

**46-18-501. Definition of persistent felony offender.** A "persistent felony offender" is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. An offender is considered to have been previously convicted of a felony if:

- (1) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed;
- (2) less than 5 years have elapsed between the commission of the present offense and either:
  - (a) the previous felony conviction; or
  - (b) the offender's release on parole or otherwise from prison or other commitment imposed as a result of the previous felony conviction; and
- (3) the offender has not been pardoned on the ground of innocence and the conviction has not been set aside in a postconviction hearing.

**History:** En. 95-1507 by Sec. 5, Ch. 513, L. 1973; amd. Sec. 21, Ch. 184, L. 1977; amd. Sec. 11, Ch. 584, L. 1977; R.C.M. 1947, 95-1507(1).

#### **Case Notes:**

*Alternative Sentence for Drug Offense Not Precluded by Persistent Felony Offender Statutes, but Incarceration Not Error:* Brendal pleaded guilty to fraudulently obtaining dangerous drugs and was sentenced to 25 years in prison with 15 years suspended. Based on prior convictions for the same offense, the sentencing court designated Brendal as a persistent felony offender and imposed a mandatory 10-year prison sentence. Brendal appealed the sentence on grounds that the sentencing court should have considered a sentence to a drug treatment program pursuant to the alternative sentencing authority in 45-9-202. However, the Supreme Court affirmed. The persistent felony offender statutes do not preclude a District Court from providing an alternative sentence under 45-9-202 for a person convicted of a drug-related offense, as long as the required criteria for imposing an alternative sentence are satisfied. Therefore, although the District Court could have provided an alternative sentence, it was not error to sentence Brendal to incarceration. *St. v. Brendal*, 2009 MT 236, 351 M 395, 213 P3d 448 (2009).

*Assignment of Persistent Felony Offender Status for Commission of Second Felony Before Conviction of First Felony Consistent With Definition:* The language in this section clearly defines a persistent felony offender as a person who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. Under this language, the persistent felony offender statute can be used to enhance a sentence when the second felony was committed before conviction of the first felony. *St. v. Anderson*, 2009 MT 39, 349 M 245, 203 P3d 764 (2009), affirming *St. v. Williamson*, 218 M 242, 707 P2d 530 (1985), and *St. v. Hamm*, 250 M 123, 818 P2d 830 (1991).

*Consideration of Sentencing Factors in Sentencing Persistent Felony Offender Not Violative of Right to Trial by Jury:* Following conviction for an eighth DUI, Vaughn was sentenced as a persistent felony offender to a 50-year term in the state prison. Relying on the proposition in *Blakely v. Wash.*, 542 US 296 (2004), that factual findings that serve to enhance a sentence beyond the statutory maximum must be determined by a jury beyond a reasonable doubt, Vaughn appealed the felony sentence, asserting that the 50-year sentence imposed under 46-18-502 served to enhance the sentence beyond the maximum 13-month commitment to the Department of Corrections followed by a suspended sentence of up to 5 years authorized for felony DUI in 61-8-731 and that therefore the persistent felony offender sentence should have been determined by a jury on the facts. The Supreme Court first noted that the Blakely proposition applies to a fact other than the fact of a prior conviction and that it is the fact of a defendant's prior felony conviction that authorizes an enhanced sentence under 46-18-502 and this section. Here, Vaughn's enhanced felony DUI sentence was based on the sentencing court's finding that Vaughn had a prior felony DUI conviction. That factual determination may properly be made by the sentencing court rather than by a jury. The prior DUI was a sentencing factor that was an aggravating or mitigating circumstance supporting the imposition of a sentence within the range authorized for a persistent felony offender. Thus, Vaughn's right to a trial by jury was not violated by the sentencing court's findings of fact in support of a sentence as a persistent felony offender. The sentence was affirmed. *St. v. Vaughn*, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). See also *Apprendi v. N.J.*, 530 US 466 (2000).

*Constitutionality of Persistent Felony Offender Statutes:* Shults contended that the persistent felony

offender (PFO) statutes were unconstitutional on their face in violation of double jeopardy, equal protection, and cruel and unusual punishment or as they applied to Shults's case. The Supreme Court disagreed. First, the PFO statutes do not constitute double jeopardy because a sentence as a habitual criminal is not viewed as a new jeopardy (see *Gryger v. Burke*, 334 US 728 (1948)). Second, Shults was not able to show that the PFO statutes classify two or more similarly situated groups in an unequal manner and thus failed to meet the first threshold of a meritorious equal protection claim. Last, a sentence that is within maximum statutory guidelines and that is not so disproportionate as to shock the conscience or outrage the moral sense of the community is not considered cruel and unusual punishment. Shults's sentence was within statutory parameters, and in light of Shults's 18-year criminal history and repeated failure to conform his behavior to societal norms despite having numerous opportunities to do so, the sentence could not be seen as so disproportionate as to shock the conscience or outrage the moral sense of the community and thus was not considered cruel and unusual punishment. *St. v. Shults*, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

*Failure to Raise Legality of Sentence on Direct Appeal -- Postconviction Consideration Barred:* Osborne was convicted of a fourth DUI in 1999, and when charged with felony DUI in 2003, the state sought to have Osborne declared a persistent felony offender. The District Court obliged, and Osborne was declared a persistent felony offender and sentenced to 10 years in prison with 5 years suspended. Osborne did not appeal the sentence directly, but filed a petition for postconviction relief, asserting that the sentence was not legal. The petition was denied, and Osborne appealed. The state argued that the Supreme Court was procedurally barred under 46-21-105 from considering the petition because the legal challenge to the sentence could have been raised on direct appeal. Osborne asserted that because the state did not raise the procedural bar issue in District Court, that argument was waived. Although the Supreme Court as a rule does not consider issues raised for the first time on appeal, this general rule does not preclude consideration of jurisdictional questions raised for the first time on appeal. The procedural bar is jurisdictional, so the court considered the state's argument, concluding that lack of subject matter jurisdiction may not be waived and that 46-21-105 represents a jurisdictional limit on courts' ability to entertain and decide petitions for postconviction relief and effectively prohibits courts from exercising jurisdiction over grounds for relief that could have been raised on direct appeal. Thus, Osborne's failure to challenge the legality of the sentence on direct appeal precluded consideration in a postconviction petition. *St. v. Osborne*, 2005 MT 264, 329 M 95, 124 P3d 1085 (2005).

*Persistent Felony Offender Statute Not Violative of Double Jeopardy Protections:* Wardell was convicted of felony sexual contact with a child in South Dakota and later was charged with numerous sexual crimes in Montana, including failure to register as a sex offender. The District Court sentenced Wardell to 5 years on the failure to register count and designated Wardell as a persistent felony offender, ultimately adding an additional 20-year consecutive sentence. Wardell appealed on grounds that the conviction for failure to register and the sentence for persistent felony offender constituted double jeopardy because each relied on the same underlying conviction. The Supreme Court disagreed. A sentence as a habitual criminal is not to be viewed as a new jeopardy. The sentence enhancement was related to the second crime--failure to register--and thus did not constitute double jeopardy. Under this section, the dual use of the prior South Dakota conviction for designating Wardell as a persistent felon was authorized. Further, it is not a crime to be a persistent felony offender, and being designated a persistent felony offender cannot constitute double jeopardy. *St. v. Wardell*, 2005 MT 252, 329 M 9, 122 P3d 443 (2005).

*Use of Persistent Felony Offender Statute to Increase Sentence Not Considered Cruel and Unusual Punishment:* Wardell was originally sentenced as a persistent felony offender to 45 years in prison with 30 years suspended. Wardell filed a petition for postconviction relief, and that sentence was vacated. Upon resentencing, Wardell's sentence was increased to 20 years suspended plus 5 years for failure to register as a sex offender. Wardell argued on appeal that the sentence constituted cruel and unusual punishment because it was excessive when compared to other sentences for failure to register. The Supreme Court noted that Wardell's sentence was within statutory maximum guidelines and was not so disproportionate to the crime as to shock the conscience or outrage the moral sense of the community or of justice. The sentence was affirmed. *St. v. Wardell*, 2005 MT 252, 329 M 9, 122 P3d 443 (2005), distinguishing *St. v. Mount*, 2003 MT 275, 317 M 481, 78 P3d 829 (2003).

*District Court Jurisdiction to Apply Persistent Felony Offender Designation to Felony DUI:* Yorek

pleaded guilty to and was sentenced on a felony DUI charge. The District Court determined that it had jurisdiction and imposed a persistent felony offender designation. Yorek sought postconviction relief on grounds that the District Court lacked subject matter jurisdiction to impose a persistent felony offender designation for felony DUI. The District Court denied the petition for postconviction relief, concluding that sentencing for felony DUI is not solely governed by 61-8-731 and 61-8-734, that nothing in the persistent felony offender statute excludes felony DUI offenders from its application, and that Yorek waived any jurisdiction claim by pleading guilty. The Supreme Court affirmed. Nothing in 46-18-502 distinguishes between or among the types of felonies to which it applies, or excludes DUI offenders. Rather, if the underlying charge meets the definition of a felony and if the state has provided proper notice of its intent to seek persistent felony offender status under 46-13-108, a District Court has the statutory authority to designate and sentence an offender as a persistent felony offender. Yorek's crime met the definition of a felony, and Yorek fell squarely within the persistent felony offender statute. The state met the notice provisions, and the District Court possessed subject matter jurisdiction to designate Yorek as a persistent felony offender. Because the jurisdiction question was dispositive, the Supreme Court did not reach the question of whether Yorek's guilty plea was a procedural bar against bringing the claim. *St. v. Yorek*, 2002 MT 74, 309 M 238, 45 P3d 872 (2002), followed in *St. v. Pettijohn*, 2002 MT 75, 309 M 244, 45 P3d 870 (2002), and *St. v. Damon*, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

*Release From Commitment Triggering Commencement of Statutory Persistent Felony Offender Period:* Montoya's initial suspended sentence for a 1984 felony burglary conviction was revoked, and he was resentenced to prison for 5 years in 1994, with 2 years of the sentence suspended with conditions. Montoya was then released from commitment in 1996. Under this section, the 5-year period began to run in 1996, and a subsequent 1998 felony conviction was well within the time limit of the statute, so the sentencing court did not err in designating Montoya a persistent felony offender. *St. v. Montoya*, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999), following *St. v. Graves*, 241 M 533, 788 P2d 311, 47 St. Rep. 483 (1990), clarifying *St. v. Smith*, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988), and followed in *St. v. Bales*, 1999 MT 334, 297 M 402, 994 P2d 17, 56 St. Rep. 1334 (1999), and *St. v. Charlie*, 2010 MT 195, 357 Mont. 355, 239 P.3d 934.

*Unconstitutionality of Prior Conviction Not Proved:* LaPier's attorney asked LaPier's parole officer, Riley, if anything in Riley's investigative report indicated that in a police court trial, LaPier had waived his right to a jury trial. Riley indicated that nothing in his report showed a waiver. LaPier argued on appeal that he could not be found a persistent felony offender because the police court conviction was constitutionally infirm. The Supreme Court upheld LaPier's conviction, stating that there is a presumption of the regularity of court proceedings and LaPier had offered no direct evidence that he had been denied his right to a jury trial. *St. v. LaPier*, 1998 MT 174, 289 M 392, 961 P2d 1274, 55 St. Rep. 707 (1998). See also *St. v. Perry*, 283 M 34, 938 P2d 1325 (1997).

*Notice of Intent to Seek Increased Punishment Not Filed With Court Until After Trial -- No Error in Persistent Felony Offender Designation:* The state timely served defense counsel with notice of its intent to seek increased punishment for McQuiston as a persistent felony offender but did not file the notice with the court until after trial was concluded, 5 months before sentencing. McQuiston contended that timely filing of the notice was a jurisdictional prerequisite and that failure to so do constituted reversible error. However, the state's notice to defense counsel 5 months before trial and to the court 5 months before sentencing did not prejudice McQuiston, and the persistent felony offender designation was not made in error. *St. v. McQuiston*, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

*Definitional Requirements of Persistent Felony Offender Met -- Enhanced Sentence Proper:* Sentence enhancement was proper upon a showing that defendant was: (1) previously convicted of mitigated deliberate homicide on February 19, 1980; (2) paroled on that offense on October 9, 1985; and (3) convicted of two counts of burglary, one count of theft, and one count of attempt on March 29, 1989. The definitional requirements of this section having been met, an additional 10-year consecutive sentence was proper. *St. v. Graves*, 241 M 533, 788 P2d 311, 47 St. Rep. 483 (1990), followed in *St. v. Montoya*, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999), and *St. v. Charlie*, 2010 MT 195, 357 Mont. 355, 239 P.3d 934.

*Proof of Constitutionality of Prior Conviction Not Required:* While a constitutionally infirm conviction cannot be used to support a determination of persistent felony offender (see *St. v. Lewis*, *supra*), the state is not required to prove that a prior conviction offered for purposes of the persistent felony offender

determination is constitutionally valid. *St. v. Farnsworth*, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989). See also *St. v. Okland*, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997), and *St. v. Ailport*, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

*Probation Not "Commitment" -- Enhanced Sentence Reversed:* The trial court relied on subsection (2)(b) of this section in enhancing defendant's sentence because the present offense occurred less than 5 years after defendant's probation from a prior suspended sentence. The state contended that probation constituted commitment for purposes of designating defendant a persistent felony offender. The Supreme Court disagreed and voided the enhanced sentence, finding that the plain meaning of "commitment" reveals that the period of commitment begins when a defendant is handed over to law enforcement personnel for confinement and ends when the defendant is released from custody. The statutory 5-year period starts when an offender is once again free to victimize society, not at the end of a period of probation. *St. v. Smith*, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988), clarified in *St. v. Montoya*, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999).

*Defendant Persistent Felony Offender:* Defendant claimed that his prior felony conviction was invalid because the offense was committed on the Flathead Reservation, and that he was convicted in the District Court of the Fourth Judicial District, which lacked jurisdiction. The court observed that this is not the forum for determining whether the court that issued his prior conviction had jurisdiction. Defendant had a prior felony conviction for the offense of armed robbery that qualified him as a persistent felony offender. *St. v. Campbell*, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

*No Collateral Estoppel and Due Process Bars to Sentencing:* Defendant argued that collateral estoppel and due process barred his status as both a persistent felony offender and dangerous offender (see 1995 repeal of 46-18-404) because the designations served to sentence him twice for the same offense. The court found no merit to the argument. *St. v. Campbell*, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

*Time of Multiple Offenses -- No Window of Opportunity:* Defendant was charged with two felonies occurring at about the same time and had previously been convicted of a felony 5 years prior to the later charges. Defendant's attorney erroneously advised him that the state could notice him as a persistent felony offender based on the former conviction. Defendant pleaded guilty to avoid increased punishment as a persistent felony offender and later sought to withdraw the plea on grounds of coercion and ineffective assistance of counsel. The District Court denied the motion, and the Supreme Court affirmed. The courts rejected defendant's contention that the statute should be construed to ban the use of the statute since the second offense was committed prior to the conviction on the first one. "On a different occasion" does not mean "in a different time frame". Separate crimes committed at about the same time can be used to increase punishment under this statute. A defendant may not commit any number of felonies between the time he commits his first felony and his conviction therefor and be immune from designation as a persistent felony offender. There is no "window of opportunity" under 46-18-501. *St. v. Williamson*, 218 M 242, 707 P2d 530, 42 St. Rep. 1551 (1985), followed in *St. v. Hamm*, 250 M 123, 818 P2d 830, 48 St. Rep. 830 (1991).

*Deferred Imposition of Sentence Not Dismissed -- "Conviction" for Purposes of Persistent Felony Offender Status:* On appeal following conviction for criminal mischief and attempted burglary for which the defendant was sentenced as a persistent felony offender, the defendant argued that a prior conviction and deferred imposition of sentence should not have been considered a "conviction" under the persistent felony offender statutes because he successfully completed probation, even if the record of his prior conviction was not expunged or the sentence dismissed. The Supreme Court held, consistent with the rationale of *St. v. Drew*, 158 M 214, 490 P2d 230 (1971), that the case should be remanded to District Court to determine whether the prior unrevoked deferred sentence should be dismissed, and directed that if the sentence is dismissed then it should not be considered in determining whether the defendant is a persistent felony offender. *St. v. Gladue*, 209 M 235, 679 P2d 1256, 41 St. Rep. 669 (1984).

*Timing of Sentencing Required to Bring Defendant Within Operation of Statute:* Where the defendant was convicted of two counts of negligent homicide following a previous conviction for burglary within 5 years prior to the negligent homicide convictions, the District Court did not err in sentencing the defendant under the persistent felony offender statute. The defendant's contention that he is not "presently being sentenced for a second felony" until after the court has determined to sentence him to a term of imprisonment for more than 1 year is a hypertechnical construction of the statute intended to avoid the

clear intention of the Legislature. The defendant's case is covered by the legislative mandate [deleted by a 1983 amendment] that the chapter be liberally construed to the end that dangerous offenders be correctively treated in custody for long terms as needed. *St. v. Ballard*, 202 M 81, 655 P2d 986, 39 St. Rep. 2342 (1982).

*Void Conviction:* Since the prior felony conviction was void because of a denial of due process during arraignment, it was improper to sentence the defendant under the former second offense statute. *Lewis v. St.*, 153 M 460, 457 P2d 765 (1969), followed in *St. v. Okland*, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997). Okland was followed, with a different result, in *St. v. Ailport*, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).