

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAFAYETTE MILLER,	§	
	§	No. 291, 2007
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	Cr. ID No. 0403022047
	§	

Submitted: September 28, 2007

Decided: January 9, 2008

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 9<sup>th</sup> day of January 2008, upon consideration of the parties' briefs and the Superior Court record, it appears to the Court that:

(1) The appellant, Lafayette Miller, filed this appeal from the Superior Court's May 24, 2007 denial of his "motion for correction of illegal sentence" pursuant to Superior Court Criminal Rule 35(a) ("Rule 35(a)"). After careful consideration of the parties' briefs we conclude that the judgment of the Superior Court should be affirmed.

(2) In 2004, Miller was charged and convicted of, among other offenses, two counts of Possession of a Deadly Weapon by a Person Prohibited

(“PDWBPP”).<sup>1</sup> The Superior Court sentenced Miller to a total of six years in prison, *i.e.*, three years mandatory minimum for each count, pursuant to title 11, section 1448(e) of the Delaware Code.<sup>2</sup>

(3) In April 2007, Miller filed a motion for correction of sentence pursuant to Rule 35(a).<sup>3</sup> At the request of the Superior Court, the State filed a response. By order dated May 24, 2007, the Superior Court denied the motion.<sup>4</sup> This appeal followed.

(4) Miller argues on appeal that the Superior Court should have given him the opportunity to file a reply to the State’s response. Next Miller argues that the Superior Court erred when using a 1998 New Jersey drug conviction as a basis for imposing the mandatory minimum sentence under section 1448(e). Third, Miller argues that the mandatory minimum sentence was imposed retroactively in his case, in violation of the *ex post facto* clause.<sup>5</sup>

(5) Miller’s arguments are without merit. Miller is mistaken that section 1448(e) was applied retroactively. Section 1448(e)’s minimum sentencing

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<sup>1</sup> Del. Code Ann. tit. 11, § 1448 (2001 & Supp. 2006) (amended 2007).

<sup>2</sup> *Id.*

<sup>3</sup> Prior to that Miller’s convictions were affirmed on direct appeal, *Miller v. State*, 2005 WL 1653713 (Del. Supr.). Miller’s appeal from the denial of postconviction relief, *State v. Miller*, 2006 WL 3404644 (Del. Super. Ct.), was dismissed as untimely, *Miller v. State*, 2007 WL 604725 (Del. Supr.).

<sup>4</sup> *State v. Miller*, 2007 WL 1651972 (Del. Super. Ct.).

<sup>5</sup> “[F]or a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment.” *DiStefano v. Watson*, 566 A.2d 1, 5 n.3 (Del. 1989) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

provisions were added to the statute in June 2003.<sup>6</sup> The conduct for which Miller was convicted and sentenced occurred in March 2004.<sup>7</sup>

(6) The Court has further concluded that the Superior Court was not required to give Miller an opportunity to file a reply to the State's response to the motion for correction of sentence. Rule 35 on its face does not provide for the filing of a reply to a response to a motion.<sup>8</sup> Miller, moreover, has not demonstrated that any reply that he would have made to the response would have altered the Superior Court's decision on the motion.<sup>9</sup>

(7) In the final analysis it is clear that Miller was properly sentenced pursuant to section 1448(e), which provides that a person who is convicted of PDWBPP within ten years of a prior violent felony is subject to a mandatory minimum sentence of three years imprisonment.<sup>10</sup> Under section 1448(e), "violent felony" is defined as any felony so designated in title 11, section 4201(c) of the Delaware Code or any offense set forth under the laws of any other state "which is the same as or equivalent to" any so designated offense.<sup>11</sup>

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<sup>6</sup> 74 Del. Laws ch. 106 (2003).

<sup>7</sup> *Miller v. State*, 2005 WL 1653713 (Del. Supr.).

<sup>8</sup> *Cf.* Del. Super. Ct. Crim. R. 61(f)(3) (providing for filing of reply to response to postconviction motion).

<sup>9</sup> *Cf. Roth v. State*, 2006 WL 1186806 (Del. Supr.) (concluding that proffered reply brief would not have changed decision on postconviction motion).

<sup>10</sup> Tit. 11, § 1448(e).

<sup>11</sup> *Id.*

(8) In this case, Miller in 1998 pled guilty in New Jersey to the offense of Possession with Intent to Distribute in the Second Degree.<sup>12</sup> New Jersey's Possession with Intent to Distribute in the Second Degree is equivalent to Delaware's offense of Possession with Intent to Distribute Cocaine,<sup>13</sup> which is designated as a violent felony under section 4201(c).<sup>14</sup> Thus, by operation of section 1448(e) and as a result of his 1998 New Jersey conviction, Miller properly was sentenced in 2004 to a mandatory minimum three years in prison for each count of PDWBPP.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>12</sup> See N.J. Stat. Ann. § 2C:35-5(a)(1), (2) (2000) (providing that person possessing a specified quantity of cocaine with an intent to distribute is guilty of a second degree crime).

<sup>13</sup> See Del. Code Ann. tit. 16, § 4751(a) (2003 & Supp. 2007) (providing that Possession with Intent to Deliver Cocaine is guilty of a class C felony).

<sup>14</sup> See Del. Code Ann. tit. 11, § 4201(c) (2007) (including Possession with Intent to Deliver Cocaine in list of crimes designated as violent felonies).