



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LENELL T. ABBOTT,)
)
 Defendant—Below,)
 Appellant,)
)
 v.) No. 373, 2025
)
 STATE OF DELAWARE)
)
 Plaintiff—Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT’S REPLY BRIEF

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I. ABBOTT’S THREE CONVICTIONS UNDER 11 DEL. C. § 1448, FOR SIMULTANEOUSLY POSSESSING TWO FIREARMS AND AMMUNITION IN HIS HOME, ARE MULTIPLICITOUS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSITUTION.

a. **§ 1448 is ambiguous due to its history and construction alongside § 223.**

“A statute is ambiguous if it is reasonably susceptible of different conclusions or interpretations.”¹ 11 *Del. C.* § 223’s provision that a word denoting the singular “may denote the plural” must be considered alongside the legislative history. That history shows that the revision of “any” to “a” within 11 *Del. C.* § 1448 occurred during a statutory revision when clear legislative intent focused elsewhere, pursuing alignment with the relevant federal statute and a small revision to the category to prohibited persons.² The “shall” language within § 223 is not necessary for a finding of ambiguity, and the State’s focus on out-of-state jurisdictions³ without a statute analogous to § 223 and with their own distinctive legislative histories, simply sidesteps the factors creating ambiguity under Delaware law.

This Court has explained the crux of 11 *Del. C.* § 1448’s intent with reference to its predecessor statute, which “demonstrate[d] a manifest intention on the part of the General Assembly to protect the public from the actions of members of that class

¹ *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998) (internal quotations omitted).

² Op. Br. at *12–16.

³ Ans. Br. at *17–19.

of persons who, by their past conduct, have shown themselves unworthy to possess firearms.”⁴

It is neither irrational nor against public interest for a statute to prohibit the specific point at which conduct becomes a risk to public safety. Consider, for example, 21 *Del. C.* § 4177, which prohibits driving a vehicle while under the influence. Though intoxication can be established through several different forms of proof, there is no enhanced penalty or additional charge created when someone is intoxicated due to both alcohol and a drug, or when someone’s blood alcohol content multiplies upon the .08 limit, though those facts would arguably make the conduct more dangerous. Instead, like § 1448, the potential penalty is a function of relevant prior conviction history, and thus how severely an individual should be punished for creating that type of public safety risk.

In *Parker v. State*,⁵ this Court rejected arguments that contemporaneous theft of multiple small motor vehicles should not merge, noting that proportionality in punishment was achieved through aggregation of the total value of the stolen vehicles.⁶ Here, in § 1448, the statute reflects a clear legislative intent to proportionately raise penalties in relation to the characteristics of the person that is

⁴ *Ryle v. State*, 271 A.3d 1142 at *2 (Del. 2022) (Table) (citing *State v. Robinson*, 251 A.2d 552, 555 (Del. 1969)).

⁵ *Parker v. State*, 201 A.3d 1181, 1190–91 (Del. 2019).

⁶ *Parker* at 1191.

unlawfully armed, but as discussed throughout Appellant’s Briefs, the statute is ambiguous as to whether penalties should multiply on a per-firearm basis. Under these circumstances, without merger, the ambiguity multiplies a proportionate penal mechanism into a disproportionate one, without corresponding and clear legislative intent.

b. § 203 does not substantially alter the analysis of ambiguity.

Though the State cites 11 *Del. C.* § 203 as an outright bar to lenity and thus contrary to Abbott’s arguments,⁷ as applied here, the distinction is less one of substance than a labeling exercise. The legislative intent behind § 203 is best understood through the *Commentary to the Delaware Criminal Code of 1973* (hereafter “*Code Commentary*”). “In ascertaining legislative intent, courts are required to give great weight to an official commentary written by the drafters of the statute.”⁸

⁷ Ans. Br. at 25–26. It should be noted that the State’s citation of *State v. O’Dell*, 2017 WL 923461, at *6 & n.54 (Del. Super. Ct. Mar. 6, 2017), for the premise that lenity has no applicability within Title 11, follows Judge Witham’s Opinion in *O’Dell* into an inaccurate characterization of § 203’s scope. § 203 specifically cabins its applicability as a rule of construction for the “Criminal Code”, a term which has specific meaning because at its passage (in 58 Del. Laws, c. 497, § 1), the bill repealed and replaced only Part 1 of Title 11, calling the new Part 1 the “Criminal Code”. *O’Dell*, in contrast, dealt with a statute in Part 2.

⁸ *Poteat v. State*, 840 A.2d 599, 605 (2003) (citing *Stigars v. State*, 674 A.2d 477, 483 (Del. 1996)).

The *Code Commentary*, in its “COMMENTARY ON § 203”, states in part

that:

This section abolishes the rule of strict construction, formerly adhered to in criminal cases. The former rule required, for the protection of the innocent, that all penal statutes be strictly construed. While such a rule does provide some safeguard, a construction which tends to effectuate the true purposes of the law will provide an **equal safeguard**, particularly where, as here, all of the criminal law is codified and its purposes can be ascertained from the Commentary. **Moreover, substantial procedural safeguards and codified defenses are made available in this Criminal Code, and they are to be given a liberal construction. Thus the net result should not materially differ from the former strict construction requirement.** Section 203 should be read in conjunction with § 201, which sets forth the purposes of this Criminal Code. Abolition of the rule of strict construction is primarily intended to prevent hypertechnical construction of the provisions of this Criminal Code. It does not mean, of course, that new offenses can be created by court decision, or **that constitutional objections based on ambiguity or the like are eliminated.**⁹

Abbott is raising precisely the sort of constitutional objection, rooted in ambiguity, that § 203 did not intend to nullify. Because of its confusing operation in conjunction with § 223, and legislative history that shows unrelated and contradictory intentions at the time of its relevant amendment from “any” to “a”, § 1448 does not provide fair warning¹⁰ or adequately define the scope of the prohibited

⁹ *Code Commentary* at *8.

¹⁰ § 201(2).

act,¹¹ which accordingly raises concerns over whether proportionate penalties are being applied.¹²

c. *Ammunition is a lesser-included offense within § 1448 under 11 Del. C. § 206(a)(1) and § 206(b)(3).*

The State argues that *Brown v. State*¹³ should remain undisturbed due to the force of its “main point”: “that PFBPP and PABBP require proof of a fact that the other does not (firearm versus ammunition).”¹⁴ This, according to the State, shows that *Brown* “squarely addresses” the issue.¹⁵

Nonetheless, that analysis is only one facet of the statutory analysis required under 11 *Del. C.* § 206, which is Delaware’s statutory codification of double jeopardy protections, and states (in relevant part):¹⁶

§ 206. Method of prosecution when conduct constitutes more than 1 offense.

(a) When the same conduct of a defendant may establish the commission of more than 1 offense, the defendant may be prosecuted for each offense. The defendant’s liability for more than 1 offense may be considered by the jury whenever the State’s case against the defendant for each offense is established in accordance with § 301 of this title. The defendant may not, however, be convicted of more than 1 offense if:

¹¹ § 201(3).

¹² § 201(4).

¹³ *Brown v. State*, 2021 WL 2588923 (Del. June 24, 2021).

¹⁴ Ans. Br. at *29.

¹⁵ Ans. Br. at *28.

¹⁶ *Mills v. State*, 201 A.3d 1163, 1167 (Del. 2019).

(1) One offense is included in the other, as defined in subsection (b) of this section; or

(2) One offense consists only of an attempt to commit the other; or

(3) Inconsistent findings of fact are required to establish the commission of the offenses.

(b) A defendant may be convicted of an offense included in an offense charged in the indictment or information. **An offense is so included when:**

(1) It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(3) It involves the same result but differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(c) The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.

Brown did not examine the applicability of § 206(b)(3), and thus the analysis was incomplete. However, in comparing ammunition and a firearm under § 1448(a), § 206(b)(3) appears to applicably characterize the distinction. § 206(b)(3) is applicable to merger analysis, as demonstrated by *Poteat v. State*.¹⁷ Moreover, as noted *supra*, in the *Code Commentary* on § 203, a statute containing procedural

¹⁷ *Poteat* at 603–04.

safeguards such as § 206 should be understood to have a liberal construction. The *Code Commentary* on § 206 explains the distinctions among (b) at the time,¹⁸ as follows: “Paragraph (c) differs from paragraph (a) in that, although the included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the elements necessary to prove the offense. Therefore (a) would not strictly apply and (c) is needed to fill the gap.”¹⁹

The “same result” here is a breach of the legal requirement under § 1448 that a person with the particularized status of a prior felony must remain unarmed. As this Court stated in *Ryle v. State*, explaining that charges under § 1448 for a firearm or ammunition did not merge into Carrying a Concealed Deadly Weapon due to that charge’s element of concealment: “[t]he elements of PFBPP and PABPP are the ‘purchasing, owning, possessing or controlling [of] a deadly weapon or ammunition for a firearm’ by a person prohibited.”²⁰ The Delaware Superior Court’s *Pattern Criminal Jury Instructions* also treat the possession of a firearm and/or ammunition as a unified element, alongside prohibited status and a *mens rea* element that a defendant acted knowingly.²¹

¹⁸ Previously, the statute was structured as § 206(2)(a–c), but is substantially the same though it has been restructured as § 206(b)(1–3).

¹⁹ As noted *supra* in fn. 15, (a) through (c) within the quotation correspond to (b)(1) through (b)(3) in the current statute.

²⁰ *Ryle v. State*, 271 A.3d 1142 at *2 (Del. 2022) (Table) (citing § 1448).

²¹ Published at https://courts.delaware.gov/superior/pattern/pattern_criminal.aspx, at *1326-27.

§ 1448’s prohibition is a matter directed at public interest, as it is found within “Subchapter VII. Offenses Against Public Health, Order and Decency”, in Chapter 5 of Title 11 of the Delaware Code. It is obvious that, for a person with a felony conviction, possessing ammunition without an accompanying firearm is a matter of lower public risk and personal culpability than possessing a firearm itself, hence the fact that it is subject to a lower penalty and no minimum mandatory, in contrast with other sentences that are authorized under § 1448.

Nor does the State’s citation²² to the legislative history of ammunition within § 1448 point to a broad legislative desire to address categories of multiplicity within the statute. Rather, because the relevant bill was adding ammunition to § 1448, the new law defined an undefined term. The State argues that the bill was intended to “addressed the same issue with respect to ‘ammunition’”,²³ but that’s inapt; the bill did not change how the already-prohibited items were charged, but instead added to the scope of the prohibition.

d. ***There was no meaningful differentiation of time and location between counts, nor distinctions in intended purpose.***

Citing only *Williams v. State*,²⁴ the State claims, via pure conjecture,²⁵ that time and location can be meaningfully distinguished between the contraband

²² Ans. Br. at *22.

²³ Ans. Br. at *22.

²⁴ *Williams v. State*, 796 A.2d 1281, 1286 (Del. 2002).

²⁵ Ans. Br. at *27.

armaments, such that they would constitute separate possessory offenses even if merger were otherwise applicable. Yet in *Williams*, a vastly greater difference in location, compared with items all possessed within Abbott's trailer, was insufficient to defeat merger: "[r]egardless of whether the drugs were in the apartment or in the car 500 feet from the apartment, this possession represented a single instance of possession, with two hiding places for the drugs."²⁶

Like *Williams*,²⁷ Abbott's possession also demonstrated a clearly unified intent, namely for self-defense, given his fear for his safety after nearby shootings in his neighborhood. A126. Nor has the State cited any evidence proving a temporal distinction within Abbott's act of possession.²⁸ If anything, *Williams* reflects that merger is clearly supported by the record in the present case.

²⁶ *Williams* at 1287.

²⁷ *Williams* at 1287-88.

²⁸ Op. Br. at *4.

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated and reversed, remanding the case to the trial court for resentencing.

Respectfully submitted,

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