



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAVIER AYALA,)
)
 Defendant Below,)
 Appellant,)
)
 v.) No. 103, 2018
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

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DATED: July 27, 2018

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II THE DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS AN HABITUAL OFFENDER FOR THE POSSESSION OF A FIREARM BY A PERSON PROHIBITED OFFENSE.

The Defendant contends that his prior conviction for possession of controlled substance within 300 feet of a park and two prior convictions of use of a dwelling for keeping a controlled substance should not be considered predicate felony convictions for imposing an habitual offender sentence because the three prior offenses are no longer felonies. The State acknowledges, Ans. Br. at 25, that the habitual offender statute, Section 4214(a),¹ does not expressly address this situation but contends that the Court’s prior precedents of *Watson* and *Wehde*,² and also the statutory language of Section 4215A are controlling. Ans. Br. at 25-27.

In *Watson v. State*,³ however, the Court recognized as *dicta* that the “[predicate offense] remained a felony, even though at the time of sentencing the defendant’s conduct would have constituted a misdemeanor.” *Id.* *Watson* is

1 Section 4214(a) provides for an enhanced habitual offender sentence for “any person who has been 3 times convicted of any felony under the laws of this State ... and who shall thereafter be convicted of a felony....” 11 *Del. C.* § 4214(a).

² *Wehde v. State*, 2015 Del. LEXIS 429 (Del);

³ *Watson v. State*, 892 A.2d 366, 370 (Del. 2005).

distinguishable from this case because the Defendant's prior conviction no longer remains an offense. Moreover, The Court's later analysis in *Butcher*⁴ should therefore apply because both *Butcher* and this case address the consequence of a predicate felony sentencing enhancement where the nature, effect, and consequence of the prior predicate offense has been legislatively reclassified after the commission of the predicate offense and before an enhanced sentencing for a subsequent offense was to be imposed based on the prior, predicate offense. *Wehde* summarily applies *Watson* and Section 4215A to state that even if predicate felonies for an habitual offender sentence were subsequently reclassified as misdemeanors, the status of the prior offenses at the time of conviction is controlling.⁵

In addition, the State relies on Section 4215A and the Court more recently discussed the effect of section 4215A in the *Butcher*⁶ decision, which implicated sentencing enhancements under the possession of a firearm by a person prohibited statute, 11 *Del. C.* § 1448 (e)(1), while this case implicates sentencing enhancements under the habitual offender sentencing law.⁷ As in *Butcher*, the enhanced sentence imposed on the Defendant was not imposed for

⁴ *Butcher v. State*, 171 A.3d 537, 539 (Del. 2017).

⁵ *Wehde v. State*, 2015 Del. LEXIS 429 (Del), *6-7.

⁶ *Butcher v. State*, 171 A.3d 537, 543 n. 34 (Del. 2017).

⁷ *Id.*

the commission of the original predicate offense, but was imposed for the commission of the subsequent offense which may be subject to enhancement due to the prior offense. The “savings clause”⁸ addressed by the Court in *Butcher* illustrates why the analysis in both cases is alike. If the Defendant was originally being sentenced here for the original offense of possession of a controlled substance within 300 feet of a park and had that offense been repealed after the Defendant’s commission of that offense as a result of the “Ned Carpenter Act,” *Butcher* confirms that he still would have been sentenced for the original felony offense, despite its interim repeal, because the operation of the “savings clause” addressed in *Butcher* would have then come into effect. *Butcher v. State*, 171 A.3d, at 543 n. 33 (citing *State v. Edgar*, 2016 Del. Super LEXIS 531, 2016 WL 6195980, at *3) (“It is all but axiomatic that a savings clause requires courts to apply the penalties in place at the time the crime was committed”). But the Defendant in this case, like *Butcher*, was not being sentenced for the original predicate offense and therefore the savings statute did not apply. Instead, following *Butcher*, the Defendant was being sentenced, not for the original offense, but for the subsequent enhanced offense and therefore the contemporaneous nature of the prior predicate offense at the time the subsequent offense was committed should have controlled: “[T]he better view

⁸ 11 *Del. C.* § 211.

is that a criminal penalty for recidivist punishment is not "incurred" within the meaning of Section 211 until the person commits the most recent offense for which enhanced punishment is sought." *Butcher*, 171 A.3d, at 543.

If a criminal penalty for recidivist punishment is not "incurred" until the person commits the most recent offense, it is also clear from *Butcher* that the nature of the prior predicate offense for which a defendant is currently being punished is controlling. In *Butcher*, the nature of the prior offense was that it was no longer a violent felony. In this case, the nature of the prior offense was that it was no longer a felony. Both sentences were imposed following a legislative reclassification of former felony drug offenses under the "Ned Carpenter Act," which repealed the felony possession of a controlled substance within 300 feet of a park and felony possession of a controlled substance in a dwelling offenses. 78 Del. Laws, c. 13, §§ 10, 59 (eff. Sept. 1, 2011). *Butcher* recognized that the prior offense was reclassified and no longer considered a "violent felony" or even a felony. *Butcher*, 171 A.3d, at 540.⁹ In this case, the prior offense was reclassified under the Ned Carpenter Act and no longer considered a felony under it. In either case, the enhanced sentence is not imposed on the commission of the original offense; it is a statutory re-

⁹ Actually, although no longer a felony either due to the operation of the "Ned Carpenter Act," that overarching argument did not need to be made in *Butcher*.

designation of the original felony offense as a non-felony having less onerous consequences under the Ned Carpenter Act for the purpose of enhanced sentencing for a current offense. The analysis in *Butcher* makes clear that, unlike a sentencing for the original offense, the recidivist effect of a former predicate felony offense should be considered as of the time of enhanced sentencing for the subsequent offense. The State's argument simply does not take into account the Court's more recent analysis *Butcher*, and the Superior Court should not have considered the Defendant's prior repealed offenses of possession of a controlled substance within 300 feet of a park and use of a controlled substance in a dwelling as predicate felony offenses due to the enactment of the Ned Carpenter Act which repealed those former felony offenses.

In addition, the State relies on Section 4215A¹⁰ to sustain the felony

¹⁰ (a) Notwithstanding any provision of law to the contrary, if a previous conviction for a specified offense would make the defendant liable to a punishment greater than that which may be imposed upon a person not so convicted, that previous conviction shall make the defendant liable to the greater punishment if that previous conviction was: (1) For an offense specified in the laws of this State or for an offense which is the same as, or equivalent to, such offense as the same existed and was defined under the laws of this State existing at the time of such conviction; or (2) For an offense specified in the laws of any other state, local jurisdiction, the United States, any territory of the United States, any federal or military reservation, or the District of Columbia which is the same as, or equivalent to, an offense specified in the laws of this State.

character of the since repealed offenses for the purpose of subsequent sentencing for a later committed offense. Ans. Br. at 26-31. The alleged predicate offenses were no longer sufficient, however, because, under Section 4215A, each was no longer “the same as, or equivalent to” a felony offense that is currently punishable in the controlled substances title. The previous convictions do not make the defendant “liable to the greater punishment” because the prior conviction is no longer the “same as” or “equivalent” to a current felony offense because each offense was repealed and the conduct effectively redefined as a misdemeanor. Under the language of the statute, what was previously considered a predicate offense is no longer “the same as, or equivalent to” a current felony offense, is no longer a felony offense and therefore should not qualify as a sufficient predicate currently. 11 *Del. C.* § 4215A.

Contrary to the State’s argument, the Court’s analysis in *Butcher* shows that “a criminal penalty for recidivist punishment is not "incurred" within the meaning of [the Savings Clause] until the person commits the most recent

(b) This section shall apply to any offense or sentencing provision defined in this Code unless the statute defining such offense or sentencing provision or a statute directly related thereto expressly provides that this section is not applicable to such offense or sentencing provision.

Del. C. tit. 11, § 4215A.

offense for which enhanced punishment is sought.” *Butcher*, 171 A.3d, at 543.

Under that analysis, the nature of alleged prior predicate felonies should be determined as of the time that the current offense is being punished.

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's convictions and sentences for aggravated possession of heroin and cocaine should be reversed.

Respectfully submitted,

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DATED: July 27, 2018