

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE, )  
 ) IK00-11-0158  
 5. )  
 )  
 VELVET GRACE, )  
 (ID. No. 0001017271) )  
 )  
 Defendant. )

*Submitted: April 24, 2001*

*Decided: July 27, 2001*

James Kriner, Esq., Dover, Delaware. Attorney for the State.

James E. Liguori, Esq., Dover, Delaware. Attorney for the Defendant.

*Upon Consideration of  
Defendant's Motion to Dismiss*

**GRANTED**

**VAUGHN, Resident Judge**

**ORDER**

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Upon consideration of the parties' briefs and the record of this case, it appears that:

1. The defendant has moved to dismiss the indictment on the constitutional grounds of double jeopardy and also under Rule 48(b) for unnecessary delay in presenting the charge to the grand jury. The procedural events of this case began with the defendant being arrested for DUI on January 25, 2000. She was tried and convicted in JP Court and sentenced to sixty days at Level V as a second offender. She then exercised her right to appeal to the Court of Common Pleas for a trial *de novo*. While her appeal was pending there, the State decided that she was a third DUI offender for sentencing purposes and that the charge should have been brought in this Court. It then entered a *nolle prosequi* of her appeal and on November 6, 2000 presented the DUI charge to the grand jury for indictment. For the reasons which follow, I conclude that for sentencing purposes the current offense is, in fact, a second offense, not a third offense, and that the motion to dismiss should be granted because the prosecution in this Court conflicts with the defendant's statutory right to have her appeal heard in the Court of Common Pleas.

3. In order for a person who is a third offender to be sentenced as such, the person's third offense "must have occurred within 5 years of the first offense to be calculated for sentencing."<sup>1</sup> Otherwise, a third offender is sentenced as a second offender, or, if more than five years have elapsed between the second and third

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<sup>1</sup> 21 *Del. C.* § 4177B(e)(2)b.

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offenses, a first offender.<sup>2</sup> In this case the defendant's first DUI arrest occurred on January 8, 1995. She was adjudicated guilty of Reckless Driving, Alcohol Related on June 15, 1995. On September 16, 1997 she entered the First Offender Program following her second DUI arrest. The State argues that her first "offense" occurred on June 15, 1995, citing 21 *Del. C.* § 4177B(e)(1), which provides that "[a] conviction pursuant to § 4175(b) or § 4177" or "[p]articipation in a course of instruction" shall "constitute a prior or previous ... offense." In other words, the State argues that the date of her first offense is the date of the conviction, not the date of the arrest. From this it argues that her January 25, 2000 arrest constitutes a third "offense" occurring within five years of her first "offense" (i.e. the June 15, 1995 conviction). In a different context, the Delaware Supreme Court has noted that 4177B(e) equates convictions to offenses.<sup>3</sup> However, that case did not deal with calculations of time. 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 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

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<sup>2</sup> 21 *Del. C.* § 4177(d)(1) - 4177(d)(2); 21 *Del. C.* § 4177B(e)(2)a.

<sup>3</sup> *Zimmerman v. State*, Del. Supr., 693 A.2d 311 (1997).

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offender commits an offense on the day that he or she does the offensive act. The language of the statute is clear. Therefore, the 1995 offense is not counted for sentencing purposes, since the date of the commission of that offense (January 8, 1995) is more than five years prior to the date of the commission of her current alleged offense (January 25, 2000). Therefore, the defendant is a second offender for sentencing purposes and trial of the case in the JP Court with appeal to the Court of Common Pleas is within the jurisdiction of both courts and was correct procedure.<sup>4</sup>

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<sup>4</sup> The time computation language currently at 21 *Del. C.* § 4177b(e)(3) was added to the Delaware Code by 70 *Del. Laws*, c. 62, which was approved June 12, 1995. The requirement that a third offense be within five years of the first offense for enhanced sentencing as a third offender was not added until July 17, 1997. 71 *Del. Laws*, c. 71.

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4. 21 *Del. C.* § 708(b) provides, in relevant part, that “any person convicted under this title shall have the right of appeal to the Court of Common Pleas only in those cases in which the sentence imposed was imprisonment.” Having been convicted in the JP Court and sentenced to sixty days imprisonment, the defendant has a “right of appeal to the Court of Common Pleas.” If she is convicted in the Court of Common Pleas, she also has the right to appeal that conviction, on the record, to this Court.<sup>5</sup> The attempt to prosecute her by indictment here, after she was tried, convicted and sentenced in the JP Court, conflicts with her right to have an appeal of that conviction heard in the Court of Common Pleas and destroys her right to appeal from that court to this Court if convicted there.

5. Our rules recognize that the Court can act on defenses and objections based on defects in the institution of the prosecution.<sup>6</sup> The prosecution brought here is one which adversely affects significant procedural rights of the defendant as set forth above. This impairment of the defendant’s procedural rights rises to the level of a material defect in the institution of this criminal action calling for dismissal of the indictment.<sup>7</sup>

6. Therefore, the defendant’s motion to dismiss the indictment is *granted*.

**IT IS SO ORDERED.**

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<sup>5</sup> Del. Const. art IV, § 28; 11 *Del. C.* § 5301(c).

<sup>6</sup> Super. Ct. Crim. R.12(b).

<sup>7</sup> Accordingly, it is unnecessary to address whether the indictment should be dismissed on double jeopardy grounds or under Superior Court. Criminal Rule 48(b).

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Resident Judge

oc: Prothonotary

cc: Order Distribution