

IN THE SUPREME COURT OF OHIO

State of Ohio	:	Case No. 2014-1814
Appellee,	:	
vs.	:	On Appeal from the
Adrian L. Hand, Jr.	:	Montgomery County
Appellant.	:	Court of Appeals, Second
		Appellate District

BRIEF OF APPELLEE, THE STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

This case raises the question of whether a juvenile delinquency adjudication qualifies as a prior conviction for purposes of enhancing a later sentence imposed upon the offender for crimes committed as an adult. Appellant Adrian Hand was indicted by the Montgomery County Grand Jury on one count each of aggravated burglary, aggravated robbery and kidnapping, all felonies of the first degree; two counts of felonious assault, felonies of the second degree; and attendant firearm specifications. At the time he committed these offenses, Hand was 20 years old. He eventually pled no contest as charged and, as part of a sentencing agreement with the prosecutor, agreed to serve six years in prison - three years for the merged firearm specifications, consecutive to three-year for the underlying felonies. (6/12/13 Plea Tr. 2-5)¹

Prior to sentencing, both Hand and the prosecutor filed sentencing memoranda to address the question of which part of Hand's prison sentence was mandatory – the prosecutor arguing that the entire sentence was mandatory, while Hand argued that only the sentence attributed to the firearm specification was mandatory. The trial court agreed with the prosecutor and found that Hand's entire sentence was mandatory. (7/18/13 Sent. Tr. 2-5) In doing so, the trial court noted that in 2008 when Hand was 17 years old, he was adjudicated a delinquent child for having committed aggravated robbery, a first-degree felony if committed by an adult, thereby making his sentence here, for subsequent first and second-degree felonies, mandatory under R.C. 2901.08(A) and 2929.13(F)(6). (*Id.*)

Hand appealed his sentence to the Second District Court of Appeals, contending that the trial court's use of his prior juvenile delinquency adjudication to enhance his sentence from a

¹ As a result of the merger of allied offenses, Hand's was sentenced to concurrent three-year prison terms for one count each of aggravated burglary, aggravated robbery and felonious assault. (7/18/13 Sent. Tr. 3-5)

non-mandatory to a mandatory prison term violated his due process rights and *Apprendi v. New Jersey*, 530 U.S. 430, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The court of appeals disagreed and, on September 5, 2014, affirmed the trial court's decision. *State v. Hand*, 2nd Dist. Montgomery No. 25840, 2014-Ohio-3838.

In a 2-1 decision, the court of appeals rejected Hand's claim that treating a juvenile delinquency adjudication as a prior conviction violates due process simply because the defendant was not afforded a jury trial in juvenile court. *Id.* at ¶ 5-6. The court of appeals held that, despite the absence of the right to trial by jury in juvenile court, a prior juvenile delinquency adjudication nevertheless falls within *Apprendi*'s prior-conviction exception. *Id.* at ¶ 6-7.

Hand filed his notice of appeal with this Court on October 20, 2014. On March 25, 2015, this Court granted jurisdiction to hear the case. This appeal followed.

ARGUMENT

Proposition of Law:

Despite the absence of the right to trial by jury in most juvenile cases, treating a juvenile delinquency adjudication as a prior conviction to enhance the sentence imposed upon a defendant for a subsequent conviction that the defendant commits as an adult does not offend due process and falls within the prior-conviction exception set out in *Apprendi v. New Jersey*.

There should be little doubt that offenses committed by juveniles often have adverse consequences on the offenders as adults. For example, an offender's record of prior juvenile adjudications is a well-accepted recidivism factor when imposing sentencing under R.C. 2929.13(D)(2). Past delinquency adjudications can serve to restrict an adult's right to possess a firearm. R.C. 2923.13(A)(2) and (3). And sex offenses committed by juveniles may lead to sex-offender designations carrying registration requirements that continue well into adulthood. R.C. 2152.82 through 2152.831; *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729.

At issue in this appeal is the adverse consequence codified in R.C. 2901.08(A), which directs trial courts to treat prior juvenile delinquency adjudications as convictions for purposes of determining the proper sentence to be imposed for a later offense. On two occasions, this Court has applied R.C. 2901.08(A) in finding that juvenile delinquency adjudications can be counted as “prior convictions” under the five-convictions threshold of R.C. 4511.19(G)(1)(d), which elevates the offense of driving under the influence from a first-degree misdemeanor for a first offense, to a fourth-degree felony for a sixth offense. *State v. Bode*, ___ Ohio St.3d ___, 2015-Ohio-1519, ___ N.E.2d ___; *State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766. The only qualification that this Court placed on the state’s use of a juvenile delinquency adjudication under R.C. 2901.08(A) is the necessity of ensuring that the juvenile was either represented by counsel at the time of the adjudication or effectively waived his right to counsel. *Bode* at ¶ 29.

Hand’s case here raises a different, yet similar, question regarding the use of a juvenile delinquency adjudication to determine the sentence to be imposed for a later offense: Can a delinquency adjudication be counted as a “prior conviction” under R.C. 2929.13(F)(6), which mandates the imposition of a mandatory prison term for “[a]ny offense that is a first or second degree felony * * * if the offender previously was convicted of or pleaded guilty to * * * any first or second degree felony.” Both the trial court and court of appeals below, relying in part on *Adkins, supra*, said yes. They are correct.

Hand does not challenge the fact that, when read together, R.C. 2901.08(A) and 2929.13(F)(6) support the trial court’s imposition of a mandatory sentence. He argues instead that treating a juvenile delinquency adjudication as a prior conviction, as R.C. 2901.08(A) does, violates his due process rights because he was not afforded a jury trial in juvenile court. Treating

his juvenile adjudication as a prior conviction, Hand argues, violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 436 (2000), which holds 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. *Id.* at 490. *Apprendi* was extended in *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) to include not only facts that increase maximum sentences for a crime, but also increase minimum sentences. *Id.* at 2163.

But *Apprendi* provided for a specific exception: A prior conviction may be used to enhance the penalty for a crime even if it was not submitted to the jury and proved beyond a reasonable doubt. *See Apprendi* at 490 (Emphasis added.) (“*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.”). The Supreme Court has recognized *Apprendi*’s prior-conviction exception several times since. *See Oregon v. Ice*, 555 U.S. 160, 163, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Alleyne* at 2168 (Roberts, C.J., dissenting). And it is *Apprendi*’s prior-conviction exception that is at the heart of this appeal.

Hand contends that *Apprendi*’s prior-conviction exception should not apply to juvenile delinquency adjudications because delinquency adjudications do not qualify as a “conviction” as that term was intended in *Apprendi*. In Hand’s view, a prior conviction for *Apprendi* purposes must have been obtained in a proceeding in which the defendant was afforded a right to trial by jury. And since juveniles lack the right to have a jury decide delinquency adjudications, Hand argues that delinquency adjudications fall outside the prior-conviction exception carved out in *Apprendi*.

But Hand’s contention that the only way for a delinquency adjudication to, in his words, “pass[] the gauntlet of procedural safeguards” and qualify as a reliable prior conviction is through a trial by jury is unpersuasive. First off, *Apprendi* does not say that, nor does any other decision from the United States Supreme Court that has applied or interpreted *Apprendi*. Among federal appellate courts, only the Ninth Circuit has held that *Apprendi*’s prior-conviction exception is limited to prior convictions obtained through proceedings that included the right to trial by jury. See *U.S. v. Tighe*, 266 F.3d 1187 (9th Cir.2001). But every other federal circuit court that has considered the issue, including the Sixth Circuit, has explicitly rejected *Tighe*’s rationale and found that using a juvenile delinquency adjudication as a sentencing enhancement, even though the adjudication was obtained without a jury trial, does not violate a defendant’s right to due process or run afoul of *Apprendi*. See *U.S. v. Matthews*, 498 F.3d 25 (1st Cir.2007); *U.S. v. Jones*, 332 F.3d 688 (3rd Cir.2003); *U.S. v. Wright*, 594 F.3d 259 (4th Cir.2010); *U.S. v. Crowell*, 493 F.3d 744 (6th Cir.2007); *Welsh v. U.S.*, 604 F.3d 408 (7th Cir.2010); *U.S. v. Smalley*, 294 F.3d 1030 (8th Cir.2002); *U.S. v. Burg*, 407 F.3d 1183 (11th Cir.2005).^{2 3}

State courts have found the same. Of the handful of state courts that have considered the issue, a majority have agreed that juvenile delinquency adjudications fall within the *Apprendi* prior-conviction exception and may be used to enhance a later sentence. See *People v. Nyugen*,

² The Fifth Circuit Court of Appeals has never addressed the issue. The Second and Tenth Circuits, while recognizing both sides of the issue, have nevertheless explicitly chosen to take no position. See *U.S. v. Santiago*, 76 Fed.Appx. 397 (2nd Cir.2003); *Gardner v. McKune*, 242 Fed.Appx. 594 (10th Cir.2007).

³ In the federal courts, the issue regarding the use of a juvenile delinquency adjudication as a prior conviction has arisen in the context of the Armed Career Criminal Act, 18 U.S.C. § 924, which provides that a defendant convicted of certain offenses shall be sentenced to a mandatory prison sentence if the offender has three previous convictions for a violent felony, and defines “violent felony” as including “any act of juvenile delinquency” that involved the use or carrying of a knife or firearm and physical force against another.

46 Cal.4th 1007, 209 P.2d 946 (2009); *State v. Huber*, 139 P.3d 628 (Colo.2006); *Ryle v. State*, 842 N.E.2d 320 (Ind.2005); *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002); *State v. McFee*, 721 N. W.2d 607 (Minn.2006); *State v. Weber*, 159 Wash.2d 252, 149 P.3d 646 (2006). *But see State v. Brown*, 879 So.2d 1276 (La.2004) (adopting the rationale in *Tighe*); *State v. Harris*, 339 Or. 157, 118 P.2d 236 (2005) (finding the rationale in *Smalley* unpersuasive, partially on independent state law grounds). And in *State v. Parker*, 8th Dist. Cuyahoga No. 97841, 2012-Ohio-4741 – the only appellate court in Ohio to consider the issue (other than the Second District here) - the Eighth District agreed with the majority of federal circuits in finding that “juvenile adjudications come within the [*Apprendi* prior-conviction] exception, and may be used to enhance adult sentences, even though they were not presented to a jury. *Id.* at ¶ 20.

The rationale behind including delinquency adjudications within *Apprendi*'s prior-conviction exception, despite the absence of a right to a jury trial in juvenile court, begins with the recognition that “trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.” *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (Plurality opinion). This Court, too, has recognized that “indictment or trial by jury are not requisite in delinquency proceedings, either as matters of constitutional guarantees or sound public policy.” *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 42, quoting *McKeiver* and *In re Agler*, 19 Ohio St.2d 70, 77-78, 249 N.E.2d 808 (1969).

Secondly (and more importantly), even absent trial by jury the procedural protections that *are* afforded juveniles during delinquency proceedings – the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the right to introduce evidence on his own behalf, the privilege against self-incrimination, protection against double jeopardy, and proof beyond a reasonable doubt - are “more than sufficient to ensure the reliability that *Apprendi*

requires.” *Smalley*, 294 F.3d at 1033; *Matthews*, 498 F.3d at 25. *See also Hitt*, 273 Kan. at 236 (holding that juvenile adjudications are encompassed within the *Apprendi* exception for prior convictions because “[j]uvenile adjudications are included within the historical cloak of recidivism and enjoy ample procedural safeguards.”).

As the Sixth Circuit explained in *Cowell*, rather than relying (as Hand does here) on the “narrow parsing of words” that would create a bright-line requirement of proof beyond a reasonable doubt, fair notice, and a right to trial by jury before a delinquency adjudication can qualify under the *Apprendi* exception, “a court should instead consider ‘the reliability of the actual juvenile adjudication [] to determine whether [it is] sufficiently reliable so as to not offend constitutional rights if used to qualify for the *Apprendi* exception.’” *Cowell*, 493 F.3d at 750, quoting *Jones*, 332 F.3d at 695-96. The court reasoned, then, that “[j]uvenile adjudications, where the defendant “has the right to notice, the right to counsel, the right against self-incrimination, the right to confront and cross-examine witnesses, and the right to a finding of [delinquency] beyond a reasonable doubt, provide sufficient procedural safeguards to satisfy the reliability requirement that is at the heart of *Apprendi*,” even without a jury trial. *Cowell, supra*.

The same is true here. There is no indication (Hand offers none) that Hand was not afforded appropriate due process protections during his juvenile delinquency adjudication. He has never challenged the validity of his adjudication but, rather, asserts merely that his adjudication cannot be counted as a prior conviction for purposes of enhancing the sentence for his adult felony conviction because, regardless of the constitutional validity of his juvenile court proceedings, he was not afforded a jury trial. But for the reasons set out above, when all other procedural safeguards afforded to a juvenile are present, the mere absence of the right to trial by jury in juvenile court in no ways weakens the adjudication’s reliability or causes the adjudication

to fall outside *Apprendi*'s prior-conviction exception. Hand's argument to the contrary simply cannot stand.

CONCLUSION

Because Hand was afforded all the process he was due during his juvenile delinquency adjudication proceedings – including his right to notice, right to counsel, right against self-incrimination, right to confront and cross-examine witnesses, right to introduce evidence on his own behalf, and right to a finding of delinquency beyond a reasonable doubt - imposition of a mandatory sentence following his conviction for multiple first and second-degree felonies, based upon his delinquency adjudication for aggravated robbery, did not violate his due process rights or run afoul of *Apprendi*, 530 U.S. 466. The court of appeals' decision below, therefore, must be affirmed.

Respectfully submitted,
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Certificate of Service

I hereby certify that a copy of the foregoing *Merit Brief of Appellee the State of Ohio*, was sent by regular first class mail, postage pre-paid, to counsel of record for Appellant: Stephen A. Goldmeier, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215; and to Eric Murphy, Office of the Attorney General of Ohio, 30 East Broad Street, 17th Floor, Columbus, OH 45215, on July 28, 2015.

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