

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE**

**IN AND FOR KENT COUNTY**

STATE OF DELAWARE, )  
Appellant, )  
v. )  
LARRY COLE, )  
Defendant-below )  
Appellee. )

Case No.: 0203013705  
Cr.A. No.: 02-07-1333

Date Submitted: January 24, 2003  
Date Decided: February 14, 2003

The Honorable Valerie S. Csizmadia  
Deputy Attorney General  
Department of Justice  
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The Honorable Paul Swierzsbinski  
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**DECISION ON APPEAL**

The matter before the Court is an appeal of a decision of Justice of the Peace Court #7 dismissing a driving under the influence charge brought pursuant to 21 Del. C. §4177(a). The trial judge ruled that the proper charge should have been 21 Del. C. §6816, which deals with driving under the influence while operating an off-highway vehicle, and dismissed the case. The State of Delaware (“State”) appealed. While I agree with the trial judge that the defendant should have been charged pursuant to 21 Del. C. §6816, the case should not have been dismissed. Instead, the case should have been tried

to determine whether the defendant violated 21 Del. C. §6816. Therefore, the decision of the trial judge dismissing the driving under the influence charge is reversed and remanded for trial to determine whether the defendant violated 21 Del. C. §6816.

### **FACTS**

Larry Cole, the Defendant-Below, Appellee, (“Defendant”) was charged with driving an off-highway vehicle (“OHV”) while under the influence of alcohol (“DUI”) pursuant to 21 Del. C. §4177(a) on March 9, 2002. On June 7, 2002, that charge was dismissed by the trial judge for the reason that the Defendant should have been charged by the State for a violation of 21 Del. C. §6816 (“§6816”) instead of 21 Del. C. §4177 (“§4177”). The State filed a Notice of Appeal pursuant to 10 Del. C. §9902(a) with the Court of Common Pleas on July 8, 2002. The State contends that the trial judge’s dismissal of the §4177 charge against the Defendant was erroneous and that the existence of §6816, relating to the operation of an OHV while under the influence of intoxicating liquor or controlled substances, does not prevent the State from charging a person with a DUI pursuant to §4177 when the vehicle being operated is an OHV.

### **DISCUSSION**

#### **I. Standard of Review**

In this case, a question of law has been raised. Therefore, this Court must determine whether the trial court has erred as a matter of law. *State v. Johnson*, 1998 WL 281230, at \*2 (Del. Super.). See also *State v. Stonesifer*, 2000 WL 33662346, at \*2 (Del. Com. Pl.).

## **II. Application of Title 21 to DUI Offenses on OHVs**

Title 21 of the Delaware Code has two provisions that provide for the offense of driving an OHV under the influence. Delaware's general DUI statute is found at §4177. In pertinent part, it provides that:

“No person shall drive a vehicle:

- (1) When the person is under the influence of alcohol;
- (2) When the person is under the influence of any drug;
- (3) When the person is under the influence of a combination of alcohol and any drug;
- (4) When the person's alcohol concentration is .10 or more; or
- (5) When the person's alcohol concentration is, within four hours after the time of driving, .10 or more.”

21 Del. C. §4177(a). Pursuant to §4177(c)(4), the term “vehicle” as used in §4177(a) specifically includes OHVs.

Additionally, §6816 provides a DUI offense specific to those who are operating an OHV. It states that “[a] person shall not operate an OHV while under the influence of intoxicating liquor or controlled substances as defined in §4177 of this title.” 21 Del. C. §6816. Furthermore, the chapter of Title 21 containing this section includes another section that provides that “[s]hould any provision of this chapter conflict with other statutes, the provisions or requirements of this chapter shall apply.” 21 Del. C. §6833.

The main difference between §4177 and §6816, and the reason for the dispute on the State's appeal, is the penalty for their violation. While a person convicted of violating §4177 faces a fine, the mandatory loss of their driver's license and jail time, which is

mandatory for second and subsequent offenses, a person violating §6816 only faces a fine and the possible impoundment of their OHV for a period of thirty days.

By their language, both §4177 and §6816 appear to apply to the present fact situation. However, a statute's unambiguous language may not be interpreted to contradict its plain meaning. *State v. Hodges*, 2002 WL 31687185, at \*3 (Utah Supr.); *People v. Granados*, 666 N.E. 2d 1191, 1196 and 1197 (Ill. 1996). The plain unambiguous language of §6833 of Title 21 (“§6833”) indicates that should any provision of Chapter 68 of Title 21 conflict with any other statutes, the provisions or requirements of Chapter 68 shall apply. Since §6816 is part of Chapter 68 of Title 21, to the extent §4177 conflicts with §6816, §6816 applies and controls. Such an interpretation of Title 21 of the Delaware Code also complies with the “rudimentary principle” that the “specific [statute] governs the general [statute].” *Jett v. Dallas Independent School District*, 491 U.S. 701, 738 (1989). Section 6816 is a more specific statute than §4177. While §6816 is concerned solely with the operation of OHVs while under the influence, §4177 is applicable to a wider variety of DUI violations and types of vehicles.

The State attempts to avoid such an interpretation of Title 21 of the Delaware Code by contending that §6816 was repealed by implication when §4177 was enacted in 1978, recodifying Delaware's general DUI law and adding OHVs back into its coverage. Prior to 1977, the offense of driving under the influence for individuals driving an OHV fell within the general DUI statute located in Title 21, which was the predecessor to Delaware's current §4177. In 1977, the Delaware General Assembly passed legislation establishing Chapter 68 of Title 21, which expressly exempted the coverage of OHVs from the general DUI law, and created §6816. See 61 Del. Laws, c.142 §6. This legislation was signed into

law by the Governor on July 14, 1977, and became effective on January 1, 1978.

Approximately six months later, the Delaware General Assembly recodified Delaware's general DUI law as §4177 and specifically added off-highway vehicles to the recodified statute. See 61 Del. Laws, c.474 §2. This recodification of the general DUI law was signed by the Governor and became effective on July 11, 1978.

As a general rule, the repeal of statutes by implication is not favored by Delaware courts. *Christiana Hospital v. Fettori*, 714 A.2d 754, 757 (Del. 1998); *State v. Biddle*, 71 A.2d 273, 274 (Del. O & T 1950). A court should, where possible, adopt a construction of statutes that retains the viability of pre-existing law. *Silverbrook Cemetery Co. v. Board of Assessment Review of New Castle County*, 355 A.2d 908, 910 (Del. Super. 1976), *rev'd on other grounds*, 378 A.2d 619 (Del. 1977). Such a construction of statutes should be guided by the court's determination of legislative intent. See *Abrahams v. Superior Court of New Castle County*, 131 A.2d 662, 672 (Del. 1957). In terms of legislative intent, it is assumed that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter and *in the absence of any express repeal or amendment therein*, the new provision is enacted in accord with the legislative policy embodied in the previous statutes, and they are to be construed together. *Wilmington Trust Co. v. Barron*, 470 A.2d 257, 264 (Del. 1983). Thus, the presumption is that unless the two statutory provisions "cannot have a concurrent operation" or there exists "conclusive evidence of an intent to supersede it," a former act will not be held to have been repealed by a later act. *Town of Seaford v. Easter Shore Public Service Co.*, 24 A.2d 436, 442 (Del. Super. 1942). "When a subsequent act, however, contains terms and operating effects which cannot be harmonized with the terms and necessary effect of an earlier act, an implied repeal of the earlier act will

result, *since the latter act is the last expression of the legislative will.*” *State v. Biddle*, 71 A.2d at 274 (emphasis added).

The present case is distinguishable from any cases cited by the State in support of a repeal by implication in that none of the courts in those cases had a provision such as §6833 to consider. The language of §6833 has a special legal connotation. It shows an *express legislative intent* that the specific statutes to which it pertains shall control in the circumstances covered by those provisions, despite the existence of some other statute which might otherwise apply to require a different or contrary outcome. See *Souvannarath v. Hadden*, 95 Cal. App. 4<sup>th</sup> 1115, 1125 and 1126 (Cal. App. 5<sup>th</sup> Dist. 2002) (discussing the impact of the language “Notwithstanding any other provision of law”). Given this express legislative intent, any law or statute covered by such language may only be repealed by an express repeal or amendment and may not be repealed by implication. Therefore, §6816 was not repealed by implication by the 1978 enactment of §4177 and the trial judge’s conclusion that the Defendant should have been charged under §6816 instead of §4177 was correct.

### **III. The Dismissal of the Charge**

Once the trial judge had determined that §6816 was the correct statute under which the Defendant should have been charged, he dismissed the DUI charge against the Defendant. He did so in error. Pursuant to the Justice of the Peace Criminal Rules, an error in a citation or its omission is not a ground for dismissal of a charging document if the error or omission does not mislead the defendant to the defendant’s prejudice. See Justice of the Peace Criminal Rule 7(c)(2) and Justice of the Peace Criminal Rule 52. The elements alleged by the State at trial for the DUI satisfied both

§4177 and §6816. The Defendant had notice of the factual and legal basis for the charge against him regardless of the section under which it was pursued. The error in the citation did not mislead the Defendant to the Defendant's prejudice and was not grounds for dismissal. Once the trial judge had determined that §6816 contained the proper charge, the trial should have proceeded to determine whether the Defendant was guilty of that charge.

### **CONCLUSION**

While I agree with the trial judge that the correct charge for the State to bring against the Defendant for driving under the influence was 21 Del. C. §6816 rather than 21 Del. C. §4177(a), the case should not have been dismissed. Instead, the case should have been tried to determine whether the Defendant violated 21 Del. C. §6816. As such, the decision of the trial judge dismissing the charge is hereby reversed and remanded for trial to determine whether the Defendant violated 21 Del. C. §6816.

**IT IS SO ORDERED.**

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CHARLES W. WELCH  
JUDGE