

SUPREME COURT OF THE UNITED STATES

No. 91-719

AL C. PARKE, WARDEN, PETITIONER v. RICKY HAROLD
RALEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[December 1, 1992]

JUSTICE BLACKMUN, concurring in the judgment.

I agree that Kentucky's burden-shifting procedures established in *Dunn v. Commonwealth*, 703 S. W. 2d 874, 876 (Ky. 1985), cert. denied, 479 U. S. 832 (1986), are constitutional under the Due Process Clause and that the Court of Appeals erred in concluding that the Commonwealth had the burden of establishing by clear and convincing evidence that the prior guilty pleas complied with *Boykin v. Alabama*, 395 U. S. 238 (1969). I write separately, however, to emphasize that I agree with this conclusion only because Kentucky's persistent-felony-offender statute, Ky. Rev. Stat. Ann. §532.080 (Michie 1990), is a sentencing provision rather than a statute creating a separate criminal offense.

The persistent-felony-offender provision is located not in the substantive criminal offense chapters of the Kentucky Revised Statutes but as part of chapter 532, where the offense classifications and the respective penalties are located. Section 532.080 is entitled "Persistent felony offender sentencing," and it is specifically concerned with enhancing the penalty that would otherwise follow from a conviction on the underlying criminal offense. In respondent's case, for example, his persistent-felony-offender status enhanced the punishment normally associated with a second-degree robbery conviction—at least 5 but not more than 10 years imprisonment—to a minimum of 10 and a maximum of 20 years. §532.080(6)(b).

PARKE v. RALEY

The Supreme Court of Kentucky has described the persistent-felony-offender statute:

“There is no additional punishment imposed by a persistent felony offender conviction, merely a more severe punishment. KRS 532.080 does not create or define a criminal offense. It recognizes a status and, in a proceeding separate and apart from the initial trial, fixes a penalty which is to be imposed rather than the one fixed by the jury on the initial trial.” *Hardin v. Commonwealth*, 573 S. W. 2d 657, 661 (Ky. 1978).

See also *Malicoat v. Commonwealth*, 637 S. W. 2d 640, 641 (Ky. 1982). Under Kentucky law, the Commonwealth has the burden of proving beyond a reasonable doubt each “element” of the offense of being a first-degree persistent-felony offender. *Hon v. Commonwealth*, 670 S. W. 2d 851, 853 (Ky. 1984). However,

“[i]t is the fact of conviction which the Commonwealth seeks to prove in introducing the judgment against a defendant charged as a persistent felon. KRS 532.080 does not specify that the Commonwealth must affirmatively prove both the fact of conviction and that the previous conviction was not obtained by constitutionally impermissible means.” *Commonwealth v. Gadd*, 665 S. W. 2d 915, 917 (Ky. 1984).

I believe that had Kentucky chosen to make being a persistent-felony offender a separate crime, as Respondent mistakenly believes that it has, Brief for Respondent 12-13, the Commonwealth would have had the burden affirmatively to prove that the underlying felony convictions were obtained by constitutional means. Under those circumstances, *Boykin* would not permit the Commonwealth to rely on a silent record. But, because the persistent-felony-offender statute is properly understood to be a sentencing provision, I see no reason why the Commonwealth may not place the burden on the

91-719—CONCUR

PARKE v. RALEY

defendant to rebut the presumption of regularity that attaches to the prior convictions. For this reason, I agree that the Court of Appeals has demanded more of the Commonwealth of Kentucky than is constitutionally required.