152 So.3d 445
Supreme Court of Alabama.

Ex parte Reginald Tyrone Lightfoot.
(In re Reginald Tyrone LIGHTFOOT
v.
STATE of Alabama).

1120200.
|
July 12, 2013.

Synopsis

Background: Defendant was convicted in the Circuit Court, Madison County, Nos. CC–09–6518 and CC–09–6519, David A. Mann, J., of trafficking in cocaine and of unlawful possession of marijuana in the second degree, and received an enhanced sentence of 15 years in prison. Defendant appealed. The Court of Criminal Appeals, No. CR–11–0376, 152 So.3d 434, affirmed defendant's conviction for trafficking in cocaine but remanded the case with directions as to sentencing concerning the reassessment of certain fines. On return to remand, the Court of Criminal Appeals affirmed defendant's sentence, without opinion. Defendant filed petition for writ of certiorari.

Holdings: The Supreme Court, Main, J., held that:

[1] enhancement of defendant's sentence for trafficking in cocaine based on defendant's possession of a firearm during the commission of a crime violated *Apprendi*, and

[2] trial court's error in enhancing defendant's sentence for trafficking in cocaine based on defendant's possession of a firearm during the commission of a crime, in violation of *Apprendi*, was not harmless; overruling, *Jones v. State,* 853 So.2d 1036, *Poole v. State,* 846 So.2d 370, and *Pearson v. State,* 794 So.2d 448.

Reversed and remanded.

Murdock, J., concurred in the result, with opinion.

Shaw, J., dissented in part and concurred in the result, with opinion, in which Bryan, J., concurred.

On remand, Ala.Crim.App., 152 So.3d 453.

West Headnotes (3)

[1] Jury Sentencing Matters

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(6) In general

Apprendi jury-trial rights apply to increases in both mandatory maximum sentences and mandatory minimum sentences. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[2] Jury Drug offenses

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(8) Drug offenses

Enhancement of defendant's sentence for trafficking in cocaine based on defendant's possession of a firearm during the commission of a crime violated *Apprendi*, though application of the enhancement did not increase defendant's sentence beyond the statutory maximum for the underlying offense, where the enhancement was not proved to the jury beyond a reasonable doubt. U.S.C.A. Const.Amend. 6; Code 1975, §§ 13A–5–6(a)(1), 13A–12–231(2, 12).

5 Cases that cite this headnote

[3] **Criminal Law** Sentencing proceedings in general

Criminal Law Right to jury determination

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177.3 Sentencing and Punishment
110k1177.3(2) Sentencing proceedings in general
110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1177.3 Sentencing and Punishment
110k1177.3(3) Right to jury determination

Trial court's error in enhancing defendant's sentence for trafficking in cocaine based on defendant's possession of a firearm during the commission of a crime, in violation of *Apprendi*, was not harmless, even though application of the enhancement did not increase defendant's sentence beyond the statutory maximum for the underlying offense; because the finding that defendant had in his possession a firearm during a drug-trafficking offense produced an increased penalty for defendant, it constituted an element of the offense, which had to be found by the jury beyond a reasonable doubt, regardless of what sentence defendant might have received had a different range been applicable; overruling, *Jones v. State,* 853 So.2d 1036, *Poole v. State,* 846 So.2d 370, and *Pearson v. State,* 794 So.2d 448. U.S.C.A. Const.Amend. 6; Code 1975, §§ 13A–5–6(a)(1), 13A–12–231(2, 12).

4 Cases that cite this headnote

Attorneys and Law Firms

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Luther Strange, atty. gen., and John C. Neiman, Jr., deputy atty. gen., and P. David Bjurberg, asst. atty. gen., for appellee.

Opinion

MAIN, Justice.

Reginald Tyrone Lightfoot petitioned this Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals affirming his conviction for trafficking in cocaine and his sentence of 15 years' imprisonment. See *Lightfoot v. State,* 152 So.3d 434 (Ala.Crim.App.2012) (opinion on application for rehearing). This Court granted certiorari review to determine, as a matter of first impression, whether an *Apprendi* [1] error in applying a sentence enhancement is automatically harmless when the erroneous application of the sentence enhancement does not increase the defendant's sentence beyond the statutory maximum for the underlying offense. We hold that it is not, and we reverse the judgment of the Court of Criminal Appeals and remand the case.

I. Factual Background and Procedural History

The Court of Criminal Appeals summarized the facts in this case:

> "The evidence adduced at trial indicated the following. On January 18, 2009, at approximately 4:00 a.m., Blake Dean, a patrol officer with the Huntsville Police Department, executed a traffic stop of a vehicle that had 'swerved a few times across the line and had no tag light.' ... The vehicle was being driven by Lightfoot; Brandy Newberry was a passenger in the vehicle. When Officer Dean approached the vehicle, he smelled the odor of marijuana emanating from inside the vehicle. When asked about the odor, Lightfoot said that he had been in a nightclub. Lightfoot also told Officer Dean that he had a pistol in the vehicle and that he had a permit for the pistol. Officer Dean then had Lightfoot and Newberry get out of the vehicle, and he searched the vehicle, finding what was later determined to be 42.4 grams of cocaine and 21.3 grams of marijuana in a purse on the passenger-side floorboard, and finding a pistol in the center console. Officer Dean first questioned Newberry about the narcotics. Based on her responses, he then, after advising Lightfoot of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), questioned Lightfoot about the narcotics. Lightfoot told Officer Dean that when he first saw Officer Dean's emergency lights, he got the cocaine and marijuana out of the center console of the vehicle ***447** and gave them to Newberry, who put them in her purse.
>
> "After both sides rested and the trial court instructed the jury on the applicable principles of law, the jury convicted

> Lightfoot of trafficking in cocaine ... as charged in the indictment."

152 So.3d at 436–37.

As to Lightfoot's allegation that the trial court erred in applying the sentence-enhancement provision in what was then § 13A–12–231(13), Ala.Code 1975 (possession of a firearm during a trafficking offense),[2] to his sentence for the trafficking-in-cocaine conviction, the Court of Criminal Appeals stated:

> "The record reflects that, at the beginning of trial, just before the venire was brought into the courtroom, the State requested that the trial court instruct the jury on the firearm enhancement in § 13A–12–231(13) and allow the jury to determine its applicability. The record contains no notice to Lightfoot from the State of its intent to seek application of the enhancement before the State requested the jury instruction at the beginning of trial. Lightfoot objected to the State's requested instruction on the ground that the enhancement was 'not a part of the indictment and we were not notified that we would be defending that.' The trial court did not rule on the State's request or Lightfoot's objection, stating instead 'I haven't decided what I'm going to do yet.' The record reflects no further discussion of the requested jury instruction, Lightfoot's objection, or the enhancement. In addition, the trial court did not instruct the jury on the enhancement, and Lightfoot lodged no objection to the trial court's failure to instruct the jury on the enhancement.
>
> "At the sentencing hearing, the trial court sentenced Lightfoot to a total of 15 years' imprisonment for the trafficking conviction, which included the 5–year enhancement in § 13A–12–231(13) for possession of a firearm during the commission of the crime, and ordered Lightfoot to pay fines totaling $75,000—$50,000 for his trafficking conviction under § 13A–12–231(2)a., plus an additional $25,000 for possession of a firearm during the commission of the crime under § 13A–12–231(13). Lightfoot objected to the application of the sentence enhancement but not on the grounds he now raises on appeal. However, Lightfoot filed a timely motion to reconsider his sentence, in which (1) he argued that application of the firearm enhancement to his sentence for the trafficking conviction violated *Apprendi* and its progeny because the jury did not find, beyond a reasonable doubt, that he possessed a firearm during the commission of the crime, and (2) he reiterated the argument he had made previously that he had not received notice, a reasonable time before trial, of the State's intent to seek application of the enhancement. The trial court denied the motion."

152 So.3d at 441 (footnote and citations to record omitted).

Lightfoot appealed to the Court of Criminal Appeals. The Court of Criminal Appeals unanimously affirmed Lightfoot's conviction for trafficking in cocaine but remanded the case to the trial court with directions as to sentencing concerning the reassessment of certain fines.[3] On return ***448** to remand, the Court of Criminal Appeals unanimously affirmed Lightfoot's sentence in an unpublished memorandum. *Lightfoot v. State* (No. CR–11–0494, October 26, 2012). Lightfoot timely sought certiorari review with this Court.

II. Standard of Review

Because this case involves a question of law—whether an *Apprendi* error in applying a sentence enhancement is automatically harmless when the erroneous application of the sentence enhancement does not increase the defendant's sentence beyond the statutory maximum for the underlying offense—this Court applies a de novo standard of review. *Ex parte Key,* 890 So.2d 1056, 1059 (Ala.2003) (providing that the standard of review for pure questions of law in a criminal case is de novo).

III. Analysis

The Court of Criminal Appeals concluded that the trial court's application of the firearm enhancement to Lightfoot's sentence violated *Apprendi* because the enhancement was not proven to the jury beyond a reasonable doubt and because Lightfoot did not receive notice of the State's intent to seek application of the enhancement until moments before trial began, which notice the Court of Criminal Appeals held was unreasonable.[4] The Court of Criminal Appeals, however, held that because the application of the sentence enhancement did not increase Lightfoot's sentence above the statutory maximum, then any error under *Apprendi* was harmless.

Because this Court has not previously addressed whether an *Apprendi* error in applying a sentence enhancement can be harmless, we must first examine the development of the law in regard to *Apprendi* and harmless-error analysis.

A. Apprendi*, Harmless Error, and* Alleyne v. United States

The United States Supreme Court in *Apprendi* held that, under the Sixth Amendment, any fact (other than a prior conviction) that exposes a defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and must be established beyond a reasonable doubt, not merely by a preponderance of the evidence. 530 U.S. at 490. The Supreme Court subsequently, in *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), however, drew a distinction between judicial fact-finding that increases the sentence beyond the statutory maximum sentence, which is prohibited under *Apprendi,* and judicial fact-finding that increases only the minimum mandatory sentence, which the Court held does not violate the Sixth Amendment. [5] In *Washington v. Recuenco,* 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), the United States Supreme Court held that an *Apprendi* error is subject to a harmless-error analysis and framed a test ***449** for determining whether such error is harmless.

Particularly relevant to our analysis in this case, in *Washington v. Recuenco* the jury found the defendant guilty of assaulting his wife with a deadly weapon, which the information charged was "a handgun." At sentencing, the judge found that the defendant was armed with a "firearm" and imposed the three-year mandatory sentence enhancement attendant to that finding, rather than the one-year enhancement attendant to the jury's "deadly weapon" finding. On appeal, the State of Washington conceded that the three-year enhancement violated *Apprendi,* but argued that the error was harmless. The Washington Supreme Court, however, had concluded that an *Apprendi* error could never be harmless. The Supreme Court granted review solely to determine whether a harmless-error analysis applies to an *Apprendi* error.

The Court acknowledged that under *Apprendi* it "ha[d] treated *sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.*" 548 U.S. at 220 (emphasis added). Accordingly, the Court found the case before it "indistinguishable from" *Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), explaining:

> "The only difference between this case and *Neder* is that in *Neder,* the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of 'armed with a firearm' to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes."

Recuenco, 548 U.S. at 220.

Because the question of *Apprendi* error also involved judicial fact-finding versus jury fact-finding, the Court concluded that the harmless-error analysis applied in *Neder* also applied to the error in *Recuenco. Id.* In *Neder,* the Court framed the test as follows: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder,* 527 U.S. at 18. The Court concluded that the same harmless-error analysis developed in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and applied in cases concerning the erroneous admission of evidence under the Fifth and Sixth Amendments also applied to infringement of the jury's fact-finding role under the Sixth Amendment. *Neder,* 527 U.S. at 18. The Court explained:

> "[A] court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.' *Rose* [*v. Clark*], 478 U.S. [570,] 577 [(1986)]."

527 U.S. at 19. In *Recuenco,* the Supreme Court reversed the judgment of the Washington Supreme Court, holding that harmless-error analysis does apply to an *Apprendi* sentencing error.

[1] On June 17, 2003, in *Alleyne v. United States,* —— U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the United States Supreme Court overruled *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), and applied *Apprendi* to increases in mandatory minimum ***450** sentences and held that because a mandatory minimum sentence increases the penalty for a crime, any fact that increases the mandatory minimum sentence is an "element" of the crime that must be submitted to the jury. In sum, *Apprendi* jury-trial rights now apply to increases in both mandatory maximum sentences and mandatory minimum sentences. The Supreme Court in *Alleyne* emphasized that a fact increasing either end of the sentencing range (the minimum or the maximum) produces a new penalty, constitutes an element of the offense, and must be found by the jury, regardless of what sentence the defendant might have received had a different range been applicable. – — U.S. at ——, 133 S.Ct. at 2162. With the above framework, we must now turn to the question whether the *Apprendi* error in this case was harmless.

B. Whether Apprendi *Error Was Harmless in this Case*

Lightfoot was convicted of trafficking in cocaine. See § 13A–12–231(2), Ala.Code 1975. Section 13A–12–231(12), Ala.Code 1975, classifies trafficking in cocaine as a Class A felony. The proper range of punishment for a person convicted of a Class A felony is "life or not more than 99 years or less than 10 years." § 13A–5–6(a)(1), Ala.Code 1975. Lightfoot was sentenced to 15 years, which included 5 years for the firearm enhancement. See § 13A–12–231(13), Ala.Code 1975. [6]

[2] **[3]** Applying the United States Supreme Court's decisions to the facts of this case, we conclude that the *Apprendi* error in this case was not harmless. Instead, the trial court's error in applying the firearm-enhancement provision to Lightfoot's sentence without a jury's finding the enhancement to exist beyond a reasonable doubt was not harmless. Under the *Apprendi/Alleyne* Sixth Amendment line of cases, because the finding that Lightfoot had in his possession a firearm during a drug-trafficking offense produces an increased penalty for Lightfoot, it constitutes an element of the offense, which must be found by the jury beyond a reasonable doubt, regardless of what sentence Lightfoot might have received had a different range been applicable. " 'Merely because [Lightfoot] *could* have been sentenced to [15] years does not mean he *would* have been if the trial judge had not considered the [firearm enhancement]. Harmless error cannot be based on such possibilities. Saltzburg, *The Harm of Harmless Error,* 59 Va. L.Rev. 988 (Sept.1973).' " *Ex parte Thomas,* 435 So.2d 1324, 1326 (Ala.1982) (quoting *Thomas v. State,* 435 So.2d 1319, 1324 (Ala.Crim.App.1981) (Bowen, J. dissenting)). To the extent that *Jones v. State,* 853 So.2d 1036 (Ala.Crim.App.2002); *Poole v. State,* 846 So.2d 370 (Ala.Crim.App.2001); and *Pearson v. State,* 794 So.2d 448 (Ala.Crim.App.2001), are inconsistent with this opinion, they are overruled.

IV. Conclusion

Based on the foregoing, we reverse the judgment of the Court of Criminal Appeals as to Lightfoot's sentence on the trafficking-in-cocaine offense, and we remand the cause for that court to order a new sentencing hearing consistent with this opinion.

REVERSED AND REMANDED.

MOORE, C.J., and STUART, BOLIN, PARKER, and WISE, JJ., concur.

***451** MURDOCK, J., concurs in the result.

SHAW and BRYAN, JJ., dissent in part and concur in the result.

MURDOCK, Justice (concurring in the result).

The main opinion states that the "jury-trial right[ ]" recognized under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), "now appl[ies] to increases in both mandatory maximum sentences and mandatory minimum sentences." 152 So.3d at 450. Although this is true, it does not in my view fully express the reason for

which a sentence enhancement—any sentence enhancement—must be considered by a jury.

My view in this regard aligns with that of Justice Shaw as explained in the first four paragraphs of his special writing in the present case, including particularly the passage he quotes from his own special writing as a judge on the Court of Criminal Appeals in *Poole v. State,* 846 So.2d 370, 397–98 (Ala.Crim.App.2001) (Shaw, J., concurring in the result). That is, regardless whether we find ourselves near the bottom or the top or the middle of a sentencing range, there is validity in Justice Shaw's criticism of "the idea that it is proper to assume that the trial court would have made the same sentencing decision had the impermissible sentencing enhancement not been considered." 152 So.3d at 453. For that matter, authority cited by the main opinion at the close of its analysis is consistent with this view:

> " ' "Merely because [Reginald Tyrone Lightfoot] *could* have been sentenced to [15] years does not mean that he *would* have been if the trial judge had not considered the [firearm enhancement]. Harmless error cannot be based on such possibilities. Saltzburg, *The Harm of Harmless Error,* 59 Va. L. Rev. 988 (1973)." ' *Ex parte Thomas,* 435 So.2d 1324, 1326 (Ala.1982) (quoting *Thomas v. State,* 435 So.2d 1319, 1324 (Ala.Crim.App.1981) (Bowen, J., dissenting))."

152 So.3d at 450.

That said, I cannot go further and join Justice Shaw's special writing. In this particular case, the indictment did not include allegations sufficient to put Lightfoot on notice that he would be required to defend against a firearm enhancement; Lightfoot was not put on notice of the need to prepare for or to present a defense as to a firearm enhancement until the start of the trial. There is an entwinement between the due-process issue of notice and an opportunity to be heard regarding a sentence-enhancement issue and the ability to find harmless error arising from the separate fact that the issue ultimately was not presented to the jury. Specifically, the lack of notice could have affected the defendant's preparation for trial and, as a result, the state of the record upon which an appellate court must determine whether "no rational jury, considering the element, would find it not to be proved." 152 So.3d at 453 (Shaw, J., dissenting in part and concurring in the result). In fairness, therefore, we cannot use that record as the basis for concluding that any failure to have presented the issue to the jury was harmless. To borrow from the rationale articulated by Professor Saltzburg and quoted in the main opinion, 152 So.3d at 450, "merely" because of the "possibilit[y]" that the record would have been the same is not a sufficient basis on which to conclude that an error that could have affected that record is harmless.

Moreover, in the present case, the Court of Criminal Appeals specifically found "meritorious" "Lightfoot's arguments that the enhancement was improperly applied to his sentence because he had not received notice, a reasonable time before trial, of the State's intent to seek application of the enhancement." *Lightfoot v.* ***452** *State,* 152 So.3d 434, 442 (Ala.Crim.App.2012) (opinion on application for rehearing). The Court of Criminal Appeals concluded that, "[i]n this case, it is clear that Lightfoot did not receive notice of the State's intent to seek to apply the firearm enhancement in § 13A–12–231(13)[, Ala.Code 1975,] until only moments before the trial began. That notice was not reasonable." 152 So.3d at 443. I agree.

Accordingly, my agreement with Justice Shaw's analysis must be fettered by the fact that we do not have before us a record unaffected by the State's due-process violation to which to apply the harmless-error standard. I therefore concur in the result reached by the main opinion.

SHAW, Justice (dissenting in part and concurring in the result).

The petitioner, Reginald Tyrone Lightfoot, was convicted of trafficking in cocaine, see Ala.Code 1975, § 13A–12–231(2). He challenges whether his sentence was properly "enhanced" under Ala.Code 1975, § 13A–12–231(13),[7] which essentially provided that any person who possessed a firearm during the commission of an offense falling within § 13A–12–231 would be sentenced to five years' imprisonment "in addition to, and not in lieu of, the punishment otherwise provided ...."

As the Court of Criminal Appeals held in its opinion in this case: "[T]he trial court's application of the enhancement to Lightfoot's sentence was in violation of *Apprendi* [*v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)]." *Lightfoot v. State,* 152 So.3d 434, 443 (Ala.Crim.App.2012) (opinion on application for rehearing).

However, the court held that, because the application of the sentencing enhancement did not increase Lightfoot's sentence beyond the statutory maximum penalty for the offense, any *Apprendi* error was harmless.[8] See, e.g., *Jones v. State,* 853 So.2d 1036, 1038 (Ala.Crim.App.2002).

I have previously written, as a member of the Court of Criminal Appeals, as to why I believe such harmless-error analysis is incorrect:

> "I simply cannot agree that a defendant suffers no substantial prejudice from an illegal, *mandatory sentence,* even when the sentence imposed does not exceed the statutory maximum. The harmless error approach ... appears to me to conflict with the rationale of this Court's decisions in *McClintock v. State,* 773 So.2d 1057 (Ala.Crim.App.2000); *Crenshaw v. State,* 740 So.2d 478 (Ala.Crim.App.1998); and *Pickens v. State,* 475 So.2d 637 (Ala.Crim.App.1985). Of particular significance, I think, is this Court's statement in *Pickens:*
>
> > " 'The State contends that since the appellant's life sentence was within the allowable range of punishment, his sentence should stand. We cannot agree with this argument.
> >
> > " 'The Alabama Supreme Court held in *Ex parte Thomas,* [435 So.2d 1324 (Ala.1982)] [agreeing with Judge Bowen's dissent in *Thomas v. State,* 435 So.2d 1319 (Ala.Crim.App.1981)] that merely because a trial judge *could have* sentenced a defendant to a ***453** particular sentence does not necessarily mean that he *would have imposed that particular sentence* had he not considered improper matters.'
>
> "4[7]5 So.2d at 640. (Emphasis in original.)"

Poole v. State, 846 So.2d 370, 397–98 (Ala.Crim.App.2001) (Shaw, J., concurring in the result) (footnote omitted).

In *Poole,* I criticized the idea that it is proper to assume that the trial court would have made the same sentencing decision had the impermissible sentencing enhancement not been considered. However, in the instant case, it appears that we know that the enhancement caused the trial court to make a different sentencing decision. At the sentencing hearing, the trial court sentenced Lightfoot to 15 years' imprisonment and described the sentence as follows: "Of that 15, you will have 2 mandatory, by law, minimum sentences to fulfill. One is a 3–year sentence that is mandatory, by statute, based on the trafficking offense. Another is the 5 years additional that is mandatory, based on a firearm involved in this case." I see nothing that would allow me to assume that, without the firearm enhancement, Lightfoot would have received the same sentence. Thus, the error in applying the firearm enhancement is not harmless. I would reverse the Court of Criminal Appeals' decision in this respect, and I concur in the main opinion's decision to do so.

Nevertheless, the State offers another rationale for why the *Apprendi* error in this case was harmless. Under *Apprendi,* the firearm enhancement is essentially considered an element of the offense that must be decided by the jury in order for the enhancement to be applied. As the main opinion notes, the United States Supreme Court has held that the failure of a jury to decide such an *Apprendi* element is harmless error if no rational jury, considering the element, would find it not to be proved. See *Washington v. Recuenco,* 548 U.S. 212, 218–22, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (citing *Neder v. United States,* 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

The Court of Criminal Appeals did not discuss this issue in its decision (and it did not need to, because it found different grounds on which to affirm the trial court's judgment). I would remand the case to the Court of Criminal Appeals to examine whether this issue is available to affirm the trial court's decision. I thus dissent from the portion of the main opinion remanding the case for a new sentencing hearing.

BRYAN, J., concurs.

All Citations

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Footnotes

1 *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

2 Effective May 10, 2012, a subsection was added to § 13A–12–231, and § 13A–12–231(13) was renumbered as § 13A–12–231(14), Ala.Code 1975. See Act No. 2012–267, Ala. Acts 2012.

3 Lightfoot was also convicted of the unlawful possession of marijuana in the second degree.

The trial court sentenced Lightfoot to one year's imprisonment for the possession conviction and ordered him to pay a $500 fine. Lightfoot's appeal to the Court of Criminal Appeals also challenged that conviction and sentence. The Court of Criminal Appeals affirmed his conviction and sentence for the unlawful possession of marijuana. The possession conviction is not before us on certiorari review.

4 We note that *Apprendi* and its progeny do not discuss a reasonable-notice requirement. Because we granted certiorari review only as to the issue whether a harmless-error analysis can be applied to the *Apprendi* error in this case, we pretermit discussion of the issue regarding the reasonableness of the notice.

5 *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), was overruled when the Supreme Court released its opinion in *Alleyne v. United States,* —— U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), on June 17, 2013.

6 Now § 13A–12–231(14), Ala.Code 1975. See supra note 2.

7 Effective May 10, 2012, § 13A–12–231(13) was redesignated as § 13A–12–231(14). See Act No. 2012–267, Ala. Acts 2012.

8 This Court did not grant certiorari review to determine whether the Court of Criminal Appeals correctly held that *Apprendi* was violated; I thus express no opinion regarding the United States Supreme Court's recent decision in *Alleyne v. United States,* —— U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).