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Case Number 436,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYSHAUN REMBERT,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 436, 2024
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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DATED: January 14, 2025

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

NATURE AND STAGE OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT.....2

STATEMENT OF FACTS.....3

ARGUMENT

I. **THE TRIAL COURT IMPROPERLY FOUND THAT REMBERT'S TWO PRIOR CONVICTIONS FOR DRUG DEALING, AS DEFINED IN 16 Del. C. §4754 (1), CONSTITUTED PREDICATE VIOLENT FELONIES, AS DEFINED IN 11 DEL. C. §4201, WARRANTING THE ENHANCEMENT OF THE SENTENCE FOR HIS CONVICTION OF POSSESSION OF A FIREARM BY A PERSON PROHIBITED.**.....5

Conclusion.....11

September 13, 2024 Oral Denial of Rembert's Sentencing Motion.....Exhibit A

September 13, 2024 Sentence Order.....Exhibit B

TABLE OF AUTHORITIES

Cases:

Butcher v. State, 171 A.3d 537 (Del. 2017) 5, 6, 8

In re Last Will & Testament of Palecki, 920 A.2d 413 (Del. Ch. 2007) 8

Lamie v. U.S. Tr., 540 U.S. 526 (2004).....9

Ross v. State, 990 A.2d 424 (Del. 2010) 8

Snyder v. Andrews, 708 A.2d 237 (Del. 1998).....5

Sommers v. State, 2010 WL 5342953 (Del. 2010).....9

United States v. Granderson, 511 U.S. 39 (1994).....9

United States v. Taylor, 487 U.S. 326 (1988) 9

Statutes:

11 Del. C. §211 7

11 Del. C. §1448 .....5, 6

11 Del. C. §4201 .....*passim*

16 Del. C. §4754 (1).....*passim*

16 Del. C. §4754 (a).....*passim*

Other Sources:

Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 Geo. Wash. L. Rev. 857 (2017) 10

A Theory of Scrivener's Error, 52 Rutgers L. Rev. 589 (2000) 9

NATURE AND STAGE OF THE PROCEEDINGS

An information was filed charging Tyshaun Rembert with several offenses.[1] However, on March 25, 2024, all charges were severed from two "person prohibited" offenses.[2] On March 26, 2024, Rembert pled guilty to one count of Possession of a Firearm by a Person Prohibited.[3] The trial court ordered a presentence investigation report.

On May 22, 2024, defense counsel submitted a letter to the judge arguing that the two prior convictions which the State sought to rely upon for a sentence enhancement were not "violent felonies" as required.[4] An oral argument on the motion was conducted. The judge reserved decision and defense counsel submitted a supplement to his oral argument.[5] The State responded with its position.[6]

On September 13, 2024, the trial court denied defense counsel's motion and sentenced Rembert to 10 minimum-mandatory years in prison followed by probation.[7] This is his Opening Brief in support of his timely-filed appeal.

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[1] A4.
[2] A1.
[3] A18.
[4] A20.
[5] A44.
[6] A46.
[7] September 13, 2024 Oral Denial of Rembert's Sentencing Motion, Ex. A; September 13, 2024 Sentence Order, Ex.B.

SUMMARY OF THE ARGUMENT

1. Rembert's two prior convictions for drug dealing, as defined in 16 Del. C. §4754 ***(1)***, are not convictions of a violent felony warranting enhancement of the sentence for his conviction of Possession of a Firearm by a Person Prohibited because the applicable definition of violent felony, under 11 Del. C. §4201, did not designate that version of §4754 as a violent felony. Because Rembert was never convicted of §4754 ***(a)***, the version in existence at the time he committed the person prohibited offense, he did not qualify for an enhanced sentence. Even if this Court decides that the legislature enacted into law something different from what it intended, it is beyond the Court's "province to rescue [the legislature] from its drafting errors, and to provide for what [it] might think ... is the preferred result." Accordingly, Rembert's sentence must be vacated.

STATEMENT OF FACTS

On March 26, 2024, Rembert pled guilty to the offense Possession of a Firearm by a Person Prohibited, ("PFBPP"). The plea agreement and truth in sentencing forms indicate that he pled to a class C felony pursuant to 11 Del. C. §1448 (e) (1) due to two prior convictions of a violent felony.[8] However, at the plea hearing, defense counsel informed the judge that the issue of whether Rembert was actually qualified for the enhanced sentence was still in dispute.[9] He explained that he intended to research the issue and follow up with a motion if appropriate. The State did not object to that proposal.

On May 22, 2024, Rembert submitted a letter motion arguing that his two prior convictions of drug dealing upon which the State relied, did not qualify as violent felonies in this case and, thus, his sentence should not be enhanced per §1448 (e) (1).[10]

Rembert had been convicted of drug dealing as defined in §4754 ***(1)*** on April 8, 2014 and on February 16, 2017. At the time Rembert committed the PFBPP, §4754 ***(1)*** did not exist. Rather, drug dealing was defined under §4754 ***(a)***. Rembert explained that the Delaware Supreme Court holds that the offenses in existence at the time of PFBPP control whether the sentence

[8] A18.
[9] A11-12, 15-16.
[10] A20.

should be enhanced. Because §4754 ***(1)*** did not exist at the time Rembert committed the PFBPP, he was not subject to enhanced sentencing.

At sentencing, and following oral argument and subsequent filings, the judge denied Rembert's motion and concluded that Rembert was eligible for the enhanced sentencing.[11] However, the judge made it clear that "if [he] did not feel constrained by the minimum mandatory requirements, [he] would not have sentenced him to 10 years." [12] The judge went on to state, "I don't like what I have to do—what I think I have to do here today."[13] His opinion was based on his review of "Rembert's circumstances, the circumstances of this charge and the record."[14]

In the end, the court sentenced Rembert to 10 minimum-mandatory years in prison followed by probation.[15]

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[11] A83-87.
[12] A85.
[13] A87.
[14] A87.
[15] A91-92.

I. THE TRIAL COURT IMPROPERLY FOUND THAT REMBERT'S TWO PRIOR CONVICTIONS FOR DRUG DEALING, AS DEFINED IN 16 Del. C. §4754 (1), CONSTITUTED PREDICATE VIOLENT FELONIES, AS DEFINED IN 11 DEL. C. §4201, WARRANTING THE ENHANCEMENT OF THE SENTENCE FOR HIS CONVICTION OF POSSESSION OF A FIREARM BY A PERSON PROHIBITED.

Question Presented

Whether Rembert's two prior convictions for drug dealing, as defined in 16 Del. C. §4754 ***(1)***, are convictions of a violent felony warranting the enhancement of the sentence under 11 Del. C. §1448 (3) (1) when §4754 ***(1)*** did not exist at the time he committed PFBPP.[16]

Standard of Review

"Whether a prior conviction constitutes a predicate violent felony under Section 1448 (e) (1) is a question of law, which this Court reviews *de novo*."[17] Further, this Court "review[s] statutory construction issues *de novo* to determine if the Superior Court erred as a matter of law in formulating or applying legal precepts."[18]

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[16] A20, 23.

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

[18] *Id.* (quoting *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998)).

Argument

Rembert pled guilty to the offense of Possession of a Firearm by a Person Prohibited, (PFBPP).[19] Generally, PFBPP is a class D felony which, upon conviction, carries a sentencing range of 0-8 years in prison and a presumptive sentence of up to 12 months at level 2 or level 3 probation. However, pursuant to 11 Del. C. §1448 (e) (1) (c), if the defendant was "convicted on 2 or more separate occasions of any violent felony," PFBPP is elevated to a class C felony and a mandatory-minimum sentence of "[t]en years at Level V" must be imposed. Section 1448 (e) (3) defines a "violent felony" as "any felony so designated by § 4201(c) of this title [.]"[20]

On February 16, 2023, the date of the offense in this case, § 4201(c) designated drug dealing pursuant to 16 Del. C. § 4754 ***(1)*** as a violent felony. However, at that time, 16 Del. C. § 4754 ***(1)*** did not exist. Rather, drug dealing was defined at that time by 16 Del. C. § 4754 ***(a)***. Nonetheless, the State sought to enhance Rembert's penalty to ten years based upon two prior convictions of drug dealing under 16 Del. C. § 4754 ***(1)*** - one from April 8, 2014, and another from February 16, 2017- arguing they were convictions of a violent felony. Defense counsel argued that because the applicable version

[19] A18-19.
[20] *Butcher*, 171 A.3d at 538. A20, 46, 84.

of § 4201 referred to a non-existent § 4754 ***(1)*** and did not refer to a "prior" or "former" version of § 4754 ***(a)***, the court could not impose the enhanced penalty.

While the trial court characterized Rembert's argument as "creative" and made in "good faith," it concluded that because the legislature is permitted to modify the statute, pursuant to 11 Del.C. § 211, he was bound to impose the minimum-mandatory sentence. [21] This decision failed to address the soul of Rembert's argument. There is no dispute that the legislature is permitted to modify the statute. What is not permissible is for the court to engage in judicial legislation by looking beyond the plain language of the statute.

As early as September 1, 2011, § 4754 was codified as follows:

> **§ 4754. Drug dealing- Aggravated possession; class D felony.**
>
> Except as authorized by this chapter, any person who:
>
> ***(1)*** Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance;
>
> ***(2)*** Possesses a controlled substance in a Tier 3 quantity; or
>
> ***(3)*** Possesses a controlled substance in a Tier 1 quantity, and there is an aggravating factor,
>
> shall be guilty of a class D felony.

[21] A83-87, 91-92.

On December 15, 2019, §4754 was recodified as follows:

> **§ 4754. Drug dealing- Aggravated possession; class D felony.**
>
> ***(a)*** Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance;
> ***(b)*** Violation of subsection (a) of this section is a class D felony.

Meanwhile, from September 3, 2015 through July 30, 2023, § 4201 remained the same and continuously referred to § 4754 ***(1)***. But, from December 15, 2019 to well after the PFBPP offense was committed in this case, § 4754 ***(l)*** did not exist, § 4754 ***(a)*** did. So, at the time the PFBPP was committed in this case, §4201 referred to a non-existent § 4754 ***(1)***. And, as the parties and the court agreed, "the convictions that are properly used as predicates for an enhanced sentence must … be for the specific crimes *currently* listed in section 42[01](c)."[22] Because Rembert was never convicted of §4754 (a), or a non-existent current § 4754 ***(1)*** he did not qualify for an enhanced sentence.

A court must apply unambiguous "statutory language to the facts of the case before it."[23] Courts must "only refuse to give effect to a linguistically faithful reading of a clear statute in the most extreme circumstances."[24] Here, the language is not ambiguous, the relevant version of § 4201 clearly

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[22] *Butcher*, 171 A.3d at 541.
[23] *Ross v. State*, 990 A.2d 424, 428 (Del. 2010).
[24] *In re Last Will & Testament of Palecki*, 920 A.2d 413, 415 (Del. Ch. 2007).

references a non-existent § 4754 ***(1)*** rather than the existent § 4754 ***(a)*** or a prior version of § 4754 ***(a)***.[25] Thus, Rembert did not fall "within the terms of the unambiguous statutory requirement for an enhanced penalty[.]"[26]

Even if this Court decides that the legislature enacted into law something different from what it intended, it is beyond the Court's "province to rescue [the legislature] from its drafting errors, and to provide for what [it] might think ... is the preferred result."[27] This ensures that both the legislative and judicial "branches [] adhere to [their] respected, and respective, constitutional roles."[28] Thus, to the extent the inconsistency is found to be a drafting error, courts cannot correct the error. Otherwise, they improperly ignore or overwrite the plain language of the statute.[29] Here, the judge acknowledged that the legislation "is sloppy." [30] Allowing courts to correct a

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[25] A subsequent amendment to § 4201 changed reference of §4754 (1) to "[Former] 4754 (1)." It makes no reference to current §4754 (a) . Thus, the legislature had an opportunity to "correct" the statute if it felt it was necessary. Instead, it chose not to address the effect of the §4754 (a).

[26] *Sommers v. State*, 2010 WL 5342953*2 (Del. 2010).

[27] *United States v. Granderson,* 511 U.S. 39, 68 (1994) (Kennedy, J. concurring).

[28] *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004).

[29] *A Theory of Scrivener's Error*, 52 Rutgers L. Rev. 589, 601–02 (2000); *United States v. Taylor*, 487 U.S. 326, 344–46 (1988) (Scalia, J. concurring) (1988) ("It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the [statute] … which, if it becomes law, the people must obey.").

[30] A40.

drafting error encourages the legislature "to be even sloppier the next time around." [31]

It is true that had the trial judge been permitted to exercise his discretion, rather than be constrained by the minimum mandatory, he still could have imposed a significant sentence.[32] However, the judge was clear, "if I did not feel constrained by the minimum mandatory requirements, I would not have sentenced him to 10 years." [33] "I don't like what I have to do—what I think I have to do here today."[34] He went on to explain that his opinion was based on a review of "Rembert's circumstances, the circumstances of this charge and the record."[35] Thus, should the Court determine that there was a drafting error, it should not allow the statute to be overwritten in such a way as to take away the authority of the court.

Accordingly, Rembert's enhanced sentence for PFBPP must be vacated.

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[31] Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 Geo. Wash. L. Rev. 857, 908 (2017).

[32]Defense counsel and the trial court each asserted that the judge would have had the discretion to sentence Rembert to 10 years or more even if he was not subject to a mandatory sentence. However, if the two prior convictions are deemed not to be violent felonies, the PFBPP would remain a class D felony and permit a sentence of only up to 8 years.

[33] A85.

[34] A87.

[35] A87.

CONCLUSION

For the reasons and upon the authorities cited herein, Rembert's sentence must be vacated.

Respectfully submitted,

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DATED: January 14, 2025