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Re: *State of Delaware v. Kimberly A. Thoroughgood*
Case No.: 0702010766

Date Submitted: January 14, 2009
Date Decided: January 21, 209

LETTER OPINION

Dear Counsel:

On November 24, 2008, defendant Kimberly A. Thoroughgood ("defendant") appeared in this court 2008 to plead to a charge of Driving Under the Influence of Alcohol (DUI) in violation of 21 *Del.C.* §4177(a). The legal issue arose before accepting the plea as to whether the plea was a second offense for purposes of sentencing. *See,* 21 *Del.C.* §4177(d). The State's position was that the charge of 21 *Del.C.* §4177(a) was a second offense DUI and therefore subject to the increased penalties set forth in 21 *Del.C.* §4177(d)(2). Defendant's counsel contends that the charge is properly charged as a first offense because it does not meet the statutory criteria for a second offense. The Court requested and received limited briefing on the legal issue from counsel.

As noted below, the Court finds that defendant's current DUI charge is properly classified under Delaware law as a "second offense" under Delaware's DUI statute for sentencing purposes.

The Facts

On July 6, 2002, defendant was charged with a violation of 21 *Del.C.* 5288(a) in New Castle County. On September 12, 2002, defendant made a First Offense election as prescribed by 21 *Del.C.* §4177B.[1] On January 21, 2007, defendant was again charged with a violation of 21 *Del.C.* §4177(a) on Rt. 52 in Greenville, Delaware, New Castle County. Defendant has not yet been convicted or plead guilty to that charge. The issue before the Court is whether defendant's second alleged violation of 21 *Del.C.* §4177(a) should be considered a "second offense" under Delaware's DUI statute and therefore subject to enhanced sentencing penalties, including, but not limited to, jail time, suspension of her driver's license, increased fines, and an increased level of probation.

The Law

> 21 *Del.C.* §4177 provides:
> (d) Whoever is convicted of a violation of subsection (a) of this section shall:
>
> > (2) For a second offense, be fined not less than $575 nor more than $2,300 and imprisoned not less than 60 days nor more than 18 months. The minimum sentence for a person sentenced under this paragraph may not be suspended.
>
> 21 *Del.C.* §4177B provides:
> (e) (1) *Prior or previous conviction or offense.* For purposes of §§2742, 4177, and 4177B of this title the provisions of §4215A of

[1] Under Delaware's First Offender Program, a person who is charged with a DUI for the first time and meets other specified conditions may elect to have further proceedings stayed and be placed on probation. Defendant completed the requirements of the program and was taken off of probation.

> Title 11 shall not be applicable but instead the following shall constitute a prior or previous conviction or offense.
> (2) *Time Limitations*. For the purpose of determining the applicability of enhanced penalties pursuant to §4177 of this title, the time limitations on use of prior or previous convictions or offenses as defined by this subsection shall be:
>
> a.) For sentencing, pursuant to §4177(d)(2) of this title, the 2nd offense must have occurred within 5 years of a prior offense.
>
> (3) *Computation of time limitations*. For the purpose of computing the periods of time set out in §2742, §4177 or §4177B of this title, the period shall run from the date of the commission of the prior or previous offense to the date of the commission of the charged offense. However, in any case in which the prior offense is defined in subparagraph (1)c. or (1)d. of this subsection, the date of the driving incident which caused the adjudication or program participation shall be the date of the prior or previous offense.

Where statutory language is clear and unambiguous, the Court must hold the statute to it's plain meaning.[2] In addition, "… a statute's unambiguous language may not be interpreted to conflict with its plain meaning." *State v. Hodges*, 2002 WL 316817185 at 3 (Utah Supr.); *People v. Gianodus*, 666 N.E.2nd 1191, 1196, 1197 (Ill., 1996).

Discussion

Delaware's DUI statute provides for enhanced penalties for repeat offenders.[3] Section 4177B(e) defines prior offenses, sets a time limit on the use of prior convictions, and outlines how to properly compute that time limit. It is undisputed that defendant's First Offense election constitutes a "prior offense" under the statute.[4] In order for her current DUI charge to be considered a second offense, it must have occurred within five years of

[2] *Matter of Estate of Smith*, 467 A.2d 1274 (Del.Ch. 1983)
[3] 21 *Del.C.* §4177(d)
[4] 21 *Del.C.* §4177B(e)(1)(c)

her prior DUI offense.[5] The issue pending before the Court is when that five year period begins, and when it ends. The statute provides that "…[f]or the purpose of computing the periods of time set out in §2742, §4177, or §4177B of this title, the period shall run from the date of the commission of the prior or previous offense to the date of the commission of the charged offense."[6] That subsection also provides that when the prior offense involved a First Offense election, "…the date of the driving incident which caused the adjudication or program participation shall be the date of the prior or previous offense."[7]

Despite this clear statutory language, Defendant's counsel asserts that the proper time period should run from the *conviction* date for the first offense to the *conviction* date for the charged offense. Applying that computation, Defendant could not be charged with the enhanced second offense penalties of §4177B(e)(2)(a), because she has not yet been convicted of the second offense, and more than five years have elapsed from the date of the first offense. The submitted memorandum of law by Defendant cites a footnote in *Stewart v. State*, 930 A.2d 923 (Del. 2007), which uses a DUI conviction from Florida as a prior offense. While defendant's counsel is correct in asserting that the court in *Stewart* used the Florida conviction date rather than the date of the offense, the Court finds that reliance on the footnote is misplaced. The issue in *Stewart* was limited to whether the Florida DUI statute was a "same or similar statute" under §4177B(e)(1)(a); not how to properly calculate the time period to determine repeat offender status under 21 *Del.C.* §4177(d).

[5] 21 *Del.C.* §4177B(e)(2)(a)
[6] 21 *Del.C.* §4177B(e)(3)
[7] 21 *Del.C.* §4177B(e)(3)

The Superior Court of Delaware analyzed an argument similar to that advanced by Defendant's counsel in *State v. Grace.* In that case, the State asserted that the date of the first offense was the date of conviction, not the date of arrest. However, the court found that such a contention is contrary to the plain language of §4177B(e)(3). As the court explained, "…for purposes of computing time, one focuses on the date the offense was committed, not the date it was adjudicated. An offender commits an offense on the day that he or she does the offensive act. The language of the statute is clear."[8]

In addition, Judge Vaughn of the Superior Court in *Grace* noted in overruling the State's argument as follows

> " Here, aside from the illogicality in mixing arrests and convictions as equivalent for purposes of computing time, the fallacy of the State's argument becomes readily apparent when one reads 21 *Del.C.* §4177B(e)(3), which specifically covers computation of time. This section provides that '[f]or the purpose of computing the periods of time set out in §2742, §4177 or §4177B of this title, the period shall run from the date of the commission of the prior or previous offense to the date of the commission of the charged offense.' Thus for purposes of computing time, one focuses on the date the offense was committed, not the date it was adjudicated. An offender commits an offense on the day that he or she does the offensive act. The language of the statute is clear." (Emphasis applied).

Opinion and Order

The Court finds that the language of 21 *Del.C.* §4177B(e)(3) regarding computation of the time limit to sentence repeat offenders is clear and unambiguous. The five-year period began on July 6, 2002, when defendant was first charged with an offense of violating 21 *Del.C.* §4177(a). Because she was again charged by Information by the State with a

[8] *State v. Grace*, 2001 WL 1221661 at *1 (Del. Super.)

violation of 21 *Del.C.* §4177(a) on January 21, 2007, less than five years after her prior offense, that charge is properly a second offense for future sentencing purposes should Defendant proceed to sentencing.

The Criminal Clerk shall therefore reschedule the matter for sentencing.

IT IS SO ORDERED this 21st day of January, 2009

John K. Welch
Judge

/jb

cc: Ms. Juanette West, Scheduling Case Manager
CCP, Criminal Division