

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : No. CR-34-2021
 :
 MICHAEL FRANK GERBER, JR., :
 Defendant :
 :
 Jennifer L. Rapa, Esquire : Counsel for Commonwealth
 Assistant District Attorney :
 Adam R. Weaver, Esquire : Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – May 31, 2024

Defendant, Michael Gerber, appeals from the judgment of sentence imposed by this court on April 5, 2024, following his plea to driving under the influence of a controlled substance, claiming that counting his prior acceptance of Accelerative Rehabilitative Disposition (“ARD”) as a prior offense under 75 Pa.C.S.A. §3806(a)(1) for purposes of considering his current driving under the influence conviction as a second offense and the imposition of a mandatory minimum sentence under 75 Pa.C.S.A. §3804(c)(2) violates his right to procedural due process.

FACTUAL AND PROCEDURAL BACKGROUND

On July 31, 2020, Defendant was arrested following a traffic stop and was subsequently charged with four counts of driving under the influence, two counts of possession of a controlled substance, and one count of driving under suspension. Defendant pled guilty to one count of driving under the influence of a controlled substance,

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impaired ability, under 75 Pa.C.S.A. §3802(d)(2), as a second offense, a misdemeanor of the first degree.¹

On April 5, 2024, Defendant was sentenced to a period of imprisonment of not less than ninety days nor more than five years. The ninety-day mandatory minimum was imposed under 75 Pa.C.S.A. §3804(c)(2)(i) because Defendant had accepted ARD for a prior DUI offense in 2016. Defendant's prior ARD was considered a prior offense under Section 3806 of the Vehicle Code which provides, in relevant part, as follows:

§3806. Prior offenses

(a) General rule.-- Except as set forth in subsection (b), the term "prior offense" as used in this chapter shall mean any conviction for which judgment of sentence has been imposed, adjudication of delinquency, juvenile consent decree, *acceptance of Accelerated Rehabilitative Disposition* or other form of preliminary disposition before the sentencing on the present violation for any of the following:

¹ In all candor to the Court on appeal, the undersigned was not the presiding judge at Defendant's guilty plea colloquy on December 2, 2022. At that time, Defendant was advised – incorrectly – of the penalty applicable to a first time DUI offender (N.T. 12/2/22).

When Defendant appeared for sentencing on August 17, 2023, the undersigned immediately inquired whether the criminal information had been amended to reflect the grade of the offense as a misdemeanor of the first degree and whether at the time of his plea he was advised of the applicable penalty for a second time driving under the influence of a controlled substance offense. (N.T. 8/17/23, pp. 2-4). As to the first question, an amended stipulation was presented to the court at this hearing and an order signed accepting the amendment. As to the second question, the Assistant District Attorney present acknowledged he was not in court when the plea was entered and did not know. (N.T. 8/17/23, p.2). Defense counsel indicated he could not recall. (N.T. 8/17/23, p.3).

At this point in the proceedings, the court was prepared to conduct a new plea colloquy when defense counsel interjected and agreed to stipulate that Defendant had been properly advised of the penalties he was facing and that a new plea colloquy would not be necessary. (N.T. 8/17/23, pp. 3-4). Unfortunately, sentencing could not proceed that day because Defendant had yet to complete his necessary drug and alcohol evaluations. (N.T. 8/17/23, pp. 4-5).

On April 5, 2024, when Defendant again appeared before the undersigned for sentencing, the court reviewed with counsel in greater detail that Defendant was advised of the range of sentences he was facing for a second offense driving under the influence of a controlled substance, a misdemeanor of the first degree. The court proposed conducting a new plea colloquy, however, after defense counsel conferred with his client and Defendant was sworn in, Defendant was specifically advised of the penalties he was facing for a second offense of DUI of a controlled substance and wanted to proceed with sentencing. (N.T. 4/15/24, pp. 4-7). Not until a transcript of the guilty plea colloquy was requested and prepared following defense counsel's request on April 12, 2024, after the appeal was taken, did the undersigned become aware of the defect in Defendant's original guilty plea. The court would also note that this issue has not been raised on appeal.

(1) an offense under section 3802 (relating to driving under influence of alcohol or controlled substance); . . .

75 Pa.C.S.A. §3806(a)(1) (emphasis added). The above applies so long as the prior offense occurred within a ten-year lookback period. See 75 Pa.C.S.A. §3806(b).

Also on April 5, 2024, following his sentencing, Defendant filed a Post-Sentence Motion, raising two issues: (1) for the court to make him eligible for work release and (2) for the court to reconsider and modify his sentence, to treat his conviction as a first offense and not consider his prior ARD as a prior offense, and to defer ruling on this issue for 120 days pending the Pennsylvania Supreme Court's decision in Commonwealth v. Richards, 25 MAP 2023, in which the constitutionality of treating ARD as a prior offense was then before the State Supreme Court. By Order dated April 9, 2024, we granted Defendant's request to be made eligible for immediate work release, but denied his Motion to the extent it challenged Defendant's prior ARD in 2016 as a first offense in the computation of his instant DUI conviction as a second offense.

On April 10, 2024, Defendant filed an appeal from the judgement of sentence as made final by the denial of his Post-Sentence Motion. In response to our order dated April 10, 2024, directing Defendant to file a concise statement of the errors complained of on appeal no later than twenty-one days from the entry of the order (see Pa.R.A.P. 1925(b)), Defendant timely filed his Concise Statement on April 12, 2024. Therein, Defendant raises the identical two issues pending before the Supreme Court in Richards:

- (1) In light of Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) is it not unconstitutional to consider an acceptance of ARD as a prior offense for sentencing purposes without the procedural protections afforded by Alleyne, i.e., a prior offense can only be determined by proof beyond a reasonable doubt?
- (2) Is it not fundamentally unfair and a violation of due process to equate a prior acceptance of ARD with a prior conviction for purposes of a

recidivist mandatory minimum sentence even though that acceptance involved no proof of guilt beyond a reasonable doubt?

Commonwealth v. Richards, 294 A.3d 300 (Pa. 2023).

In sum, Defendant claims that by equating a prior acceptance of ARD to a prior conviction for purposes of imposing a mandatory minimum sentence for a second or subsequent DUI offense, Section 3806(a)(1) of the Vehicle Code is unconstitutional. More specifically, the relevant question is whether Defendant's prior acceptance of ARD constitutes an unproven "fact," which must be submitted to a jury, or is equivalent to a prior conviction, which may be determined by the court at sentencing.

DISCUSSION

Ultimately at issue is whether Defendant's prior ARD is a sentencing factor or an element of the offense to which Defendant pled guilty. The distinction is important given that elements of an offense must be "charged in the indictment [*i.e.*, the charging document], submitted to a jury, and proven by the Government beyond a reasonable doubt." Jones v. U.S., 526 U.S. 227, 232, 119 S.Ct. 1215, 1219, 143 L.Ed.2d 311 (1999).² None of the foregoing is required of a sentencing factor whose relevance is specific to the sentencing of a defendant after he has been found guilty of a charged crime.³

² Those "accused" of a "crime" have the right to be tried by an "impartial jury." U.S.Const.amend. VI. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re: Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Sixth Amendment entitles a defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (quoting Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

³ In McMillan v. Pennsylvania, 477 U.S. 79, 86, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the Court initially invoked the distinction between "elements" and "sentencing factors," the latter referring to a fact not found by the jury but that could affect the sentence imposed by the Court. "The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the

A state has the right and power to determine what conduct constitutes a crime—what are the elements of the crime—and what penalties can be imposed upon conviction of that crime. “The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an ‘element’ or ‘ingredient’ of the charged offense.” Alleyne v. United States, 570 U.S. 99, 107, 133 S.Ct. 2151, 2158, 186 L.Ed.2d 314 (2013). “Any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” 570 U.S. at 103. This definition of elements “necessarily includes not only facts that increase the ceiling, but also those that increase the floor.” Alleyne, 570 U.S. at 108.

In Almendarez-Torres v. United States., 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Court needed to determine whether 8 U.S.C. §1326(b)(2) defined a separate crime or was a sentencing factor. As described by Justice Breyer:

Subsection (a) of 8 U. S. C. § 1326 defines a crime. It forbids an alien who once was deported to return to the United States without special permission, and it authorizes a prison term of up to, but no more than, two years. Subsection (b)(2) of the same section authorizes a prison term of up to, but no more than, 20 years for “any alien described” in subsection (a), if the initial “deportation was subsequent to a conviction for commission of an aggravated felony.” The question before us is whether this latter provision defines a separate crime or simply authorizes an enhanced penalty. If the former, *i.e.*, if it constitutes a separate crime, then the Government must write an indictment that mentions the additional element, namely, a prior aggravated felony conviction. If the latter, *i.e.*, if the provision simply authorizes an enhanced sentence when an offender also has an earlier conviction, then the indictment need not mention that fact, for the fact of an earlier conviction is not an element of the present crime.

523 U.S. at 226, 118 S.Ct. at 1222.

The Court concluded that Section 1326(b)(2) was

jury’s finding that the defendant is guilty of a particular offense.” Apprendi, 530 U.S. at 494, n.19 (emphasis in original).

a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor that it mentions, an earlier conviction, in the indictment.

523 U.S. at 226-227. The Court held that when considered as a penalty provision, the fact of recidivism is a sentencing factor, not an element of the offense. In reaching this conclusion, the Court “stressed the history of treating recidivism as a sentencing factor, and noted that, with perhaps one exception, Congress had never clearly made prior conviction an offense element where the offense conduct, in the absence of recidivism, was independently unlawful.” Jones, 526 U.S. at 235.⁴

Critical to the Court's decision in Almendarez-Torres was that the relevant statutory subject matter was recidivism, “a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.” 523 U.S. at 243. Recidivism, unlike other facts, “does not relate to the commission of the offense, *but goes to the punishment only*, and therefore... may be subsequently decided.” Id. at 244 (citation and quotation marks omitted) (emphasis in original). Consistent with this distinctive nature of recidivism, the Court further noted that “the lower courts have almost uniformly interpreted statutes (that authorize higher sentences for recidivists) as setting forth sentencing factors, not as creating new crimes (at least where the conduct, in the absence of the recidivism, is independently unlawful).” Id. at 230. Moreover, in the context of this tradition of regarding recidivism as a sentencing factor, the Court noted it was unaware

⁴ The exception referred to is that at 18 U.S.C. §922(g)(1) which makes it unlawful for any person “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]” to, *inter alia*, “possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” Because it is the conviction which makes conduct *not* otherwise unlawful a crime, the conviction is an element of the offense. Almendarez-Torres v. United States, 523 U.S. 224, 230, 118 S.Ct. 1219, 140 L.Ed2d 350 (1998).

of any statute enacted by Congress which “made a defendant’s recidivism an element of an offense where the conduct proscribed is otherwise unlawful.” *Id.* at 244.

Section 3806(a)(1) of the Vehicle Code defines what constitutes a prior offense in relation to a pending DUI charge or conviction for which a sentence has yet to be imposed. It focuses on recidivist behavior.⁵ The existence of a prior offense affects the grade and statutory sentencing range, including mandatory minimums, for sentencing on a subsequent offense. See 75 Pa.C.S.A. §3804 (Penalties).⁶ Whether or not a prior offense exists has no bearing on whether the defendant is guilty of a pending DUI offense with which he has been charged: he either violated the elements of the offense set forth in Section 3802 of the Vehicle Code or he didn’t.

In Commonwealth v. Richards, 284 A.3d 214 (Pa.Super. 2022) (*en banc*), appeal granted, 294 A.3d 300 (Pa. 2023), the Pennsylvania Superior Court held that “the portion of Section 3806(a), which equates prior acceptance of ARD to a prior conviction for purposes of imposing a Section 3804 mandatory minimum sentence, passes constitutional muster.” *Id.* at 220. Its material facts - prior ARD, subsequent conviction of a new DUI offense, treatment of the prior ARD as a first offense for sentencing - are on all fours with the facts at issue here. Its holding is binding on us and confirms the

⁵ In Almendarez-Torres the significance of defendant’s prior convictions was that they evidenced his recidivist behavior. So too does ARD for DUI when the record of the defendant’s charges, proceedings, ARD application, and court acceptance and approval of that application are all matters of public record. If either the fact of a defendant’s conviction or acceptance of ARD is in dispute, that would be a question for the jury.

⁶ In this case, if Defendant’s conviction had been treated as his first DUI offense, Defendant would have been facing a minimum period of imprisonment of no less than seventy-two consecutive hours, a maximum period of imprisonment not to exceed six months, and a fine of not less than \$1,000 nor more than \$5,000. 75 Pa.C.S.A. §3804(c)(1). When counted as a second offense, taking into account ARD as a first offense, Defendant was subject to a period of imprisonment of no less than ninety days, a maximum of no more than five years, and a fine of not less than \$2,500 nor more \$10,000. 75 Pa.C.S.A. §3804(c)(2). Additionally, the grade of Defendant’s offense was increased from an ungraded misdemeanor to a misdemeanor of the first degree.

constitutionality of treating Defendant's prior ARD as a first offense for sentencing. See also Commonwealth v. Moroz, 284 A.3d 227 (Pa.Super. 2022) (*en banc*) (same).

Richards expressly overruled Commonwealth v. Chichkin, 232 A.3d 959 (Pa.Super. 2020), which determined that "prior acceptances of ARD could not be categorized as 'prior convictions' exempt from the holdings of Apprendi and Alleyne [v. United States], 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)," and that "[t]he 'fact' that a defendant accepted ARD does not carry with it the procedural safeguards of a traditional conviction following a judge or jury trial." Richards, 284 A.3d at 219.⁷ Chichkin, however, does not appear to give due deference to the significance of the subject matter here, being a penalty provision founded on recidivism, as in Almendarez-Torres, and the tradition of regarding recidivism as a sentencing factor, not an element of the offense.

As in Almendarez-Torres, the fact of recidivism as reflected in Defendant's prior ARD, "does not relate to the commission of the offense, *but goes to the punishment only*, and therefore... may be subsequently decided." Almendarez-Torres, 523 U.S. at 244 (emphasis in original). Under the Due Process Clause and the Sixth Amendment right to a jury, the facts which must be proved to a jury beyond a reasonable doubt are those integral to the Defendant's conduct in committing the offense, and not those with respect

⁷ The substantive basis for treating ARD as a prior offense under Section 3806(a)(1) of the Vehicle Code is not in issue here. From a substantive due process analysis, treating a prior ARD as a prior offense is rationally related to a valid state objective: punishing recidivist behavior. Quoting Whalen v. Com., Dept. of Transp., Bureau of Driver Licensing, 32 A.3d 677, 681 (Pa. 2011), the opinion affirming the judgment of sentence in Richards stated:

Although ARD is legally distinct from a conviction, the General Assembly has chosen to equate ARD with a conviction under a variety of circumstances. For example, ARD may be statutorily construed as a conviction for purposes of computing sentences on subsequent convictions.

Commonwealth v. Richards, 284 A.3d 214, 218 (Pa.Super. 2022). Additionally, while substantive due process also "provides heightened protection against government interference with certain fundamental rights and liberty interests." Commonwealth v. Bullock, 913 A.2d 207, 214 (Pa. 2006) (citation omitted), Defendant's challenge focuses on procedural due process: his constitutional right to have the elements of an offense proven beyond a reasonable doubt before a jury.

to the Defendant's prior record. See, e.g., Alleyne (holding that "brandishing" a firearm while committing a crime of violence – i.e., conduct material to the manner in which the crime was committed - and which increased the term of a mandatory minimum sentence, was an element of the offense); Apprendi (holding that a hate-crime statute which increased the maximum term of imprisonment to which a defendant was subject if, in committing the underlying crime, the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity," goes directly to the commission of the offense itself and was an element of the offense to be determined by the jury on the basis of proof beyond a reasonable doubt). The opinion in Chichkin cites no case in which recidivism is an element of the offense.

As to procedural safeguards, ARD is not a conviction, nor are its procedural protections equal to those surrounding a criminal conviction. Nevertheless,

ARD is not some trivial mechanism for avoiding a conviction and expunging an arrest record. Rather, it is an intensive process involving personal assessments, safety classes, and addiction treatment if necessary, all under court supervision....

Richards, 284 A.3d at 218 (quoting Whalen v. Com., Dept. of Transp., Bureau of Driver Licensing, 32 A.3d 677, 684 (Pa. 2011)). "A defendant receives ARD only after he has requested acceptance into the program, indicated an understanding of the proceedings, and agreed to comply with the conditions imposed by the trial court." Richards, 284 A.3d at 220.

Prior to being placed on ARD, Defendant had the benefit of arraignment, as well as a preliminary hearing, pre-trial discovery and counsel, unless waived. He had the right to a jury trial and the right to require the Commonwealth to prove him guilty beyond a

reasonable doubt. In accepting ARD, Defendant made a conscious decision to enter a program emphasizing rehabilitation and, upon successful completion, providing the opportunity for a fresh start without a conviction, having the charge dismissed, and having his record expunged, in exchange for avoiding the risk of conviction and the accompanying consequences that may entail. Additionally, "[t]he fact that ARD will constitute a prior offense for purposes of sentencing on a second or subsequent DUI conviction is written directly into Section 3806, and a defendant is presumed to be aware of the relevant statute." Richards, 284 A.3d at 220 (citation omitted). Defendant has not been deprived of due process commensurate with his acceptance of ARD and its bearing on second or subsequent DUI offenses. See Bundy v. Wetzel, 184 A.3d 551, 557 (Pa. 2018) (holding that procedural due process "is a flexible concept which varies with the particular situation") (citation and quotation marks omitted).


CONCLUSION

The fact of Defendant's acceptance of ARD and court approval is as much a judicial fact of record as is a conviction. Under Almendarez-Torres it is not a fact that needs to be proven beyond a reasonable doubt.

Here, the procedural safeguards which accompanied the entry of Defendant's prior 2016 ARD, the fact that the existence of this prior ARD is not in dispute, and the distinctive nature of recidivism traditionally recognized as a sentencing factor, relating not to the commission of the offense but for sentencing only, all mitigate the due process and Sixth Amendment concerns otherwise at issue in allowing the court to accept ARD as a sentencing factor - as a prior offense here - with the effect of subjecting Defendant to an

enhanced sentence as a recidivist. See also Commonwealth v. Verbeck, 290 A.3d 260 (Pa. 2023) (3-3 decision) (Mundy, J., Opinion in Support of Reversal).

BY THE COURT:


_____ P.J.