

[J-166-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 21 EAP 2002
	:	
Appellee	:	Appeal from the Judgment entered on
	:	9/28/01 (reargument denied on 11/28/01)
	:	affirming in part and remanding in part the
v.	:	Judgment of Sentence entered on
	:	2/23/2000 in the Court of Common Pleas,
	:	Criminal Division of Philadelphia County at
	:	No. 9907-1046 1/1.
MELVIN APONTE,	:	
	:	
Appellant	:	ARGUED: October 23, 2002

OPINION

MR. JUSTICE EAKIN

DECIDED: August 19, 2004

We granted allowance of appeal to determine whether 35 P.S. § 780-115(a), which doubles the statutory maximum penalty upon proof of a prior conviction for a similar offense, without requiring proof beyond a reasonable doubt before a jury, violates due process under the Pennsylvania and United States Constitutions. We conclude § 780-115(a)'s sentencing enhancement is constitutionally valid, and affirm.

After willfully absenting himself from trial, appellant was tried in absentia before a jury which convicted him of possession with intent to deliver a controlled substance (PWID), and conspiracy. A presentence report was ordered, but appellant remained a fugitive. The presentence investigator sent a letter to appellant's mother, and gathered information "from the Court Deferred File (R.O.R. background information in that file), the prison computer information (background information is in there also), the Family Court File # 345614 which was generated as a result of one of [appellant's] brother's juvenile arrest [sic], and from the

Probation file.” Pre-Sentence Report, 6/13/01, at 1. The report also listed the Connecticut State Prison-Parole Records as a source of information. Id., at 3. The report noted appellant had three convictions: 1994 Felony Drugs in Connecticut; 1997 Felony Drugs in Philadelphia; and the present matter. Id., at 2.

Because this was appellant’s third drug offense, the sentencing court applied the sentencing enhancement in 35 P.S. § 780-115:

Second or subsequent offense

(a) Any person convicted of a second or subsequent offense under clause (30) of subsection (a) of section 13 of this act or of a similar offense under any statute of the United States or of any state, may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

35 P.S. § 780-115(a) (emphasis added).

Accordingly, the trial court sentenced appellant, in absentia, to 10 - 20 years imprisonment for possession with intent to deliver--twice the statutory maximum “otherwise authorized.” The court also imposed twice the statutory maximum sentence for appellant’s conspiracy conviction.

On appeal, the Superior Court affirmed the sentence. Relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), the court concluded the Commonwealth need not have pled the prior convictions in the information, nor was it required to establish them beyond a reasonable doubt before a jury. However, the Superior Court vacated the enhanced sentence for conspiracy and remanded for resentencing, concluding § 780-115(a) applies

only to similar drug offenses, not the underlying inchoate crimes. After reargument was denied, appellant sought and was granted review by this Court.¹

Appellant argues 35 P.S. § 780-115(a) violates due process under the United States and Pennsylvania Constitutions, because it raises the maximum penalty for recidivist drug offenders, making the prior convictions an element of the “second or subsequent offense” without requiring they be proven beyond a reasonable doubt before a jury.

“[W]e begin our analysis by recognizing that there is a strong presumption in the law that legislative enactments do not violate the constitution. Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute.” Commonwealth v. Barud, 681 A.2d 162, 165 (Pa. 1996) (citations omitted). As a matter of statutory construction, we presume “the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.” 1 Pa.C.S. § 1922(3). A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the

¹ The Commonwealth argues this issue is waived because appellant failed to raise it in the trial court or in his Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal, but raised it for the first time in his brief to the Superior Court. However, in a similar situation, where an appellant failed to challenge the constitutionality of his sentence in post sentence motions or in his Rule 1925(b) statement, the Superior Court held the issue implicated the legality of sentence and was thus non-waivable. Commonwealth v. Wynn, 760 A.2d 40 (Pa. Super. 2000). This Court granted allowance of appeal and did not hold the issue was waived, but rather concluded per curiam reversal was appropriate because the sentencing statute had been declared unconstitutional in Commonwealth v. Butler, 760 A.2d 384 (Pa. 2000). Commonwealth v. Wynn, 786 A.2d 202 (Pa. 2001). Recently, in Commonwealth v. Belak, 825 A.2d 1252 (Pa. 2003), the appellant raised an Apprendi issue in his brief to this Court, but had not first included it in his petition for allowance of appeal. We held, “Although arguments of an unlawful sentence cannot be waived, see, e.g., Commonwealth v. Walker, [] 362 A.2d 227, 230 ([Pa.] 1975), this issue is not properly before this Court. Belak did not raise this issue in his petition for allowance of appeal or in his initial brief to this Court, but rather, raised it for the first time in his reply brief. As such, it would be improper for us to consider this issue.” Belak, at 1256 n.10. Here, appellant’s issue raises a challenge to the legality of his sentence, and was raised in his petition for allowance of appeal; we will consider the issue.

Constitution; all doubts are to be resolved in favor of a finding of constitutionality. Commonwealth v. Hendrickson, 724 A.2d 315, 317 (Pa. 1999).

Appellant first claims § 780-115 violates the Sixth² and Fourteenth Amendments to the United States Constitution. In Apprendi v. New Jersey, *supra*, the United States Supreme Court squarely addressed the issue of whether a fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Apprendi involved a “hate crime” statute which provided for an enhanced sentence if the trial judge found, by a preponderance of the evidence, the defendant committed the crime to intimidate a person or group because of race. See N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000). The defendant pled guilty to possession of a firearm for an unlawful purpose, a second degree offense punishable by 5 - 10 years imprisonment. Id., §§ 2C:39-4(a), 2C:43-6(a)(2). Under the hate crime enhancement, the authorized prison term for second degree offenses was 10 - 20 years. Id., § 2C:43-7(a)(3). The trial judge found the defendant’s actions were taken with the purpose of intimidating the African-American family who lived in the house where he fired the shots, and imposed the enhanced sentence. The New Jersey Superior and Supreme Courts affirmed.

The United States Supreme Court reversed, holding the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, as applied to the states through the Fourteenth Amendment, require:

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. ... “It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the

² The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....” U.S. Const. amend. VI.

prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established beyond a reasonable doubt.”

Appendi, at 490 (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)).

Prior to Appendi, the Supreme Court first addressed the issue of what constitutes a “sentencing factor” in McMillan v. Pennsylvania, 477 U.S. 79 (1986). McMillan involved a challenge to Pennsylvania’s Mandatory Minimum Sentencing Act, 42 Pa.C.S. § 9712 (1982), which contained a provision mandating a minimum sentence of five years imprisonment if the judge found, by a preponderance of the evidence, the defendant visibly possessed a firearm while committing one of the specified felonies. Id., § 9712(a). The High Court concluded the statute did not violate the constitutional requirement that the State bear the burden of proving guilt, but noted the statute at issue did not “alter[] the maximum penalty for the crime committed...it operate[d] solely to limit the sentencing judge’s discretion in selecting a penalty within the range already available to it[,]” McMillan, at 87-88 (emphasis added), and that the appellant’s argument that visible possession of a firearm was an element of the offense “would have at least more superficial appeal if a finding of visible possession exposed [him] to greater or additional punishment...” Id., at 88 (emphasis added).

Over a decade after McMillan, the Supreme Court again faced the question of the distinction between a “sentencing factor” and an “element” in Almendarez-Torres v. U.S., 523 U.S. 224 (1998). Almendarez-Torres involved a federal statute authorizing an increase in the maximum sentence for an alien found in the United States after being deported, if the initial deportation was subsequent to a conviction for an aggravated felony. 8 U.S.C. § 1326(b)(2). The appellant had pled guilty to the offense, admitting he had three aggravated felony convictions before his initial deportation; however, on appeal, he argued he was not subject to the enhanced sentence because the indictment failed to mention the prior

convictions. The Supreme Court held § 1326(b)(2) was a penalty provision which did not define a separate offense; therefore, the prior aggravated felony convictions did not have to be charged in the indictment, Almendarez-Torres, at 226-27, or found by a jury. Id., at 235.

One year later, the Supreme Court clarified the holding in Almendarez-Torres, noting, “Congress had never clearly made prior conviction an offense element where the offense conduct, in the absence of recidivism, was independently unlawful.” Jones v. United States, supra (federal carjacking statute, 18 U.S.C. § 2119, defined three distinct offenses, rather than one offense with three maximum sentence options; each offense must be charged, submitted to jury, and proven beyond reasonable doubt).³

Apprendi, decided one year after Jones, made clear that any fact which increases the maximum penalty must be submitted to a jury and proved beyond a reasonable doubt.⁴ However, the Apprendi Court was careful to delineate prior convictions as an exception to this requirement, for the following reasons:

³ See also Apprendi, at 487. The majority in Apprendi commented that Almendarez-Torres represented, at best, an “exceptional departure” from the historical practice of treating facts which exposed a defendant to a greater punishment than that prescribed as “elements” of a separate offense. Id. The majority also noted the defendant in Almendarez-Torres had admitted his three prior convictions, so no question concerning the right to a jury trial or the standard of proof was before the Court; rather, the sufficiency of the indictment was the specific issue in that case. Id., at 488. Further, the prior convictions in Almendarez-Torres, unlike the sentence enhancement in Apprendi, had been entered in a proceeding where the defendant had the right to a jury trial and proof beyond a reasonable doubt. Id. Thus, the majority concluded, with respect to Almendarez-Torres, although that case was arguably decided incorrectly, “[g]iven its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.” Apprendi, at 489. The Apprendi Court further held McMillan was limited “to cases that do not involve the imposition of a sentence more severe than the statutory maximum...--a limitation identified in the McMillan opinion itself.” Apprendi, at 487 n.13.

⁴ Apprendi did not address the indictment issue separately, as the appellant did not assert a claim based on the omission of any reference to sentence enhancement in the indictment. Id., at 477 n.3.

Whereas recidivism “does not relate to the commission of the offense” itself, ... New Jersey’s biased purpose inquiry goes precisely to what happened in the “commission of the offense.” Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which a defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Id., at 496 (citation omitted) (emphasis added).

Two years after Apprendi, the Supreme Court decided Ring v. Arizona, 536 U.S. 584 (2002). In Ring, a jury convicted the defendant of felony murder committed in the course of an armed robbery, but was deadlocked on whether he was guilty of premeditated murder; the facts at trial were insufficient. Thus, the defendant was eligible for the death penalty only if he was the actual killer or had been a major participant in the robbery which led to the killing. The state’s capital sentencing statute provided for the trial judge, sitting alone, to determine the existence of aggravating factors warranting imposition of the death penalty. See Ariz.Rev.Stat. Ann. § 13-703(C) (West 2001). The trial judge determined, based on the sentencing hearing testimony of a co-defendant, that the defendant was not only a major participant, but also had been the killer; consequently, the trial judge found two aggravating factors.⁵ Concluding these factors outweighed the one mitigating factor, the trial judge sentenced the defendant to death. The Arizona Supreme Court affirmed. In reversing the judgment of that court, the United States Supreme Court relied upon Apprendi, noting:

Capital defendants, no less than non-capital defendants, we concluded, are entitled to a jury determination on any fact on which the legislature conditions an increase in their maximum punishment.

⁵ The judge determined the defendant “committed the offense...in expectation of the receipt[] of anything of pecuniary value,” Ariz.Rev.Stat. Ann. § 13-703(G)5, and “in an especially heinous, cruel or depraved manner.” Id., § 13-703(G)6.

* * *

If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.

Ring, at 2432 (emphasis added), 2439 (emphasis added) (citing Apprendi, at 482-83).

Appellant argues Ring's failure to mention Apprendi's prior conviction exception evinces its intent to retract the exception, and that now, prior convictions are required to be proven beyond a reasonable doubt, as is any fact which increases the maximum sentence. We disagree with this fractured reading of Ring; the key issue in Ring was how to reconcile Apprendi with Walton v. Arizona, 497 U.S. 639 (1990), which had held the aggravating factors in § 13-703(G) were "sentencing considerations," not "elements," and thus could be found by the trial judge.⁶ Thus, because Ring was not dealing with prior convictions as aggravating circumstances, mention of Apprendi's prior conviction exception was unnecessary. As the Court noted:

Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge Almendarez-Torres [], which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.

Ring, at 597 n.4.

⁶ In light of Apprendi, the Court overruled Walton. Ring, at 2443.

Accordingly, we reject appellant's argument that Apprendi's prior conviction exception has been tacitly overruled.⁷

Our analysis does not end here, however, as appellant also contends § 780-115 violates Article I, §§ 6 and 9 of the Pennsylvania Constitution. "This Court has long emphasized that, in interpreting a provision of the Pennsylvania Constitution, we are not bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions." Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991) (citations omitted).⁸ Moreover, this Court has recognized that our state

⁷ Our conclusion in this regard is confirmed by a recent decision of the Supreme Court. See Blakely v. Washington, ____ U.S. ____, ____, 124 S. Ct. 2531, 2536 (2004) (reciting, with approval, the Apprendi rule, complete with its exception for prior convictions).

⁸ In Edmunds, this Court set forth four factors to be briefed and analyzed by litigants asserting state constitutional claims:

- 1) text of the Pennsylvania Constitutional provision;
- 2) history of the provision, including Pennsylvania case law;
- 3) related case law from other states;
- 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Depending upon the particular issue presented, an examination of related federal precedent may be useful as part of the state constitutional analysis, not as binding authority, but as one form of guidance. However, it is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution.

Edmunds, at 895.

constitution can provide greater rights and protections to the citizens of this Commonwealth than those provided under similar provisions of the federal constitution. Id.

[T]he federal constitution establishes certain minimum levels which are "equally applicable to the [analogous] state constitutional provision." However, each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution.

Id. (quoting Commonwealth v. Sell, 470 A.2d 457, 466 (Pa. 1983)) (citation omitted).

Appellant claims Article I, §§ 6 and 9 of the Pennsylvania Constitution require the right to a jury trial in cases where recidivism results in an enhanced sentence because such right existed at common law. See Pa. Const. art. I, § 6 ("trial by jury shall be as heretofore, and the right thereof remain inviolate."); id., art. I, § 9 ("in all criminal prosecutions the accused hath a right to a speedy public trial by an impartial jury of the vicinage...nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."); see also William Goldman Theatres, Inc. v. Dana, 173 A.2d 59, 64 (Pa. 1961) ("an individual is entitled to a public trial by an impartial jury of the vicinage in every situation in which he would have been entitled to such a trial at the adoption of the Pennsylvania Constitution in 1790 and ever since under succeeding constitutions.").

In support of this claim, appellant cites several decisions involving application of recidivist penalties, which held the fact of the prior conviction must be pled in the indictment, the defendant's identity as the person previously convicted must be established,

and the defendant must be afforded notice of the possibility of an increased sentence and the opportunity to be heard.⁹

Appellant also relies on Commonwealth v. Reagan, 502 A.2d 702 (Pa. Super. 1985) (en banc), which involved imposition of a mandatory minimum sentence for recidivism under the Drunk Driving Act, 75 Pa.C.S. § 3731(e)(1)(ii). In holding that prior driving under the influence (DUI) convictions are not an essential element of the crime of DUI, and therefore need not be alleged in the information, the Superior Court distinguished the cases cited by appellant, see n.10, supra, stating:

[I]n each of these cases, the recidivist statute under which the defendant was sentenced provided for an increased maximum sentence or an “enlarged” sentence, and it was for this reason that the Courts concluded that prior convictions had to be alleged in the Information or Indictment. The Courts held that the increased maximum sentence, or change in the grade of

⁹ See Commonwealth v. Moses, 271 A.2d 339, 340 (Pa. 1970) (trial court lacked power to impose increased sentence when indictment did not contain averments of prior convictions); Commonwealth v. Dermendzin, 156 A.2d 804, 807 (Pa. 1959) (defendant may not be sentenced as recidivist without supporting judicial determination of issue, and unless he is notified, prior to sentencing, of issue of recidivism and has had opportunity to be heard); Commonwealth v. Payne, 89 A. 559, 561 (Pa. 1913) (previous conviction of accused must be averred in indictment and record of conviction must be offered in evidence in support of averment); Rauch v. Commonwealth, 78 Pa. 490, 1875 WL 13105, *4 (1876) (court cannot impose increased punishment based upon second misdemeanor conviction unless former conviction is stated in indictment); Commonwealth v. Herstine, 399 A.2d 1118, 1119 (Pa. Super. 1979) (since second offense carries greater penalty than first offense, it is different in kind and character than first offense, and particular characteristics distinguishing it from first offense must be pled in indictment); Halderman’s Case, 53 Pa. Super. 554, 1913 WL 4715, *1 (1913) (“To leave to a trial judge to find from evidence not suggested in the record that the party convicted was guilty of the offense to which the greater punishment is attached would deprive the defendant of the right to a trial on a question vitally affecting his liberty and as to which he had a right to be heard.”); Commonwealth v. Stack, 20 Pa.D. 599, 1910 WL 3240, *2 (Pa.O. & T.) (1910) (clear meaning of discussion in Rauch is that district attorney is required to establish, affirmatively, fact of recidivist’s identity unless it is admitted, and it must be put to jury).

offense, made a subsequent offense different in kind and character than a first offense.

Reagan, at 705 (emphasis added); see also Rauch, at *4 (imprisonment is not lawful consequence of conviction for unlawful sale of liquors; it is lawful consequence of second sale only after former conviction).

Although Pennsylvania courts, historically, have treated prior convictions as elements when those convictions increase the maximum penalty for an offense, appellant overlooks the rationale behind this characterization. The original understanding at common law regarding what constitutes an “element” was broader than that today, due to the fact that each crime, as defined by the legislature, had its own specific punishment; there was no separation of offenses and sentences. See U.S. v. Gray, 438 U.S. 41, 45-46 (1978) (explaining that, in early days of Republic, when imprisonment had only recently emerged as alternative to death, confinement in public stocks, and whipping, period of incarceration was specifically prescribed by legislature; not until later did fixed system give way to individualized, flexible approach to sentencing, with discretion vested in sentencing court); see also Apprendi, at 499-518 (Thomas, J., concurring) (detailing history of treatment of recidivism as element of offense). Rauch, one of the chief cases upon which appellant relies, was decided under such a scenario.

When the General Assembly passed the Crimes Code in 1972, however, common law crimes were abolished; the Code specifically provides no conduct constitutes a crime unless statutorily defined. 18 Pa.C.S. § 107(b). The statute under which appellant was convicted, 35 P.S. § 780-113(a)(30), defines the offense of possession with intent to deliver, but does not mention any sentence enhancement; the recidivist provision pertaining to this offense is instead found separately, in 35 P.S. § 780-115(a). While this Court has never squarely addressed the interplay of these two sections, in Commonwealth v. Griffin, 804 A.2d 1 (Pa. Super. 2002), the defendant was convicted and sentenced under the same

statutes as appellant; he raised the same challenge to § 780-115(a). The Superior Court aptly noted:

[N]othing in [§ 780-115(a)] creates a new crime called “possession of a controlled substance with intent to deliver as a second or subsequent offense,” nor does it add a new element to the statutory definition of the crime of possession of a controlled substance with intent to deliver. ... Our statutory law defines only one offense pertaining to the possession of a controlled substance with the intent to deliver that substance:

Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act,...or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). When read in pari materia, clearly the language of sections 780-113(a)(30) and 780-115(a) creates no new possessory offense requiring a previous conviction as a substantive element.

Griffin, at 15 (emphasis added). See also Commonwealth v. Sobeleski, 617 A.2d 1309, 1312 (Pa. Super. 1992) (prior conviction does not alter guilt or innocence of person charged; prior conviction is only relevant to determination of sentence following adjudication of guilt); Commonwealth v. Lark, 504 A.2d 1291, 1297-98 (Pa. Super. 1986) (holding previous homicide conviction does not become element of murder merely because sentencing enhancement will apply based on previous conviction); Commonwealth v. Harvin, 500 A.2d 98, 100 (Pa. Super. 1985) (prior offenses used in grading do not constitute substantive element of crime); Commonwealth v. Coleman, 433 A.2d 36, 39 (Pa. Super. 1981) (noting, in retail theft case, had legislature intended to make grading of offense one of its substantive elements, it would not have divided definition of offense and grading of offense into distinct, separately labeled subsections).

The logic in Griffin rings true: the offense of possession with intent to deliver is completely and exclusively defined in § 780-113(a)(30); the recidivist provision of § 780-115(a) is a sentence enhancement, separate from the elements of possession with intent to

deliver, and it does not transpose prior convictions for that offense into a substantive element of § 780-113(a)(30). Accordingly, appellant's historical argument fails.

Other jurisdictions which have addressed the issue of recidivist sentencing enhancements have concluded Apprendi's prior conviction exception applies and a prior conviction need not be determined by a jury beyond a reasonable doubt. See, e.g., Fyler v. State, 852 So. 2d 442 (Fla. Dist. Ct. App. 5th Dist. 2003) (habitual offender classification based on defendant's prior criminal record does not require jury determination pursuant to holding in Apprendi); State v. Kendall, 58 P.3d 660 (Kan. 2002) (use of defendant's two prior DUI convictions to change classification of subsequent DUI conviction from misdemeanor to felony did not violate Apprendi); State v. Clemons, 45 P.3d 384 (Kan. 2002) (juvenile adjudications are within exception of Apprendi for prior convictions and may be used in calculating defendant's criminal history score under Kansas Sentencing Guidelines Act); State v. Hitt, 42 P.3d 732 (Kan. 2002) (Apprendi prior conviction exception, to requirement that jury must determine any fact increasing penalty for crime beyond statutory maximum, encompasses juvenile adjudications); State v. Weldele, 69 P.3d 1162 (Mont. 2003) (Apprendi did not require that prior DUI convictions be submitted to jury and proven beyond reasonable doubt); State v. Hurbenca, 669 N.W.2d 668 (Neb. 2003) (fact of prior convictions did not have to be determined by jury for purposes of habitual criminal sentencing; prior convictions must be proven by preponderance of evidence); State v. LeBaron, 808 A.2d 541 (N.H. 2002) (prior conviction was merely sentencing factor, rather than element of separate felony-level offense of driving after having been certified as habitual offender; defendant's prior convictions need not have been alleged in indictment nor proved to jury beyond reasonable doubt); State v. Smith, 75 P.3d 934 (Wash. 2003) (neither federal nor state constitutions require that prior convictions be proved to a jury beyond a reasonable doubt); State v. Wheeler, 34 P.3d 799 (Wash. 2001) (same); State ex rel. Appleby v. Recht, 583 S.E.2d 800 (W.Va. 2002) (fact of predicate felonies supporting

recidivist enhancement need not be proven to jury beyond reasonable doubt); State v. Veldt, 671 N.W.2d 717 (Wisc. App. 2003) (according to Apprendi, fact of prior drunk driving conviction does not have to be submitted to jury).¹⁰

Thus, there is ample support for the conclusion that Apprendi's prior conviction exception remains viable.

Appellant further argues, however, that this Court has drawn a distinction between cases where the recidivist statute provides for a mandatory minimum sentence and cases such as his, where the statute increases the maximum sentence. Appellant points to Commonwealth v. Wright, 494 A.2d 354 (Pa. 1985), and Commonwealth v. Allen, 494 A.2d 1067 (Pa. 1985), which address the constitutionality of two sections of the Mandatory Minimum Sentencing Act. See 42 Pa.C.S. §§ 9712 (requiring imposition of minimum sentence of five years total confinement if defendant visibly possessed firearm during commission of certain felonies) and 9714 (requiring imposition of minimum sentence of five

¹⁰ Other jurisdictions, in applying Apprendi's holding where the fact which increased the maximum penalty was something other than a prior conviction, have also noted Apprendi's prior conviction exception. See, e.g., Ex Parte Waldrop, 859 So.2d 1181, 1186 (Ala. 2002); State v. Ring, 65 P.3d 915, 937-38 (Ariz. 2003); People v. Sengpadychith, 27 P.3d 739, 742 (Cal. 2001); State v. Sanko, 771 A.2d 149, 155 (Conn. App. 2001); State v. Carvalho, 63 P.3d 405, 410 (Haw. Ct. App. 2002); People v. Swift, 781 N.E.2d 292, 294 (Ill. 2002); State v. Jacobs, 644 N.W.2d 695, 698 (Iowa 2001); State v. Palermo, 818 So. 2d 745, 751 (La. 2002); State v. Burdick, 782 A.2d 319, 323 (Me. 2001); People v. Mass, 628 N.W.2d 540, 635 (Mich. 2001); State v. Jones, 659 N.W.2d 748, 751 (Minn. 2003); State v. Whitfield, 107 S.W.3d 253, 262 n.7 (Mo. 2003); Abrego v. State, 38 P.3d 868, 870 (Nev. 2002); State v. McDonald, 79 P.3d 830, 832 (N.M. Ct. App. 2003); People v. Walters, 763 N.Y.S.2d 715, 719 (N.Y. Sup. Ct. 2003); State v. Lucas, 548 S.E.2d 712, 730 (N.C. 2001); State v. Kelso, 2000 Ohio App. LEXIS 4641, *5 (Ohio Ct. App. 2000); State v. Dilts, 39 P.3d 276, 279 (Ore. App. 2002); State v. Simuel, 2004 S.C. App. LEXIS 23, *4 (S.C. Ct. App. 2004); State v. Holton, 2004 Tenn. LEXIS 1, *42 (Tenn. 2004); Ex parte Boyd, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001).

years total confinement if defendant convicted of violent felony has prior state or federal conviction of crime of violence).

In Wright and Allen, this Court held the sentencing factors of visible possession of a firearm and prior conviction of a violent crime were not elements of offenses, because: 1) the legislature had explicitly stated, in the respective statutes, that the “[p]rovisions of this section shall not be an element of the crime...,” 42 Pa.C.S. §§ 9712(b), 9714(c); 2) the statutes’ factors did not satisfy the Crimes Code’s definition of an “element of an offense,” see 18 Pa.C.S. § 103;¹¹ 3) the statutes neither altered the degree of guilt of the offenses nor increased the maximum sentences for the offenses; and 4) the statutes “applie[d] only where the defendant is convicted of one of the offenses enumerated therein, and thus relates solely to the sentencing proceedings.” Allen, at 1070-71; Wright, at 357.

Appellant emphasizes this Court’s observation that neither of the statutes in Wright and Allen increased the maximum penalty for the offenses; from that, he extrapolates that, in a case where the maximum sentence is increased by a recidivist statute, the prior offense is an element of the crime. To support this supposition, appellant relies on Commonwealth v. Williams, 733 A.2d 593 (Pa. 1999) (“Williams I”), in which this Court held the sexually violent predator provisions of Pennsylvania’s Megan’s Law, 42 Pa.C.S. §§ 9791-9799.6, were unconstitutional because the determination of whether a defendant is a

¹¹ An element of an offense is:

- Such conduct or such attendant circumstances or such a result of conduct as:
- (1) is included in the description of the offense;
 - (2) establishes the required kind of culpability;
 - (3) negatives an excuse or justification for such conduct;
 - (4) negatives a defense under the statute of limitation; or
 - (5) establishes jurisdiction or venue.

18 Pa.C.S. § 103.

sexually violent predator is a “separate factual determination, the end result of which is criminal punishment,” Williams I, at 603, and therefore the requirement that a defendant rebut the presumption he is a sexually violent predator violates due process. Id. In so holding, this Court distinguished Wright, noting that unlike that case, the sexually violent predator provision “expands the maximum sentence to be imposed for the predicate crimes...if the offender is found to be a sexually violent predator.” Id., at 602.

Appellant overlooks the fact, however, that the statute at issue in this case does not provide for any fact-finding, nor does it make the increased maximum sentence contingent on any factual question that has not already been determined. The fact of a prior conviction stands alone; it does not require a presumption -- it either exists as a matter of public record or it does not. See Allen, at 1071 (“The existence of a prior conviction is a simple historical fact which may be ascertained through official documents.”). The appellant’s guilt of the prior offense has already been determined beyond a reasonable doubt, by a jury, if he chose to exercise that right, and is a “straightforward issue capable of objective proof’ and where ‘the risk of error was slight’....” Commonwealth v. Butler, 760 A.2d 384, 388 (Pa. 2000) (quoting Williams I, at 607); see also Wright, at 362 (noting that in § 9712 proceeding, risk of error is slight because visible possession of firearm is “simple, straightforward issue susceptible of objective proof....[and t]here is scant potential that suspicion and conjecture will enter into the factfinder’s decision”; further, evidence of visible possession is “amenable to meaningful appellate review.”).

Thus, in cases where the fact which increases the maximum penalty is not a prior conviction and requires a subjective assessment, anything less than proof beyond a reasonable doubt before a jury violates due process. Additionally, any judicial finding which results in punishment beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. See Commonwealth v. Williams, 832 A.2d 962 (Pa. 2003) (“Williams II”) (citing Apprendi). Where, however, the judicial finding is the fact of a

prior conviction, submission to a jury is unnecessary, since the prior conviction is an objective fact that initially was cloaked in all the constitutional safeguards, and is now a matter of public record.¹²

In the present case, although the fact of appellant's prior drug convictions was not required to be pled in the information charging appellant with PWID, the information notified appellant of the Commonwealth's intent to seek the enhancement. Appellant's prior drug convictions appeared in the Quarter Sessions file and presentence report available to the sentencing court. For the reasons expressed in Williams and Butler, supra, the existence of these convictions was capable of objective proof; there was no need to resubmit them for the jury to determine they were recorded in appellant's file. Accordingly, appellant was properly sentenced under the enhancement in § 780-115(a), and the judgment of sentence is affirmed.

Judgment of sentence affirmed.

Former Chief Justice Zappala did not participate in the decision of this case.

Mr. Justice Castille files a concurring opinion.

Mr. Justice Saylor files a concurring opinion.

¹² Furthermore, prior convictions are extremely prejudicial to a defendant, if admitted into evidence at trial. See Commonwealth v. Spruill, 391 A.2d 1048, 1050-51 (Pa. 1978) ("Evidence of prior criminal activity...is probably only equaled by a confession in its prejudicial impact upon a jury...."). In Commonwealth v. Koczwara, 155 A.2d 825 (Pa. 1959), this Court concluded although the accused must be notified before trial that the Commonwealth intends to seek an enhanced sentence for recidivism, evidence of the prior convictions could not be admitted at trial, except for impeachment purposes, in order "to avoid possible prejudice of the defendant by the charge of a former conviction." Id., at 831. See also Almendarez-Torres, at 234 (noting, in response to argument that name and details of prior offense could be redacted for jury, that jurors would still learn of nature of offense, e.g., aggravated felony, and that "we do not believe...Congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested.")