacting the aiGravating - fact Provisions of burGlary statute can not alter the conclusion that the top of a standard range dictated by section 16-11-311(A)(1)A-D(2)(3) constitutes a statutory maximum. Neither the right to trial by Jury nor the beyond-a-reasonable-doubt rule of In Re Winship, 397 U.S. 358 (1970) turn on legislative intent. Rather, as both Apprendi and Ring v. Arizona, 536 U.S. 584 (2002) makes clear, the applicability of these constitutional rules depends solely on whether legislature has created a system under which a court may not impose a certain sentence unless it finds an additional fact not comprised in the Guilty verdict. Apprendi, id at 490. Ring, id at 592. State v. Washington, 338 S.C. 392 (2000)

Ring's decision is Particularly instructive here. Arizona's legislature enacted the statutory

scheme at issue with purest of motives: to comply with the court's Eighth Amendment jurisprudence requiring that states winnow the pool of death-eligible defendants to avoid undue arbitrariness Ring, id at 606-07. Not one speck of evidence suggested that Arizona was trying to avoid any constitutional rule. Yet the Supreme Court deemed Arizona's noble intent irrelevant and unflinchingly applied Apprendi. The dispositive question Ring court explained, is one of effect. "if a state makes an increase in a defendant's authorized punishment contingent on a finding of fact. that fact... must be found beyond a reasonable doubt." Ring, id at 602. Similarly, the court in Mullaney v. Wilbur, 421 U.S. 684 (1975) ruled that:

> "The rationale of Windship requires an analysis that looks to the effect and operation of the law as applied and enforced by the state."
>
> Mullaney, id

Whatever else Ring, Apprendi stands for, it certainly stands for the proposition that what Brahom used as the line of separation for confrontation and some Due Process, is not the line of seperation for purposes of the right to jury trial and proof beyond a reasonable doubt rule. So also does Ring, which even while narrowing Apprendi, made it clear that mere fact a certain finding "goes only to the penalty" does not end the inquiry".

Thus, there were no cases in this state precedents resolving this point: "Serious Doubt" whether the state/federal constitution permits sentence to be increased tenfold on the basis of fact not charged, tried to a jury and found beyond a reasonable doubt. Relevant question for present purposes is not whether prior felony conviction is "typically" used as a sentencing factor.

But rather if section 16-11-311(2)(B) provides a higher maximum for burglary committed by convicted felons. Prior convictions are typically treated as sentence enhancements rather than an element of separate offense. It is not difficult to understand why. it would matter for jury trial purposes whether this statute labels this aggravating factor a sentencing fact which allows state to elevate actions that would normally fall within parameters of South Carolina Code Ann. Sec. 16-11-312(A) 16-11-313. Washington. id at 711.. The only difference between these two circumstances concerns legislative policy about which label to place on the prior convictions that lead to a greater sentence

This court should not deviate from this effects-based test. Discerning the motivation of a legislative body is always "a hazardous matter" for the search for the actual or primary purpose of a statute is likely to be elusive. See. Doe v. State. 421 S.C. 490(2017)

Furthermore, Petitioner invokes the doctrine of "Constitutional Doubt" requires this court to interpret sections 16-11-311(A)(1) A-D (2)(3) as setting forth a sentencing factor(s) not elements of the crime. See. United States v. Jin Fuey Moy. 241 U.S. 394(1916); State v. Neuman. 384 S.C. 395 (2009) as court held that:

> "A statute must be construed. if fairly possible. so as to avoid not only the conclusion that it is unconstitutional but also Grave doubts upon that score"
>
> Jin Fuey Moy. id at 401; Neuman. id

The doctrine is designed to minimize disagreement between the branches by preserving legislative enactments. that might otherwise founder on legislative constitutional objectives.

1) Identification of a statutory maximum does not turn on whether the legislature intended to evade Apprendi ?

The burglary statute basic requirement that aggravating facts evince "a substantial and compelling reason" to impose an exceptional sentence. Section 16-11-311(B)(a)(1)A-D thus operates just like any other component of a criminal statute: it establishes a legal standard and then requires the factfinder (here, the sentencing court) to find facts that meet that standard. The statute sets forth six acceptable aggravating factors. Section 16-11-311 would apply to a vast majority of exceptional sentences under section 16-11-311(A)(1)A-D(2)(3)

To be sure, the statute provides that these enumerated aggravating factors are merely "illustrative" S.C. Code Ann. Sec. 16-11-311. but as the word "illustrative" implies if a trial court invokes an unenumerated aggravating fact to justify sentence, that factor must be "analogous" to an enumerated one. A sentencing court finding of an aggravating factor, therefore, is much more than an exercise in "transparency" it is legislatively a prerequisite that court find a particular kind of additional fact before imposing a sentence.

Furthermore, if the trial court had relied on the legitimate aggravating factor of (App. pg 6-7) statute, without also finding facts that supported that invocation (App. pg 11-12) the sentence will be illegal. See, State v. Phillips, 215 S.C. 314 (1949); State v. Finley, 429 S.C. 419 (2019) The sentencing reform act expressly provides that:

> "Whatever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law"
>
> South Carolina Code Ann. Sec. 17-25-60 (Cum. Supp. 19)

Lest there be any doubt, our State Supreme Court has explained in no uncertain terms that there must be sufficient "evidence in the record to support the reasons for imposing a sentence". Muldrow, id., sec. 17-25-60; State v. Parris, 89 S.C. 140 (1911); State v. Kelly, 89 S.C. 303 (1911)

2) Apprendi defines a statutory maximum as the harshest statutory sentence that may be imposed <u>based solely on a Guilty verdict</u>?

The question whether a certain sentencing threshold is a "Statutory Maximum" for Purposes of Apprendi is unquestionably one of federal law. Both Apprendi and Ring involved state criminal statutes. Yet this Proceeded in both cases to determine whether the sentencing threshold at issue constituted such a maximum. In each opinion, the court defined "statutory maximum" as "the maximum (the defendant) would receive if Punished according to the facts Reflected in the Guilty verdict alone." Apprendi, id. at 483; Ring, id. at 604,. In other words, if the sentence a court imposes "may not legally be imposed.... unless at least one aggravating factor is found to exist" this sentence exceeds a statutory maximum. Regardless of how state law labels the Particular statutory threshold that the sentence exceeds. Ring, id at 597,.

Under this definition, the top of a standard range dictated by section 16-11-311(a)(1) A-D (B) is a statutory maximum. This statute sets limits that a sentencing court may not exceed unless it finds at least one aggravating fact "that was not an element of the crime." Only if the court finds such a fact may it impose a sentence longer than the standard statutory range. Washington, id.,

3) Neither the "Illustrative" nor the "Qualitative" nature of South Carolina 16-11-311 enumerated <u>aggravating factors removes them from the Purview of Apprendi</u>?

Despite the clear result that the "statutory maximum" test of Ring and Apprendi dictates here, the state, echoed by the Guilty Plea colloquy (app. pg 14 lines 9-16) appears to suggest burglary sentencing provision is distinguishable from the system in Ring because the statutory list of Potential aggravating factors in section 16-11-311(A)(1)A-D is "illustrative" instead of exclusive.

This statute also appears, to show burglary provision employs decisively different aggravating factors from those in Ring, because South Carolina burglary statute involves Qualitative Judgments. No State Precedents have ever advanced either of these arguments. Nor has the State ever done so, and for good reason, these efforts to distinguish Ring both (A) distort South Carolina law and (B) Misconstrue the Apprendi rule.

Wherefore, it is Prayed court Grant writ.

Date: 9 day of June, 20 20.

Respectfully Submitted:
s/ Kelly Bruton
Kelly Bruton / Pro Se