Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-268

JANUARY TERM, 2005

State of Vermont v. Michael J. Gates	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Bennington Circuit DOCKET NO. 1263-9-01 BnCr Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

Defendant Michael J. Gates appeals from his enhanced sentence for driving under the influence, third or more offense, after a jury found that he was a habitual offender under 13 V.S.A. § 11. Defendant argues that the trial court committed reversible error by taking judicial notice that perjury is a felony that carries a maximum penalty of fifteen years in prison, because it impermissibly relieved the State from its burden of proving every element of the charged crime. We affirm.

In September 2001, defendant was charged with one count of driving while intoxicated (DWI), third or more offense, one count of driving with a suspended license, and one count of contempt of court for violating a condition of pretrial release. In April 2002, the State filed an amended charge of driving while intoxicated, third or more offense- habitual offender. A two-day bifurcated trial was held, and a jury found defendant guilty of DWI, operating a motor vehicle with a suspended license, and violating a condition of pretrial release. Defendant asked for a jury trial on his status as a habitual offender. The State presented evidence at trial from the police officers who had arrested defendant, and it introduced docket disposition reports (DDRs) for the convictions. The DDR on the perjury charge indicated that defendant had been convicted of a felony. The district court clerk also testified that perjury was a felony, and noted that the " felony" box on the DDR had been checked. The clerk acknowledged that the DDR had erroneously omitted the statutory provision governing perjury, and she stated that she did not know the exact statutory citation that defined perjury. She stated that she knew perjury was a felony because in her ten years at the clerk's office, she had never seen it marked as anything but a felony.

Defendant did not present any evidence on his own behalf. After both parties rested, the State moved to reopen its case. The State asked the court to inform the jury that in Vermont, perjury is a felony. Defendant objected, arguing that the court should not take judicial notice in any criminal proceeding of any element of the charged crime. The court rejected this argument, and granted the State's request, indicating that it would take judicial notice of the definition of a felony and the penalty for perjury. Defendant then moved for a judgment of acquittal, asserting that the State had failed to prove that perjury was a felony, and therefore failed to prove that defendant was a habitual offender. The court denied defendant's motion, finding the evidence sufficient based on the docket entries, records, and the clerk's testimony that perjury was a felony. The court then informed the jury that it was giving it judicial notice that in Vermont a felony was a charge that carried a maximum penalty of more than two years' imprisonment. The court also took judicial notice that the offense of perjury carried a maximum penalty of fifteen years. The court instructed the jury that it was not required to accept the judicially-noticed facts as conclusive, although it could do so. The jury found that defendant had three prior felony convictions, and was therefore a habitual offender under 13 V.S.A. § 11. This appeal followed.

Defendant argues that the court committed reversible error by taking judicial notice of the fact that perjury is a felony,

and that the maximum penalty for perjury is fifteen years in prison because it impermissibly relieved the State of its burden of proof. We disagree. First, we note that the habitual offender statute does not constitute a separate or new offense, but it instead " provides an enhanced penalty for repeat offenders." State v. Ingerson, 2004 VT 36, ¶ 3, 852 A.2d 567. We assume for the purposes of argument that the State needed to prove defendant's prior convictions beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that " 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") (emphasis added); accord State v. Stevens, 2003 VT 15, ¶ 10, 175 Vt. 503 (" Apprendi explicitly allows the fact of a prior conviction to be used for sentence enhancement without it being found by the jury."). There can be no reasonable doubt that perjury is a felony in Vermont.

The " facts" challenged by defendant in this appeal are not " adjudicative facts" governed by V.R.E. 201. Adjudicative facts are " propositions pertaining to the particular events which give rise to the lawsuit." Reporter's Notes, V.R.E. 201. At most, these are legislative facts- " those more general propositions relied upon by a court in determining the existence or scope of a rule of law" - which the trial court may take judicial notice of in its " inherent and absolute discretion, unrestricted by the rules." Id.; see also State v. O' Key, 899 P.2d 663, 682 n.35 (Or. 1995) (" When a court, in determining what the law- statutory, decisional, or constitutional- is or should be, takes judicial notice of certain facts, it is taking judicial notice of legislative facts."); Rodriguez v. State, 90 S.W.3d 340, 360 (Tex. App. 2001) (" Legislative facts are facts that are general, relate to the content of law and policy, and do not concern only the parties involved in the case at hand."); cf. McCollum v. State, 582 N.E.2d 804, 815 (Ind. 1991) (" [W]hether an offense is a felony is not a question of fact for the jury, but a matter of law, predetermined by the legislature and applied by the judiciary."); Reporter's Notes, V.R.E. 201 (explaining that neither the Rules of Evidence nor the Rules of Civil or Criminal Procedure expressly cover judicial notice of statutory or decisional law of Vermont or federal law, and although such matters have been spoke of as questions of judicial notice, they are more properly viewed as matters which the judge is bound to know by virtue of his office.). We note that, in addition to the facts judicially noticed by the court, the DDR offered by the State indicated that defendant's perjury conviction was a felony, and the court clerk testified to this effect as well. Defendant did not present any contradictory evidence, nor could he have on this issue. The court did not impermissibly relieve the State of its burden of proof, and we find no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned