IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JUAN MANUEL TOLANO, *Appellant*.

No. 1 CA-CR 17-0057
FILED 2-1-2018

Appeal from the Superior Court in Maricopa County
No. CR 2014-133407-001
The Honorable David V. Seyer, Judge *Pro Tempore*
The Honorable Annielaurie Van Wie, Commissioner

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

The Poster Law Firm, PLLC, Phoenix
By Rick D. Poster
Counsel for Appellant

MEMORANDUM DECISION

Judge Patricia A. Orozco[1] delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Maria Elena Cruz joined.

O R O Z C O, Judge:

¶1 Juan Manuel Tolano appeals the superior court's imposition of a maximum sentence after the jury convicted him of two counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs (DUI). For the following reasons, we affirm the convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 The State charged Tolano with two counts of aggravated DUI, both class 4 felonies. Pursuant to Arizona Rule of Criminal Procedure 13.5, the State subsequently amended the indictment and added an allegation of three historical priors. The jury found Tolano guilty of both DUI counts. The superior court then held a bench trial on the allegation of historical priors for purposes of his sentencing classification, and found that the State proved the prior felony convictions beyond a reasonable doubt.

¶3 The DUI convictions, combined with the finding of the historical priors, each carried a presumptive sentence of 10 years in prison. *See* Arizona Revised Statutes (A.R.S.) Section 13-703(J). At sentencing, the State recommended a sentence of 12 years. Because the presumptive sentence was 10 years, the Court asked the State whether it had filed a motion alleging aggravating circumstances. The State admitted it had not done so, but argued the historical priors could be used as aggravators despite the absence of a specific motion alleging them as aggravating circumstances. Tolano disagreed. Agreeing with the State, the court stated it would "allow and consider the prior felony convictions for possible aggravating factors," and sentenced Tolano to a maximum prison term of 12 years.

[1] The Honorable Patricia A. Orozco, retired Judge of the Arizona Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

¶4 Tolano timely appealed his convictions and sentences and we have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1).

DISCUSSION

¶5 Tolano presents only one argument on appeal. He argues the trial court erred by imposing a sentence beyond the presumptive term because the jury did not find any aggravating factors beyond a reasonable doubt. He claims that "[i]n order to impose a sentence beyond the presumptive term . . . the State was required to prove *to a jury*, beyond a reasonable doubt, at least one statutory aggravating circumstance." (Emphasis added.)

¶6 "We review de novo sentencing issues that involve statutory interpretation and constitutional law." *State v. Urquidez*, 213 Ariz. 50, 53, ¶ 11 (App. 2006).

¶7 In Arizona, an adult who "stands convicted of a felony and has two or more historical prior felony convictions" must be sentenced as a category three repetitive offender. A.R.S. § 13-703(C). The presumptive sentence for a category three repetitive offender who stands convicted of a class four felony is 10 years. *Id.* § 13-703(J). A court can, however, increase the presumptive sentence and impose a "maximum" prison sentence of 12 years if "one or more of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt or are admitted by the defendant, except that an alleged aggravating circumstance under [A.R.S. § 13-701(D)(11)] *shall be found to be true by the court*." *Id.* § 13-701(C) (emphasis added); *cf. State v. Bonfiglio*, 231 Ariz. 371, 373 (2013) ("A trial court may impose a maximum prison term only if one or more statutory aggravating circumstances are found or admitted." (citing A.R.S. § 13-701(C)).

¶8 The aggravating circumstance in A.R.S. § 13-701(D)(11) is whether a defendant was "previously convicted of a felony within the ten years immediately preceding the date of the offense." In other words, under our statutes, the jury must generally make findings of fact regarding aggravating circumstances, but the finding of fact of the aggravating circumstance of a prior felony conviction "within the ten years immediately preceding the date of the offense" "shall" be made by a judge. *See* A.R.S. § 701(D) ("[T]he trier of fact shall determine and the court shall consider the following aggravating circumstances, except that the court shall determine an aggravating circumstance under paragraph 11 of this subsection[.]").

¶9 Nearly two decades ago, the United States Supreme Court rejected the argument that the Constitution requires recidivism to be treated as an element of a charged offense, even where a recidivism finding increases the statutory maximum. *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). The effect of that conclusion was to allow judges, and not require juries, to make recidivism-related factual findings. *See id.* at 248 ("This [case] causes the Court to confront the difficult question whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime — to be charged in the indictment, and found beyond a reasonable doubt by a jury." (Scalia, J., dissenting)).

¶10 Two years later, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court faced a distinct, but related question. There, a defendant pleaded guilty to three criminal charges. *Id.* at 469-70. During sentencing proceedings, the trial judge concluded that the defendant's crime had been "motivated by racial bias," which triggered a statutory sentencing enhancement. *Id.* at 471. The issue was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Id.* at 469. The Court concluded that the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment command that any fact increasing the maximum penalty for a crime be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 476. The Court noted, however, that *Almendarez-Torres* represents a "departure" from historic practice. *Id.* at 487. It even added that "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." *Id.* at 489. However, because the defendant there "[did] not contest th[at] decision's validity," "we need not revisit it for purposes of our decision today to treat [*Almendarez-Torres*] as a narrow exception to the general rule," the Court explained. *Id.* at 490. "*Other than the fact of a prior conviction*," the Court therefore held, "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."[2] *Id.* (emphasis added).

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[2] For purposes of *Apprendi*, the statutory maximum in Arizona is the presumptive sentence. *See State v. Brown*, 209 Ariz. 200, 203, ¶ 12 (2004); *cf. Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) ("[T]he relevant 'statutory

¶11 The viability of the *Almendarez-Torres* exception has been subsequently questioned. *See Mathis v. United States*, 136 S. Ct. 2243, 2259 (2016) ("I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered." (Thomas, J., concurring)); *see also Shepard v. United States*, 544 U.S. 13, 27 (2005) ("*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." (Thomas, J., concurring)). As the Court later explained in *Blakely v. Washington*, the right of jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." 542 U.S. 296, 305-06 (2004). In *Blakely*, the Court noted that:

> Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. . . . *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Id. at 306.

¶12 But the Court has not revisited the issue. *See Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) ("In *Almendarez-Torres v. United States*, we recognized a narrow exception to th[e] general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today." (internal citation omitted)). As a result, prior convictions continue to be exempt from the general rule requiring that "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." *Cunningham v. California*, 549 U.S. 270, 282 (2007); *see also State v. Bonfiglio*, 228 Ariz. 349, 354, ¶ 21 (App. 2011) ("The use of a prior felony conviction to aggravate a sentence . . . is exempt from the *Blakely* jury trial principle. . . . A trial court may use the same convictions to enhance or increase the sentencing range and to aggravate a defendant's

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maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

sentence within the enhanced range."). Consequently, Tolano's argument fails.[3]

¶13 Finally, we also note that, during an April 2015 settlement conference, the court explained to Tolano that, in addition to being able to use the historical priors to enhance his sentence, the sentencing judge could also use the historical priors to aggravate the sentence. As a result, Tolano cannot claim he lacked notice that the prior convictions would be used against him as aggravating circumstances at sentencing.

CONCLUSION

¶14 For the reasons previously stated, we affirm Tolano's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA

[3] In his reply brief, Tolano argues, for the first time, that (1) he did not receive proper notice of aggravating circumstances pursuant to Rule 2.18 of the Local Rules of Practice Superior Court, Maricopa County and (2) the jury needed to find "beyond a reasonable doubt at least one other aggravator before [the] judge c[ould] find the (D)(11) aggravator to make a defendant eligible for a sentence above the presumptive term." We decline to address those new arguments. *See State v. Brown*, 233 Ariz. 153, 163, ¶ 28 (App. 2013).