

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COURT COURTHOUSE
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RE: State of Delaware v. Robert J. Williams
ID No. 1211017156

Submitted: December 20, 2013

Decided: December 31, 2013

On Defendant's "Amended Motion for Review and Modification of Sentence."

DENIED.

Dear Counsel:

Defendant Robert Williams ("Defendant") requests that the required transdermal alcohol ("TAD") monitoring portion of his Third Offense Driving Under the Influence sentence be declared unconstitutional or, alternatively, that he be discharged from probation. Because the TAD monitoring is mandated by statute and not a violation of Defendant's constitutional equal protection rights or

right to travel, his Amended Motion for Review and Modification of Sentence is **DENIED**.

I. FACTS

Defendant, a Pennsylvania resident, pled guilty to his third DUI on September 5, 2013.¹ He was sentenced to two years level 5 suspended after 99 days for supervision at level 2 or 3 (to be decided at the discretion of Probation and Parole).² Sentencing for a third DUI under 21 *Del. C.* § 4177(d) mandates at least one year at level 5 during which the first three months may not be suspended.³ Any suspended portion of the sentence after the first three months must include the following:

- a. A drug and alcohol abstinence program requiring that the offender maintain a period of not less than 90 consecutive days of sobriety as measured by a transdermal continuous alcohol monitoring device. In addition to such device, the offender shall participate in periodic, random breath or urine analysis during the entire period of supervision.
- b. An intensive inpatient or outpatient drug and alcohol treatment program for a period of not less than 3 months. Such treatment and counseling may be completed while an offender is serving a Level V or Level IV sentence.
- c. Any other terms or provisions deemed appropriate by the sentencing court or the Department of Correction.⁴

There is nothing in the statute that allows the Department of Correction or the Court to waive TAD monitoring.

Probation for out-of-state offenders is governed by the Interstate Compact for Adult Offender Supervision.⁵ The Compact states in pertinent part that “[a] receiving state that is unable to enforce a special condition imposed in the sending

¹ Def.’s Am. Mot. for Rev. and Modification of Sentence at 2.

² St.’s Response at 1.

³ 21 *Del. C.* § 4177(d)(3).

⁴ 21 *Del. C.* § 4177(d)(9).

⁵ Codified into Delaware law by 11 *Del. C.* §4358.

state shall notify the sending state of its inability to enforce a special condition at the time of request for transfer of supervision is made.”⁶

Defendant’s sentencing order states that his “[p]robation may be transferred to Pennsylvania if accepted by that State and in agreement with the probation officer.”⁷ Delaware Probation and Parole does not oppose transfer of Defendant’s probation to Pennsylvania

Pennsylvania has informed the Delaware Probation and Parole officers handling Defendant’s case that it is not able to provide TAD monitoring in compliance with the Delaware statute. Probation and Parole has advised the Court that Pennsylvania will not accept Defendant as a supervised probationer for this reason. Defendant is currently staying in a Delaware hotel “a couple of miles” south of his home in Boothwyn over the Pennsylvania state line because he is caught between Delaware’s requirement that he be TAD-monitored and Pennsylvania’s refusal to accept his transfer.⁸

II. DISCUSSION

Defendant’s Amended Motion for Review and Modification of Sentence was filed more than 90 days after his sentencing and therefore could be time barred under Superior Court Criminal Rule 35(b). However, 35(a) states that “[t]he court may correct an illegal sentence at any time.”⁹ Given the Defendant’s claim that the TAD monitoring portion of his sentence is unconstitutional, the Court will address Defendant’s motion on the merits.

When arguing the constitutionality of Defendant’s sentence and the test to be applied, both the State and Defendant cite the standard set out in *State v. Phlipot*:

Under traditional equal protection analysis, a legislative classification is presumed to be constitutional and must be sustained unless it is patently arbitrary and bears

⁶ ICAOS Rules, Rule 4.103(d), <http://www.interstatecompact.org/Legal/RulesStepbyStep/Chapter4/Rule4103.aspx> (last visited Dec. 30, 2013).

⁷ Def.’s Am. Mot. at 2.

⁸ *Id.*

⁹ Super. Ct. Crim. R. 35(a).

no rational relationship to a legitimate governmental interest. Inherently suspect classifications, which are those based on race, alienage and national origin, are subject to strict scrutiny and a heavy burden of justification. Placement in this category bars the application of the presumption of constitutionality and requires the showing of a compelling state interest to justify the law.¹⁰

This Court holds that Defendant is not an alien (as he otherwise contends) within the context *Phlipot* intended. The term “alien,” for the purposes of this case, refers to a citizen of another country as opposed to a citizen of Pennsylvania. The Uniform Commercial Driver License Act of the Delaware Code defines an “alien” as “any person not a citizen or national of the United States.”¹¹ In other places in the Code, Delaware distinguishes between “aliens” and “nonresidents.”¹² As Defendant is more properly categorized as a “nonresident” than an “alien” the Court declines to apply strict scrutiny analysis and instead will address his claim under a rational basis analysis.¹³

Defendant fails to show that the sentencing requirements in 21 *Del. C.* § 4177(d) are “patently arbitrary and bear[] no rational relationship to a legitimate governmental interest.” Delaware is not targeting out-of-state residents with harsher punishments than in-state residents. Defendant’s situation is an unfortunate side effect of Pennsylvania’s refusal to accept Defendant’s transfer. The imposition of TAD monitoring after three Driving Under the Influence convictions reflects Delaware’s legitimate interest in the protection of its citizens and their property from dangerous repeat offenders. Monitoring the alcohol intake of a person who, despite multiple convictions, continues to get behind the wheel while intoxicated is rationally related to that interest. The sentencing restrictions, while rigid, are constitutional under a rational basis analysis.

Defendant is not entitled to an “unfettered right to travel”¹⁴ to Pennsylvania while serving his probation. Defendant relies on *Maher v. Roe*¹⁵ in his argument that right to travel cases need to “pass muster under the compelling-state-interest test....” However, the passage upon which Defendant relies is from the dissent in *Maher* and is therefore not binding authority on this Court. Restrictions on a defendant’s right to travel have been held as a valid condition of probation by the

¹⁰ *State v. Phlipot*, 2010 WL 94347, at *1 (Del. Super. Jan. 6, 2010).

¹¹ 21 *Del. C.* § 2603.

¹² See 7 *Del. C.* § 515 (governing the possession of protected game or fish without a hunting, trapping, or fishing license).

¹³ The Court of Appeals for the Third Circuit, addressing a Pennsylvania probation disparity as to out-of-state sex offenders, declined to examine the level of scrutiny because additional restrictions for only out-of-state offenders failed rational basis review. *Cf. Doe v. Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 107 (3d Cir. 2008).

¹⁴ St.’s Response at 5.

¹⁵ 432 U.S. 464, 488 (1977).

Third Circuit.¹⁶ Further, the Interstate Compact for the Supervision of Adult Offenders establishes that “[t]he compacting states recognize that there is no ‘right’ of any offender to live in another state.”¹⁷ Whether the Court or the State did not oppose his transfer is irrelevant to this analysis.

III. CONCLUSION

The Interstate Compact for the Supervision of Adult Offenders prohibits the transfer of Defendant’s probation to Pennsylvania at this time because Pennsylvania is unable to provide TAD monitoring in compliance with 21 *Del. C.* § 4177(d).¹⁸ Therefore he must complete TAD monitoring in Delaware which requires temporary residence in the state for 90 days. The court understands that Probation and Parole will permit occasional visits to Pennsylvania for purposes of medical appointments and like reasons. Therefore, Defendant’s Amended Motion for Review and Modification of Sentence is **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotaary
Investigative Services

¹⁶ *Turner v. U.S.*, 347 Fed.Appx. 866, 869 (3d Cir. 2009) (quoting *United States v. Warren*, 186 F.3d 358, 366 (3d Cir. 1999)). See also *Williams v. Wisconsin*, 336 F.3d 576, 581 (7th Cir. 2003) (“[L]ike prisoners, ... parolees ... have no right to control where they live in the United States; the right to travel is extinguished for the entire balance of their sentences.”)

¹⁷ 11 *Del. C.* § 4358.

¹⁸ As this Court finds the imposition of TAD monitoring in this case constitutional, any change to the law as to out-of-state residents must come from the General Assembly.