IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	:	
	:	
v.	:	Crim. I.D. No. 0007008894
	:	
TODD E. ROGERS,	:	
	:	
Defendant.	:	

Decision Announced: September 7, 2001
Written Decision Issued: October 9, 2001

OPINION

This case concerns the application of Title 21 § 4177B(e)(2) of the Delaware Code. The statute defines "prior or previous conviction or offense" to include: "A conviction pursuant to § 4177 of this title, or a *similar statute of any state* … within the 5 years immediately preceding the date of the present offense."[1] The State contends that the Defendant's prior conviction in North Carolina for Driving While Impaired should constitute a prior conviction for sentencing purposes because it is a prior conviction from a similar statute of another state. The Defendant contends that the North Carolina statute is substantially different from 21 *Del. C.* § 4177B(e)(2) and cannot be considered a prior conviction from a similar statute of another state.

On June 4, 2001, the Defendant pleaded guilty to Driving Under the Influence in violation of 21 *Del. C.* § 4177. On October 8, 1996, the Defendant pleaded guilty to two counts of Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177. On March 17,

[1] 21 *Del. C.* § 4177B(e)(2) (emphasis added).

1999, the Defendant was convicted of Driving While Impaired in North Carolina in violation of N.C.Gen.Stat. §20-138.1.

The sole issue in this case is whether the Defendant's North Carolina conviction for Driving While Impaired constitutes a prior conviction from a similar statute of another state according to 21 *Del. C.* § 4177B(e)(2).

21 *Del. C.* § 4177B(e)(2) states:

> (e) For purposes of §§ 2742, 4177 and 4177B of this title, the following shall constitute a prior or previous conviction or offense: (2) A conviction pursuant to § 4177 of this title, *or a similar statute of any state*, local jurisdiction, any federal or military reservation or the District of Columbia, within 5 years immediately preceding the date of the present offense. (emphasis added).

21 *Del. C. §* 4177 states:

> (a) 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 4 hours after the time of driving, .10 or more.

N.C.Gen.Stat. § 20-138.1 states:

> (a) Offense. – A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
> 1) While under the influence of any impairing substance; or
> 2) After having consumed sufficient alcohol that he has, at any relevant time after driving, an alcohol concentration of 0.08 or more.

The Defendant focuses solely on the fact that the Delaware statute provides a presumption of intoxication when the person's alcohol concentration is .10 or more while the

presumptive level for North Carolina is .08. He argues that difference to be the basis for a finding that the North Carolina statute is not "similar" to Delaware's Driving Under the Influence statute. The argument fails for two reasons.

First, the Defendant has not provided any evidence as to the level of intoxication associated with his North Carolina conviction. The State tells me that the Defendant was convicted in North Carolina on March 17, 1999, of Driving While Impaired. No details are provided. It cannot be assumed that the Defendant's blood alcohol level was below .10; nor can it be assumed that he was convicted solely on the basis of a blood alcohol reading. An argument predicated on an assumption not in the record is unpersuasive.

Secondly, the North Carolina statute, like the Delaware statute, provides that the defendant can be convicted if he drives "[w]hile under the influence of any impairing substance."[2] This ground for conviction is entirely separate from the presumption of impairment associated with measured blood alcohol levels. North Carolina case law has set the standard for application of its statute:

> Under our statutes, the consumption of alcohol, standing alone, does not render a person impaired. An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired. Nor does the fact that defendant smells of alcohol by itself control. On the other hand, the State need not show that the defendant is "drunk," i.e., that his or her faculties are materially impaired. The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired.[3]

Delaware, too, provides an alternate basis for proving a violation. In Delaware it is unlawful to drive "while under the influence." That phrase has been defined by statute to mean "that the person is, because of alcohol or drugs or a combination of both, less able than the

person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle."[4] The evidence typically relied upon to prove impairment is: the manner in which the vehicle is operated; the driver's physical appearance and actions; whether the driver smells of alcohol; and the driver's performance on field sobriety tests.[5]

In comparing a statute for the purpose of determining whether it is pursuant to a similar statute, it is the prohibited behavior that must be similar, not the evidentiary standards by which the act is proven.[6] The issue is whether the elements of North Carolina statute if proven in Delaware would justify a conviction for driving under the influence.[7]

The word *similar* means, "nearly corresponding; resembling in many respects; having a general likeness, although allowing for some degree of difference."[8]

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[2] N.C.Gen.Stat. § 20-138.1.
[3] *State v. Harrington,* 78 N.C.App. 39, 45, 336 S.E.2d 853, 855 (1985).
[4] 21 *Del. C.* § 4177(c)(5).
[5] *Darst v. State,* Del. Super., Nos. 99-07-3322-1-AP, 9907008478, 2001 WL 312456, at *3, Toliver, J. (March 26, 2001).
[6] *State v. Whewell,* Ct. Comm. Pl., Cr.A. No. 85-11-0178, Trader, J. (September 11, 1986) at 2 (citing *State v. Geyer,* 355 N.W.2d 460, 461 (Minn. Ct. App. 1984)).
[7] *Id.* at 2 (citing *Anderson v. State,* 305 N.W.2d 786 (Minn. Ct. App. 1981)).
[8] *Black's Law Dictionary* 1383 (6th ed. 1990) (emphasis added).

I conclude that the North Carolina statute is similar to the Delaware statute and, therefore, meets the enhanced penalty requirements of 21 *Del. C.* § 4177B(e)(2).

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Allison L. Peters, Esquire, Deputy Attorney General
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