COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2014 CR 00499**
vs.	:	**Judge McBride**
DONALD KEITH HARP	:	**DECISION/ENTRY**
Defendant	:	

Carol A. Rowe and Darren Miller, assistant prosecuting attorneys for the state of Ohio, 76 S. Riverside Dr., 2nd Floor, Batavia, Ohio 45103.

Daniel B. Startsman III, attorney for the defendant Donald K. Harp, 10 S. Third Street, Batavia, Ohio 45103.

On September 10, 2015, the defendant appeared in court and expressed a desire to enter a plea of guilty to the charge of illegal possession or assembly of chemicals for the manufacture of drugs in violation of R.C. 2925.041(C), a felony of the third degree.

To comply with Crim.R. 11, before the court would accept a guilty plea, the court directed the parties to each submit a brief on the applicable sentencing penalty the defendant would be subject to under that offense. Specifically, the court directed the parties to submit their positions as to whether the offense would be subject to a presumption in favor of prison at the time of sentencing or would be subject to a

mandatory prison term of not less than two years as a result of the defendant having previously been convicted of or having pleaded guilty two or more times to a felony drug abuse offense.

Upon consideration of the record of the proceeding, the oral and written arguments of the parties, and the applicable law, the court renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On September 4, 2014 the state indicted the defendant Donald K. Harp for illegal possession or assembly of chemicals for the manufacture of drugs, the drug involved being methamphetamine, in violation of R.C. 2925.041(C), a felony of the third degree.

The indictment alleges that on January 4, 2014 the defendant knowingly possessed or assembled chemicals for the manufacture of methamphetamine, a schedule II drug. The indictment further states that the charge against the defendant is a felony of the third degree. Although the defendant has been found guilty of or has pled guilty to two or more felony drug abuse offenses previously, the indictment does not allege that the defendant has any prior convictions.

LEGAL ANALYSIS

R.C. 2925.041(C) criminalizes the assembly or possession of chemicals used to manufacture a controlled substance with the intent to manufacture drugs.[1] If the

[1] R.C. 2925.041provides: "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the

defendant possessed the drugs with intent to make methamphetamine, then a presumption for a prison term applies.[2] When the offender has two or more prior convictions or guilty pleas for a felony drug abuse offense, the defendant is subject to a mandatory prison term for a minimum of two years.[3] In either situation, a conviction or plea under R.C. 2925.041(C) is a third degree felony.

In the case at bar, the defendant has been indicted for violating R.C. 2925.041(C). His intent to have the chemicals used to manufacture drugs is alleged in the indictment. The fact that he has been found guilty of or has pled guilty to two or more felony drug abuse offenses previously is not alleged in the indictment.

The issues before the court are as follows: when a defendant's prior conviction increases the penalty of a later offense, but does not increase the degree of the offense, must the prior conviction be alleged in the indictment and is it subject to determination by the trier of fact? The court's determination of whether the defendant is subject to a two-year maximum sentence with a presumption of a prison sentence or is subject to a mandatory prison sentence of at least two years, turns upon the answer to these questions. In this regard, the sentence that is imposed must comport with both the

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intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code. * * * (C) Whoever violates this section is guilty of illegal assembly or possession of chemicals for the manufacture of drugs. Except as otherwise provided in this division, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the third degree, and, except as otherwise provided in division (C)(1) or (2) of this section, division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. * * * (1) Except as otherwise provided in this division, there is a presumption for a prison term for the offense. If the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than two years."

[2] R.C. 2925.041(C).

[3] R.C. 2925.041(C)(1).

United States Constitution, as interpreted by the U.S. Supreme Court and the Ohio Supreme Court, and the Ohio Revised Code.

(A) CONSTITUTIONALITY

The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination of guilt for each element of the charged crime.[4] "It is well settled that the state must prove all essential elements of an offense beyond a reasonable doubt."[5]

Furthermore, the "indictment must set forth each element of the crime that it charges."[6] The constitutional issue raised in this case is whether the defendant's two prior felony drug abuse convictions are an essential element to the charge of violating R.C. 2925.041(C). If the convictions are an essential element, then the defendant's constitutional right to a jury trial will be violated if he pleads guilty and receives a mandatory prison sentence on account of convictions when they were not alleged in his indictment.[7]

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[4] *Apprendi* at 466.
[5] *State v. Miller* 12th Dist. Warren No. CA2011-02-013, citing R.C. 2901.05(A) and *State v. Day*, 99 Ohio App.3d 514, 517 (12th Dist. 1994). *See Almendarez-Torres v. U.S.*, 523 U.S. 224, 118 S.Ct. 1219, 1229, 140 L.Ed.2d 350 (1998), quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (The "Constitution's 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.'").
[6] *Almendarez-Torres*, citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).
[7] *See State v. Bevly*, 142 Ohio St.3d 41, 2015-Ohio-475, ¶ 1, 27 N.E.3d 516 (holding a defendant's Sixth and Fourteenth Amendment rights are violated when the defendant pleads guilty and is sentenced to a mandatory prison term based upon an unproven essential element).

There is a long line of U.S. Supreme Court and Ohio Supreme Court cases that define the parameters of the Sixth and Fourteenth Amendments' guarantees as they relate to sentencing. In the seminal case of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, L.Ed.2d 435 (2000), the Supreme Court held: "The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt."[8] The *Apprendi* case dealt with a plea agreement for the unlawful possession of a firearm, which was a second degree offense punishable by imprisonment for between five years and 10 years.[9] A separate statute made the crime punishable for between 10 and 20 years if the crime was committed with a biased purpose.[10] The trial court, not the jury, found that this hate crime enhancement applied, thus increasing the defendant's maximum sentence.[11] The Supreme Court held that the hate crime enhancement was an essential element of the underlying crime and thus had to be determined by the jury.[12]

Significantly to the case at bar, the Court in *Apprendi* carved out an exception for penalties that are increased on account of a defendant's "prior conviction."[13] In crafting this exception, the Court thoroughly reviewed *Almendarez-Torres v. U.S.*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which involved the sufficiency of an indictment.[14] In *Almendarez-Torres* the defendant was sentenced to a term higher than the term attached to the offense in his indictment due to the fact that he had a prior

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[8] *Apprendi* at 466.
[9] Id. at 468-69.
[10] Id.
[11] Id. at 469-70.
[12] Id. 475-76.
[13] Id. at 490.
[14] Id. at 488.

felony conviction.[15] The *Almendarez-Torres* Court held the defendant's right to a jury trial had not been abridged when the trial court increased his sentence in light of his prior conviction.[16]

The Court in *Apprendi* explained that the rationale for maintaining this "narrow exception" from *Almendarez-Torres* was in part due to "the procedural safeguards attached to any 'fact' of prior conviction."[17] Indeed, a prior felony conviction would have necessarily been proved by a reasonable doubt. The Court noted that recidivism does not relate to the commission of an offense in the same way as other essential elements and that recidivism is a traditional basis for increasing an offender's sentence.[18]

Beyond the rationales cited in *Apprendi*, the *Almendarez-Torres* Court provided additional support for the recidivism exception. It reasoned that the state does not need to allege a prior conviction in an indictment because recidivism "does not relate to the commission of the offense, but goes to the *punishment only*," and therefore it may "be subsequently decided."[19] Additionally, if recidivism was an element to the crime, the state "would be required to prove to the jury that the defendant" committed the prior crime. In this regard, proving the defendant committed prior crimes "risks significant prejudice" to the defendant.[20]

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[15] Id. at 487-88.
[16] Id. at 1231.
[17] Id. at 488.
[18] Id. *See State v. Barnette*, 7th Dist. Mahoning No. 02 CA 65, 2004-Ohio-7211, ¶¶ 182-86 (Donofrio, J., concurring), citing *Graham v. West Virginia*, 244 U.S. 616, 629, 32 S.Ct. 583, 56 L.Ed. 917 (1912) (examining the long history of using recidivism as a sentence enhancement factor and noting that "to hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as 'go[ing] to the punishment only.'"
[19] (Emphasis original.) *Almendarez-Torres* at 1231, quoting *Graham* at 629.
[20] *Almendarez-Torres* at 1266.

The prior convictions exception has survived the fifteen years following the *Apprendi* decision. In *Alleyne v. United States*, 133 S. Ct. 2151, 186 L.Ed.2d 314, 81 (2013), the Supreme Court extended the reasoning in *Apprendi* to mandatory minimum sentences. Because mandatory minimum sentences increase the penalty for a crime, the Court found that any fact that increases the mandatory minimum is an element that must be submitted to the jury.[21] The *Alleyne* case dealt with whether brandishing a weapon was an element, not whether a prior conviction was an element. Although a prior conviction was not at issue, the *Alleyne* Court observed: "In *Almendarez–Torres v. United* States * * * we recognized a narrow exception to this 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."[22] Hence, the prior conviction exception remains good law under U.S. Supreme Court jurisprudence.[23]

Recently, the Ohio Supreme Court revisited this topic in *State v. Bevly*, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516. The underlying crime, gross sexual imposition, required the court to impose a mandatory minimum prison term of 60 months when "corroborating evidence" of the crime was produced.[24] By contrast, in the absence of corroborating evidence, the defendant only faced a presumption that prison time would be served, up to 60 months.[25] In applying the principles in *Alleyne*, the Ohio Supreme Court held that that the underlying statute violated the defendant's right to a

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[21] *Alleyne v. United States*, 133 S. Ct. 2151, 1253 186 L.Ed.2d 314, 81 (2013).
[22] Id. at fn. 1.
[23] Further, the Sixth Circuit Court of Appeals also stated the prior conviction exception first articulated in *Almendarez-Torres* "remains good law," and "a prior conviction need not be submitted to a jury." *U.S. v. Ogburn*, 288 Fed. Appx. 226, 237-38 (6th Cir. 2008).
[24] *State v. Bevly*, 142 Ohio St.3d 41, 2015-Ohio-475, ¶ 25, 27 N.E.3d 516.
[25] Id.

jury trial and due process.[26] "In raising the floor of the minimum sentence, the statute produces a higher sentencing range. As explained by *Alleyne*, this 'conclusively indicates that the fact is an element of a distinct and aggravated crime.'"[27]

The defendant argues that the reasoning in *Bevly* is applicable to the case at bar.[28] Although *Bevly* is analogous to the instant case in that it involves mandatory sentencing, it is different in one critical respect. *Bevly* did not involve a prior conviction and was silent on the prior conviction exception. Hence, *Bevly* is not particularly instructive in this case because it did not analyze or overrule the prior conviction exception from *Apprendi.*

A second Ohio Supreme Court case decided after *Bevly* provides additional support for the proposition that the prior conviction exception survives. In *State of Ohio v. Willan*, __ N.E.3d ___, 2015-Ohio-1475, the Ohio Supreme Court reviewed *Apprendi* and its progeny. Like *Apprendi*, *Alleyne*, and *Bevly*, the sentencing enhancement at issue was not a prior conviction. Even so, the dissent notably observed that "prior convictions fall under an exception to the United States Supreme Court's *Apprendi* analysis."[29] In light of the foregoing case law, enhancing the defendant's sentence to a mandatory prison term based on his prior convictions does not violate his Sixth and Fourteenth Amendment rights because recidivism is not an essential element to his underlying offense.[30]

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[26] Id.
[27] ¶ 26 citing *Alleyne* at 2163.
[28] Def.'s Mem. at 2.
[29] (Lanzinger, J., dissenting.) *State of Ohio v. Willan*, __ N.E.3d ___, 2015-Ohio-1475, ¶ 42.
[30] *See State v. Ahlers*, 12th Dist. Butler No. CA2013-07-134, 2014-Ohio-3991, ¶ 15 (the court analyzed *Alleyne* and *Apprendi*, noting the prior conviction exception).

A separate line of Ohio cases that do not rely on *Apprendi* and its progeny buttress the conclusion that Ohio law does not characterize a prior conviction as an essential element to a crime. In *State v. Allen*, 29 Ohio St.3d 53, 54, 506 N.E.2d 199 (1987), the Ohio Supreme Court was squarely presented with the issue of whether "the existence of a prior conviction is an essential element of the offense where that previous conviction affects only the penalty and does not enhance the degree of the offense itself." In answer, the Court held that when "a prior conviction enhances the penalty for a subsequent offense, but does not elevate the degree thereof, the prior conviction is not an essential element of the subsequent offense, and need not be alleged in the indictment or proved as a matter of fact."[31]

However, a prior conviction is an essential element that the state must prove when the conviction does not merely enhance the penalty, but it increases the degree of the crime.[32] This rule serves to prevent undue prejudice to the defendant. The Ohio Supreme Court reflected that "a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule. The undeniable effect of such information is to incite the jury to convict based on past misconduct rather than restrict their attention to the offense at hand."[33]

In a subsequent case, *State v. Smith*, 12th Dist. Clermont No. CA2007-05-064, 2008-Ohio-4431 (Sept. 2, 2008), the Twelfth District Court of Appeals dealt with the same statute at issue as the present case, R.C. 2925.041. In the process of determining whether it was prejudicial error for a defendant's convictions to be

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[31] *State v. Allen*, 29 Ohio St.3d 53, 506 N.E.2d 199 (1987). In addition to not addressing the prior conviction exception the U.S. Supreme Court created in *Apprendi*, *Bevly* also failed to address the prior conviction exception the Ohio Supreme Court established in *Allen*.
[32] Id. at 54.
[33] Id. at 55.

mentioned in the indictment, voir dire, trial, and verdict forms, *Smith* examined whether prior convictions are an essential element of R.C. 2925.041(A).[34]

The appellant was charged with one count of illegal assembly or possession of chemicals for the manufacture of drugs.[35] The indictment contained "language indicating that appellant had previously been convicted of two felony drug offenses."[36] After reviewing *State v. Allen*, the court held that the "prior convictions do not constitute an element or specification of any of the offenses" the defendant was charged of under R.C. 2925.041.[37] Instead, the court treated the prior conviction like "a penalty enhancement for sentencing purposes."[38] Accordingly, the appellant's right to a fair trial was violated because the state had "no reason to justify" introduction of the prior convictions.[39] Therefore, both the *Apprendi* line of cases and the *Allen* line of cases demonstrate that a prior conviction that increases a penalty, but not the degree, of a crime is not an essential element to R.C. 2925.041(A), and hence it need not be included in the indictment.

(B) R.C. 2945.75

R.C. 2945.75 provides: "(A) When the presence of one or more additional elements makes an offense one or more serious degree: (1) The affidavit, complaint,

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[34] *State v. Smith*, 12th Dist. Clermont No. CA2007-05-064, 2008-Ohio-4431, ¶ 8 (Sept. 2, 2008).
[35] Id. at ¶ 4.
[36] Id.
[37] Id. at ¶ 12. Post-*Smith*, Ohio courts have continued to cite to the prior conviction exception from *Allen*. *See, e.g., State of Ohio v. English*, 10th Dist. Franklin No. 13AP-88, 2014-Ohio-89, ¶ 29 (citing to *Allen* for authority for the prior conviction exception).
[38] Id.
[39] Id.

indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense."

The defendant argues that R.C. 2945.75 supports his arguments under *Apprendi*, but R.C. 2945.75 is inapplicable to his case.[40] R.C. 2945.75 requires that an indictment state the degree of the charge or the elements comprising it. If the indictment fails in this respect, then the defendant may only be charged with the least degree of the offense.

The case at bar does not involve a discrepancy between the degrees of the offenses because both are felonies of the third degree. Due to the defendant's two or more prior drug abuse felonies, the penalty for his offense increases from a thirty-six month maximum sentence with a presumption of prison time to a thirty-six month maximum sentence with prison being mandatory and a mandatory minimum sentence being required of two years. Under either sentence, the defendant would be convicted of a third degree felony.

The defendant's situation is also distinguishable from the case he cited in support, *State of Ohio v. McDonald*, 137 Ohio St.3d, 2013-Ohio-5042, 1 N.E.3d 374, which involved a felony enhancement that violated R.C. 2945.75. In *McDonald*, the jury verdict form failed to state either the degree of the offense or the statutory language that enhanced the offense from a misdemeanor to a third degree felony.[41] The defendant

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[40] Def.'s Mem. at 3.
[41] *State v. McDonald*, 137 Ohio St.3d, 2013-Ohio-5042, ¶ 1, 1 N.E.3d 374.

submits that "any element that increases the degree, or seriousness, of the offense must be included in the indictment and the jury verdict form."[42]

However, the defendant's position that the indictment must include all elements that increase the penalty's "seriousness" is broader than the language in R.C. 2945.75 or the holding in *McDonald*. Increasing a penalty's "seriousness" is distinct from increasing the "degree" of an offense, and R.C. 2945.75 and *McDonald* only apply to the latter. Specifically, according to *McDonald*, under "the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense."[43]

In the instant case, rather than transforming the defendant's charge to a higher degree, the defendant's two prior drug abuse felonies increase his penalty from that allowed for a third degree felony with a presumption of prison time to that allowed for a third degree felony with a mandatory prison term subject to a minimum of two years, both of which are third degree offenses. For these reasons, the indictment in the case at bar is not deficient under R.C. 2945.75 with regard to allowing the court to sentence defendant with the harsher penalty. Accordingly, if the defendant pleads or is found

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[42] Def.'s Mem. at 4, citing *McDonald* at 521-22.

[43] (Emphasis added.) *McDonald* at ¶ 13, quoting *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, ¶ 14, 860 N.E.2d 735. *McDonald* deals with the adequacy of verdict forms under R.C. 2945.75(A)(2), and this case deals with indictments under Subsection (A)(2). Both provisions have overlapping language, such that both the indictment and verdict must "state the degree of the offense" or alternatively state the "additional element or elements."

guilty of violating R.C. 2945.75, he will be subject to a mandatory sentence of two or more years in prison because he has two or more felony drug offense convictions.[44]

CONCLUSION

The defendant's constitutional right to a jury trial has not been abridged by the state's failure to allege his prior felony drug abuse convictions in the indictment. Nor is R.C. 2945.75 violated by sentencing him with the higher penalty, should he plead guilty or be found guilty beyond reasonable doubt, because the sentence remains a third degree felony.

IT IS SO ORDERED.

DATED: 10-6-15

JUDGE JERRY R. McBRIDE

[44] Because the indictment is sufficient, the court will forgo analyzing the defendant's argument under Crim.R. 7(D), which concerns the state's ability to amend the indictment. Since the indictment is not insufficient and needs no amending, this point is moot.