



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 SUPPLEMENTAL
ANSWERING BRIEF ON CROSS-APPEAL

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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. This is Barnes' Supplemental 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 and legislative history, the plain, unambiguous language of the TIS Act itself does not amend or even reference Title 21 offenses. Furthermore, that Title 21 offenses do not fall under the TIS Act has been generally accepted practice by the trial courts, the Board of Parole, and the Truth-in-Sentencing Commission for twenty-five years.

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 into 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-

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.

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 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 re-incarceration because the relief sought by the State was to send the case back to

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.

the BOP in order to officially rescind its parole. B-121. The Superior Court issued a written decision later that day. B-125.

I. THE TRUTH IN SENTENCING ACT OF 1989
DOES NOT APPLY TO TITLE 21 OFFENSES

Question Presented

The question presented is whether sentences of confinement imposed under Title 21, the Motor Vehicle Code, are not permitted as parole eligible under the Truth in Sentencing Act of 1989.

Standard and Scope of Review

The standard and scope of review is *de novo*.

Merits of Argument

TIS Act of 1989

Prior to 1990, all sentences of confinement for Title 11 criminal offenses were provided for in the Criminal Code, Title 11. Each specific substantive offense in Chapter 5 of the Title 11 Criminal Code was assigned a classification within the section defining the offense from a Class A to a Class E felony or Class A to Class C and unclassified misdemeanors depending on the seriousness of the offense.⁴ Chapter 42 of the Title 11 Criminal Code also enumerated the duration range of imprisonment sentences for each

⁴ 11 *Del. C.* §§ 4201, 4202.

classification of offenses, both sentences for felonies⁵ and sentences for misdemeanors.⁶

Before 1990, Title 16 Controlled Substance offenses were also classified within Title 16 based on the severity of the specific offense from Classification A penalties to Classification F penalties and misdemeanors.⁷

At that time, Title 21 Motor Vehicle Code offense penalties, including imprisonment terms,⁸ were provided for in the specific offense sections defining the offense although some catch-all penalties were provided within particular chapters.⁹

Also before 1990, prior to the Truth in Sentencing Act (“TIS”), all prisoners sentenced to imprisonment, regardless of whether the sentence was imposed for a Title 11, Title 16, or Title 21 offense, were eligible for parole.¹⁰

The State contends in this cross-appeal that the enactment of the TIS Act in 1989 abolished eligibility for parole, not only for sentences imposed pursuant to Titles 11 and 16, but also for sentences imposed under Title 21, the

⁵ 11 *Del. C.* § 4205.

⁶ 11 *Del. C.* § 4206.

⁷ 16 *Del. C.* §§ 4751-4763.

⁸ Speeding, for example, could result in an imprisonment term of 10-30 days. 11 *Del. C.* § 4169.

⁹ 21 *Del. C.* §§ 2351, 2757, 4102, 4205.

¹⁰ 11 *Del. C.* § 4346(a) (“A person confined to any correctional facility administered by the Department may be released on parole by the Board....”).

Motor Vehicle Code, particularly driving under the influence, and any other sections of the Delaware Code that permitted sentences of confinement. In order to determine the validity of the State's claim the literal text of the TIS Act should be examined in order to determine what the TIS Act did and did not do with respect to sentences of confinement permitted under the Delaware Code.

Most obviously, the title of the TIS Act states that is an "Act to Amend Title 11 and Title 16" of the Delaware Code. (A109). Second, in Section 4 of the Act, it states that only provisions of Title 11 and Title 16 are being repealed by the Act. (A109). Presumably, due to this clear and unambiguous language, sentencing provisions of the Title 21 Motor Vehicle Code and all other provisions of the Delaware Code outside of Title 11 and Title 16 are unaffected by the TIS Act. In addition, under Section 4 the prior sentencing provisions of Titles 11 and 16 (permitting parole) were specifically declared to remain in effect until June 30, 1990. This transition provided for parole eligibility as to Title 11 and 16 offenses only until June 30, 1990 for offenses committed before that date. No temporary reprieve needed to be provided for parole eligibility for Title 21 offenses committed before that date because parole eligibility as to Title 21 offenses was never in the first instance prospectively repealed by the TIS Act of 1989.

Third, Section 6 of the TIS Act of 1989 revises the penalties of imprisonment imposed under the Criminal Code by specifically amending only the Title 11 provisions of the Delaware Code that provide for penalties for offenses that are defined in Title 11, including sentences of imprisonment. (A110). Felonies and misdemeanors were reclassified into categories depending on the gravity of the offense. (A110-111). Revised sentencing ranges were drawn for each category by generally reducing by one third the range of minimum and maximum sentences of confinement permitted before TIS. (A111-112). However, sentences imposed for felonies under Title 11 were no longer “subject to parole” under the TIS Act of 1989. (A112). The exclusion of parole in the Act for only Title 11 felony offenses was unambiguous: “No sentence to Level V incarceration imposed pursuant to this Section (§4205) is subject to parole.” (A112).¹¹ Previously, parole was permitted but the TIS Act of 1989 now excluded for parole eligibility sentences of confinement imposed for Title 11 felony offenses. No mention was made of any restrictions on parole eligibility for sentences of imprisonment imposed under Title 21 of the Motor Vehicle Code or any other title of the Delaware Code. The General Assembly could have readily imposed similar restrictions on parole eligibility outside of

¹¹ TIS Act, 67 *Del. Laws*, c. 130, § 6 (app. July 17, 1989) (11 *Del. C.* § 4205(j)).

Title 11 Criminal Code offenses, but did not. With respect to misdemeanors under Title 11, the General Assembly likewise reclassified misdemeanor offenses under Title 11 into categories depending on the gravity of the misdemeanor offenses and provided for new penalty ranges as to each category, including imprisonment, depending on the gravity of the offense. Again, however, only misdemeanor offenses defined in Title 11 were addressed by this provision of the TIS Act of 1989 which repealed parole eligibility as of June 30, 1990. (A112).¹²

Fourth, Section 7 of the TIS Act of 1989 states that that “[n]o 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.” (A112-113).

Because, under Section 7 of the TIS Act, parole eligibility was repealed only with respect to sentences “imposed pursuant to the Truth in Sentencing Act of

¹² Unlike the language of Section 6 of the TIS Act of 1989 specifically providing for the repeal of parole eligibility for Title 11 felony offenses, (11 *Del. C.* § 4205(j)), a similar provision is omitted from Section 6 of the TIS Act addressing the reclassification of and revised penalties for misdemeanor offenses under 11 *Del. C.* § 4206. This omission might support an argument that the General Assembly did not intend to eliminate parole eligibility for Title 11 misdemeanor offense under the TIS Act. However, Section 7 of the TIS Act also added a new section to Title 11 providing that “[n]o 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.” *See* 11 *Del. C.* § 4354. The ambiguity is not within the scope of the State’s cross-appeal because the State only contends that the TIS Act of 1989 denied parole eligibility for sentences of confinement imposed under Title 11 of the Motor Vehicle Code.

1989,” and there are no other sections or language within in the TIS Act suggesting that the repeal of parole eligibility was intended for offenses in the Delaware Code defined outside of Titles 11 or 16, it must be presumed that Section 7 meant what it plainly stated.

Fifth, Section 8 of the TIS Act of 1989 reclassified penalties, including confinement, of every offense defined within Title 11 of the Delaware Code (A113-119). The TIS Act identified what offenses were excluded from parole eligibility, and, besides these identified offenses, no offenses were identified outside of these offenses in Title 11 as being excluded from parole eligibility. These are the offenses for which “[n]o sentence imposed pursuant to the provisions of the Truth in Sentencing Act of 1989, shall be subject to parole....” *67 Del. Laws, c. 130, §7*. Similarly, Section 9 of the TIS Act of 1989 not only reclassified sentences of confinement for all controlled substance offenses under Title 16, but likewise identified which offenses were no longer subject to parole eligibility on sentences of confinement under the TIS Act as well as enumerating under Section 10 the range of penalties of confinement for those controlled substance offenses. (A119-120).

Under these specific, unambiguous provisions of the TIS Act of 1989, no offenses defined outside of Title 11 or 16 were identified as being ineligible

for parole under the TIS Act of 1989.¹³ Considering the TIS Act of 1989 as a whole, unambiguous on its face, the offenses defined under Title 11 and Title 16 are the only offenses for which the General Assembly expressly terminated parole eligibility.¹⁴ In the TIS Act of 1989, the General Assembly did not amend or revise any of the sentences of confinement permitted under Title 21 by eliminating previously available parole eligibility for Motor Vehicle Code offenses. The General Assembly could have, but chose not to do so. The General Assembly addressed only Title 11 and Title 16 offenses in the TIS Act of 1989 by unambiguously eliminating parole eligibility only for offenses committed under those titles.

Historical Perspective

The General Assembly enacted the Truth in Sentencing Act in 1989, to be effective in 1990. Despite the express and unambiguous terms of that Act

¹³ The State contends 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 of 1989.

¹⁴ Consequently, the offenses of vehicular homicide and vehicular assault, 11 *Del. C.* §§ 628-630A, do not permit parole eligibility because those offenses are defined under Title 11, the Criminal Code, while driving under the influence generally permits parole eligibility because it is defined under Title 21, the Traffic Code.

indicating that it only repealed parole eligibility on sentences of confinement for offenses defined in either Titles 11 or 16 of the Delaware Code, the State now comes forward in this cross-appeal, nearly twenty five years later, to contend that the Truth in Sentencing Act of 1989 not only denied parole eligibility for criminal offenses defined under Title 11 and controlled substances defined under Title 16, but also for traffic offenses, including driving under the influence offenses, defined under Title 21 of the Delaware Code.¹⁵ The State does not dispute that since 1990, the Board of Parole has continuously considered applications for parole eligibility with respect to prisoners sentenced to confinement for convictions of Title 21 offenses. Undoubtedly, the Department of Correction was aware of that also. That continued practice has been in effect for almost twenty-five years. Also very recently, the Chairman of the Board of Parole stated that “[t]he Board has always maintained that Senate Bill 58, which was signed into law on July 17, 1989, established the Truth in Sentencing Act of 1989 and amended Title 11 and Title 16 offenses only.” (C1).

¹⁵ In fact, the Superior Court’s sentencing order in this case indicated that it was a “NON-TIS” sentence, (A15-20), but the State failed to appeal that sentence as an illegal sentence under 10 *Del. C.* § 9902 while later claiming in this cross-appeal that it was illegal. The State’s acquiescence in this respect has occurred in probably thousands of sentences since 1990.

The interpretation of the Truth in Sentencing Act by these State agencies has been continuous for almost twenty-five years and has not been overturned by the General Assembly. In a similar duration of prisoner confinement case which also involved the issue of parole eligibility, the Court previously observed that “the original regulation adopted by the Department [of Correction] remained in effect for fourteen years without interference by the General Assembly. Such inaction may well constitute acquiescence and be indicative of legislative intent.” *Watson v. Burgan*, 610 A.2d 1364, 1368 (Del. 1992); *cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-845 (1984).¹⁶ This interpretation has also been followed by the trial courts.¹⁷ In this cross-appeal, the State stretches the impact of the TIS Act

¹⁶ In addition, while this appeal was pending, House Bill 415 was introduced in the General Assembly. B-135. The bill intended to amend the TIS Act by adding the language: “All Title 21 felony offenses shall be covered by this Act and any amendments thereto.” B-135. The Synopsis of the bill stated that “[t]his bill ensures that Truth in Sentencing provisions apply to Title 21 felony offenses.” B-135. The bill as drafted indicated that Title 21 offenses were not originally encompassed within the TIS Act of 1989. H.B. 415 passed the House but was tabled in the Senate after debate. The debate in the Senate indicated that members of the Senate were not incredulous that the TIS Act of 1989 did not abolish parole for Title 21 offenses. On the contrary, the debate suggested that the Senators were uncertain about approving the bill because they had not been informed about possible unforeseen legal consequences of the bill, including its legal scope and fiscal consequences, had not had enough time to do so independently, and therefore tabled the bill. (C2).

¹⁷ The State argues for a reading of the TIS Act of 1989 that is at odds with accepted practice and prior 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

but the unambiguous language of the Act speaks for itself. The State’s proposed interpretation of the TIS Act to include Title 21 offenses by forbidding parole for sentences of confinement imposed on those offenses conflicts with accepted practice for nearly twenty five years. The Superior Court was correct in finding that the TIS Act of 1989 did not prohibit parole eligibility for sentences of confinement imposed for offenses under Title 21, the Motor Vehicle Code.

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. In addition, 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.

CONCLUSION

The TIS Act of 1989 did not incorporate Title 21 offenses in its unambiguous language and does not forbid eligibility for parole as to sentences of confinement imposed under the Motor Vehicle Code.

Respectfully submitted,

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