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Case Number 169,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 169, 2014
	)	
	)	
ANDY LABOY,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE'S REPLY BRIEF

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Dated: February 9, 2015

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STATUTES AND RULES

I. Superior Court erred in sentencing Laboy for a first offense DUI when he had two prior offenses.

Laboy does not contend that his August 27, 1999 conviction for Driving Under the Influence ("DUI") in Maryland is not, as a matter of law, a "prior offense" under 21 *Del. C.* § 4177B(e)(1). Instead, Laboy argues that: 1) the Double Jeopardy clause prohibits this Court from reversing and remanding to resentence him for a third offense DUI; 2) the State waived the arguments advanced on appeal; 3) the State advocates for a "mere probability" standard of proof of prior convictions for enhancing DUI sentences; 4) the State was required to prove his Maryland DUI conviction beyond a reasonable doubt; and 5) the State was required to prove that the Maryland statute substantially conformed with 21 *Del. C.* § 4177, and failed to do so. Each argument is meritless.

The Double Jeopardy Clause does not preclude the Court from reversing Laboy's illegal sentence

Laboy argues that his rights under the Fifth Amendment's Double Jeopardy Clause will be violated if this Court reverses Superior Court's erroneous first sentence and imposes the legally mandated sentence for a third offense DUI. (Ans. Brf. 11-13). As part of his double jeopardy argument, Laboy contends that "the State had the opportunity to raise this appeal under 10 Del. C. Section 9902(e) and not under 10 Del. C. Section 9902(f)." (Ans. Brf. 11). He is incorrect as to both the statutory basis for appeal and the broader double jeopardy analysis.

The State could not appeal Laboy's illegal sentence pursuant to 10 *Del. C.* § 9902(e) as Laboy posits. (Ans. Brf. 11). Section 9902(e) addresses cross-appeals, allowing the State to file a cross-appeal *when the defendant has appealed from a judgment of conviction.*[1] Because Laboy did not appeal, section 9902(e) is inapplicable. Section 9902(f), however, provides the State the right to appeal "any sentence on the grounds that it is unauthorized by, or contrary to, any statute or court rule."[2] Thus, the State's appeal claiming that Superior Court erred in sentencing Laboy as a first offense DUI when he has two prior DUI convictions is proper, and as prescribed by 10 *Del. C.* § 9902(f), "shall affect the rights of [Laboy]."[3]

While Laboy cites authority for the undisputed, general proposition that the Fifth Amendment to the United States Constitution protects against multiple trials and punishments for the same offense, Laboy cites no authority to support his assertion that reversing his illegal sentence and remanding for re-sentencing as a third offender would violate double jeopardy. Correcting Laboy's illegal sentence would not violate double jeopardy.

In *Bozza,* the United States Supreme Court held that double jeopardy was not violated when a trial judge recalled a defendant after he had begun serving his

[1] 10 *Del. C.* § 9902(e).

[2] 10 *Del. C.* § 9902(f).

[3] *Id.*

sentence and modified his sentence to comport with the minimum punishment required by statute.[4] The Court noted that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."[5]

In *DeFranceso*, the United States Supreme Court analyzed whether government appeals of a sentence violate either the guarantee against multiple punishment or against multiple trials when the government's appeal seeks imposition of a more serious sentence.[6] The Court held that a federal statute specifically authorizing the government to seek review of sentences imposed against dangerous special offenders, did not violate the Double Jeopardy Clause.[7] The Court stated that "the Government's taking a review of [a defendant's] sentence does not in itself offend double jeopardy principles just because its success might deprive [the defendant] of the benefit of a more lenient sentence."[8] The Court explained that "a sentence does not have the qualities of constitutional

[4] *Bozza v. United States*, 330 U.S. 160 (1947).

[5] *Id.* at 166-67.

[6] *United States v. DiFrancesco,* 449 U.S. 117, 132 (1980).

[7] *Id.*

[8] *Id.* at 132. *See also In re Bonner*, 151 U.S. 242, 260 (1894) ("The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed error in passing the sentence.") (citation omitted).

finality that attend an acquittal"[9] and concluded that "the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase."[10] The critical factor in *DiFrancesco* was that because the defendant was deemed to have knowledge of the statute specifically authorizing government appeals, he had no legitimate expectation of finality in his sentence until the appeal was concluded or the time for appeal expired.[11]

Similarly, here, Laboy is deemed to have knowledge of 10 *Del. C.* § 9902(f) that permits the State to appeal an erroneous sentence. As a result, Laboy had no legitimate expectation of finality in his sentence until this appeal concluded. Laboy argues that because he completed the improperly imposed probationary sentence during the pendency of the appeal, resentencing him to impose the sentence of incarceration mandated by 21 *Del. C.* § 4177(d)(3) violates the Double Jeopardy Clause. (Ans. Brf. 12). It does not. When he completed the probationary sentence, Laboy: 1) knew the State had sought mandatory sentencing as a third offender in Superior Court; 2) was charged with knowledge that Delaware law provides the State a right to appeal an erroneous sentence and that

[9] *DiFrancesco,* 449 U.S. at 134.

[10] *Id.* at 137.

[11] *Id.* at 137 & 139. *See also White v. State,* 576 A.2d 1322, 1326 & 1329 (Del. 1990) (analyzing *DiFrancesco* and holding that the "constitutional prohibition against double jeopardy is not implicated when a defendant charged with multiple crimes successfully appeals a conviction on double jeopardy grounds and the trial court resentences the defendant within the combined duration of the original sentences imposed.").

such an appeal, if successful, would impact his sentence; 3) knew that the State had appealed his sentence under the applicable provision; and 4) even had the benefit of the State's opening brief on appeal. Moreover, particularly here, where the course of the appeal has been delayed by Laboy,[12] it is inappropriate to consider the passage of time as rendering this appeal barred by double jeopardy. The Double Jeopardy Clause is not violated by reversing Laboy's erroneous sentence and remanding for resentencing in accordance with 21 *Del. C.* § 4177(d)(3), with credit for the probation term previously served.[13]

The State did not waive the claim that Laboy should be sentenced as a third offender

Laboy next argues that "the State waived its right to argue this issue on appeal under 10 *Del. C.* § 9902(f)." Laboy is wrong. The State's argument before

[12] The State filed its notice of appeal, with designation of record to be transcribed, on April 7, 2014 (Filing ID 55262416). The Clerk ordered the Court Reporter to file the transcript with the Prothonotary by May 21, 2014 (Filing ID 55264755), and the Court Reporter complied. (Filing ID 55473330). Despite the time limitation in Rule 9(e)(iii), Laboy waited until May 23, 2014 to designate additional portions of the record. (Filing ID 55493040). This resulted in a delay in briefing. The State timely filed its opening brief. (Filing ID 55949833). After the Court denied Laboy's motion to affirm, Laboy twice sought, and the Court granted without opposition, extensions of time to file his answering brief. (Filing IDs 56067503, 56095987, 56097027, 56338184, 56339009). Laboy then sought, and the Court granted without opposition, a stay to obtain documentation from the court below that Laboy had been discharged from probation during the intervening delay. (Filing IDs 56484985, 56490607).

[13] *See United States v. McMillen*, 917 F.2d 773, 777 (3d Cir. 1990) (rejecting appellee's claim that government's appeal violated the double jeopardy clause because he had begun serving his sentence and noting the applicability to the remand requiring imposition of a greater sentence that "the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense.") *(quoting North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969)).

the court below was that Laboy had two prior convictions for DUI, one in Maryland and one in Delaware, that required that the court sentence Laboy as a third offender. That is the same argument that the State advances on appeal. Although the State did not present to the court below the text of the 1999 Maryland DUI statute, as discussed in detail in its opening brief (Op. Brf. 7-14), the State presented documentation and argument, which together with the presentence report, should have prompted the court to sentence Laboy as a third offender. The State has been steadfast in this position. Thus, the State has not waived the issue.

The cases cited by Laboy in support of his waiver claim are inapposite. In *Montgomery v. Aventis Pharm*, 2007 WL 4577625 (Del. Super. Dec. 14, 2007), the appellant argued in the court below that the statute of limitation in 10 *Del. C.* § 8109, rather than in 10 *Del. C.* § 8106, applied to her claim, but then argued on appeal that a New Jersey statute of limitation applied to her claim. In *Equitable Trust Co. v. Gallagher*, 77 A.2d 548 (Del. 1950), this Court declined to review appellant's contract theory when the Court believed that appellant had relied only on a gift theory below. Moreover, *Equitable Trust Co.* is notable because this Court later determined it would consider the merits of the contract theory, stating "appellant did not wholly omit to make this argument in the lower court."[14] Here, the fact that the State did not provide the court below the text of the 1999

[14] *Equitable Trust Co. v. Gallagher,* 99 A.2d 490, 491 (Del. 1953), *adhered to,* 102 A.2d 538 (Del. 1954).

Maryland statute does not constitute waiver. Rather, the State has consistently and vigorously maintained that Laboy must be sentenced pursuant to section 4177(d)(3).

Superior Court improperly attempted to "cut [Laboy] a break."

Next, Laboy misunderstands the position advanced by the State where he contends that it is the State's position that "this court can lower the standard to a mere probability that an out-of-court sentence conforms to Delaware law." (Ans. Brf. 14). The court commented that it believed the Maryland DUI conviction "probably … satisfies the statute." (Op. Brf. 10 (quoting A73-74)). The State did not quote the court's language to suggest that a "probably" standard is the correct standard. Instead, the State quoted the entirety of the trial court's ruling to support its argument that the court purposefully chose to turn a blind eye to the evidence before the court. (Op. Brf. 13-14). The State argued that the "Superior Court's own comments show that its ruling was made to 'cut [Laboy] a break.'" (Op. Brf. 14 (quoting A73)). In doing so, the court imposed an illegal sentence.

The State was not required to prove Laboy's prior convictions beyond a reasonable doubt

Laboy argues that *Alleyne*[15] requires the State to prove beyond a reasonable doubt a prior conviction that enhances a DUI sentence. (Ans. Brf. 15, 18-19). Laboy cites no authority supporting his claim. This Court has held that, even in the

[15] *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

context of DUI where the prior conviction elevates the offense from a misdemeanor to a felony, *Apprendi*[16] does not require proof of the prior conviction to be proven beyond a reasonable doubt.[17] And this Court rejected the claim that *Alleyne* requires the State to prove to a jury beyond a reasonable doubt the fact of a prior conviction that subjects a convicted defendant to a minimum mandatory sentence, and instead held that the rule announced in *Apprendi* still governs proving prior convictions.[18] Therefore, Laboy's *Alleyne* claim is meritless.

The Court should decline Laboy's invitation to consider the issue under the Delaware Constitution. (Ans. Brf. 19, n.2). Laboy waived this argument both by raising the argument in a footnote[19] and by presenting the argument in a conclusory manner.[20] Moreover, this Court has held that the right to jury trial preserved in the

[16] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[17] *Talley v. State*, 2003 WL 23104202, at *2 (Del. Dec. 29, 2003).

[18] *Fountain v. State*, 2014 WL 4102069, at *2 (Del. Aug. 19, 2014) (following rule established in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) that "[o]ther 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 in *Fountain).*

[19] *Lum v. State*, 101 A.3d 970, 972 (Del. 2014) (collecting cases and citing Del. Supr. Ct. R. 14(b)(vi)(A)(3)).

[20] *See Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005) ("The proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the criteria set forth in *Jones [v. State*, 745 A.2d 856, 864-65 (Del. 1999)]," including: textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes).

Delaware Constitution does not require a jury trial to prove a prior conviction to sentence a DUI offender for a subsequent offense.[21]

Superior Court erred in sentencing Laboy as a first offense DUI.

Laboy argues that the State failed to establish that his 1999 conviction for DUI in Maryland is a "prior conviction" under 21 *Del. C.* § 4177B(e)(1).[22] Laboy argues that this Court's decisions interpreting the standard and manner of proof for proving prior offenses *under the habitual offender statute* should apply to determining whether an out-of-state conviction is based on a statute "similar" to the DUI statute. (Ans. Brf. 15-16, 19). But, this Court has specifically rejected application of the habitual offender cases to DUI.[23] There is no requirement that the State prove a prior conviction under 21 *Del. C.* § 4177B(e)(1) beyond a reasonable doubt, and there is no requirement that the out-of-state statute "substantially conform to the equivalent Delaware statute." (Ans. Brf. 15). The terms of section 4177B(e)(1) are clear – the out-of-state statute only need be "similar."[24]

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[21] *Talley,* 2003 WL 23104202, at * 2; *Mergenthaler v. State,* 239 A.2d 635, 639 (Del. 1968).

[22] Laboy does not dispute the State's argument in the opening brief that Superior Court correctly implicitly rejected his claim that his 2001 Delaware DUI conviction is a "prior conviction" under 21 *Del. C.* § 4177B(e)(1).

[23] *Stewart v. State,* 93 A.2d 923 (Del. 2007).

[24] *Id.* at 926 (approving Superior Court's rejection of the position that "the level of intoxication required by either [of two State] statutes[s] made the statutes dissimilar," and emphasizing that statutes must be similar, not identical).

Laboy argues that the "Opening Brief offers broad general assertions with no specifics from the record below." (Ans. Brf. 17). To the contrary, the State's opening brief cited to the record below, specifically:

- Laboy's admission as part of his guilty plea that he had prior DUI convictions in Delaware and Maryland (Op. Brf. 7 (citing A28, 29, 31));
- The State's "motion to sentence defendant as a third offense DUI," which attached certified copies of Laboy's two prior convictions. (Op. Brf. 8-9 (citing A47, 51-55 & 59-63));
- The presentence report that contained a certified copy of Laboy's Delaware driving record (Op. Brf. 9-10 (citing A118-19)).

From the record, the court should have concluded that Laboy was required by Delaware law to be sentenced as a third offender. Although a comparative analysis of the text of the Maryland DUI statute to the Delaware DUI statute is one way to prove that the statutes are similar,[25] it was not the only way to prove that Laboy must be sentenced as a third offender.

Here, Laboy's certified Maryland record reveals he was convicted of "Dr. While Intox., Under the Influ. Of Alcohol or D rugs or Drugs &Alcohol or Controlled Dang. Substanc," an offense "similar" to a Delaware DUI. (A51)). The Superior Court recognized this conviction and noted, "I don't think they would call it 'driving under the influence' if it was anything other than the statute that prohibits people from driving under the influence of alcohol or drugs." (A73).

[25] *See Stewart*, 930 A.2d 923.

The Maryland certified records also show that the Maryland court imposed conditions of probation that are routinely imposed for Delaware DUI offenders, including abstaining from alcohol, submitting to an alcohol and drug evaluation, and not going to places that sell alcohol. (A53). The certified copy of Laboy's Delaware driving record produced in the presentence report revealed that the Division of Motor Vehicles had treated the 1999 Maryland conviction as the equivalent of a Delaware DUI, and revoked his driver's license and required him to complete DUI rehabilitation. (A119). And, the State noted in its motion for reargument that the Superior Court had found a Maryland DUI to qualify as a prior offense. (A77 (citing *Davis v. State*, 2014 WL 1312742 (Del. Super. Feb. 28, 2014)). Moreover, the certified record of Laboy's 2001 Delaware DUI conviction reveals that the Court of Common Pleas had sentenced Laboy as a second offender (A60), necessarily rendering Laboy a third offender for the instant DUI.[26] Based on this record, Superior Court erred in denying the State's motion to sentence Laboy for a third offense DUI and in sentencing Laboy for a first offense DUI.

[26] Laboy did not appeal that ruling (A59), and Laboy did not challenge the validity of that conviction in the manner set forth in section 4177B(e)(5).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court below, and this case should be remanded for sentencing in accordance with 21 *Del. C.* § 4177(d)(3).

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Dated: February 9, 2015

CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on February 9, 2015, I have caused a copy of the State's Reply Brief to be served electronically upon the following:

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