

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,

v.

SCOTT R. PHILLIPS,

Defendant.

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Cr.A. No. 1504021003

Submitted: February 26, 2016

Decided: April 13, 2016

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**MEMORANDUM OPINION AND ORDER
ON DEFENDANT’S MOTION
TO BE TREATED AS A FIRST TIME DUI OFFENDER**

Scott R. Phillips (“Defendant”) brings this Motion to Be Treated as a First Time DUI Offender (the “Motion”) on the basis that for sentencing purposes, and pursuant to 21 *Del. C.* § 4177B (the “Sentencing Statute”), Defendant’s New York State DWI should not be considered a prior DUI conviction. Defendant filed this Motion on December 10, 2015, the

day on which trial was scheduled. Trial was continued, and the Court ordered briefing on the matter. This is the Court's final Decision and Order on Defendant's Motion.

PROCEDURAL HISTORY

On February 4, 2014, Defendant was arrested in Schroon, New York and charged with Driving While Intoxicated pursuant to N.Y.C. VTL §1192.2 ("New York DWI Statute") and speeding. On March 4, 2014, Defendant entered a guilty plea in absentia to the lesser charge of Driving While Ability Impaired ("DWAI") pursuant to N.Y.C. VTL § 1192.1 ("DWAI Subsection"). On March 26, 2014 Defendant was sentenced on a conditional discharge as follows: pay the fines of \$700.00 and surcharges of \$353.00 within 30 days; complete a DWI victim impact panel or out of state equivalent program; and complete an alcohol/substance abuse evaluation, and complete any and all recommended treatment. The sentencing order also provides that if Defendant violates any of the conditions the Court may revoke this sentence and return him to court for resentencing.

On April 29, 2015, Patrolman Costa ("Costa") of the Delaware River and Bay Authority arrested Defendant for driving under the influence of alcohol, pursuant to 21 *Del. C.* § 4177(a)(1) and related traffic offenses. On June 30, 2015, Defendant was arraigned in this Court and pled not guilty to all charges. On December 10, 2015, the State and Defendant requested a continuance of Defendant's DUI trial in order to submit briefing on this Motion. On February 26, 2016 this matter was taken under advisement. Trial is scheduled for April 21, 2016.

PARTIES' CONTENTIONS

Defendant contends that section 4177(a)(4) – (5) of the Delaware DUI Statute and the New York DWI Statute are similar in that they both “require a BAC of 0.08%, or higher for conviction” and are both misdemeanors.¹ In contrast, Defendant argues, Defendant’s plea to a DWAI constitutes a plea to a traffic violation where there is no essential element of a BAC reading. Defendant contends that New York case law has “long held” that the elements required for a DWI and DWAI conviction are different, and that since New York State’s courts distinguish between DWI and DWAI, the State cannot, pursuant to the Delaware Statute meet its burden in establishing similarity to have defendant treated as a subsequent offender under the statute. Defendant also argues that New York’s and Delaware’s rehabilitative and educational programs are not similar for sentencing purposes.

In its answer, the State asserts three alternative contentions as to why Defendant’s DWAI conviction is a prior offense under the provisions of 21 *Del. C.* § 4177(d). The State’s primary argument is that the language in each statute, which proscribes the behavior, is plainly and demonstratively similar. Thus, the State argues, the Defendant’s DWAI conviction constitutes a prior offense for sentencing purposes under the Delaware statute.²

DISCUSSION

The provisions of 21 *Del. C.* § 4177B(e)(1)(a) and (c) define “prior or previous conviction or offense” as:

¹ Def.’s Opening Br. p. 5.

² The State presents alternative arguments; however for the purposes of this analysis, the Court will only address the merits of Defendant’s arguments in support of this Motion.

A conviction or other adjudication of guilt or delinquency pursuant to § 4175(b) or §4177 of this title, or a *similar statute of any state*;³ or participation in a course of instruction or program of rehabilitation or education pursuant to § 4175(b) of this title, § 4177 of this title or this section, *or a similar statute of any state*.⁴

In determining whether a conviction is a prior or previous conviction pursuant to a similar statute, “it is the prohibited behavior that must be similar, not the evidentiary standards by which the act is proven.”⁵ When comparing rehabilitative or educational programs, a court must examine “whether the objective of the diversionary programs” are similar.⁶ That an out-of-state statute requires a different level of intoxication to prove a DUI is not enough, on its own, to conclude that a statute is dissimilar from the Delaware DUI statute.⁷

A. The Delaware and New York DUI Statutes

The Delaware DUI Statute provides in its pertinent part, as follows:

- (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 .08% or more.⁸

³ 21 Del. C. § 4177B(e)(1)(a) (emphasis added).

⁴ 21 Del. C. § 4177B(e)(1)(c) (emphasis added).

⁵ *State v. Rogers*, 2001 WL 1398583, at *2 (Del. Super. Ct. Oct. 9, 2001).

⁶ *State v. Brown*, Del. CCP, C.A. No. 15-02-004036, at *6, Welch, J. (February 22, 2016) (pending motion for reargument).

⁷ *Stewart v. State*, 930 A.2d 923, 926 (Del. 2007).

⁸ 21 Del. C. § 4177(a).

The New York DWI Statute provides in its pertinent part, as follows:

1. Driving while ability impaired. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol
2. Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood.⁹

B. Statutory Comparison

Defendant argues that a review of the DUI statutes makes it “crystal clear” that Defendant's conviction, pursuant to the New York DWI statute, does not qualify as a prior conviction for the purposes of the Sentencing Statute because the statutes are “obviously markedly different.”¹⁰

Defendant's argument in support of the statutes' dissimilarity expressly relies upon a perceived minimum BAC prerequisite to a Delaware DUI conviction, and a lack thereof in the language of the DWAI Subsection. According to Defendant the Delaware DUI statute, “require[s] a BAC of 0.08% for a DUI conviction,”¹¹ and lacks a subsection comparable to the New York DWI statute's, DWAI subsection.¹²

Defendant's contention is not supported by a fair reading of the Delaware DUI statute. The Delaware DUI statute, subsections 4177(a)(1) – (3), provides multiple bases to convict a defendant of DUI absent any evidence of a defendant's BAC, so long as the State

⁹ N.Y. Vehicle and Traffic Law §1192 (McKinney 2009).

¹⁰ Def.'s Reply Br. p. 3.

¹¹ Def.'s Opening Br. p. 2.

¹² *Id.*

put forth credible evidence of a defendant's impairment. Likewise, the DWAI Subsection provides the prosecution with a means of obtaining a DUI conviction without providing evidence of a defendant's BAC.

In assessing statutory similarity, the Court is to avoid a comparative analysis of the statutes' requisite evidentiary standards, but instead, must analyze and compare the prohibited behavior.

Section 4177(a)(1) of the Delaware DUI statute prohibits driving when a person is "under the influence of alcohol."¹³ The Delaware DUI statute defines "under the influence" as meaning that the person is "because of alcohol . . . 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."¹⁴

The New York DWI statute's DWAI Subsection, prohibits a person's operating a motor vehicle while the person's "ability to operate such motor vehicle is impaired by the consumption of alcohol."¹⁵

Although the DWAI Subsection does not define "impaired," the behavior implicitly prohibited by that statute as compared to the Delaware DUI statute is unambiguous. Both statutes focus on behavior where one's consumption of alcohol has impaired such individual's capacity to operate a motor vehicle. Although phrased in different ways—"less able" as compared to "impaired"—the statutes, without reference to a requisite BAC,

¹³ 21 *Del. C.* § 4177(a)(1).

¹⁴ 21 *Del. C.* §4177(c)(11).

¹⁵ N.Y. Vehicle and Traffic Law §1192.1 (McKinney 2009).

expressly prohibit behavior which affects one's ability to operate a motor vehicle as a result of consumption of alcohol.

Therefore, the statutes are very similar in that they both pertain to situations where the individual is less able than the person would ordinarily have been to exercise clear judgment. Each statute has a subsection explicitly prohibiting driving a motor vehicle with a BAC above a set level, and each a subsection prohibiting driving a motor vehicle while impaired, without regard to an individual's BAC level.


Defendant argues that the states' programs of rehabilitation and education are dissimilar and thus, compel a conclusion that for sentencing purposes, Defendant's participation, pursuant to his New York conviction, in a victim impact panel does not constitute a prior conviction. This argument fails to take into account the sentencing language in the DWAI conviction which required the defendant to complete an alcohol substance abuse evaluation and recommended treatment¹⁶. Moreover, Defendant fails to address head on the programs' objectives, but instead attempts to shift the Court's focus from a comparative analysis of each programs' objectives, to the task of parsing the difference between one's being "*court-ordered* to participate in a program," and "*required* to watch a short video on drinking and driving."¹⁷ Such an analysis is too specific to meaningfully distinguish the objectives underpinning the states' educational and rehabilitative programs.

¹⁶ See attached Schroon Town Court Sentencing Order (Attachment "A")

¹⁷ Def.'s Reply Br. p. 6 (emphasis added).

Accordingly, I find that for sentencing purposes Defendant's conviction under the New York Statute would constitute a first offense, and if Defendant is convicted of the pending charge it would constitute a second offense. The Clerk shall schedule the matter for trial.

IT IS SO ORDERED.



Alex J. Smalls,
Chief Judge

Attachment A

STATE OF NEW YORK
ESSEX COUNTY

SCHROON TOWN COURT
CRIMINAL PART

PEOPLE OF THE STATE OF NEW YORK

ORDER AND CONDITIONS
OF CONDITIONAL
DISCHARGE

VS.

SCOTT R. PHILLIPS; dob: 12/19/1952, Defendant

CASE NO: 14020038

On the 26th day of March 2014, you were convicted in this Court of the following charges:

VTL 1180 OD - Speeding 85/65 VTL 1192 01 - DWAI ALCOHOL

Pursuant to Section 65.01 and 65.10 of the Penal Law, this Court places Defendant on a conditional discharge for a period of ONE YEAR from the 26th day of March 2014.

The Court imposes the following conditions on the Defendant:

A. GENERAL CONDITIONS (Section 65.10-2-a-h Penal Law)

1. Refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;
2. Work faithfully at a suitable employment or faithfully pursue a course of study or vocational training;
3. Support his/her dependants and meet other family responsibilities;
4. Make restitution of the fruits of his/her offense or make reparation for the loss or damage caused thereby.

B. SPECIAL CONDITIONS (Section 65.10-2-i Penal Law)

You will complete and alcohol/substance abuse evaluation and complete any and all recommended treatment.

You will pay fines/surcharges to the court within 30 days.

You will complete a DWI Victim Impact Panel or Out of State equivalent program.

In it's discretion, the Court may modify or enlarge the conditions. If you commit an additional offense other than a traffic infraction or violate one or more of the above conditions at any time before this conditional discharge expires, the Court may revoke this sentence and return you to court for resentencing.

Dated: 3/26/14

William A. Thibault
Judge, Justice

I have read or had read to me the above conditions imposed and I thoroughly understand the conditions imposed. I acknowledge that I have received a copy of this order and the conditions imposed on me.

Dated: _____

Defendant

Address