



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

STATE'S SUPPLEMENTAL REPLY BRIEF ON CROSS APPEAL

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I. THE TRUTH IN SENTENCING ACT OF 1989 APPLIES TO THE CRIME OF DRIVING UNDER THE INFLUENCE.

“Where a statute contains unambiguous language that clearly reflects the intent of the legislature, then the language of the statute controls.”¹ Both the State and Barnes contend that the statutes at issue here are unambiguous. The parties differ, however, on the meaning and application of the unambiguous language. Barnes argues that the Truth in Sentencing Act of 1989 (the “TIS Act”) does not apply to the crime of driving under the influence (“DUI”) and that offenders incarcerated for DUI are eligible for parole; the State argues that the TIS Act applies to DUI and that DUI offenders are not eligible for parole. A plain reading of pertinent statutes supports the State’s position:

- 11 *Del. C.* § 103 specifies that the Criminal Code governs offenses defined outside of the Criminal Code “[u]nless otherwise expressly provided, or unless the context otherwise requires.”²
- 11 *Del. C.* § 201 specifies that one of the general purposes of the Criminal Code is “[t]o give fair warning of ... the sentences authorized upon conviction.”³
- 11 *Del. C.* §§ 202 and 233 recognize that statutes outside of the Criminal Code can make conduct a “criminal offense,” a “crime” or an “offense.”⁴

¹ *Zhurbin v. State*, 104 A.3d 108, 110 (Del. 2014) (citations omitted).

² 11 *Del. C.* §103(b).

³ 11 *Del. C.* §202(2).

⁴ Section 202 of Title 11 provides that “[n]o conduct constitutes a criminal offense unless it is made a criminal offense by this Criminal Code or another law.” Section 233 of Title 11 provides

- 21 *Del. C.* § 4177 establishes the crime of DUI, which for a fifth offense, such as Barnes’s, is a class E felony.⁵
- 11 *Del. C.* § 4204(a) specifies: “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. This section applies to all judgments of conviction, whether entered after a trial or upon a plea of guilty or nolo contendere.”⁶
- 11 *Del. C.* § 4205(j), which addresses “Sentence for felonies,” specifies: “No sentence to Level V incarceration imposed pursuant to this section is subject to parole.”

Based upon these statutes, Barnes was not eligible for parole from the sentence of incarceration for his felony DUI conviction. There is nothing in the plain language of the statutes supporting Barnes’s contrary claim.

However, in support of this contrary position, Barnes points to the title of the TIS Act and the fact that the TIS Act did not make any changes to Title 21. (Supp. Ans. Brf. 10). But, as stated in the opening brief, the TIS Act made changes to the Criminal Code (Title 11) applicable to all crimes defined in Title 21 or elsewhere throughout the Delaware Code. As such, the title of that Act properly referenced

that “[c]rime’ or ‘offense’ means an act or omission forbidden by a statute of this State and punishable upon conviction”

⁵ 21 *Del. C.* § 4177(d)(5).

⁶ When the TIS Act was enacted, the exclusion for environmental misdemeanors did not exist. See 11 *Del. C.* § 4204(a)(1988) (“Every person convicted of an offense shall be sentenced in accordance with this Criminal Code. This section applies to all judgments of conviction, whether entered after a trial or upon a plea of guilty or nolo contendere.”). The exclusion for environmental misdemeanors shows that the General Assembly knows how to create an exclusion when it wishes to do so. The General Assembly did not create a similar exclusion for DUI or any other offenses located outside the Criminal Code.

Titles 11 and 16 – the code provisions subject to modification; reference to Title 21 was unnecessary and, in fact, would have been contrary to legislative drafting convention.⁷ The structure of the Delaware Code, both before and after enactment of the TIS Act, was that the Criminal Code governed all crimes defined throughout the Delaware Code unless otherwise expressly provided. Indeed, although the TIS Act modified 11 *Del. C.* § 4204(b), the General Assembly left 11 *Del. C.* § 4204(a) untouched: “Every person convicted of an offense shall be sentenced in accordance with this Criminal Code. This section applies to all judgments of conviction, whether entered after a trial or upon a plea of guilty or nolo contendere.”⁸

Barnes claims that the transition provision in Section 4 of the TIS Act “provided for parole eligibility as to Title 11 and 16 offenses only until June 30, 1990 for offenses committed before that date.” (Supp. Ans. Brf. 10). But the plain language of Section 4 does *not* specify that the transition provision applies only to offenses defined in Title 11 and 16. Rather, section 4 states: “The provisions of

⁷ The Delaware Constitution, “Article II, Section 16 does not require the title of a bill to be an index of its details, or a synopsis of the means by which the bill’s object is to be accomplished. The requirements of the section are satisfied if the title of the bill is sufficiently informative so as to put on notice parties interested in the general subject matter in such manner as would lead them to inquire into it.” *Opinion of the Justices*, 177 A.2d 205, 208 (Del. 1962). “The effect and meaning of Article II, Section 16 has many times been passed upon by our courts. Uniformly it has been held that the purpose of this section of the Constitution is to insure that the titles of bills shall be sufficiently comprehensive to give the people of the State, as well as the members of the General Assembly, fair and reasonable notice of the subject matter of the proposed legislation. Fundamentally, it is designed to prevent deception of the general public and the members of the General Assembly by titles to bills which give no adequate information of the subject matter of the bills. *Opinion of the Justices*, 194 A.2d 855, 856 (Del. 1963).

⁸ See TIS Act, A111. Compare 11 *Del. C.* § 4204(a)(1988) with 11 *Del. C.* § 4204(a)(1989).

Title 11 and Title 16, which are repealed by this Act shall remain in force and effect for the purpose of trial and sentencing for *all crimes* which occur prior to 12:01 a.m., June 30, 1990.”⁹ Thus, parole was available for all crimes committed through June 29, 1990; for crimes committed thereafter, parole was extinguished.

As argued in the opening brief and above, Title 11 explicitly applies to crimes defined throughout the Delaware Code unless otherwise expressly provided or the context requires otherwise. Prior to the passage of the TIS Act, there appears to be no question that the parole and good time provisions of Title 11 were applicable to Title 21 crimes.¹⁰ When amending these provisions, the General Assembly did not, as would be required to support Barnes’ position, expressly provide that the TIS Act does *not* apply outside of Title 11. Barnes argument that the General Assembly *could have* explicitly stated that the abolishment of parole *does* apply to Title 21 rejects the clear mandate of section 103 of the Delaware Criminal Code.¹¹ Thus, as the General Assembly’s offered no statement to the contrary, and the Act’s purpose in eliminating parole was clear, the changes to the Criminal Code made by the TIS Act apply to all crimes defined anywhere in the Delaware Code.

⁹ TIS Act § 4 (emphasis added), A109.

¹⁰ See e.g. *State v. Clyne*, 2002 WL 1652149 (Del. Super. July 22, 2002) (applying pre-TIS provisions of Title 11, Section 4382 to a post-TIS Title 21 offense).

¹¹ 11 *Del. C.* § 103.

Barnes’ fundamental premise is that, following the passage of the TIS Act, two separate sets of rules exist to assess parole eligibility and good time – one set for Title 11 and 16 offenders, and a second for all others. Yet, Barnes recognizes that both sets of rules emanate from within Title 11. To be sure, it would be unusual, and contrary to the principles of basic legislative drafting, for the General Assembly to have repealed and replaced statutes applicable to criminal offenses, while intending to retain what can best be described as “shadow statutes” – provisions expressly repealed and no longer appearing in the Delaware Code – to govern the myriad criminal offenses found beyond Titles 11 and 16. “Courts should strive to give effect to the apparent intention of the legislature when that yields a sensible result.”¹² The apparent intention of the legislature, expressed through the plain language of the TIS Act is that its provisions apply to “all crimes” found throughout the Delaware Code.

Barnes contends that the Board of Parole “has continuously considered applications for parole eligibility with respect to prisoners sentenced to confinement for convictions of Title 21 offenses.” (Supp. Ans. Brf. 15). The State does not know that to be the case and, through efforts to verify the accuracy of this claim, was informed by counsel to the Board of Parole that the Board does not maintain records of the types of cases presented and the number of parole

¹² *Zhurbin*, 104 A.3d at 113.

applications granted. As explained in the opening brief, more lengthy DUI sentences, such as Barnes', that might have (improperly) been the subject of a parole application are of recent origin. (Supp. Op. Brf. 16). This Court sought "information and input, so that the briefing from the Public Defender reflects the long-standing policies and positions of [the Board of Parole]." The Board of Parole responded with a brief letter that stated: "The Board has always maintained that Senate Bill No. 58, which was signed into law of July 17, 1989, established the Truth in Sentencing Act of 1989 and amended Title 11 and Title 16 offenses only. It is the Board's opinion that it does maintain authority over any/all Title 21 cases." (C1).

This statement, however, is belied by the Board's own rules and guidance published on the Board's public website. Rule 2 of the Rules of the Delaware Board of Parole, titled "Abolition of Parole," states, in part: "Pursuant to the Truth-In-Sentencing Act of 1989, parole was abolished for all offenses committed June 30, 1990, or thereafter."¹³ (RA2-3) Similarly, Board of Parole Rule 22 evidences the Board's conclusion that the TIS Act categorically abolished parole.¹⁵ The

¹³ Del. Bd. of Parole R. 2; *Rules of the Delaware Board of Parole*, available at <http://boardofparole.delaware.gov/rules.shtml> (last visited March 19, 2015) (RA1-9).

¹⁵ Rule 22 states: "Sentence Modification: Pursuant to 11 *Del. C.* § 4217, with respect to sentences imposed under the Truth-In-Sentencing Act of 1989 (i.e., crimes committed June 30, 1990, or thereafter), the Department may file an application for sentence modification 'for good cause shown which certifies that the release of the offender shall not constitute a substantial risk to the community or himself.'" Del. Bd. of Parole R. 22 (emphasis added) (RA7).

Board's public website reflects this same position that parole was categorically abolished for crimes committed after June 30, 1990 where it states, in part:

The Delaware Board of Parole has absolute authority to grant parole to eligible adult prison offenders whose crimes were committed prior to June 30, 1990.... Parole in Delaware was abolished under the Truth-In-Sentencing Act, effective with crimes committed on June 30, 1990, or thereafter. Individuals sentenced under this Act, however, may be heard before the Board of Parole, upon application by the Department of Correction, for sentence modification consideration.... For eligible inmates sentenced prior to the Truth-In-Sentencing Act, the factors used to determine parole release include [various considerations].¹⁶

(RA10). Furthermore, in the Frequently Asked Questions ("FAQ") section of the Board's website, the question "Didn't Truth In Sentencing Abolish Parole?" is answered by stating: "Pursuant to the Truth-In-Sentencing Act of 1989, parole was abolished for all offenses committed in Delaware on June 30, 1990, or thereafter" and continues by discussing the modification hearing process for "all criminal cases sentenced in Delaware following the enactment of the Truth-In-Sentencing statute." (RA16)¹⁷ Contrary to the Board's present position, nothing in the Board's rules or on the Board's website reflects an opinion or belief that the TIS Act's abolishment of parole applies only to Title 11 and 16 offenses. Based upon

¹⁶*About the Delaware Board of Parole*, available at <http://boardofparole.delaware.gov/aboutagency.shtml> (last visited March 9, 2015) (RA10-12).

¹⁷ *Frequently Asked Questions*, available at <http://boardofparole.delaware.gov/faqs.shtml> (last visited March 19, 2015) (RA13-20).

these published guidelines, the TIS Act applies to DUI offenders and, as such, they are ineligible for parole.

Assuming, *arguendo*, that the Board of Parole’s rules and website expressed a position consistent with its most recent letter and with the position set forth within the SENTAC *Benchbook* – reflecting a belief that the TIS Act does not apply to offenses outside of Titles 11 and 16 – the plain language of the TIS Act controls. While courts give deference to an administrative agency’s interpretation of a statute where the legislature has “left a gap for the agency to fill,” where, as here, the intent of the legislative body is clear, “the court, as well as the agency, must give effect to the unambiguously expressed intent.”¹⁸ “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”¹⁹ Here, the unambiguous language of the statutes, as amended by the TIS Act, shows that Barnes was not eligible for parole: 1) “Every person convicted of an offense shall be sentenced in accordance with this Criminal Code....;”²⁰ 2) A fifth offense DUI is a felony for which Barnes was sentenced;²¹ and 3) “No sentence to Level V incarceration imposed pursuant to this section [addressing sentences for felonies] is

¹⁸ Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

¹⁹ *Id.* at 843, n.9 (citation omitted).

²⁰ 11 *Del. C.* § 4204(a).

²¹ 21 *Del. C.* § 4177(d)(5).

subject to parole.”²² Thus, where, as here, there has been a long-standing misinterpretation of the scope of the TIS Act, it is this Court’s function to correct it rather than defer to it.²³

As additional support for his position, Barnes points to the General Assembly’s consideration and ultimate tabling of House Bill 415, which was introduced during the last session of the General Assembly. (Supp. Ans. Brf. 16). However, the debate on the Senate floor evidences, at most, confusion about the bill’s scope. Importantly, even if House Bill 415 had passed, it would not establish that the TIS Act did not already apply to Title 21 offenses; rather, the bill would have clarified that the TIS Act has, and does, apply to Title 21 felonies. The General Assembly can, and does, pass bills clarifying earlier legislation. By way of example, House Bill 252, considered and passed during the same session as House Bill 415, clarified that the General Assembly had, in fact, intended to confer jurisdiction on lower courts to temporarily revoke bail in cases even when the case on which the bail was set was then before a higher court.²⁴ Thus, House Bill 415 did not reveal a legislative understanding that Title 21 offenses (or offenses defined elsewhere outside of Titles 11 and 16) were excluded from the operation of

²² 11 *Del. C.* § 4205(j).

²³ *See Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243, 248 (Del. 1982) (“Failure to enforce the law does not change the law.”).

²⁴ *See 79 Del. Laws*, ch. 244, § 1.

the TIS Act; it sought to clarify that Title 21 offenses were, in fact, subject to the TIS Act. Indeed, the Synopsis to the bill states: “This bill *ensures* that Truth in Sentencing provisions apply to Title 21 felony offenses.” (B135).

CONCLUSION

For the foregoing reasons, this Court should find that the Truth in Sentencing Act of 1989 applies to the crime of Driving Under the Influence and should reverse the Superior Court's judgment denying the State's motion to correct an illegal sentence.

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Dated: March 19, 2015

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on March 19, 2015, I have caused a copy of the State's Supplemental Reply Brief on Cross-Appeal to be served electronically upon the following:

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