IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RONALD J. CHENETTE, Appellant.	No. 39428-6-II UNPUBLISHED OPINION

Armstrong, J. — Ronald Chenette appeals his conviction for harming a police dog, arguing that the trial court should have suppressed his statements to a police officer because the State failed to prove they were voluntary. He also challenges his persistent offender sentence, arguing that the trial court violated his constitutional rights to a jury trial, due process, and equal protection under the law. Finding no error, we affirm.

FACTS

On October 23, 2007, Chenette spent the morning drinking with Richard Countryman. Chenette suffers from chronic paranoid schizophrenia. His symptoms include delusions, hallucinations, and mood swings, which are often exacerbated by alcohol.

At some point in the morning, Chenette and Countryman walked to the store to buy more beer. The police received a report that a mentally unstable man, armed with a handgun, was making statements about shooting police. Numerous law enforcement officers responded to the area, setting up a perimeter in order to locate the subjects.

Chenette ran into the woods and hid for several hours. The SWAT (Special Weapons and Tactics) team deployed a police dog to locate Chenette. Shortly after the dog was released,

several officers heard a gunshot. The dog was later found with a gunshot wound to the head.

Chenette eventually came out of the woods. Deputy Alan Earhart ordered Chenette to get down on the ground. When he did not, Deputy Earhart released a second police dog. The dog caught Chenette and bit his right arm. The police apprehended Chenette and transported him to the hospital to attend to his injury.

On the way to the hospital, one of the officers riding in the ambulance advised Chenette of his *Miranda*[1] rights. Chenette, who was agitated and argumentative, said he did not understand them. At the hospital, after his wounds had been sutured and a drain tube inserted, Deputy Earhart attempted to question Chenette a second time. Chenette told Earhart that a large black dog had bitten him and that Deputy Earhart was lucky Chenette did not have a blade, because otherwise the dog would have been dead. Chenette also said he did not know what Earhart was talking about when he mentioned that a dog had been shot.

The State charged Chenette with harming a police dog and first degree unlawful possession of a firearm. RCW 9A.76.200; RCW 9.41.040(1)(a). Chenette pleaded guilty to the firearm charge and the case proceeded to trial on the remaining count.

Before trial, the court conducted a 3.5 hearing to determine the admissibility of Chenette's statements to Deputy Earhart. The deputy testified that at the hospital he advised Chenette of his rights. According to Deputy Earhart, Chenette responded that he understood his rights and that he was willing to talk. Deputy Earhart further testified that Chenette followed along, gave appropriate answers, was pleasant to talk to, and that they had a "lighthearted" conversation. Report of Proceedings (RP) at 52. He stated that he did not know of any medication that had

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

been administered but noted the change in Chenette's demeanor from aggressive to cooperative. Finding that Chenette appeared rational, and with no record that he was under the influence of any drugs, the court ruled that his waiver was voluntary and admitted his statements.

The jury found Chenette guilty of harming a police dog. Because the jury also found that he was armed with a firearm during the commission of the crime, his offense was classified as a most serious offense. RCW 9.94A.030(29)(t). At sentencing, the State established, by a preponderance of the evidence, that Chenette had two prior convictions for most serious offenses. Concluding that Chenette was a persistent offender, the court sentenced him to life without the possibility of parole.

ANALYSIS

I. Voluntary Waiver of Rights

Chenette contends the State failed to prove that his statements to Deputy Earhart were voluntary. He argues that given his dramatic change in demeanor, the circumstances suggest that his resistance to an interrogation was lowered by the drugs he was given during treatment.

A custodial statement is voluntary, and therefore admissible, if made after the defendant has been advised of his rights and then knowingly, voluntarily, and intelligently waives those rights. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). A statement is voluntary for the purposes of due process if, in light of all the circumstances, the defendant exercised free will and was not coerced into making the statement. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); *State v. Saunders*, 120 Wn. App. 800, 809, 86 P.3d 232 (2004). In determining

voluntariness, a trial court considers the defendant's physical condition, age, mental capabilities, experiences in custody and while being interrogated, and police conduct. *Aten*, 130 Wn.2d at 664. A trial court should also consider a defendant's mental disability and drug use at the time of a confession, but those factors do not necessarily render a confession involuntary. *Aten*, 130 Wn.2d at 664. We will not overturn a trial court's decision that the defendant voluntarily waived his rights if substantial evidence supports the decision. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

In *Aten*, 130 Wn.2d at 664, the defendant took anti-anxiety medication with a mild calming effect before speaking with law enforcement officers. Although two possible side effects of the medication are confusion and drowsiness, the defendant had no trouble expressing herself and showed no signs of being sedated. *Aten*, 130 Wn.2d at 664. The court found no evidence that the medicines affected her ability to voluntarily talk with the police or that they exploited her mental condition. *Aten*, 130 Wn.2d at 664-65. Accordingly, the court concluded that the defendant voluntarily waived her rights. *Aten*, 130 Wn.2d at 665.

The burden of proving a confession voluntary does not require the State to establish the absence of drugs or medication. As shown in *Aten*, that a defendant is medicated does not necessarily render his statement involuntary, especially where it does not affect his decisional capacity. Instead, whether a defendant's statement is voluntary is measured by his outward behavior and ability to communicate. Like the defendant in *Aten*, Chenette was calm, cooperative, and able to communicate at the time of his conversation with Deputy Earhart. For the purposes of this inquiry, it does not matter whether Chenette's relaxed demeanor was a result

of a cooling off period, the treatment of his injury, or the possible administration of medication. Moreover, there is no evidence that Chenette was medicated when speaking with Deputy Earhart. We conclude that the trial court did not err in ruling that Chenette voluntarily talked with Deputy Earhart.

II. Rights at Sentencing

Chenette claims he was denied his rights to due process and a jury trial when the trial court ruled his prior convictions were established by a preponderance of evidence. Chenette relies on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), for the proposition that any increase in punishment contingent on a finding of fact, *including prior convictions*, must be found by a jury beyond a reasonable doubt. He acknowledges that the rule pronounced in *Apprendi* states that *other than a fact of a prior conviction*, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt. He argues, however, that this statement of law cannot be read as holding that prior convictions are necessarily excluded from the rule. Instead, Chenette asserts that it demonstrates that the Supreme Court has not yet decided the issue of prior convictions under the Sixth Amendment. According to Chenette, subsequent opinions, such as *Blakely*, make clear that due process protections apply to all sentencing factors that increase a sentence beyond the standard range. For these reasons, Chenette argues that we are not bound to follow our Supreme Court, which has rejected the argument that recidivism at sentencing must be proved by a jury beyond a

reasonable doubt. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001).

The legislature enacted the Persistent Offender Accountability Act in 1994. Laws of 1994, ch. 1, §§ 1-3. Notwithstanding the statutory maximum sentence for a crime, a person found to be a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release. RCW 9.94A.570. A persistent offender is one who has been convicted of a felony considered a most serious offense, and, on at least two separate occasions, has been convicted of felonies that qualify as most serious offenses. RCW 9.94A.030(36).

In *Almendarez-Torres*, 523 U.S. 224, 226-27, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the U.S. Supreme Court held that a federal statute's penalty provision, which authorized an increased sentence for a recidivist, did not define a separate crime requiring the government to charge the fact of a prior conviction in the indictment. *Wheeler*, 145 Wn.2d at 121. The court reasoned that recidivism is a traditional basis for a court to increase an offender's sentence. *Almendarez-Torres*, 523 U.S. at 243. In *Apprendi*, 530 U.S. at 490, the court held that other than the fact of a prior conviction, any fact that increases the penalty beyond the prescribed statutory maximum must be proved to a jury beyond a reason doubt. Despite expressing reservations about *Almendarez-Torres*, the majority carved out an exception for prior convictions that specifically preserved its earlier decision. *Apprendi*, 530 U.S. at 489. Although the Washington State Supreme Court has acknowledged that the recidivism issue raised in *Apprendi* is arguably undecided, it has also recognized that *Apprendi* confined its decision to factors other than recidivism. *Wheeler*, 145 Wn.2d 122-23.

Since *Apprendi*, defendants and courts alike have cast doubt on the viability of *Almendarez-Torres*. But *Almendarez-Torres* has not been explicitly overruled and no other case has extended *Apprendi* to require the State to prove recidivism to a jury beyond a reasonable doubt. *See Wheeler*, 145 Wn.2d at 123. And, *Blakely*, without discussing *Almendarez-Torres*, accepted *Apprendi*'s exclusion of prior convictions from the rule requiring proof to a jury beyond a reasonable doubt. *Blakely*, 542 U.S. at 301. Thus, even if the issue is not foreclosed, there is no controlling law that alters the clearly stated exception in *Apprendi*.

Moreover, our Supreme Court has repeatedly rejected the argument that the Sixth Amendment applies to sentencing determinations under the Persistent Offender Accountability Act (POAA). *State v.Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) ("*Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt"), *Wheeler*, 145 Wn.2d at 124 (rejecting defendant's argument that the federal constitution requires recidivism to be pleaded and proved to a jury beyond a reasonable doubt); *see also Smith*, 150 Wn.2d at 143 (noting that the *Almendarez-Torres* Court expressly held that prior convictions need not be proved to a jury and has not held otherwise since). We have also rejected similar arguments. In *State v. Ball*, we held that *Blakely* does not apply to sentencing under the POAA. *State v. Ball*, 127 Wn. App. 956, 959, 113 P.3d 520 (2005) (reasoning that sentencing under the POAA is neither an exceptional sentencing situation under RCW 9.94A.535 or sentencing enhancement for the crime committed under RCW 9.94A.533); *see also State v. Magers*, 164 Wn.2d 174, 193, 189 P.3d 126 (2008) (approving *Ball*'s holding that *Blakely* has no application in sentencing under the POAA). And in *State v.*

Rudolph, we found no authority that would allow us sidestep the recidivism exception recognized by *Apprendi*. *State v. Rudolph*, 141 Wn. App. 59, 69, 168 P.3d 430 (2007) (Quinn-Brintnall, J, dissenting). Accordingly, until reexamined by a higher court, we must follow our Supreme Court in declining to extend *Apprendi* to recidivism statutes. *See State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984).

III. Equal Protection

Chenette contends that the POAA's classification of his prior convictions as sentencing factors rather than as additional elements of the crime violates his equal protection rights. He argues there is no rational basis to require that some prior convictions be proved to a jury beyond a reasonable doubt (elements of the crime) and allow others be found by a judge by a preponderance of the evidence (sentencing factors). We disagree.

Under both the state and federal constitutions, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. Const. amend XIV; Wash. Const. art. I, § 12; *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). Our Supreme Court has upheld the POAA as constitutional, including challenges based on equal protection principles. *Thorne*, 129 Wn.2d at 772 (holding that the state is justified in punishing a recidivist more severely than a first time offender); *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996) (public safety is a legitimate state objective when punishing recidivists). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless that classification also affects a semi-suspect class. *Thorne*, 129 Wn.2d at 771. Recidivist criminals are not a suspect class. *Manussier*, 129 Wn.2d at 673. Thus, we apply rational basis scrutiny to

Chenette's challenge.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. *State v. Smith*, 117 Wn.2d 263, 279, 814, P.2d 652 (1991). The burden is on the party challenging the classification to show that it is purely arbitrary. *Thorne*, 129 Wn.2d at 771.

Chenette takes issue with our Supreme Court's reasoning in *State v. Roswell*, 165 Wn.2d 186, 196, P.3d 705 (2008). In that case, the defendant was charged with communication with a minor for immoral purposes, a crime that is elevated from a gross misdemeanor to a felony if the defendant has a prior conviction for the same crime or a felony sex offense. *Roswell*, 165 Wn.2d at 190; RCW 9.68A.090. The defendant requested that the court bifurcate the trial by having a jury decide the elements of communication with a minor for immoral purposes as a misdemeanor and the judge determine the element of a prior conviction. *Roswell*, 165 Wn.2d at 190. In rejecting the defendant's request, the court distinguished between prior convictions as an aggravator that merely increase the maximum punishment and prior convictions that actually alter the crime charged. *Roswell*, 165 Wn.2d at 192-94. The court concluded that the prior conviction was an essential element of the felony that needed to be proved to a jury beyond a reasonable doubt because the defendant could not have been convicted of the crime charged without proof of the prior conviction. *Roswell*, 165 Wn.2d at 194.

Chenette argues that the *Roswell* court's distinction between a prior conviction as

sentencing aggravator and a prior conviction as an element of a crime is arbitrary. He argues that the recidivist fact in his case operates in the same fashion as it does in *Roswell*: it merely alters the maximum penalty to which the offender is subject.

Divisions One and Three of our court recently addressed this issue in *State v. Langstead*, 155 Wn. App. 448, 228 P.3d 799 (2010) and *State v. Williams*, 156 Wn. App. 482, 234 P.3d 1174 (2010), respectively. The *Langstead* court rejected the defendant's equal protection argument, distinguishing between offenders who engage in minor criminal misconduct more than once and offenders with a criminal record of more than two felonies. *Langstead*, 155 Wn. App. at 456. The court recognized a rational distinction between recidivists whose conduct is inherently culpable enough to incur a felony sanction and persons whose conduct is felonious only when preceded by prior convictions of the same or a similar misdemeanor. *Langstead*, 155 Wn. App. at 456-57. The *Williams* court likewise rejected the defendant's equal protection claim, noting a long history of similar distinctions for prior convictions. *Williams*, 156 Wn. App. at 498 (giving as an example the exception for prior convictions in *Apprendi*).

We also find the distinction persuasive. Two of the stated purposes of the POAA are to improve public safety by placing the most dangerous criminals in prison and to reduce the number of serious, repeat offenders by tougher sentencing. RCW 9.94A.555. The legislature did not include all recidivists under the POAA, but specifically targeted the most serious, dangerous offenders. *Thorne*, 129 Wn.2d at 764 (distinguishing the habitual criminal statute, which could apply to a relatively minor crime like petit larceny as well as serious felonies, from the POAA, which is limited to a person convicted on three occasions of serious crimes). That the legislature

chooses to treat differently people who repeatedly commit the same, less serious crime from those who repeatedly commit serious felonies does not violate equal protection. Moreover, it is within the legislature's discretion to define what facts constitute elements of the crime and the penalty for that crime, even where prior convictions as element of the crime have the singular effect of increasing punishment for recidivists. *Thorne*, 129 Wn.2d at 767 (recognizing that the fixing of punishment for criminal offenses is a legislative function subject only to constitutional provisions against excessive fines and cruel and unusual punishment). Under the rational basis test, the legislature can reasonably treat these two types of recidivists differently. Chenette's equal protection argument accordingly fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Worswick, A.C.J.

Appelwick, P.T.J.