[J-48-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 1 MAP 2022
	:	
Appellant	:	Appeal from the Order of the
	:	Superior Court dated April 9, 2021,
	:	reargument denied June 10, 2021,
v.	:	at No. 1947 MDA 2019 vacating the
	:	Judgment of Sentence of the Court
	:	of Common Pleas of Centre County,
STEVEN LEONARD VERBECK,	:	Criminal Division, dated November
	:	1, 2019 at No. CP-14-CR-0002013-
Appellee	:	2018 and remanded for
	:	resentencing.
	:	
	:	ARGUED: September 14, 2022

OPINION IN SUPPORT OF AFFIRMANCE

CHIEF JUSTICE TODD **DECIDED: February 28, 2023**

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), the United States Supreme Court set forth the general rule that any fact that increases the penalty for a crime is an element of the offense that must be stated in the charging document, submitted to the jury, and proved beyond a reasonable doubt. The high Court has recognized a narrow exception to that rule, applicable to the fact of a prior conviction, due in large part to the certainty and constitutional safeguards afforded in the previous criminal proceedings, including establishing guilt beyond a reasonable doubt.

The Opinion In Support of Reversal ("OISR") reasons that a defendant's acceptance of accelerated rehabilitative disposition ("ARD") on a charge of driving under the influence ("DUI") is the equivalent of a prior conviction, notwithstanding that, *inter alia*,

the Commonwealth bears no burden of establishing guilt in an ARD proceeding and the defendant is not required to admit guilt. The OISR opines that, similar to the fact of a prior conviction, the fact of ARD acceptance may constitutionally qualify as a prior offense for sentencing purposes if found by a judge based on a preponderance of the evidence.

I respectfully disagree, as such a conclusion conflicts with *Apprendi* and *Alleyne*. In my view, the significantly different procedures underlying a prior conviction and ARD acceptance render the prior conviction exception inapplicable here, and require this Court to adhere to the general rule that any fact that increases the penalty for a crime must be stated in the charging document, submitted to a jury, and proved beyond a reasonable doubt.

Accordingly, I would hold that the language in Section 3806 of the Vehicle Code, 75 Pa.C.S. § 3806, which includes acceptance of ARD as a prior offense and directs the trial court at sentencing to determine the number of ARD acceptances, if any, for purposes of enhancing the defendant's sentence, is unconstitutional under *Apprendi* and *Alleyne*. Due to this constitutional infirmity, I would affirm the judgment of the Superior Court, which vacated Appellee Steven Leonard Verbeck's sentence entered pursuant to Section 3806(a), and remand for resentencing. My reasoning follows.

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My analysis begins, as it must, with an examination of the prior conviction exception, the substance of which arose in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), two years before the Court's landmark ruling in *Apprendi*. In *Almendarez-Torres*, the Court examined a federal grand jury indictment charging the defendant with violating a federal statute, 8 U.S.C. § 1326(a), which rendered it a crime for a deported alien to return to the United States without special permission, and authorized a maximum sentence of two years. *Almendarez-Torres*, 523 U.S. at 226. The statute further

authorized a maximum term of 20 years imprisonment if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." *Id.* (citing 8 U.S.C. § 1326(b)(2)).

The defendant pled guilty to violating Section 1326, and admitted that his initial deportation had resulted from three convictions for aggravated felonies. The sentencing court thereafter imposed a sentence of 85 months imprisonment, rejecting the defendant's contention that the sentence enhancement in Section 1326(b)(2) was inapplicable because his indictment failed to reference his prior aggravated felony convictions.

The high Court agreed, and held that a criminal statute which enhances a sentence based upon a prior conviction does not create a separate crime that the government must charge as a fact in the indictment but, rather, is a penalty provision authorizing an enhanced sentence for recidivists. *Id.*, 523 U.S. at 226-27. Observing that the subject matter of recidivism is typically viewed as a sentencing factor, the Court examined the statutory language, structure, context, and history of the provisions, and concluded that Congress intended to set forth a sentencing factor and not a separate criminal offense. *Id.* at 235.

The following term, recognizing that the fact of a prior conviction in *Almendarez-Torres* involved recidivism, the Court decided *Jones v. United States*, 526 U.S. 227 (1999), and explained why the fact of a prior conviction was constitutionally distinct from other sentence-enhancing facts. The Court opined, "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249.

The Court further expounded upon *Almendarez-Torres's* discussion of a prior conviction in its seminal decision in *Apprendi*. In *Apprendi*, the defendant pled guilty to possessing a firearm for an unlawful purpose, which offense carried a sentence of five to ten years. At the sentencing proceeding, the prosecutor sought application of New Jersey's hate-crime sentencing enhancement, which provided for an increased sentence if a trial court finds, by a preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate a person or group based on race, a fact that had not been separately charged. The trial court found by a preponderance of the evidence that the defendant's offense was racially motivated, and sentenced him to 12 years imprisonment, exceeding the statutory maximum for the firearms' offense.

The Supreme Court held that the New Jersey sentencing procedure violated the defendant's Sixth Amendment right to a trial by jury, as well as his right to due process of law as guaranteed by the Fourteenth Amendment, because any fact that increases the penalty for a crime is an element of the offense. *Apprendi*, 530 U.S. at 483 n.10. Accordingly, the Court declared 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." *Id.* at 490.

Germane to this appeal, while adopting the exception for a prior conviction based on its decision in *Almendarez-Torres*, the Court in *Apprendi* emphasized the constitutional protections attendant to criminal convictions (which, as I will discuss below, are absent in ARD proceedings). The Court reasoned:

> Because Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies – all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own – no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.

Id. at 488 (emphasis original). The *Apprendi* Court stressed that such procedural safeguards undergirded the prior conviction exception:

> Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the 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; *see also id.* at 488 ("Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range.").

Indeed, *Apprendi* not only cabined the prior conviction exception to those convictions arising from proceedings cloaked with the panoply of constitutional trial rights, but went further, casting some doubt on the validity of the prior conviction exception itself:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

Id. at 489-90 (footnote omitted). [1]

[1] In expressing its reservations regarding the prior conviction exception, the *Apprendi* Court found it "noteworthy" that the Court's extensive discussion of the term "sentencing factor" in *Almendarez-Torres* "virtually ignored the pedigree of the pleading requirement at issue." *Apprendi*, 530 U.S. at 489 n.15 (citing *United States v. Reese*, 92 U.S. 214, 232-233 (1875) (Clifford, J., concurring) (providing that "the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted")).

Finally, about a decade later in *Alleyne*, the Supreme Court held that the *Apprendi* rule, applying to facts that increase the statutory maximum sentence, likewise applies to facts that increase the mandatory minimum sentence (which is at issue here). The Court acknowledged that prior convictions are excepted from the *Apprendi* rule, as substantively described in *Almendarez-Torres*, but did not revisit the issue, as the parties did not contest the exception. *Alleyne*, 570 U.S. at 111 n.1.

With respect to the issue before us, this governing federal jurisprudence establishes that, while recidivism is traditionally considered to be a sentencing factor that is unrelated to the actual commission of the offense, the prior conviction exception is grounded primarily upon the constitutional guarantees that are inherent in the criminal proceedings from which the previous convictions arose. Respectfully, the OISR relies on the former sentiment in finding that Section 3806(a) of the Vehicle Code passes constitutional muster, without appreciating the significance of the latter.[2] *See* OISR at 12-13 (suggesting that, because the cases applying the *Apprendi* rule to invalidate a sentence have involved judicial fact-finding relating to the commission of the current

[2] Contrary to the OISR, I do not view my position as incompatible with *Oregon v. Ice*, 555 U.S. 160 (2009). Rather than examining the prior conviction exception to *Apprendi's* general rule, *Ice* involved the unique inquiry of whether *Apprendi* was even implicated by the challenged state statute, which provided that sentences for multiple offenses shall run concurrently, unless the sentencing judge finds statutorily-described facts. The Supreme Court held that the Sixth Amendment did not prohibit states from assigning to judges the factual assessment necessary to determine whether to impose sentences consecutively or concurrently, emphasizing that such function was within the prerogative of state legislatures, and not a traditional role of a jury. *Id.* at 168. Considering that *Ice* did not specifically address the scope of the prior criminal conviction exception to *Apprendi's* general rule, I do not interpret that decision as evidencing the high Court's retreat from its recognition in *Apprendi* and *Jones* that the constitutional procedural safeguards inherent in a prior criminal conviction are an essential predicate to the application of the prior conviction exception. This is not to say, however, that a defendant can challenge the validity of his prior conviction via an *Apprendi* claim. Rather, in my view, *Apprendi* and *Jones* simply instruct that, for a sentencing court to find the fact of a prior conviction, there must be a prior conviction, which is absent here, as there was only ARD acceptance.

offense, as opposed to facts relating to a defendant's record of prior conduct, the latter may not fall within *Apprendi's* reach); *id.* at 19 (opining that recidivist determinations such as ascertaining the number of prior convictions committed by a defendant and determining whether a defendant previously accepted ARD are sentencing determinations not traditionally made by a jury; thereby suggesting that they are not protected under the *Apprendi* rule).

As the OISR acknowledges, ARD does not constitute a criminal conviction. *See Whalen v. Com., Dep't of Transp., Bureau of Driver Licensing*, 32 A.3d 677, 681 (Pa. 2011) (citing *Commonwealth v. Lutz*, 495 A.2d 928, 933 (Pa. 1985)). Rather,

> ARD is a pretrial disposition of certain cases, governed primarily by Chapter 3 of the Pennsylvania Rules of Criminal Procedure, which suspends formal criminal proceedings before conviction and provides the accused with certain rehabilitative conditions, the completion of which results in the dismissal of the pending criminal charges and a clean record for the defendant.

J.F. v. Department of Human Services, 245 A.3d 658, 661-62 (Pa. 2021).

To illustrate, in an ARD proceeding, there is no requirement that an evidentiary record of the alleged criminal conduct be admitted. *See* Pa.R.Crim.P. 313 (providing that the ARD hearing record is open to indicate the defendant's request for acceptance into the program and the defendant's understanding of the proceedings, and is closed while the trial court is apprised of the facts of the case; the record is reopened thereafter to state the conditions of the program and the defendant's acceptance thereof). The defendant's statements at the ARD hearing may not be used against the defendant in any criminal proceeding, except one based upon the falsity of the statements given. Pa.R.Crim.P. 313(b).

Critically, as discussed, our criminal procedural rules do not require a determination of guilt to be made during an ARD proceeding, as the rules do not place

upon the Commonwealth the burden to prove the defendant's culpability beyond a reasonable doubt, nor do they require the defendant to admit guilt. Further, our criminal procedural rules do not require that the defendant be informed that acceptance into the ARD program may serve as a prior offense for purposes of future sentence enhancement. Rule of Criminal Procedure 312 requires only that the record reflect the defendant's understanding that: (1) acceptance and satisfactory completion of the ARD program offers an opportunity to earn dismissal of the pending charges; and (2) should the defendant fail to complete the ARD program, the defendant waives the applicable statute of limitations and the constitutional right to a speedy trial during the enrollment period. Pa.R.Crim.P. 312. The defendant is not informed that his ARD acceptance will act as a waiver of the constitutional protections afforded by *Apprendi* and *Alleyne*, which otherwise apply to sentence enhancements untethered to a prior conviction. Upon successful completion of the ARD program, the defendant may move for dismissal of the charges and, absent objection by the Commonwealth, the defendant's arrest record is expunged. Pa.R.Crim.P. 319, 320. Finally, and most notably, no criminal penalty results from a defendant's violation of the ARD conditions; rather, if the ARD conditions are violated, the case proceeds on the deferred criminal charges as provided by law. Pa.R.Crim.P. 318.

It is clear from a review of these procedural rules that ARD acceptance does not offer the constitutional safeguards that accompany a criminal conviction, safeguards on which the Supreme Court based its tolerance for excepting prior convictions from the *Apprendi/Alleyne* general rule. Indeed, ARD acceptance lacks the reliability of a prior conviction, as ARD acceptance evidently has *no* inherent reliability, considering that, if the conditions of the program are violated, the Commonwealth begins again and proceeds with a trial *de novo* on the deferred charges, Pa.R.Crim.P. 318, a trial at which the defendant's statements at the ARD hearing are not admissible, Pa.R.Crim.P. 313(b).

I query how ARD acceptance can be sufficiently reliable for recidivist purposes when it has no inherent legal import of its own, and the OISR never addresses this glaring legal inconsistency. For these reasons, I would adhere to *Apprendi's* clear distinction between accepting the validity of a prior conviction "entered in a proceeding in which the 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." *Apprendi*, 530 U.S. at 496.[3]

It logically follows that ARD acceptance falls under the general rule of *Apprendi* and *Alleyne*, requiring that any fact that increases the penalty for a crime is an element of the offense that must be stated in the charging document, submitted to the jury, and proved beyond a reasonable doubt. These requisites were not satisfied here because, *inter alia*, the trial court, consistent with Section 3806, determined the fact of Appellee's prior ARD acceptance at the time of sentencing by a preponderance of the evidence.[4] *See Commonwealth v. Wolfe*, 140 A.3d 651, 660-61 (Pa. 2016) (holding that, because the challenged statute plainly required judicial fact-finding of the crime victim's age be determined at the time of sentencing by a preponderance of the evidence, the provision violated *Alleyne*).

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[3] I am unpersuaded by the OISR's reliance upon cases applying enhanced penalties under the Armed Criminal Career Act, 18 U.S.C. § 924 ("ACCA"), to support its contrasting position. OISR at 18-19 n.13. Respectfully, cases involving the ACCA are an inapt comparison because, unlike Section 3806(a), the ACCA enhances the sentence based upon a prior conviction, not ARD acceptance. *See* 18 U.S.C. § 924(e)(1) (providing that a person who commits an enumerated offense and has three "previous convictions" for a violent felony or a serious drug offense shall be imprisoned not less than 15 years). Thus, cases addressing the ACCA offer no insight as to whether ARD acceptance is the equivalent of a prior conviction for purposes of *Apprendi* and *Alleyne*.

[4] Section 3806(b)(2) provides that "[t]he court shall calculate the number of prior offenses, if any, at the time of sentencing." 75 Pa.C.S. § 3806(b)(2).

The OISR reaches a contrary conclusion here, reasoning that the General Assembly's enactment of Section 3806(a), providing that ARD acceptance constitutes a "prior offense" for sentencing purposes, "impl[ies] a concession by the defendant that he or she, in fact, committed the offense . . . ."[5] OISR at 8; *see also id.* at 17 ("[f]or purposes of the court's recidivism inquiry, then, [ARD acceptance] is substantially similar to a conviction based on a guilty plea in the sense that the defendant's actions in waiving his constitutional rights and accepting ARD lend sufficient reliability to those proceedings to satisfy due process.").

Respectfully, I am aware of no constitutional procedure enabling a defendant to *implicitly* concede guilt. While constitutional rights can certainly be waived, *Commonwealth v. Ball*, 146 A.3d 755, 766 (Pa. 2016), it is well-settled that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," and "we do not presume acquiescence in [their] loss"; indeed, "[a] waiver is ordinarily an *intentional* relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (footnotes and citations omitted, emphasis added).

Consistent with this foundational law, our criminal procedural rules relating to guilty pleas – unlike the rules applicable to ARD proceedings – require that the trial court must conduct a guilty plea colloquy and determine, based upon the totality of the circumstances surrounding the entry of the plea, that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea. Pa.R.Crim.P. 590; *see also Commonwealth v. Hines*, 437 A.2d 1180, 1182 (Pa.

[5] In this regard, the OISR relies upon this Court's decision in *Whalen*, *supra,* for the proposition that the responsibilities associated with ARD acceptance, including the payment of fees, costs, and restitution arising from a DUI offense, imply that the defendant, indeed, committed the DUI offense. OISR at 9 n.6 (citing *Whalen*, 32 A.3d at 684). Accepting the OISR's reading of *Whalen* in this regard does not alter my position, as the issue there was one of statutory interpretation, and not of constitutional dimension.

1981) (holding that, "[b]ecause a guilty plea is not only an admission of conduct but also is an admission of all the elements of a formal criminal charge, and constitutes the waiver of constitutionally-guaranteed rights, the voluntariness of a guilty plea must be affirmatively established").

As has been established, here, no guilty plea colloquy was conducted, Appellee did not admit guilt when accepting ARD, and the Commonwealth did not prove Appellee's guilt beyond a reasonable doubt during the ARD proceeding. Accordingly, in my view, ARD acceptance is not substantially similar to a prior conviction and should not be treated as such under *Apprendi* and its progeny.

Further unavailing is the OISR's assertion that Appellee waived his procedural due process rights by accepting ARD. Waivers of constitutional rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Commonwealth v. Vega*, 719 A.2d 227, 230 (Pa. 1998) (providing that a waiver is knowing and intelligent if the right holder is aware of both the nature of the right and the risk of forfeiting it). A defendant may waive *certain* rights in connection with the acceptance of ARD. For example, the defendant may waive the right to the applicable statute of limitations and the constitutional right to a speedy trial during the ARD enrollment period, and the trial court, under Pa.R.Crim.P. 312, is charged with ensuring that the defendant understands the nature of such rights, and voluntarily waives them. However, the defendant is not informed that his acceptance of ARD may serve to enhance his sentence in a subsequent DUI matter or that he waives the constitutional protections afforded by *Apprendi* and *Alleyne*. Thus, there can be no knowing and voluntary waiver of the constitutional guarantees afforded by those decisions.

In closing, like the OISR, I recognize the important societal goal of deterring DUI recidivism and do not question the General Assembly's policy determination, set forth in Section 3806(a), that defendants who commit a second DUI offense after having accepted ARD may warrant greater punishment than those who have not been afforded a prior chance to reform. *See* OISR at 7 (emphasizing that "deterring DUI recidivism through penalties that increase in severity with each new offense is an important societal goal, including for individuals who resolve their first DUI charge through ARD"). The basis for my position, however, is that such deterrence must be carried out through constitutional means. The Supreme Court in *Apprendi* focused on the adequacy of the state procedures, not the substantive basis for the state sentencing enhancement, emphasizing that the "strength of the state interests that are served by the hate crime legislation has no more bearing on this procedural question than the strength of the interests served by other provisions of the criminal code." *Apprendi*, 530 U.S. at 475. The same is true here: the strength of the state's interest in punishing recidivists in Section 3806, however weighty, has no bearing on the procedural question before us. The General Assembly's valid interest in deterring recidivist conduct simply must be furthered in a manner that protects the procedural due process and jury trial rights of those involved.[6] In my view, Section 3806 fails to do that.

Justices Donohue and Wecht join this opinion in support of affirmance.

[6] Because I conclude that Section 3806 violates procedural due process in violation of *Apprendi* and *Alleyne*, I do not reach Appellee's contention that it also violates substantive due process.