

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---------------------|---|------------------------------|
| DARRELL B. STEWART, | § | |
| | § | No. 173, 2003 |
| Defendant Below, | § | |
| Appellant, | § | Court Below-Superior Court |
| | § | of the State of Delaware, in |
| v. | § | for Sussex County. |
| | § | C.A. No. IS02-10-0798W |
| STATE OF DELAWARE | § | |
| | § | |
| Plaintiff Below, | § | |
| Appellee. | § | |

Submitted: July 15, 2003
Decided: July 29, 2003

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

ORDER

This 29th day of July 2003, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. On October 28, 2002, Defendant-Appellant Darrell B. Stewart was indicted by a Sussex County grand jury on multiple counts, including driving under the influence of alcohol (DUI). The indictment pertinently reads as follows:

Andre R. Stewart,¹ on or about the eighth day of September, 2002, in the County of Sussex, State of Delaware, did operate a motor vehicle upon Bay Resort Hotel in the Town of Dewey Beach, while

¹ Andre R. Stewart was one of Darrel B. Stewart's aliases. See Sentence Order, Appellant's Opening Brief.

under the influence of alcohol, drugs, or a combination of both, in violation of Title 21, Section 4177(a) of the Delaware Code.²

2. This was Stewart's third DUI offense, to which Stewart pled guilty on February 12, 2003. On March 6, 2003, Stewart was sentenced to two years at Level V, with credit for 18 days already served, suspended after serving 90 days at Level V for 21 months at Level III. The relevant statute, 21 Del. C. § 4177 (d)(3), establishes a mandatory minimum incarceration of 90 days for a third offense DUI, and a maximum incarceration of five years.

3. On appeal to this Court, Stewart argues that this DUI conviction should be dismissed because his indictment lacks specificity. Stewart contends that because a third offense DUI carries a mandatory 90 days imprisonment, his indictment was defective because it failed to specify that he was being charged with a "third offense."

4. Stewart's argument fails for two reasons. First, his claim is procedurally barred because Stewart never objected to the defect in the indictment and, moreover, pled guilty to the third DUI charge. Under Superior Court Criminal Rules 12(b)(2) and 12(f), a defense or objection based on a defect in an indictment is waived unless it is raised before the

² Appellant's Opening Brief, p. 4.

trial.³ Moreover, this Court has held that a “voluntary and intelligent” plea agreement “waives all defects allegedly occurring before the defendant enters the plea with the exception of subject matter jurisdiction.”⁴

5. Second, even if Stewart’s claim was not waived, his argument fails on the merits. Stewart conflates the substantive elements of a crime with the factors that a court is permitted to take into account in sentencing.⁵ The required minimum 90 days incarceration for a third offense DUI is not an element of the crime charged. Rather it is a legislative determination that that crime should carry a minimum sentence. As this Court has previously held, a valid indictment only need “contain a plain statement of the essential facts constituting the offense charged,”⁶ which was done here. Moreover, the purpose of an indictment is to give a defendant notice, which occurred here: Stewart’s indictment referred him to the applicable section of the Delaware Code and set forth the offense with which he was charged.

³ Super. Ct. Crim. R. 12(b), 12(f).

⁴ *Haskins v. State*, 599 A.2d 413 (Del. 1991). *Oliver v. State*, 788 A.2d 527, 529 (Del. 2001) reiterates this point noting, “to the extent that Oliver is challenging some other defect in the indictment, his guilty plea operated as a waiver of such claim.”

⁵ See Appellee’s Answering Brief, p. 5.

⁶ *Corbin v. State*, 711 A.2d 1227, 1998 WL 188562 (Del. 1998).

6. NOW, THEREFORE, IT IS ORDERED, that the Defendant-Appellant's conviction and sentence are AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice