

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

CHARLES E. BUTLER  
JUDGE

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June 5, 2014

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**Re: *State v. Mark E. Dean*  
Def. I.D. No. 01303009234**

Dear Counsel:

I am called upon here to rule on a dispute between the defendant Mark E. Dean and the State regarding certain evidence submitted post trial and concerning the appropriate sentence for Mr. Dean. The facts giving rise to this controversy are these:

Mr. Dean agrees he was sentenced by a Delaware Court in 1995 for his first offense of Driving Under the Influence of Alcohol. Mr. Dean was again convicted of Driving Under the Influence of Alcohol on January 30, 2014. Had the 2014

conviction occurred within ten years of his previous (Delaware) conviction, Mr. Dean would be facing a 60 day mandatory sentence by virtue of 21 *Del. C.* § 4177(d)(2). But because this latter offense occurred more than ten years after his previous Delaware conviction, he does not face a mandatory sentence.

Things get more complicated for Mr. Dean, however, because of a certified copy of Mr. Dean's Maryland driving record submitted by the State. The record indicates that on May 5, 1996, Mr. Dean was sentenced to a Probation Before Judgment ("PBJ") for a driving under the influence charge in Maryland. If this record is rejected by the Court (as against a complaint that it contains false or at least insufficient information) then it cannot form the basis for an enhanced penalty under Delaware law.

On the other hand, if we accept the record as factually credible, there is a further inquiry whether the PBJ under Maryland law is substantially similar to a predicate adjudication under Delaware law so as to "count" as a prior offense for the enhanced penalty provisions of 21 *Del. C.* § 4177(d)(3). Boiled down to simple terms, if the Maryland adjudication is a "conviction" for purposes of Delaware's DUI law, the recent adjudication in Delaware would constitute a third offense in his lifetime. That would trigger the 90 day mandatory sentencing provision of 21 *Del. C.* § 4177(d)(3).

We know that 21 *Del. C.* § 4177B(e)(1)(a) instructs that an out of state conviction is to be recognized as a conviction for purposes of applying the enhanced penalty provisions of Section 4177(d)(3). And we know that not only are convictions to be counted, but also other resolutions that do not result in conviction are likewise to be considered as predicate events triggering the enhanced penalty provisions.<sup>1</sup> Thus, 21 *Del. C.* § 4177B(e)(1) provides that even if the defendant was not “convicted” in the foreign jurisdiction, we should nonetheless treat the legal event as a prior conviction if it involved alcohol and death or injury<sup>2</sup> or any “conditional adjudication of guilt” that allows a defendant to receive “first offender treatment or any other diversionary program.”<sup>3</sup>

Finally, regardless of the legal nomenclature of the resolution in the foreign jurisdiction, the Code provides that if, as a result of the legal event, the defendant enrolled in a course of instruction or program of rehabilitation similar to Delaware’s mandated program for DUI offenders, then it is to be considered a conviction for purposes of enhanced sentencing in Delaware.<sup>4</sup>

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<sup>1</sup> 21 *Del. C.* § 4177B(e)(1)(b-d).

<sup>2</sup> 21 *Del. C.* § 4177B(e)(1)(b).

<sup>3</sup> 21 *Del. C.* § 4177B(e)(1)(d).

<sup>4</sup> 21 *Del. C.* § 4177B(e)(1)(c).

Defendant's attack on the State's argument is two-fold. First, he contends that the State has not shown sufficient proof of any conviction or legal event in Maryland. The State produced a certified copy of a Maryland driving record but did not produce the docket or other paperwork from the Maryland district court showing the PBJ adjudication that appears on the certified copy of the Maryland driving record. Second, the defense argues that even if the certified record from Maryland satisfies the Court that there was some legal event in Maryland, the State has not shown that this was a substantial equivalent to a Delaware predicate offense to satisfy section 4177B(e)(1).

Defendant's quantum of proof argument might have more appeal if the prior conviction was an element of the offense, thus demanding proof beyond a reasonable doubt.<sup>5</sup> But we know from *Apprendi v. New Jersey*<sup>6</sup> and *United States v. Booker*<sup>7</sup> and their many progeny that a prior conviction for enhanced sentencing purposes does not carry with it the same demand for exacting proof. Rather than the proof beyond a reasonable doubt standard, "in reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is

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<sup>5</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("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.").

<sup>6</sup> 530 U.S. 466 (2000).

<sup>7</sup> 543 U.S. 220 (2005).

clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability.”<sup>8</sup> We have been pointed to no evidence suggesting that the certified record from Maryland is false, much less demonstrably so, or lacking an indicium of reliability. Therefore, we decline to discredit the report.

Turning to the substance of the Maryland record, it reflects that Mr. Dean was assigned a PBJ as a result of his charge of Driving Under the Influence of Alcohol. Under Title 11 of the Delaware crimes code, the Court may sentence an offender to a PBJ, which is a probation term without an adjudication of guilt.<sup>9</sup> However, a PBJ is not available to Delaware DUI defendants, who instead are sometimes assigned to the First Offender’s Program (“FOP”) for their first qualifying offense. But the

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<sup>8</sup>*Mayes v. State*, 604 A.2d 839, 843 (Del. 1992). We are constrained to note that the *Mayes* holding involved a sentencing court’s consideration of other conduct charged in the indictment but to which the defendant had not pled guilty. Here, the “other conduct” was a disposition of a DUI charge in the State of Maryland that has the effect of enhancing the minimum penalty. While we see no decisions in Delaware specifically addressing the quantum of proof necessary to “find” the prior conviction, defendant here relies upon his ability to “stand mute” and has declined to join the dispute with any specific evidence that the state is incorrect. We note that even if the Delaware Supreme Court were to assign some burden of proving a prior conviction higher than “not demonstrably false,” there is a fair presumption of regularity in final judgments and placing the burden of proof on the defendant to prove some defect suffers from no constitutional infirmity. See *Parke v. Raley*, 506 U.S. 20, 31 (1992); *U.S. v. Jones*, 332 F.2d 688 (3d Cir. 2003). As defendant here offers only a general insufficiency argument in the face of the state’s submission of a certified copy of the Maryland record, he has not overcome the “presumption of regularity” with respect to the foreign adjudication. See generally *U.S. v. Gomez-Estrada*, 273 F.3d 400 (1st Cir. 2001) (defendant may not rely upon a general denial to dispute government’s evidence of prior conviction).

<sup>9</sup>*Ryan v. State*, 791 A.2d 742, 743 (Del. 2002).

character of the disposition is the same: it is a deferred adjudication available to first offenders who commit to an alcohol rehabilitation program and for whom there is no adjudication of guilt, provided they successfully complete the program. The offender is effectively discharged from the program and the case is dismissed.<sup>10</sup>

Under Maryland law, we see no diversion program designated as an FOP. Rather, section 6-220(c)(1)(iii)(1) of the Maryland Criminal Code calls for first offender treatment of DUI defendants under the designation as a PBJ with special conditions unique to a DUI case. That is, defendants receiving a deferred adjudication for a driving under the influence case in Maryland are given a PBJ but are expected to undergo a course of instruction administered by the Maryland Division of Motor Vehicles addressing alcohol and driving.<sup>11</sup>

So knowing that defendant received a PBJ in Maryland and that a Maryland PBJ is analogous to a Delaware FOP, defendant's PBJ resolution in Maryland qualifies as a prior conviction for purposes of computing prior offenses in at least two ways. First, it is a "conditional adjudication of guilt" requiring the defendant to enroll in "any other diversionary program under this section or a similar statute of

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<sup>10</sup> 21 *Del. C.* § 4177B(c).

<sup>11</sup> MD CRIM PROC § 6-220(c)(1)(iii)(1).

any state.”<sup>12</sup> Second, it required “participation in a course of instruction or program of rehabilitation or education” similar to that required of Delaware FOP offenders.<sup>13</sup>

The Court is therefore satisfied that Mr. Dean qualifies for the enhanced penalties exacted upon third offenders pursuant to 21 *Del. C.* § 4177(d)(3). The sentencing shall proceed as scheduled on Friday, June 13, 2014 at 9:30 a.m.

Sincerely,

**/s/ Charles E. Butler**

Charles E. Butler

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<sup>12</sup> 21 *Del. C.* § 4177B(e)(1)(d).

<sup>13</sup> 21 *Del. C.* § 4177B(e)(1)(c).