



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

ROBERT H. ROBINSON, JR. [#4139]
BERNARD J. O'DONNELL [#252]
Assistant Public Defenders
14 The Circle, 2nd Floor
Georgetown, Delaware 19947
(302) 752-3368

Attorneys for Cross-Appellee

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

NATURE & STAGE OF THE PROCEEDINGS..... 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF FACTS 3

ARGUMENT

**THE TRIAL COURT CORRECTLY DETERMINED THAT
THE TRUTH IN SENTENCING ACT OF 1989 DOES NOT
APPLY TO TITLE 21 OFFENSES** 7

A. This appeal must be dismissed because there is no case or
controversy that involves Barnes. The proper party to the
Cross-Appeal is the Board of Parole 7

B. The TIS Act does not include Title 21 13

CONCLUSION 16

TABLE OF CITATIONS

Cases

<i>General Motors Corp. v. New Castle County</i> , 701 A.2d 819 (Del. 1977)	11, 12
<i>Moorhead v. State</i> , 1994 WL 175590 (Del.)	12

Statutes

10 <i>Del. C.</i> § 9902(e).....	8, 9
21 <i>Del. C.</i> § 4177	3

Other Authorities

Commission on Government Reorganization and Effectiveness ("Minner Commission"), Executive Summary, E-14 (Oct. 1993)	13
Celia Cohen, A-G Biden Quit Representing Psychiatric Center in Classic Conflict, Delaware Grapevine (posted Sept. 15, 2007), at http://www.delawaregrapevine.com/9-07executivecounsel.asp (last viewed July 7, 2014).	13

NATURE AND STAGE OF PROCEEDINGS

Barnes agrees with the State's recitation of the Nature of the Proceedings in its Opening Brief on Cross-Appeal. Barnes filed an Out of Time Motion for Extension of Time which was granted. This is Barnes' Answering Brief on Cross Appeal.

SUMMARY OF ARGUMENT

1. The State's argument is DENIED. The Superior Court correctly found that the Truth in Sentencing Act of 1989 ("TIS Act") does not apply to offenses that fall under Title 21 of the Delaware Code. While the State relies on rules of statutory construction, legislative history, and even administrative burdens for the Department of Corrections (State's Opening Brief on Cross Appeal, p. 16), the plain language of the TIS Act itself does not amend or even reference Title 21 offenses. Furthermore, the fact that Title 21 offenses do not fall under the TIS Act has been generally accepted practice by the trial courts and the Truth-in-Sentencing Commission for the past several decades.

2. This appeal should be dismissed because its outcome does not affect Barnes and therefore there is no case or controversy properly before this Court.

STATEMENT OF FACTS

Barnes pleaded guilty to a single count of Driving under the Influence, Fifth Offense and the Superior Court sentenced him to the maximum sentence of 5 years of Level V, to be suspended for probation after he served the minimum sentence of 18 months at Level V. A-10. Approximately 6 months in to his Level V sentence, he received notification from the Department of Corrections and the Board of Parole (“BOP”) that he was eligible for parole because he had served one-third of his Level V sentence. He applied for parole and the BOP granted him a hearing. The Department of Justice filed a letter on December 12, 2013 opposing parole and stated its position that Barnes could not be paroled before he served the mandatory period of incarceration required under 21 *Del. C.* § 4177(d)(5) and (d)(8). B-6. On December 17, 2013 the Board voted to parole Barnes. B-8. There is no allegation Barnes applied for parole in bad faith or with any misrepresentations, and the BOP appears to have followed all of its procedures for granting parole. A-85. Once released, Barnes resumed his employment, enrolled in outpatient treatment, and reconnected with his family. B-45.

Once the State learned Barnes had been paroled over its objection, it filed an Emergency Motion to Correct Illegal Sentence in the Superior Court on or about December 23, 2013. B-10. The Superior Court conducted an office conference the

next day with the State and Barnes' former counsel where the trial judge stated he was not inclined to grant the motion because the sentence itself was not illegal. A-83. The trial judge stated he would consider a Writ of Mandamus if the State filed it that same day. A-85. The State filed a Petition for Writ of Mandamus several hours later. B-27. The Petition was captioned as the criminal case and was directed to Barnes, not the BOP. B-27. The Superior Court set the matter for a hearing on December 27, 2013.

Also on December 24, the trial judge sent an email to the Department of Justice attorney who represented the BOP alerting him to the December 27 hearing and discussing the issue of the Attorney General conflict of interest. B-26. The attorney for the BOP responded by letter dated December 26, 2013 and stated the BOP "has reviewed the motion filed by the Delaware Department of Justice Criminal Division in this case. Following review and consultation with counsel, the Board has decided that it does not oppose this motion." B-31. Nothing more has been heard from the BOP throughout these proceedings.

At the December 27 hearing, the Superior Court appeared ready to grant the Writ and re-incarcerate Barnes. Barnes' former counsel, acting as a friend of the court, asked for more time to allow Barnes to retain counsel. B-56. The trial court allowed Barnes to remain on probation and gave him several weeks to hire

counsel. The next hearing was set for January 10.

On January 6, 2014, the State filed a Petition for a Writ of Mandamus, this time captioned as a civil matter, State of Delaware, Petitioner vs. Board of Parole, Respondent. A-93. Barnes was not a party to that filing.

Also on January 6, 2014, Barnes faxed a letter to the trial court detailing the difficulties he had in retaining counsel and asking that the January 10 hearing be continued. B-62. The trial court granted the request and continued the matter until January 17.

On January 14, the State filed a Legal Memorandum in Support of its Petition for Writ of Mandamus. B-65. Although the BOP was the named party to the civil petition, it did not respond to the Petition for Writ of Mandamus directed against it. Instead, the State simply re-filed the December 26 letter from the BOP's attorney, presumably intended as the BOP's response to the January 6 filing. A-92.

After Barnes was unable to find a private attorney to take his case, the Office of the Public Defender agreed to enter its appearance on January 15.¹ B-70. Because the hearing was scheduled for the next day, the Office of the Public Defender requested additional time to file a response, and the court continued the

¹ At the time the Office of the Public Defender entered its appearance, it was unaware the State had filed the civil petition for the Writ of Mandamus. B-73.

matter until January 24.

Because the civil Petition for Writ of Mandamus was between the State and the BOP, Barnes filed a Motion to Intervene on January 20 pursuant to Superior Court Civil Rule 24 asserting he had an interest in the proceedings and his interests were not represented by the existing parties. B-71.

Also on January 20, Barnes filed a Motion to Compel seeking the minutes of the meeting of the BOP where it decided to not oppose the State's motion² as stated in the letter from the BOP attorney.³ Barnes filed a Motion to Dismiss on January 23 setting out his arguments in opposition to the State's three filings. B-83.

At the January 24 hearing, the Superior Court ruled that the BOP acted improperly when it paroled Barnes and ordered Barnes committed to the Department of Corrections. B-117-121. Barnes objected to the immediate reincarceration because the relief sought by the State was to send the case back to the BOP in order to officially rescind its parole. B-121. The Superior Court issued a written decision later that day. B-125.

² It was not clear whether the letter from the BOP's attorney was referring to the State's Motion to Correct an Illegal Sentence, or the State's first Petition for Writ of Mandamus, both of which were filed before the date of the letter.

³ Although this motion was e-filed and noted in the docket, at the January 24 hearing the trial judge stated he had never seen the motion and refused to grant it. A-92, B-94-97.

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE TRUTH IN SENTENCING ACT OF 1989 DOES NOT APPLY TO TITLE 21 OFFENSES

Question Presented

The question presented is whether the Superior Court was correct in its determination that Title 21 is not subject to the TIS Act.

Standard and Scope of Review

Barnes agrees with the State that the standard and scope of review is *de novo*.

Argument

A. This appeal must be dismissed because there is no case or controversy that involves Barnes. The proper party to the Cross-Appeal is the Board of Parole.

As a threshold question, this Court must determine whether this appeal is properly before it, because Barnes is not affected by the outcome of this appeal and therefore there is no case or controversy. The outcome of this case would only affect defendants who receive a sentence in excess of the minimum sentence, and then apply for parole after they complete the minimum portion of the sentence. Barnes is not one of those defendants.

Although Barnes' criminal case and subsequent parole lead to the State's

filing of a civil Writ of Mandamus petition against the BOP, he appealed only because he was the person who was re-incarcerated after his parole. Once the briefing schedule was published and it became apparent that his incarceration would be over by the time this appeal was decided, he filed a Notice of Voluntary Dismissal. The State, however, had filed a Cross Appeal against Barnes. The State should have taken the cross-appeal against the BOP, whose duties and powers are greatly impacted by the outcome of this decision.⁴ Simply because the State picked Barnes to respond to the cross-appeal does not mean he is the proper party to respond. In this case, Barnes is no longer a party to an actual case or controversy on appeal.

The State filed its cross-appeal under a statute which provides that:

The State shall have an absolute right to appeal to an appellate court any ruling of a lower court on a question of law or procedure adverse to the State in any case in which the accused was convicted and appeals from the judgment, except that the decision or result of the State's appeal shall not affect the rights of the accused unless the accused, on his or her appeal, is awarded a new trial or a new sentencing hearing. Once the State perfects its cross-appeal, the appellate court shall review and rule upon the

⁴ The Department of Justice filed the Petition for Writ of Mandamus against the BOP, which is represented by an attorney from the Department of Justice. This conflict was noted early on by the trial prosecutor, who acknowledged outside counsel would have to be appointed to represent the BOP. A-89. To date, however, this conflict has not been addressed by the Department of Justice and it is not even apparent the BOP is aware of this appeal that seeks to greatly restrict its powers.

questions presented therein regardless of the disposition of the defendant's appeal.

10 *Del. C.* § 9902(e).

The State directed its mandamus petition in the Superior Court against the BOP because it sought to have the BOP rescind its grant of parole to Barnes. B-27-30. Barnes had to intervene in the civil action because, although he was not an official party to that mandamus action, its outcome could directly affect his liberty and result in his re-incarceration. B-71-76. The Superior Court then granted the State's mandamus petition and ruled that the BOP could not parole Barnes before he had served his statutory minimum sentence. B125-132. Barnes then appealed the Superior Court's order that resulted in his re-incarceration to this Court. The State then filed its cross-appeal seeking to overturn that part of the Superior Court ruling in its order that the BOP had jurisdiction to parole Title 21 sentences but only after the statutory minimum sentence had been served.

The State's reliance on 10 *Del. C.* § 9902(e) as authority for its cross-appeal is misplaced because this was never a criminal appeal. In substance, it was a dispute between the Attorney General and Board of Parole over the Board of Parole's statutory authority. Barnes intervened and appealed the grant of mandamus sought by the Attorney General because he was re-incarcerated. When

he realized he would be released from incarceration before this appeal was decided, he dismissed his appeal. Barnes intervention did not mean that what was in substance a civil appeal from a mandamus petition by the Attorney General against the BOP had transformed into a criminal appeal under which the Attorney General could maintain independent cross-appeal jurisdiction.⁵ Under the circumstances, the original appeal should have been a civil appeal, and, if the State sought to contest an adverse ruling in that appeal, it should have cross-appealed from a civil action. Now that Barnes has voluntarily dismissed his appeal, however, any consequence of Barnes mis-captioning his original appeal as a criminal appeal is now moot.

Whether the State characterizes its cross-appeal as a criminal appeal or a civil appeal at this point, appellate jurisdiction now longer remains because Barnes has voluntarily dismissed his appeal and both appeals are now moot because there is no longer a continuing case or controversy between Barnes and the State. The State posits that jurisdiction remains because an independent basis exists for its own cross-appeal regardless of the disposition of Barnes' original appeal on the

⁵ The Parties captioned requests for relief in the Superior Court as both criminal and civil actions, the Superior Court captioned its ruling as both a civil and criminal action, and the Parties captioned their appeals as a criminal action, but this should not convert the substance of what was a civil action dispute between the Attorney General and the Board of Parole into a criminal appeal.

basis of mootness to him. State’s Opening Brief on Cross Appeal, p. 3, n. 7. In doing so, the State misplaces its reliance on *General Motors Corp. v. New Castle County*, 701 A.2d 819, 824 (Del. 1977) (“A cross-appeal rests on its own jurisdictional foundation....”). There is no longer continuing jurisdiction for this cross-appeal, however, because there is no longer a continuing case or controversy in this appeal. *General Motors Corp. v. New Castle County* explains that “the prerequisites of an ‘actual controversy’ are:

“(1) [i]t must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.”

Id. at 823, n. 4. The State’s cross-appeal fails under this standard requiring an actual case or controversy because: 1) the rights and interests of the Defendant are no longer affected; 2) the Defendant no longer has a legal interest in contesting this action; 3) the interests of the Defendant are no longer real or adverse; and, 4) the issue involved in the controversy is no longer ripe for judicial determination between the parties because the original controversy is now moot as to the Defendant. The cross-appeal in *General Motors* was a different case under this

standard and not moot because both parties had a substantial financial stake in the outcome of the cross-appeal regardless of the outcome of the original appeal. If General Motors prevailed in that cross-appeal its Delaware real estate tax would decrease and the County stood to lose tax revenue if it did not defeat General Motor's cross-appeal.

Another peculiar feature of this appeal that demonstrates why it should not be heard is how the real case or controversy requirement is intertwined with the Attorney General's representation conflict in this appeal. This case originated from a legal disagreement between the Attorney General and the BOP. B6-9, 26-31. The Board of Parole and the Attorney General are Constitutionally separate institutions of state government. The BOP is a body of the Executive Branch while the Attorney General is an independently elected office holder. Yet Deputies Attorney General represented both the Attorney General as the State's Chief Prosecutor and the Board of Parole as an executive agency in this case. Under these circumstances, the BOP did not have the benefit of the advice of independent counsel and representation to which it should have been legally entitled. *Moorhead v. State*, 1994 WL 175590, *3 (Del.). This is a continuing Constitutional issue in State

government that persists over many years.⁶ The Attorney General did not obtain independent counsel for the BOP for this disagreement resulting in litigation.⁷ For that reason too, the State's cross-appeal should be dismissed.

B. The TIS Act does not include Title 21.

The title of the bill that created the TIS Act is: "An Act to Amend Title 11 and Title 16 to Provide for Truth in Sentencing." A-109. The title of the bill does not mention Title 21 offenses. More importantly, however, the text of the Act does not amend any part of Title 21. The Act only amends various sections of Titles 11 and 16. Therefore, a plain reading of the Act makes it apparent that it does not include Title 21 offenses.

While this appeal was pending, House Bill 415 was introduced to the General Assembly. B-135. The bill amends the TIS Act by adding this language:

⁶ "Deputy Attorneys General who now provide legal counsel to executive agencies experience a dual loyalty between the executive interest being served and the AG. This situation has produced persistent problems that span the service of four governors and three attorneys general." Commission on Government Reorganization and Effectiveness ("Minner Commission"), Executive Summary, E-14 (Oct. 1993). "[T]he most fundamental problem afflicting the system is the erosion of the attorney-client relationship caused by the dual loyalty required of almost every DAG under the present statutory and administrative scheme." *Id.*, 3-11.

⁷ See Celia Cohen, A-G Biden Quit Representing Psychiatric Center in Classic Conflict, Delaware Grapevine (posted Sept. 15, 2007), at <http://www.delawaregrapevine.com/9-07executivecounsel.asp> (last viewed July 7, 2014).

“All Title 21 felony offenses shall be covered by this Act and any amendments thereto.” B-135. The Synopsis of the bill states “This bill ensures that Truth in Sentencing provisions apply to Title 21 felony offenses.” B-135. This bill clearly shows that Title 21 was not included in the TIS Act.

The State suggests that the “all crimes” language included in Section 3 of TIS Act shows an intent that the Act applied to all criminal offenses, including those in Title 21. Section 4 of the TIS Act, by contrast, specifically states “The provisions of Title 11 and Title 16, which are repealed by this Act shall remain in force and effect . . .” A passing reference to “all crimes,” without the specific language in the body of the statute repealing and replacing sections of the Delaware Code, is not sufficient to broadly expand the provisions of the TIS Act.

Furthermore, the State is arguing for a reading of the TIS Act that is contrary to common, accepted practice and court decisions. The Superior Court’s decision in the present matter was supported by two prior Superior Court cases and several decades of practice by attorneys, judges, and the Department of Corrections (which calculates good time credit differently for Title 21 offenses than it does for TIS offenses). For example, at one of the office conferences in this matter, the judge noted “where I see the lay of the land, this is non-TIS. I’m not going into that line contrary to what has happened *for decades*.” (emphasis added). B-40.

Additionally, the Delaware Sentencing Accountability Commission's Benchbook, which is used by all attorneys and judges who handle criminal cases, specifically states that offense found in Titles 21 and 23 are "not covered by Truth in Sentencing." B-133.

The State seeks to stretch the impact of the TIS Act but the language of the statute speaks for itself. The proposed interpretation of the TIS Act to include Title 21 offenses also flies in the face of common, accepted practice. Therefore, the Superior Court was correct in its conclusion regarding Title 21 offenses and the TIS Act.

CONCLUSION

This appeal must be dismissed because there is no case or controversy remaining and because the TIS Act did not in any way incorporate Title 21 offenses in its language.

Respectfully submitted,

/s/Robert H. Robinson, Jr.
ROBERT H. ROBINSON, JR.
BERNARD O'DONNELL
Assistant Public Defender
14 The Circle, 2d Floor
Georgetown, Delaware 19947
302-752-3368
I.D. No. 4139

Dated: July 7, 2014