EFiled: May 05 2014 05:16PM EDT
Filing ID 55395565
Case Number 52,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee/ Cross Appellant,	)	Case No. 52, 2014
	)	
v.	)	
	)	
JEFFREY W. BARNES,	)	
	)	
Defendant Below,	)	
Appellant/ Cross Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

CROSS APPELLANT'S OPENING BRIEF ON CROSS APPEAL

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Elizabeth R. McFarlan (No. 3759)
Chief of Appeals
Kathryn J. Garrison (No. 4622)
Deputy Attorney General
State Office Building
820 N. French St.
Wilmington, DE 19801
(302) 577-8500

DATE: May 5, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Cases

Statutes

Other Authorities

Rules

NATURE AND STAGE OF THE PROCEEDINGS

On January 18, 2013, Jeffrey W. Barnes ("Barnes") was arrested for driving under the influence ("DUI") (21 *Del. C.* § 4177) and related charges. DI 1.[1] Barnes was charged by information on March 21, 2013 with DUI, resisting arrest, aggressive driving, U-turn on roadway interfering with traffic, improper lane change, driving across a median, wrong way on a one way, failure to obey a traffic device, failure to stop at a red light and failure to properly use a turn signal. DI 4; A6-9 (information). On May 24, 2013, Barnes pleaded guilty to a fifth offense DUI. DI 16; A10-14 (Sent. Order). The Superior Court sentenced him to five years at supervision level 5, suspended after 18 months for 18 months supervision level 3. A15-20 (Corrected Sent. Order). His sentence was designated as non-TIS, i.e., not subject to the Truth in Sentencing Act of 1989 ("TIS Act" or "Act").[2]

On December 17, 2013, the Board of Parole granted Barnes parole, releasing him after he had served just over 6 months of his sentence.[3] On December 23, 2013, the State filed an emergency motion to correct an illegal sentence. DI 23; A21-80 (State's Emergency Mot. to Correct an Illegal Sentence). The next day, the Superior Court declined to grant the State's motion, but suggested it would entertain a petition for a writ of mandamus. DI 24; A85. Therefore, that same day,

---

[1] "DI" refers to docket items in Superior Court Criminal case I.D. No. 1301013137 (A1-5).

[2] *See* 67 *Del. Laws*, ch. 130 (A109-122) (hereinafter cited as "TIS Act, § #")

[3] *State v. Del. Bd. of Parole*, 2014 WL 595870, *2 (Del. Super. Jan. 24, 2014) ("*Barnes*").

the State filed a petition for a writ of mandamus in Barnes' criminal case seeking review of the Board of Parole's decision to release Barnes on parole. DI 24.

A hearing was held on December 27, 2013, during which the court heard arguments on the State's petition. DI 26. The Court rescheduled the hearing for two weeks to allow Barnes to retain counsel. *Id.* The Office of the Public Defender entered its appearance on behalf of Barnes and requested an additional week's continuance to prepare. DI 31. The court granted the request. *Id.*

On January 6, 2014, the State filed a petition for a writ of mandamus as a separate civil action, Case No. S14M-01-002 (THG).[4] A93-97. Thereafter, Barnes filed motions to intervene in and to dismiss the State's civil mandamus petition. A92. The Superior Court held a hearing on January 24, 2014, during which it denied the State's emergency motion to correct an illegal sentence and granted, in part, the State's petition for a writ of mandamus.[5] DI 36. The Superior Court directed the Board of Parole to reverse its decision granting parole to Barnes.[6] A105. Barnes was immediately taken into custody. DI 36; A105.

On February 5, 2014, Barnes filed a timely notice of appeal of the Superior Court's January 24, 2014 decision. The State filed a notice of cross appeal as of

---

[4] Proceedings in mandamus shall begin by filing a civil complaint in Superior Court. 10 *Del. C.* § 564 Therefore, the State amended its petition and filed it instead as a civil action.

[5] *Barnes*, at *2-3.

[6] *Id.* at 3.

right under 10 *Del. C.* § 9902(e) on March 4, 2014. Then, on April 4, 2014, Barnes filed a notice of voluntary dismissal of his appeal. This is the State's Opening Brief on Cross-Appeal.[7]

[7] *See General Motors Corp. v. New Castle County*, 701 A.2d 819, 824 (Del. 1997) ("A cross-appeal rests on its own jurisdictional foundation . . . .").

SUMMARY OF THE ARGUMENT

I. The Superior Court erred as a matter of law when it found the Truth in Sentencing Act of 1989 inapplicable to DUI offenses and, on that basis, denied the State's motion to correct an illegal sentence. The General Assembly made the TIS Act applicable to all crimes committed after June 30, 1990, including those in Title 21. Provisions of Title 11 amended by the TIS Act unambiguously applied to Title 21 offenses both before and after enactment of the Act. In addition, the provisions of Title 11 regarding good time credit, parole and offense classifications and sentence ranges, which were amended by the Act, must be read *in pari materia* with provisions of other Titles that were subject to them prior to enactment of the Act. The General Assembly expressed no intention to exclude offenses outside of Titles 11 and 16 from the effect of the TIS Act's changes to the Criminal Code. Moreover, legislative enactments since passage of the TIS Act, which specifically address sections amended by the TIS Act, support the conclusion that it intended Title 21 offenses to be subject to the Act.

STATEMENT OF FACTS

On January 18, 2013, the Delaware State Police arrested Barnes for driving under the influence after they observed him driving the wrong way on Coastal Highway in Rehoboth Beach. DI 1; A6-9. Barnes pleaded guilty and was sentenced for a fifth offense DUI on May 24, 2013 pursuant to 21 *Del. C.* § 4177(d)(5) and (8).[8] As noted by the Superior Court in its decision on the State's petition for a writ of mandamus:

> Pursuant to 21 *Del. C.* § 4177(d)(8), the Court could suspend half of defendant's minimum sentence of 3 years for probation once it imposed the conditions required of 21 *Del. C.* § 4177(d)(9). Thus, the Court sentenced him to 5 years at Level 5, and suspended defendant's Level 5 sentence after 18 months at Level 5 for 18 months at Level 3 probation. Pursuant to a corrected order dated June 12, 2013, defendant was not required to report to Level 5 until June 21, 2013.[9]

Barnes' Sentence Order states that his sentence is "NON-TIS." A15. In August, 2013, Barnes filed an application to the Board of Parole for early release.[10] A75. The Board (implicitly taking the position that it had the authority to parole a defendant for Title 21 offenses because the TIS Act does not apply to Title 21) granted Barnes parole on December 17, 2013 after he had served just over six

---

[8] 21 *Del. C.* § 4177(d)(5) provides that a fifth offense DUI is a Class E felony, requiring imprisonment of not less than 3 years and not more than 5 years. The section further provides that for a fifth offense, "at least one-half of any minimum sentence shall be served at Level V and shall not be subject to any early release, furlough or reduction of any kind." 21 *Del. C.* § 4177(d)(8).

[9] *Barnes*, at *1-2.

[10] *Id.* at *2.

months of his sentence.[11] In response, the State filed an emergency motion to correct an illegal sentence, in which it argued that Barnes's sentence was subject to the Truth in Sentencing Act, and therefore, not subject to parole. A21-25.

The Superior Court declined to rule on the State's motion, noting: "My reading of it and the case law and my personal experience on SENTAC that it has not been, felony DUIs have not been considered TIS sentences. . . . The felony DUIs came into existence six years after TIS came into effect." A82-83. The court suggested instead, that it would be willing to consider a writ of mandamus. A83.

The State filed a petition for a writ of mandamus, and after argument at two hearings, the court granted the State's petition for a writ of mandamus but denied its motion to correct an illegal sentence as meritless.[12] The Superior Court held that a driving under the influence sentence is non-TIS; therefore, "the Board of Parole has authority over . . . DUI sentences and the repealed non-TIS statutes apply."[13] The court further held, however, that the Board of Parole had no discretion to grant parole to a defendant serving the mandatory portion of his sentence, because a defendant must serve the mandatory period of a sentencing

---

[11] *Barnes*, at *2.

[12] *Id.*

[13] *Id.*

statute before he could be eligible for parole.[14] Although the issue was not raised in either the State's petition for a writ of mandamus or its emergency motion to correct an illegal sentence, the court also found that Barnes' mandatory sentence could be reduced by good time credit under 11 *Del. C.* § 4381.[15]

[14] *Id.* at *3.

[15] *Id.* at *3-4.

ARGUMENT

THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THE TRUTH IN SENTENCING ACT OF 1989 INAPPLICABLE TO THE CRIME OF DRIVING UNDER THE INFLUENCE.

Question Presented

Whether the Superior Court erred as a matter of law in finding the Truth in Sentencing Act of 1989 inapplicable to driving under the influence crimes.[16] DI 36; A99-102.

Scope of Review

This court reviews statutory construction issues *de novo* "to determine if the Superior Court erred as a matter of law in formulating or applying legal precepts."[17]

Merits of the Argument

The Superior Court erred when it denied the State's motion to correct an illegal sentence. The court incorrectly found that DUI sentences are "non-TIS," and, therefore, that the Board of Parole has jurisdiction over DUI sentences. Under Superior Court Rule 35(a), the court may correct an illegal sentence at any time. A sentence is illegal if it "is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed

---

[16] *Barnes*, at *2 (Ex. A).

[17] *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998).

by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize."[18]

Barnes' May 24, 2013 sentence is illegal because Title 21 offenses are subject to the provisions of the Truth in Sentencing Act. The fact that Barnes' sentence was designated non-TIS by the sentencing court rendered it uncertain as to its substance, ambiguous with respect to the time and manner in which it was to be served and was not authorized by the judgment of conviction.[19] The TIS Act eliminated parole for all Delaware crimes.[20] Because Barnes's sentence was classified as non-TIS, the Board of Parole believed it had jurisdiction over it and that Barnes was eligible for parole after he had served one-third of his sentence.

---

[18] *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998) (citation omitted). *See also Scarponi v. United States*, 313 F.2d 950, 953 (10th Cir. 1963) ("Surely [Fed. Crim.] Rule 35 can serve no more useful purpose than to authorize the Court to clarify any ambiguity in its judgments, to the end that they shall be served strictly in accordance with their terms."); *Brittingham*, 705 A.2d at 578 (applying 10th Circuit's recitation of standard under Fed. R. Crim. P. 35 to Del. Super. Ct. Crim. R. 35).

[19] *Cf. Dennison v. State*, 2006 WL 1971789, *1 (Del. Jul. 14, 2006) (remanding because Superior Court had not imposed six-month transition period as was required under 11 *Del. C.* § 4204(l)); *United States v. Romero*, 642 F.2d 392, 395 (10th Cir. 1981) (finding sentence illegal under Fed. R. Crim. P. 35 because court did not have discretion to sentence defendants to less than ten years under statute); *United States v. Wolf*, 90 F.3d 191, 194 (7th Cir. 1996) (finding order to pay restitution to "non-victims" would be a sentence that the judgment of conviction did not authorize when statute required restitution be paid only to victims); *United States v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991) (holding restitution order encompassing losses not stemming from charges resulting in conviction was illegal sentence because it was unauthorized by the restitution statute).

[20] *See* TIS Act, §§ 3, 6 ("The provisions of this Act will take effect with respect to *all crimes* which are committed as of 12:01 a.m., June 30 1990 or thereafter.")(emphasis added).

A. The Legislative History

On July 6, 1972, the Delaware General Assembly passed the modern day manifestation of the Delaware Criminal Code, which became effective April 1, 1973.[21] The provisions of the Criminal Code apply not only to the construction of and punishment for any offenses committed after July 1, 1973 set forth in Title 11, but also to the construction of offenses defined in other statutes, "[u]nless otherwise expressly provided, or unless the context otherwise requires."[22] The Delaware Criminal Code with Commentary further explains that the Code is "expressly made applicable, where relevant, to offenses defined elsewhere in the Delaware Code."[23] The Criminal Code explicitly provides that the penalty provisions in Chapter 42 of Title 11 apply to *all* offenses found in the Delaware Code.[24]

On July 17, 1989, the General Assembly passed the Truth in Sentencing Act with the goal of providing more certainty in the length of sentences imposed on

---

[21] *See* 58 *Del. Laws*, ch. 497; *Chance v. State*, 685 A.2d 351, 355 (Del. 1996) (discussing history of the passage of the Delaware Criminal Code).

[22] 11 *Del. C.* § 103.

[23] Del. Crim. Code with Commentary, § 101. *See also* Del. Crim. Code with Commentary, § 103 ("This would, for example, make the requirement in all cases of a voluntary act or the omission to perform an act which the defendant is physically capable of performing (see § 242) applicable to the multitude of criminal offenses to be found throughout the Delaware Code.").

[24] 11 *Del. C.* § 4204(1) (1973) ("Every person convicted of an offense shall be sentenced in accordance with this Criminal Code."); Del. Crim. Code with Commentary, § 4204 ("Subsection (1) makes it clear that penalties for *all offenses* must be imposed in accordance with this Criminal Code." (emphasis added)).

defendants.[25] The preamble of the TIS Act made it clear that it took effect "with respect to *all crimes* which are committed as of 12:01 a.m., June 30, 1990 or thereafter."[26] The Act abolished parole and amended, among other things, §§ 4381-4384 of Title 11, the provisions regarding good time credit; and §§ 4201, 4202 and 4204-4207 of Title 11, the provisions regarding felony and misdemeanor classifications, authorized disposition of convicted inmates and sentence ranges for felonies, misdemeanors and violations.[27]

Specifically, the Act amended 11 *Del. C.* § 4205 to provide "[n]o sentence to Level V incarceration imposed pursuant to this Section is subject to parole."[28] The Act also added a new section 4354 in Subchapter IV (Parole) of Chapter 43 of Title 11, which provides: "No sentence imposed pursuant to the provisions of the Truth in Sentencing Act of 1989, shall be subject to parole under the provisions of this subchapter."[29] In addition, the TIS Act changed the method for calculating good time. "Good time credits on a sentence imposed after the Act are earned at a significantly lesser rate than under a sentence imposed prior to the Act."[30]

---

[25] *See* TIS Act.

[26] *Id.* at § 3.

[27] *Id.* at §§ 5 and 6.

[28] *Id.* at § 6; 11 *Del. C.* § 4205(j).

[29] TIS Act, § 7.

[30] *Snyder*, 708 A.2d at 239.

B. The Case Law.

Prior to the decision in this case, the Superior Court has twice taken the position that the TIS Act does not apply to Title 21 offenses.[31] The first case, *State v. Clyne*[32] ("*Clyne*"), held that a defendant's good time credits should be calculated under the law in existence prior to the passage of the TIS Act because the defendant's DUI conviction was not encompassed in the Act. No rationale was provided to support the *Clyne* court's determination that DUI is not encompassed by the TIS Act. In *Owens v. State*[33] ("*Owens*"), the court relied, in part, on *Clyne* in finding that a DUI sentence is a "non-TIS" sentence.[34] The problem with each of these Superior Court decisions, and the decision below, is that they are based on the *Clyne* court's unsupported assumption that DUI sentences are not subject to the TIS Act, an assumption that was never explained by the court and that is inconsistent with Delaware law.

The Supreme Court has not addressed the issue of whether Title 21 offenses are subject to the TIS Act. In *Crosby v. State*[35] this Court stated: "The General

---

[31] *See State v. Clyne*, 2002 WL 1652149 (Del. Super. July 22, 2002) *and Owens v. State*, 2010 WL 8250841 (Del. Super. Dec. 6, 2010).

[32] 2002 WL 1652149, at *2 n.6.

[33] 2010 WL 8250841, at *2.

[34] The Superior Court further noted, however, that after the passage of the July 15, 2010 amendment to 11 *Del. C.* § 4381, sentences for DUI convictions imposed after July 15, 2010 are eligible for good time credit under the TIS Act. *Id.* at *2, n.2.

[35] 824 A.2d 894, 899 (Del. 2003) (citation omitted).

Assembly has now prospectively abolished parole as a basis for early release. Pursuant to the Truth-in-Sentencing Act of 1989, a sentence of Level V incarceration for any crime committed after June 29, 1990 is no longer subject to the parole provisions. . . ." This Court also specifically noted, "the 1989 Truth-in-Sentencing Act *completely eliminated parole*. . . ."[36] In its analysis, the Court made no distinction between Title 11 and Title 16 offenses and offenses in other Titles.[37]

C. Principles of Statutory Construction Dictate that the TIS Act Applies to All Offenses.

"In construing a statute, a Court must first look to the text of the statute in its context to determine if it is ambiguous."[38] The TIS Act, by its terms, abolished parole for all crimes and clarified the application of good time to criminal sentences. A stated purpose of the TIS Act is "[t]o achieve truth in sentencing by assuring that the public, the State and the Court will know that the sentence imposed by the Court will be served by the defendant; and that, the defendant will know what the actual effect of the sentence will be."[39] The preamble to the act

---

[36] *Id.* at 900 (emphasis in original). *See also Snyder*, 708 A.2d at 245 (noting that one of the goals of the TIS Act was to ensure the public that the sentence imposed on a defendant would be served, and that, in furtherance of that goal, the Act abolished parole).

[37] *Crosby*, 824 A.2d at 899-900. *But see Kennard v. State*, 2010 WL 3769174, *2 (Del. Sept. 8, 2010) (noting that defendant's claim that TIS did not apply to Title 21 offenses might have merit, but declining to consider the claim because it had not been properly raised).

[38] *Snyder*, 708 A.2d at 241.

[39] TIS Act, §1.

unambiguously provides that it is applicable to "*all crimes* which are committed as of 12:01 a.m., June 30, 1990 or thereafter."[40] "Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls."[41]

Driving Under the Influence is a "crime" or "offense" expressly subject to the TIS Act. Title 11 sets forth the paradigm for classifying for purposes of sentencing all crimes and offenses within the Delaware Code. "Any offense defined by statute which is not specifically designated a felony, a class A misdemeanor, a class B misdemeanor or a violation shall be an unclassified misdemeanor."[42] Moreover, "[n]o offense is a violation unless expressly declared to be a violation in this Criminal Code or in the statute defining the offense."[43]

At the time of the passage of the TIS Act, DUIs were unclassified misdemeanor offenses.[44] In 1995, the General Assembly amended 21 *Del. C.* §

---

[40] *Id.* at § 3 (emphasis added).

[41] *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989).

[42] 11 *Del. C.* § 4202. *See also* 11 *Del. C.* § 4202 (1988) (A135) ("Any offense defined outside this Criminal Code which is declared by law to be a misdemeanor or a crime without specification or the classification thereof shall be an unclassified misdemeanor.").

[43] 11 *Del. C.* § 4203 (1988-2014).

[44] *See* 21 *Del. C.* § 4177 (1988) (A140) (providing penalties for DUI first and subsequent offenses); 21 *Del. C.* 4102 (1963-2009) (A139) (providing all offenses in the Title 21 to be misdemeanors, unless otherwise declared in Title 21; amended in 2009 to remove provision classifying all Title 21 offenses as misdemeanors); 11 *Del. C.* § 4202 (1988) (A135) (providing that misdemeanors outside of the Criminal Code without specification were unclassified misdemeanors).

4177 to add felony DUI offenses.[45] Although DUIs were still misdemeanor offenses in 1989, Title 21 contained a number of felony offenses, which were subject to the sentencing provisions in Chapter 42 of the Criminal Code.[46] Thus, for example, just prior to the passage of the TIS Act, the unspecified felony offense of receiving or transferring a stolen vehicle was considered a class E felony under 11 *Del. C.* § 4201 (1988) (A134), and it would have been subject to the maximum penalties for class E felony offenses in 11 *Del. C.* § 4205 (1988) (A136).[47] Misdemeanor classifications were also governed by the Criminal Code, but the sentences for the many unclassified misdemeanors located outside of Title 11 remained in "accordance with the sentence specified in the law defining the offense."[48] This interplay of the plain language of these statutes evinces the legislature's intent to apply the provisions of the TIS Act to DUI offenses.

The Truth-in-Sentencing Commission, however, has taken the position that Title 21 offenses are "not covered by Truth in Sentencing."[49] The Commission's position and the Superior Court's conclusion in this case, and in *Clyne* and *Owens*,

---

[45] 70 *Del. Laws*, ch. 62 (A123-25).

[46] *See* 21 *Del. C.* §§ 2316, 4606, 6704, 6705 and 6708-10 (1988).

[47] *See* 21 *Del. C.* § 6704 (1988) (A141) (noting receiving or transferring a stolen vehicle is a felony offense).

[48] 11 *Del. C.* § 4206(4) (1973). *See also* Del. Crim. Code with Commentary, § 4206 ("Subsection (4) is designed to retain the punishment now provided in those sections of the Code which create crimes outside this Criminal Code.").

[49] 2014 SENTAC Benchbook at 91.

that the TIS Act does not apply to Title 21 offenses creates an incongruous result,[50] along with additional administrative work for the Department of Correction.[51] There is no reason that an offender convicted of a Title 21 crime should be subject to a different sentencing scheme than one convicted of a Title 11 crime. The TIS Act, crafted to create predictable sentences,[52] clearly eradicates this dichotomy.

"If uncertainty exists, . . . rules of statutory construction are applied. To that end, the statute must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided."[53] The doctrine of *in pari materia* is a well-settled rule of statutory construction.[54] "Under this rule, related statutes must be read together rather than in isolation, particularly when there is an express reference in one statute to another statute."[55] The purpose of the doctrine of *in pari materia* "is to ascertain and carry into effect the intention of the

---

[50] *See Daniels v. State*, 538 A.2d 1104, 1109-10 (Del. 1988) ("[T]he 'golden rule' of statutory construction provides that the unreasonableness of the result produced by one among alternative interpretations of a statute is just cause for rejecting that interpretation in favor of the interpretation that would produce a reasonable result.").

[51] Prior to 2010, the Department of Corrections ("DOC") was required to calculate good time credits for crimes outside of Titles 21 and 16 differently from those within those titles. Thus, when an inmate was convicted of both Title 21 and Title 11 offenses, as the Defendant was in *Owens*, the DOC had to separate the TIS and non-TIS offenses and calculate good time credits for each.

[52] *See Snyder*, 708 A.2d at 245 (noting one purpose of the TIS Act was to create predictable sentences).

[53] *Spielberg*, 558 A.2d at 293.

[54] *Richardson v. Bd. of Cosmetology and Barbering*, 69 A.3d 353, 357 (Del. 2013).

[55] *Id. See also Dupont v. Mills*, 196 A. 168, 177 (Del. 1937) ("The rule is that all consistent statutes which can stand together, though enacted at different dates, relating to the same subject, are treated prospectively and construed together as though they constituted one act.").

Legislature, and it proceeds upon the supposition that the several statutes relating to one subject were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions."[56]

Although the only provisions specifically amended by the Act are contained in Title 11 and Title 16, many of the provisions in Title 11 that were amended, including those regarding parole, good time and sentencing, apply to all offenses. Prior to the passage of the TIS Act, the Criminal Code provisions regarding good time credit, parole and offense classifications and sentence ranges applied to all crimes, including Title 21 offenses. The parole and good time early release provisions predated the 1973 overhaul of the Criminal Code.[57] A person confined to a correctional facility was eligible for parole if he had served one-third of the term imposed by the court.[58] In addition, a person committed to the Department of Correction could be released early for good behavior.[59]

Neither form of early release was conditioned on the statute pursuant to which the defendant had been sentenced (except where a statute explicitly

---

[56] *Dupont*, 196 A.2d at 177. *See also C & T Associates, Inc. v. Gov't of New Castle County*, 408 A.2d 27, 29 (Del. Ch. 1979) ("[I]t is misleading to read 29 *Del. C.* s 6911 in a vacuum; it must be read as a part of Chapter 69, Title 29, Delaware Code since 29 *Del. C.*, Ch. 69 was enacted as an entire chapter.").

[57] *See Crosby*, 824 A.2d at 898 (noting parole and release upon merit and good behavior credits provisions were enacted in 1964); *Snyder*, 708 A.2d at 242-43 (discussing the history of good time credits in Delaware).

[58] 11 *Del. C.* § 4346 (1988) (A137).

[59] 11 *Del. C.* § 4381 (1988) (A138).

prohibited early release), but was instead dependent upon whether the defendant was incarcerated at a facility operated by the Delaware Department of Correction. Therefore, before passage of the TIS Act, a person sentenced to incarceration for offenses defined in titles other than Title 11 were also eligible for early release on parole or for good behavior under 11 *Del. C.* §§ 4346 (1988) and 4381 (1988). In fact, the Superior Court in *Clyne* applied these repealed provisions of Title 11 to a Title 21 crime.[60]

In addition, as noted above, prior to passage of the TIS Act, the sentencing classifications and maximum penalties in the Criminal Code governed all offenses found in the Delaware Code.[61] Section 4205 of Title 11 provided for maximum penalties for the various classes of felonies. 11 *Del. C.* § 4201(2) (1973) stated, "[a]ny offense defined outside this Criminal Code which is declared to be a felony without specification of the classification thereof shall be deemed a class E felony, and, notwithstanding any other provision as to punishment, such offense shall be subject to the provisions of section 4205 of this Criminal Code." The TIS Act amended Section 4201 to state, "[a]ny crime or offenses which is designated as a

[60] 2002 WL 1652149, at *2-3.

[61] *See* note 24 *supra.*

felony but which is not specifically given a class shall be a Class G Felony and shall carry the sentence provided for said class felony."[62]

None of the amendments in the TIS Act to those provisions in §§ 4381-4384 and §§ 4201, 4202 and 4204-4207 of Title 11, sections that applied to offenses outside of Title 11, state that they should no longer apply to those offenses, nor do they otherwise exclude Title 21 offenses.[63] The General Assembly expressed no intention to exclude offenses outside of Titles 11 and 16 from the effect of the TIS Act's changes to the Criminal Code.[64] To the contrary, consistent with the fact that Chapter 42 of Title 11 applies to sentences imposed for any violation of a criminal statute found anywhere within the Delaware Code, the General Assembly said that the Act applies to "all crimes" committed on or after June 30, 1990.[65] It does not logically follow that once the provisions were amended, the legislature intended that the amended provisions would no longer apply to offenses outside of Titles 11 and 16.

Moreover, the TIS Act contains "transition provisions" to address when a person is serving a non-TIS sentence and then receives a subsequent TIS

---

[62] TIS Act, § 6 (amending 11 *Del. C.* § 4201(b), which was essentially the same as § 4201(2) (1973)).

[63] *See* TIS Act, §§ 5-7.

[64] *Cf.* 11 *Del. C.* § 4204(a) ("Every person convicted of an offense shall be sentenced in accordance with this Criminal Code, *with the exception of an environmental misdemeanor as defined in § 1304 of Title 7.*" (emphasis added)).

[65] TIS Act, § 3.

sentence.[66] If the General Assembly had intended that a future sentence for Title 21 crimes would not be subject to the TIS Act, it would not have denominated the provisions as "transition." Had the General Assembly intended to exclude Title 21 offenses from application of the TIS Act, it would have been necessary to account for the order in which a future non-TIS Title 21 sentence would be served when an inmate also has a TIS sentence. Again, this shows that the General Assembly intended the TIS Act to apply to Title 21 crimes.

In addition, the Superior Court's conclusion in *Clyne* that DUI offenses were not encompassed by the TIS Act resulted in a perplexing outcome. Felony DUI offenses were not added to Title 21 until 1995, six years after passage of the TIS Act.[67] In concluding that the TIS Act did not apply to DUIs, the court revived statutes that had been repealed more than a decade earlier – Title 11 provisions – and applied them to Title 21 offenses that had not existed prior to passage of the TIS Act. The TIS Act amended Title 11 "by striking [and replacing] Sections 4381, 4382, 4383 and 4384 in their entirety. . . ."[68] The Act clearly established its prospective application: "[t]he provisions of Title 11 and Title 16, which are repealed by this Act shall remain in force and effect for the purpose of trial and

---

[66] TIS Act, § 14.

[67] 70 *Del. Laws*, ch. 62.

[68] TIS Act, § 5.

sentencing for all crimes which occur prior to 12:01 a.m., June 30, 1990."[69] The Act did not include any condition under which the stricken sections would apply prospectively to any offenses committed after June 30, 1990.

The General Assembly's enactments since passage of the TIS Act also support the conclusion that it intended Title 21 offenses to be subject to the TIS Act. Section 713 of Title 21, which was added to Title 21 in 2009,[70] provides:

> *[n]ot withstanding § 4203 of Title 11*, any criminal offense described in § 709(e)(1) to (e)(16) of this Title, shall be a violation. *The provisions of § 4207 of Title 11 notwithstanding*, the Court may impose a sentence in accordance with the sentence specified in the law defining the offenses or a law in this title specifying a sentence for the offenses, and, if no sentence is so specified, the court may impose a fine up to $575.[71]

Driving Under the Influence is "an offense described in § 709(e)(1) to (e)(16)," specifically, it is described at § 709(e)(12) of Title 21, and is thus, for a first and second offense, an unclassified misdemeanor.[72] Subsequent offenses are specifically declared to be felonies, and the level of each felony is declared within the statute,[73] in conformity with the felony classifications delineated in 11 *Del. C.* § 4201.

---

[69] *Id.* at § 4.

[70] 77 *Del. Laws*, Ch. 60, § 2 (A128).

[71] 21 *Del. C.* § 713 (emphasis added).

[72] 21 *Del. C.* § 4177(d)(1) and (2).

[73] 21 *Del. C.* § 4177(d)(3) to (7).

Additionally, in amending 21 *Del. C.* § 4177 to add felony DUI offenses, the General Assembly included reference to the TIS Act felony sentencing provisions found in Title 11.[74] 21 *Del. C.* § 4177(d) provides that minimum sentences for DUI felony convictions may only be suspended as set forth in section 4177(d), "the provisions of § 4205(b) . . . of Title 11 or any other statute to the contrary notwithstanding. . . ." Thus, the statute under which Barnes was convicted specifically contemplates that, absent a statutory exception permitting deviation, a DUI sentence is subject to the TIS Act. If the TIS Act did not apply to crimes listed under Title 21, there would have been no need specifically to exempt DUI sentencing from the requirements of § 4205(b).[75] Similarly, in other contexts, when the General Assembly intended to exclude Title 21 from the application of a Title 11 provision regarding sentencing, it has specifically excluded Title 21 in the language of the section.[76]

In addition, in 2010, the General Assembly passed a bill intended to ensure consistent application of the TIS Act good time provisions to all offenses, other

---

[74] 70 *Del. Laws*, ch. 62.

[75] *Cf. State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 561 (Del. 1988) (finding legislature would have had no need for express reference to "members of households" in subsections of statute had it intended to permit insurers to exclude them from coverage under statute).

[76] *See, e.g.*, 11 *Del. C.* § 2104(f) ("The [bail revocation] provisions of this subsection shall not apply to pleas or convictions for any felony set forth in Title 21 of this Code."); 71 *Del. Laws*, ch. 98 (A126-27) (noting in synopsis that the Act was amended to exclude motor vehicle offenses from the coverage of the bail revocation statute).

than a life sentence, regardless of "any previously imposed statutory limitations set forth in Title 11, Title 16 or Title 21."[77] Prior to the amendment, courts did not allow inmates to earn good time if the statute pursuant to which they had been sentenced prohibited early release.[78] An additional effect of the amendment, however, was that it superseded the *Clyne* court's decision, clarifying that the TIS Act good time provisions applied to Title 21 offenses.[79]

The court and SENTAC commission created exclusion of certain offenses from the TIS Act – most notably Title 21 offenses – has led to unnecessary legal confusion and the premature release of convicted felony offenders like Barnes. Although one issue was resolved regarding the calculation and application of good time credits with the passage of Senate Bill 320 in 2010, confusion still abides regarding application of other TIS Act provisions to offenses outside of Titles 11 and 16. As exemplified in this case, the Board of Parole believes it has jurisdiction over DUI offenders, and it has exercised that jurisdiction to prematurely release repeat DUI offenders in contravention of the legislative intent.

---

[77] *See* 77 *Del. Laws*, ch. 406 (amending 11 *Del. C.* § 4381) (A130).

[78] *Id.* (noting ad hoc application of good time credits dependent upon whether specific offenses prohibited them had "caused significant administrative issues to arise that are difficult to address with limited staff and [was] inconsistent with the original intent and purpose of good time credit").

[79] *See, e.g., Owens*, at *2 n.2 ("Driving under the influence convictions are now a part of Truth in Sentencing pursuant to Senate Bill 320, which became effective on July 15, 2010. However, sentences imposed before this date are not covered by Senate Bill 320.").

Although the Superior Court in its decision below found that the Board of Parole had no authority to release a DUI offender during his minimum mandatory term, it incorrectly concluded that the Board of Parole has jurisdiction over Title 21 offenders. If, for example, a court sentenced a repeat DUI offender to a term of incarceration exceeding his minimum mandatory sentence, under the Superior Court's decision, the Board of Parole could exercise its authority to release him early after he had served his minimum sentence. Recently, the General Assembly amended 21 *Del. C.* § 4177 to strengthen sentences for repeat DUI offenders.[80] Exclusion of Title 21 offenses from the TIS Act directly contravenes the legislative intent to create strong sentences for DUI offenders. Moreover, such exclusion defeats the legislature's stated intent with the passage of the TIS Act to "assur[e] that the public, the State and the Court . . . know that the sentence imposed by the Court will be served by the defendant."[81] Consequently, the Superior Court erred in denying the State's motion to correct an illegal sentence seeking removal of the non-TIS designation from Barnes's sentence.

---

[80] *See* 78 *Del. Laws*, ch. 167 (approved Aug. 3, 2011) (A131-34) (providing in synopsis, "[t]his Act strengthens criminal penalties for Driving Under the Influence.").

[81] TIS Act, § 1.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court, denying the State's motion to correct an illegal sentence, should be reversed.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Elizabeth R. McFarlan
Elizabeth R. McFarlan (No. 3759)
Chief of Appeals

/s/ Kathryn J. Garrison
Kathryn J. Garrison (No. 4622)
Deputy Attorney General

State Office Building
820 N. French St.
Wilmington, DE 19801
(302) 577-8500

DATED: May 5, 2014

EXHIBIT A

Not Reported in A.3d, 2014 WL 595870 (Del.Super.)
(Cite as: 2014 WL 595870 (Del.Super.))

Superior Court of Delaware
State of Delaware, Petitioner,
v.
Delaware Board of Parole, Respondent.
State of Delaware
v.
Jeffrey W. **Barnes**

C.A. No. S14M–01–002 THG
Def. ID# 1301013137DECIDED: January 24, 2014

Peggy J. Marshall, Esquire and Kathryn J. Garrison, Esquire, Department of Justice, 114 E. Market Street, Georgetown, DE 19947

Robert H. Robinson, Jr., Esquire, Office of the Public Defender, 14 The Circle, Georgetown, DE 19947

Ryan P. Connell, Esquire, Department of Justice, 820 N. French Street, 6th Floor, Wilmington, DE 19801

ORDER

GRAVES, J.

***1** Pending before the Court is a petition brought by the State of Delaware ("the State") seeking the issuance of a writ of mandamus to the Board of Parole directing the Board of Parole to reverse its decision to release defendant from Level 5 custody.[FN1] This is my decision regarding several issues raised by the petition.

FN1. The State's Petition seeking a Writ of Mandamus originally was filed in the criminal matter, *State of Delaware v. Jeffrey W. **Barnes***, Def. ID# 1301013137. It has since been filed as a civil action: *State of Delaware v. Delaware Board of Parole,* C.A. No. S14M–01–002. This decision will be docketed in both the criminal case and the civil case.

On May 24, 2013, defendant Jeffrey W. **Barnes** ("defendant") pled guilty to his fifth offense of driving under the influence. The Court sentenced him pursuant to 21 *Del. C.* § 4177(d)(5) and (8).[FN2] Pursuant to 21 *Del. C.* § 4177(d)(8), the Court could suspend half of defendant's minimum sentence of 3 years for probation once it imposed the conditions required of 21 *Del. C.* § 4177(d)(9).[FN3] Thus, the Court sentenced him to 5 years at Level 5, and suspended defendant's Level 5 sentence after 18 months at Level 5 for 18 months at Level 3 probation. Pursuant to a corrected order dated June 12, 2013, defendant was not required to report to Level 5 until June 21, 2013.

FN2. The applicable statutory provisions are:

> (d) Whoever is convicted of a violation of subsection (a) of this section shall:
>
> (5) For a fifth offense occurring any time after 4 prior offenses, be guilty of a class E felony, be fined not more than $10,000 and imprisoned not less than 3 years nor more than 5 years.
>
> * * *
>
> (8) For the fifth, sixth, seventh offense or greater, the provisions of § 4205(b) or § 4217 of Title 11 or any other statute to the contrary notwithstanding, at least 1/2 of any minimum sentence shall be served at

> Level V and shall not be subject to any early release, furlough or reduction of any kind. The sentencing court may suspend up to 1/2 of any minimum sentence set forth in this section provided, however, that any portion of a sentence suspended pursuant to his paragraph shall include participation in both a drug and alcohol abstinence program and a drug and alcohol treatment program as set forth in paragraph (d)(9) of this section.

FN3. 21 *Del. C.* § 4177(d)(9) provides in pertinent part:

> Any minimum sentence suspended pursuant to paragraph ... (d)(8) of this section shall be upon the condition that the offender shall complete a program of supervision which shall include:
>
> 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 provision deemed appropriate by the sentencing court or the Department of Correction.

***2** On December 17, 2013, the Board of Parole granted defendant parole. It placed him on Level 3 supervision. Defendant was released from Level 5 incarceration on or about December 18, 2013. As of that time, defendant had served not quite 6 months of his 18 months at Level 5.

The State of Delaware ("the State") filed an emergency motion to correct an illegal sentence, which is an inappropriate motion because the sentence was not illegal. That motion is denied as meritless. It then filed in the criminal matter a petition seeking a writ of mandamus directing the Board of Parole to rescind its decision releasing defendant on parole prior to his serving the 18 months required by 21 *Del. C.* § 4177(d)(5) and (8). A hearing on the matter was scheduled for December 27, 2013. Prior to that hearing, the Board of Parole reviewed its decision and conceded the State's position.

Defendant appeared at the December 27, 2013 hearing. Defendant maintained that he should be released on parole. The Court continued the hearing and required the State and defendant to submit briefing on the following issues:

1) Is defendant entitled to release on parole pursuant to 11 *Del. C.* § 4346(a) [FN4] since he has served 1/3 of his sentence; and

> FN4. This statute, 11 *Del. C.* § 4346(a), provides in pertinent part:
>
> > A person confined to any correctional facility administered by the Department may be released on parole by the Board if the person has served 1/3 of the term imposed by the court, such term to be reduced by such merit and good behavior credits as have been earned, or 120 days, whichever is greater.

2) If he is not entitled to release before serving his 18 month mandatory sentence, may this mandatory 18 months be reduced by good time earned based upon 11 *Del. C.* § 4381.[FN5]

FN5. The applicable portions of 11 *Del. C.* § 4381 are as follows:

(a) Subject to the limitations set forth in subsection (b) of this section, all sentences, other than a life sentence, imposed for any offense pursuant to any provision of this title, Title 16 and/or Title 21 may be reduced by good time credit under the provisions of this subchapter and rules and regulations adopted by the Commissioner of Corrections. This provision will apply regardless of any previously imposed statutory limitations set forth in this title, Title 16 or Title 21.

(b) The awarding of good time credit set forth in subsection (a) of this section above will not apply to sentences imposed pursuant to § 4214 or § 4204(k) of this title or sentences imposed prior to the enactment of this statute.

Thereafter, the State filed a Petition for Writ of Mandamus in a civil action, apparently in an effort to place the matter before the Court in the correct procedural posture. Defendant obtained the Public Defender's Office to represent him. His counsel has filed several motions, including a motion to dismiss the State's various filings. The Board of Parole has taken no further steps, nor does the Court expect it to do so in light of its decision not to oppose the State's petition.

Procedurally, the case is rather convoluted. However, the two underlying legal questions are simple and they require resolution. I resolve those questions below.

Initially, I address whether the Board of Parole has jurisdiction over this matter. This Court has ruled that a driving under the influence sentence is non-TIS.[FN6] Thus, the Board of Parole has authority over non-TIS sentences such as DUI sentences and the repealed non-TIS statutes apply. [FN7]

FN6. *State v. Clyne,* 2002 WL 1652149, *2 n. 6 (Del.Super. July 22, 2002). Furthermore, the SENTAC Commission has recognized that felony driving under the influence ("DUI") sentences are non-TIS. On January 17, 2014, the SENTAC Commission voted to recommend legislation that would make felony DUIs to be TIS sentences as opposed to non-TIS sentences.

FN7. *See id.* at *3 n. 12.

***3** The case of *Woodward v. Department of Corrections* [FN8] resolves the question of whether defendant is eligible for parole after serving 1/3 of his sentence. *Woodward* holds that to be released on parole before the mandatory time elapses would violate the express terms of the statute under which a defendant was sentenced. The sentencing statute in this case, 21 *Del. C.* § 4177(d)(5) and (8), requires that defendant serve 18 months at Level 5. Where, as here, the mandatory time period of the sentencing statute is greater than the period set forth in 11 *Del. C.* § 4346(a), a defendant must serve the mandatory time period before becoming entitled to release on parole. [FN9]

FN8. 415 A.2d 782 (Del.Super.1980), *aff'd,* 416 A.2d 1225 (Del.1980) ("*Woodward* "). As the later discussion below shows, I do not follow *Woodward* with regard to the reduction of this sentence for good time credits; the statutory amendments subsequent to *Wood-*

> *ward* render that portion of the decision to be invalid.
>
> FN9. *Id.*

Therefore, the Board of Parole had no discretion to grant parole to a defendant serving the mandatory portion of his sentence. The Board of Parole is directed to reverse its decision as to the granting of parole to Jeffrey W. **Barnes**

The next question is whether defendant may receive good time credits on this mandatory 18 month period. The answer to this question requires the Court to delve into a bit of statutory history.

In 2010, the Legislature amended 11 *Del. C.* § 4381 [FN10] to allow for the award of good time credits on all sentences except for life sentences, those imposed pursuant to 11 *Del. C.* § 4214,[FN11] and those imposed pursuant to 11 *Del. C.* § 4204(k).[FN12] The synopsis of Senate Bill 320 explains the rationale for this legislation:

> The ability of inmates to earn good time credits was a mechanism established to assist and encourage appropriate behavior by inmates while they are incarcerated. This general concept has been modified by the General Assembly over time to prohibit good time credit for specific offenses. Unfortunately, this ad hoc application has caused significant administrative issues to arise that are difficult to address with limited staff and is inconsistent with the original intent and purpose of good time credit. This legislation proposed by SENTAC will ensure a fair and consistent application of credit time and will restore its original purpose as a tool for prisoner management. The legislation has no effect on the procedures used to award good time credit by DOC or the ability of the Commissioner to forfeit good time credit to reflect inappropriate prison behavior. The legislation will however restore the ability of inmates (other than ones serving a life sentence) to be awarded good time credit regardless of the statutory offense for which they are incarcerated subject to the limitations set forth in subparagraph (b). SENTAC has prepared this legislation as a result of its belief that it reflects the appropriate management of limited DOC resources and will result in financial savings to the State. The inmates will be supervised during their conditional release period by DOC probation officers.

This legislation became effective on July 15, 2010, when the Governor signed it.

> FN10. S.B. 320 with Senate Amendment 1.
>
> FN11. 11 *Del. C.* § 4214 pertains to defendants sentenced as habitual offenders.
>
> FN12. 11 *Del. C.* § 4204(k) allows for the courts, in certain instances, to require a sentence be served day for day.

The applicable sentencing statute, 21 *Del. C.* § 4177(d)(8), was signed on August 3, 2011, and became effective on June 30, 2012.[FN13] Both events are after the enactment of the current version of 11 *Del. C.* § 4381. The question is whether the language specifying that the minimum sentence "shall not be subject to any early release, furlough or reduction of any kind" means that good time credits may not be applied. That language, instructing that a minimum sentence for felony driving under the influence convictions "shall not be subject to any early release, furlough or reduction of any kind," has existed since the legislature mandated certain driving under the influence convictions to be felonies.[FN14] Because the language stating that a defendant "shall not be subject to any early release, furlough or reduction of any kind" existed at the time the applicable version of 11 *Del. C.* § 4381 was enacted, the amendment to 21 *Del. C.* § 4177 in 2011 did not render 11 *Del. C.* § 4381

inapplicable.

FN13. Sections 12 and 24 of H.B. 168, as amended by House Amendment No. 1, House Amendment No. 2 as amended by House Amendment No. 1 to House Amendment No. 2 and House Amendment No. 3.

FN14. 70 Del. Laws, ch. 62 (1995).

***4** No matter what, I conclude 11 *Del. C.* § 4381 applies. With regards to the award of good time credits and early release, the Court must construe the applicable provisions of 21 *Del. C.* § 4177 *in pari materia* with 11 *Del. C.* § 4381.[FN15] It would be absurd to not allow good time credits on a felony sentence pursuant to 21 *Del. C.* § 4177 after the legislature had just recently enacted 11 *Del. C.* § 4381 to award such credits. To hold otherwise would mean that the problems 11 *Del. C.* § 4381 eliminated would once again commence. The Court will not reach such an absurd result.

FN15. *Watson v. Burgan,* 610 A.2d 1364, 1368 (Del.1992).

Thus, defendant is entitled to good time credits on his 18 months Level 5 time pursuant to 11 *Del. C.* § 4381.

In conclusion, defendant is not entitled to an early release of incarceration pursuant to 11 *Del. C.* § 4346(a), and to that extent, the petition is GRANTED and the Court hereby directs the Board of Parole to reverse its decision allowing parole pursuant to 11 *Del. C.* § 4346(a). However, defendant's 18 months of mandatory time may be reduced by good time credits awarded pursuant to 11 *Del. C.* § 4381. Because defendant has not reached the point where those good time credits would require his release, he currently is not entitled to release from incarceration.[FN16] Defendant's arguments that his rights will be violated by requiring he go back to prison are meritless. The decision granting parole was illegal. He never should have been released from incarceration. No constitutional or *ex post facto* laws come into play. He must return to prison immediately.

FN16. This conclusion means there is no clear legal right to a direction to the Board of Parole or Department of Correction that defendant be released from incarceration and consequently, no entitlement to a writ of mandamus exists. *See State v. Clyne, supra,* at * 1.

IT IS SO ORDERED.

Del.Super., 2014
State v. Delaware Board of Parole
Not Reported in A.3d, 2014 WL 595870 (Del.Super.)

END OF DOCUMENT

CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on May 5, 2014, she caused the attached *Cross Appellant's Opening Brief on Cross Appeal* and *Appendix to Cross Appellant's Opening Brief on Cross Appeal* to be delivered to the following person in the form and manner indicated:

Robert H. Robinson, Jr., Esq.
Assistant Public Defender
14 The Circle
Georgetown, DE 19947
Attorney for Appellant

X via File and Serve Xpress.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Kathryn J. Garrison (No. 4622)
Deputy Attorney General
114 East Market Street
Georgetown, DE 19947
(302) 739-4211

DATE: May 5, 2014