



violent felony offender<sup>1</sup> upon a finding that defendant had previously been convicted of two violent felonies -- both first-degree manslaughter -- in 1976, and in 1983. On this appeal, defendant presses two arguments concerning his sentence.

First, defendant contends that Crawford v Washington (541 US 36 [2004]) applies at a predicate sentencing hearing, both as a matter of his Sixth Amendment right to be confronted with the witnesses against him, and by operation of CPL 400.15(7)(a).<sup>2</sup> In particular, defendant argues that the hearing court violated his right to confront the author of a report certifying that he had compared two fingerprint cards of a "Jose Leon" with two prior convictions (for 1976 and 1983), bearing the identical New York State Identification Number, and that, in his opinion, the two "fingerprint impressions are those of the same individual."<sup>3</sup> Defendant admitted that he was the same "Jose

---

<sup>1</sup> See Penal Law §§ 70.08; 70.04; see also CPL 400.15(7)(a); 400.16(2).

<sup>2</sup> CPL 400.15(7)(a) provides that at a persistent violent felony hearing, "[t]he burden of proof is upon the people and a finding that the defendant has been subject to a predicate violent felony conviction must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to a trial of the issue of guilt."

<sup>3</sup> CPL 60.60(2) provides:

"A report of a public servant charged with the custody of official fingerprint records which contains a certification that the fingerprints of a designated person who has

Leon" identified in the 1976, but not the 1983, conviction. Second, defendant argues that, in light of his challenge to being the same person identified in the 1983 conviction, the hearing court necessarily made a finding of fact -- the fact of his identity -- beyond the sole permissible fact of prior convictions in violation of Apprendi v New Jersey (530 US 466 [2000]).

The Appellate Division rejected both arguments, concluding that defendant was properly adjudicated a persistent violent felony offender "on the basis of admissible evidence (see CPL 60.60[2]; 400.15[7][a]; 400.16[2])," and that his constitutional arguments were meritless. We now affirm.

Sentencing proceedings are not trial prosecutions.<sup>4</sup> Thus, we read Crawford, as do the Circuit Courts of Appeals to have considered the question, as addressing "[b]y its own terms" testimonial hearsay at trial (United States v Luciano, 414 F 3d 174, 178-179 [1st Cir 2005] [collecting cases]; see also United States v Martinez (413 F 3d 239, 243 n 5 [2d Cir 2005], cert

---

previously been convicted of an offense are identical with those of a defendant in a criminal action, constitutes presumptive evidence of the fact that such defendant has previously been convicted of such offense."

<sup>4</sup> See Barber v Page (390 US 719, 725 [1968] ["The right (of) confrontation is basically a trial right"]); see also People v Perry (36 NY2d 114 [1975] ["neither the Supreme Court nor this court has ever held, nor do we now believe, that the full panoply of constitutional rights should be applied to the sentencing process." ]).

denied 546 US 1117 [2006] [collecting cases]).

Similarly, we reject defendant's contention that CPL 400.15(7)(a) incorporates into his sentencing hearing the trial right of confrontation. Before Crawford, there was little doubt that affidavits based on fingerprint comparisons were admissible at predicate sentencing hearings (see CPL 60.60[2]; CPLR 4520).<sup>5</sup> Section 400.15(7)(a)'s requirement that evidence be subject to "the rules applicable to a trial of the issue of guilt" dates to 1967 in section 470-a of the former Code of Criminal Procedure.<sup>6</sup>

---

<sup>5</sup> CPL 60.60 was enacted in 1970. Subsection (2), authorizing the admission of fingerprint comparison reports, has its origins in section 482-b of the former Code of Criminal Procedure, enacted in 1927 (see L 1927, ch 356; see also Denzer, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 60.60, at 345 [1971 ed]). CPLR 4520, in its current form, dates to 1962 (see L 1962, ch 308). With a minor, irrelevant difference, this rule has origins in the former Civil Practice Act § 367. Section 4520 provides:

"Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so file or deposited is prima facie evidence of the facts stated."

<sup>6</sup> See Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 400.20, at 132 (1971 ed) (section 400.20 "restates, in substance, the provisions of former Code section 470-a enacted in 1967. . . . The procedure established was, for the most part, completely new.").

To agree with defendant's broad construction of section 400.15(7)(a) is to presume too much of the Legislature's intent, given the timing of the enactment of section 60.60(2).

Testimonial hearsay under section 60.60(2) continued to be admitted after the passage of section 400.15, both at trial and at predicate felony hearings (although Crawford now places new restrictions at trial). Because, in our view, Crawford does not apply at sentencing proceedings, we decline to construe section 400.15 along with other hearsay statutes, which have always operated in tandem, in a way that yields unworkable results (see Consolidated Edison Co. of New York, Inc. v Department of Env. Consv., 71 NY2d 186, 195 [1988]).

Finally, we have considered defendant's Apprendi challenge and find it also to be without merit (see People v Rivera, 5 NY3d 61 [2005]; see also United States v Johnson, 440 F3d 832, 848 [6th Cir 2006] ["Common sense dictates that these facts are 'so basic as to be implicit in the fact of a prior conviction'"]; United States v Thompson, 421 F3d 278, 284 n 4 [4th Cir 2005] [same]; United States v Santiago, 268 F3d 151, 156 [2d Cir 2001] [a sentencing judge's ability to determine whether a defendant has a prior conviction extends to "the 'who, what, when, and where' of a prior conviction"]).

Accordingly, the order of the Appellate Division should be affirmed.

\* \* \* \* \*

Order affirmed. Opinion by Judge Jones. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Decided February 19, 2008