

05/31/02

“See News Release 046 for any concurrences and/or dissents.”

SUPREME COURT OF LOUISIANA

No. 00-K-2488

STATE OF LOUISIANA

versus

PATRICK PALERMO

consolidated with

No. 00-K-2499

STATE OF LOUISIANA

versus

FRANK PALERMO

Johnson, J., Dissenting

I respectfully disagree with the majority’s conclusion that LSA-R.S. 14:54 unconstitutionally deprives a defendant of the right to a jury determination on all of the elements of the attempted offense. In this case, the state tried to the jury all facts necessary to constitute the statutory offense of LSA- R.S. 14:54 and proved these facts beyond a reasonable doubt. The trial judge then sentenced the defendant, taking into consideration various factors relating to the offense and the offender and imposed a judgment within the range prescribed by the statute. The court of appeal conducted an extensive review of the legislative history of LSA-R.S. 14:54 and held that 14:54 provides a sentencing directive to the trial judge whereby the trial judge must consider La. R.S. 14:51 through 53, and 14:27 in determining the sentencing range.

The finding made by the trial court as the basis for sentencing, that the defendants created a foreseeable risk to human life, did not “expose the defendant[s] to a penalty exceeding the maximum [they] would receive if punished

according to the facts reflected in the jury verdict alone.” *Apprendi v. New Jersey*, 530 U.S. 466, 482-83, 120 S.Ct. 2348, 2359, 147 L.Ed. 2d 435 (2000).¹ A five-four court in *Apprendi* held that any fact which increases the punishment for a crime above the statutory maximum, absent the fact of a prior conviction, is subject to the jury’s determination of proof beyond a reasonable doubt. 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435.

I agree with the conclusion reached by the court of appeal that *Apprendi*’s rationale does not apply in this case because the defendants’ 10-year sentence falls within the sentencing range provided by R.S. 14:54. Under this provision, the trial court could have sentenced the defendants to a minimum term of one year imprisonment if it concluded that their actions constituted an attempted simple arson as defined in R.S. 14:52, or a maximum term of 10 years imprisonment if it concluded that their actions constituted an attempted aggravated arson as defined in R.S. 14:51. The trial court in concluding that the defendants’ actions fell under the aggravated arson provision did not decide a fact which “increase[d] the penalty for a crime beyond the prescribed statutory maximum,” but instead exercised its broad discretion in imposing a sentence within the range provided by the legislature. *State v. Cook*, 95-2748, (La. 5/31/96), 674 So.2d 957, 959 (quoting *State v. Humphrey*, 445 So.2d 1155, 1165 (La. 1984), *cert. denied*, 519 U.S. 1043, .

Apprendi’s prohibition “applies only when the disputed ‘fact’ enlarges the applicable statutory maximum and the defendant’s sentence exceeds the original maximum.” *U.S. v. Lopez-Lopez*, 282 F.d 1 (1 Cir. 2/19/02) citing *United States v. Caba*, 241 F.3d 98, 101 (1st Cir.2001); see also *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. “No *Apprendi* violation occurs when the district court sentences a

¹The Court in *Apprendi* declared a New Jersey statutory scheme for a Hate Crime unconstitutional because it allowed a court to impose a sentence exceeding the statutory maximum for the crime of which the defendant was convicted when the court found by a preponderance of the evidence that the defendant was motivated by a statutorily defined bias, which included race.

defendant below the default statutory maximum, even though a fact, determined by the court under a preponderance-of-the-evidence standard, influences the length of the sentence imposed.” *Lopez-Lopez, supra* citing *United States v. Robinson*, 241 F.3d 115,119. Accordingly, I would affirm the decision of the court of appeal.

Further, one of the defendants, Frank Palermo, was also charged and convicted under La. R.S. 14:107.2, Louisiana’s Hate Crimes Statute. This case presents the first opportunity for this Court to interpret this statute. The Hate Crimes Statute was first enacted in 1997 for the purpose of addressing the wave of hate that we are faced with in our society. The statute defines hate crimes as certain enumerated criminal offenses in which the victim is selected because of that person’s actual or perceived class or status, including race.² Enforcement of this statute requires the violation of an underlying offense. In this case, the underlying offense is La. R.S.14:54, placing combustibles. It is clear that the altercation in this case was racially motivated, as the victims were selected because of their race. The facts of this case personify the exact behavior which our legislature contemplated in enacting the Hate Crimes Statute.

The result of the majority’s conclusion that La. R.S. 14:54, the statute constituting the underlying offense in this case, is unconstitutional, is that the Hate Crimes conviction cannot stand. In my opinion, this was a heinous crime (pouring

²La. R.S. 14:107.2 provides, in pertinent part:

A. It shall be unlawful for any person to select the victim of the following offenses against person and property because of actual or perceived **race**, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property or because of actual or perceived membership or service in, or employment with, an organization: first or second degree murder; manslaughter; battery; aggravated battery; second degree battery; aggravated assault with a firearm; terrorizing; mingling harmful substances; simple, forcible, or aggravated rape; sexual battery; aggravated sexual battery; oral sexual battery; carnal knowledge of a juvenile; indecent behavior with juveniles; molestation of a juvenile; simple, second degree, or aggravated kidnaping; simple or aggravated arson; **placing combustible materials**; communication of false information of planned arson; simple or aggravated criminal damage to property; contamination of water supplies; simple or aggravated burglary; criminal trespass, simple, first degree, or armed robbery; purse snatching; extortion; theft; desecration of graves; institutional vandalism; or assault by drive-by shooting. (Emphasis added)

gasoline on the victim's vehicle and attempting to set it on fire with a three year old inside) for which Frank Palermo should not go unpunished.