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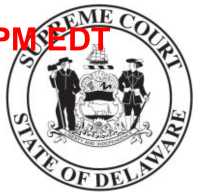

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 169, 2014
	)	
	)	
ANDY LABOY,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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

STATE'S OPENING BRIEF

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Dated: August 27, 2014

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Nature and Stage of the Proceedings 1

Summary of the Argument 3

Statement of Facts 4

Argument

I. Superior Court erred in sentencing Laboy for a first offense DUI when he had two prior offenses. 5

Conclusion 15

<u>Exhibits</u>

Exhibit A – Sentence Order, *State v. Andy Laboy*, Del. Super., ID No. 1207023933 (Mar. 7, 2013)

Exhibit B – Bench ruling on State's motion to sentence defendant as a third offense, *State v. Andy Laboy*, Del. Super., ID No. 1207023933 (Mar. 7, 2013)

Exhibit C – Order denying State's motion for reargument, *State v. Andy Laboy*, Del. Super., ID No. 1207023933 (Mar. 20, 2013)

TABLE OF CITATIONS

CASES **PAGE**

Alleyne v. United States, 133 S. Ct. 2151 (2013) 8, 11

Davis v. State, 2014 WL 1312742 (Del. Super. Feb. 28, 2014) 13

Fountain v. State, 2014 WL 4102069 (Del. Aug. 19, 2014) 11

Ortiz v. State, 869 A.2d 285 (Del. 2005) 11

State v. Dean, 2014 WL 3048724 (Del. Super. June 5, 2014) 13

State v. Fletcher, 974 A.2d 188 (Del. 2009) 5

State v. Lennon, 2003 WL 1342983 (Del. Mar. 11, 2003) 5

State v. Rogers, 2001 WL 1398583 (Del. Super. Oct. 9, 2001) 12

Stewart v. State, 930 A.2d 923 (Del. 2007) 12

STATUTES AND RULES

11 *Del. C.* § 4214 12

21 *Del. C.* § 4177 ....12, 13

21 *Del. C.* § 4177(a)...9, 11

21 *Del. C.* § 4177(d)..5, 6

21 *Del. C.* § 4177(d)(3)...1, 3, 6, 7

21 *Del. C.* § 4177(d)(11) 7

21 *Del. C.* § 4177A 9

21 *Del. C.* § 4177B(e)(1) 3, 5, 6, 12, 13

21 *Del. C.* § 4177B(e)(2) 5, 6

21 *Del. C.* § 4177B(e)(3) 5

21 *Del. C.* § 4177B(e)(4) 5

21 *Del. C.* § 4177B(e)(5) 5, 13

21 *Del. C.* § 8101 9

Md. Code Ann. Tran. § 21-902(b) (1999) 9, 12

OTHER AUTHORITIES

Black's Law Dictionary (6th ed.1990) 12

NATURE AND STAGE OF THE PROCEEDINGS

Police arrested Andy Laboy ("Laboy") following a July 28, 2012 traffic stop. (A1, DI 1). A New Castle County grand jury indicted him on April 1, 2013 on charges of driving under the influence of alcohol ("DUI"), a felony as a third offense, driving with an expired license, and speeding. (A1, DI 3). On June 13, 2013, Laboy filed a motion to suppress the intoxilyzer results of his blood alcohol concentration ("BAC"). (A2, DI 10). On August 30, 2013, Superior Court held an evidentiary hearing on the motion to suppress, and thereafter summarily denied the motion in a bench ruling. (A2, DI 17, A11).

Following a brief recess, Laboy pled guilty to a third offense DUI, admitting that he was eligible for sentencing under 21 *Del. C.* § 4177(d)(3). (A28-29; A31). The admission that he was eligible to be sentenced as a third offender was modified by his counsel's statement that "there may be the possibility that legally or factually the Maryland conviction might not be applicable." (A28). The court ordered a PSI. (A2, DI 18).

Laboy moved to be sentenced as a first offense, and the State moved to sentence the defendant as a third DUI offender. (A3, DI 20, 22; A34; A43). On March 7, 2014, Superior Court denied the State's motion and sentenced Laboy for a first offense DUI. (A3, DI 24, 25; A73-74; Ex. A to Op. Brf.). On March 21,

2014, the court denied the State's March 10, 2014 motion for reargument. (A3, DI 26, 29; Ex. B to Op. Brf.).

The State filed a timely notice of appeal. This is the State's opening brief.

SUMMARY OF THE ARGUMENT

I. Superior Court erred when it denied the State's motion to sentence Laboy for a third offense DUI and, instead, sentenced Laboy for a first offense DUI. Laboy had two "prior offenses," as defined by 21 *Del. C.* § 4177B(e)(1). Thus, Superior Court should have sentenced Laboy pursuant to 21 *Del. C.* § 4177(d)(3).

STATEMENT OF FACTS[1]

At about 4:30 a.m. on July 28, 2012, Corporal Hogate ("Hogate") of the Delaware State Police was monitoring traffic on interstate 95 near the split with interstate 295. (A12-13). Laboy drove past him at a rate of 89 miles per hour, 34 miles per hour over the posted speed limit. (A13-14). Hogate stopped the pick-up truck and saw that Laboy was the sole occupant. (A14). Laboy's eyes were bloodshot, and he had a moderate odor of alcohol. (A14, 19). Laboy admitted that he had consumed one beer and one other alcoholic drink over the course of the evening, with the last drink being consumed around 10:30 p.m. (A14). Laboy said that he thought it was shortly after midnight. (A15).

Laboy had difficulty getting out of his truck, which he explained was due to a hip injury from a prior car accident. (A14). Because of Laboy's prior injury, Hogate did not administer either the walk-and-turn or the one-leg stand tests. (A17). Laboy passed the counting backwards test, but failed the alphabet test. (A15). Hogate administered the horizontal gaze nystagmus ("HGN") test, and Laboy exhibited six of the six possible clues of intoxication. (A15-16). Hogate then performed a portable breathalyzer test ("PBT"), and Laboy's blood alcohol concentration ("BAC") was .16. (A17-18). At the police station, Hogate administered an intoxilyzer, and Laboy had a BAC of .15. (A10).

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[1] Because Laboy pled guilty, the facts are based on the suppression hearing testimony of Corporal Mark Hogate, his impaired driving report, and the intoxilyzer printout. (A6-25).

I. Superior Court erred in sentencing Laboy for a first offense DUI when he had two prior offenses.

Question Presented

Whether Superior Court erred in sentencing Laboy for a first offense DUI, rather than as a third offense DUI, when Laboy had two prior DUI convictions. (A43, A68-74).

Standard and Scope of Review

This Court reviews questions of law and of statutory construction *de novo*.[2]

Merits of the Argument

Delaware's DUI statute provides enhanced penalties for repeat offenders.[3] Section 4177B(e) defines prior offenses, establishes a time limit on the use of prior offenses, requires that prior offenses constitute separate and distinct offenses, and limits a defendant's ability to challenge the validity of a prior conviction.[4] A "prior offense" includes:

> a. A conviction or other adjudication of guilt or delinquency pursuant to § 4175(b) or § 4177 of this title, or a similar statute of any state or local jurisdiction, any federal or military reservation or the District of Columbia;
> ***

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[2] *State v. Fletcher*, 974 A.2d 188, 192 (Del. 2009) (citations omitted). *See also State v. Lennon*, 2003 WL 1342983, at *1 (Del. Mar. 11, 2003) (stating "[t]his Court reviews sentences to determine, inter alia, whether they fall 'within the statutory limits'" and reversing and remanding for resentencing where Superior Court did not impose a mandatory minimum sentence for a drug offense).

[3] 21 *Del. C.* § 4177(d).

[4] 21 *Del. C.* § 4177B(e)(1)-(5).

> c. Participation in a course of instruction or program of rehabilitation or education pursuant to § 4175(b) of this title, § 4177 of this title or this section, or a similar statute of any state, local jurisdiction, any federal or military reservation or the District of Columbia, regardless of the existence or validity of any accompanying attendant plea or adjudication of guilt;
> d. A conditional adjudication of guilt, any court order, or any agreement sanctioned by a court requiring or permitting a person to apply for, enroll in or otherwise accept first offender treatment or any other diversionary program under this section or a similar statute of any state, local jurisdiction, any federal or military reservation or the District of Columbia.[5]

While a prior offense must be committed within 10 years of an instant DUI to be subject to enhanced sentencing as a second offense, there is no time limit applicable to third or subsequent offenses.[6] When a person is convicted of DUI and has two separate and distinct prior offenses as defined in section 4177B(e)(1), it is a felony that requires imposition of a minimum mandatory period of incarceration.[7] Section 4177(d) provides:

> Whoever is convicted of a violation of subsection (a) of this section shall:
> ***
> (3) For a third offense occurring at any time after 2 prior offenses, be guilty of a class G felony, be fined not more than $5,000 and be imprisoned not less than 1 year nor more than 2 years. The provisions of § 4205(b)(7) or § 4217 of Title 11 or any other statute to the contrary notwithstanding, the first 3 months of the sentence shall not be suspended, but 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 9 months of any minimum

[5] 21 *Del. C.* § 4177B(e)(1).
[6] 21 *Del. C.* § 4177B(e)(2).
[7] 21 *Del. C.* § 4177(d)(3).

> sentence set forth in this paragraph provided, however, that any portion of a sentence suspended pursuant to this 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.[8]

When it appears that a defendant is subject to sentencing for a third DUI, the "Attorney General shall file a motion to have the defendant sentenced pursuant to those provisions."[9]

The State filed such a motion for Laboy to be sentenced for a third offense. For the reasons explained below, Superior Court erred in denying the State's motion to sentence Laboy as a third offender and, instead, sentencing Laboy as a first offender.

<u>Proceedings below</u>

Following a brief recess after denial of his motion to suppress the intoxilyzer result, Laboy pled guilty to DUI. (A28-33). In exchange, the State entered a *nolle prosequi* on the remaining charges and agreed to recommend only the minimum mandatory sentence required by law, so long as Laboy did not incur additional criminal charges before sentencing. (A28, 31). As part of the plea agreement, Laboy admitted that he had a prior January 16, 2001 DUI conviction in Delaware and a prior August 27, 1999 DUI conviction in Maryland. (A28, 29, 31). Although phrased as an outright admission that he was eligible to be sentenced as a

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[8] 21 *Del. C.* § 4177(d)(3).
[9] 21 *Del. C.* § 4177(d)(11).

third offender, Laboy's admission appears to have been modified by his counsel's statement that "there may be the possibility that legally or factually the Maryland conviction might not be applicable." (A28). It appears Superior Court allowed Laboy to plead guilty to a third offense DUI and specifically admit that he was convicted of two specific prior DUIs, but to reserve the right to argue that the Maryland offense did not qualify as a prior offense for purposes of enhancing his sentence for DUI.

Laboy thereafter filed a "motion to sentence defendant as qualifying for first offense." (A35). Laboy argued that the State could not show that "Laboy has any qualifying prior DUI convictions in the State of Delaware or in any other state to allow this to be a third offense." (A38). Relying on *Alleyne*,[10] Laboy argued that both prior convictions are an element of the offense that must be proven to a jury beyond a reasonable doubt. (A36-38). As to the prior Maryland DUI conviction, Laboy argued the Maryland DUI law is not comparable to Delaware's DUI law. (A38). As to the prior Delaware DUI conviction, Laboy argued that he had been convicted under an unconstitutional version of the statute. (A38-39).

The State filed a "motion to sentence defendant as a third offense DUI." (A43). The State attached to the motion a certified copy of records of the District Court of Maryland for Elkton County in *State of Maryland v. Andy Laboy,* Case

[10] *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

No. V586336-339. (A47). The records show that Laboy was convicted on August 27, 1999 for committing, on April 28, 1999, a DUI in violation of Md. Code Ann. Tran. § 21-902(b). (A51-55). The State also attached a certified copy of records of the Delaware Court of Common Pleas in *State of Delaware v. Andy Laboy*, Case No. 0006005760. (A59). The records show that Laboy was convicted on January 17, 2001 for committing, on May 21, 2000, a DUI in violation of 21 *Del. C.* § 4177(a). (A59-63). For that offense, the Court of Common Pleas sentenced Laboy as a second offender. (A60).

Superior Court heard argument on the motions at Laboy's March 7, 2014 sentencing hearing. (A67). At that hearing, Superior Court also had the benefit of the presentence report. (A71, 94). The presentence report contained a certified copy of Laboy's State of Delaware driving record. (A118). That record revealed that, pursuant to the Driver's License Compact, the State of Maryland had reported Laboy was arrested for DUI on April 28, 1999, and that the Division of Motor Vehicles had, as required by 21 *Del. C.* §§ 4177A and 8101, revoked his driver's license, effective September 18, 1999 (i.e., after his August 27, 1999 conviction).[11] (A119). The Division of Motor Vehicles noted "DUI rehab complete" on February

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[11] Specifically, the certified driving record notes that Laboy had an April 28, 1999 violation "4177 A1 DRIVE UNDER INFL ALCH/DRUGS" from a "MD" court and that "REV EFF 09181999 8101 12 MO: CLEARED." (A119). Section 8101 of title 21 is the Driver's License Compact, pursuant to which party states report out-of-state convictions to the "home state," which shall for certain specified offenses, including DUI, "give the same effect to the conduct reported … as if such conduct had occurred in the home state." *See* Driver's License Compact, art. II-IV, codified at 21 *Del. C.* § 8101.

29, 2000, his character investigation was favorable on April 5, 2000, and his revocation was lifted on April 12, 2000. (*Id.*)

The certified driving record also revealed Laboy's subsequent May 21, 2000 DUI in Delaware. (A118). The Division of Motor Vehicles again revoked Laboy's license for 12 months, effective February 19, 2001 (i.e., after his January 17, 2001 conviction). (A118-19). Finally, the certified driving record revealed that Laboy was arrested for a "3RD DUI OF ALCOHOL" on July 28, 2012 – the offense at issue. (A118).

At the conclusion of the hearing, Superior Court ruled as follows:

> Here is my thinking. I have some doubt about the first Maryland conviction. Probably it satisfies the statute. I mean, I don't think they would call it "driving under the influence" if it was anything other than the statute that prohibits people from driving under the influence of alcohol or drugs. Part of me tells me to treat this as a third offense, sentence the offender and stay the imposition of the sentence, and keep him out on bail pending [defense counsel's] opportunity to appeal to the Delaware Supreme Court.
> [Defense counsel]: Your Honor, we certainly have entertained that. I don't know if my client can afford the appeal.
> THE COURT: Well, there's another issue, too. And, that is, I think in good faith - I know in good faith I can treat this as a first offense because of the doubt I have over the Maryland conviction. And in this instance I am going to do that. I am going to cut you a break, and I am going to sentence you as a first offender. That being said, if you are arrested for DUI again, you will clearly be a third offender. And if you get this judge, he may find you as a fourth offender. He may change his mind about the Maryland conviction…. Therefore, despite the very cogent arguments of the prosecutor, I am going to deny the motion to treat this as a third offense. (A73-74).

Superior Court then sentenced Laboy for a first offense DUI. (A74). In doing so, Superior Court erred.

<u>Laboy should have been sentenced for a third offense DUI</u>

Superior Court correctly implicitly rejected Laboy's argument that *Alleyne* required the State to prove Laboy's prior convictions to a jury beyond a reasonable doubt. Laboy admitted below that lower federal courts have interpreted *Alleyne* as not requiring a mandatory minimum sentence enhancement to be proved to a jury beyond a reasonable doubt when, as here, the enhancement is based on a prior conviction. (A37). And Laboy provided no explanation why the Delaware constitution would provide greater protections, which is fatal to a state constitutional argument.[12] Moreover, this Court recently rejected the claim that *Alleyne* requires the State to prove to a jury beyond a reasonable doubt the fact of a prior conviction that subjects a convicted defendant to a minimum mandatory sentence.[13]

Superior Court likewise was correct in implicitly rejected Laboy's argument that his Delaware DUI conviction was not a prior offense because, he claimed, that he was convicted under an unconstitutional version of the statute. Laboy argued that "[u]pon information and belief, Mr. Laboy was convicted of a DUI under § 4177, prior to the amendments made on May 18, 1999." (A39). However, Laboy

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[12] *See Ortiz v. State,* 869 A.2d 285, 291 (Del. 2005).

[13] *Fountain v. State*, 2014 WL 4102069 (Del. Aug. 19, 2014).

was convicted for a DUI committed on May 21, 2000. (A59-62). Therefore, his argument was factually flawed and correctly rejected.

Superior Court erred, however, in deciding to "cut [Laboy] a break" even though "the first Maryland conviction … probably satisfies the statute." (A73). The State was not required to prove the "the facts and circumstances" of the Maryland DUI, as must be done to sentence someone as a habitual offender under 11 *Del. C.* § 4214.[14] To comport with section 4177B(e)(1), the Maryland DUI law only had to be "similar" to section 4177. The word similar means, "nearly corresponding; resembling in many respects; having a general likeness, although allowing for some degree of difference."[15] As the Superior Court correctly noted, "I don't think they would call it 'driving under the influence' if it was anything other than the statute that prohibits people from driving under the influence of alcohol or drugs." (A73). Indeed, a review of the 1999 Maryland statute, which is readily obtainable from Westlaw, shows that the law to which Laboy was convicted provided: "(b) *Driving under the influence of alcohol* – A person may not drive or attempt to drive any vehicle while under the influence of alcohol."[16] There can be no reasonable dispute that this is a statute "similar" to section 4177, which states in part: "No person shall drive a vehicle: (1) When the person is under

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[14] *Stewart v. State*, 930 A.2d 923, 926 (Del. 2007).
[15] *State v. Rogers*, 2001 WL 1398583, at *2 (Del. Super. Oct. 9, 2001) (quoting Black's Law Dictionary 1383 (6th ed.1990)).
[16] Md. Code Ann. Trans. § 21-902 (1999) (A92).

the influence of alcohol."[17] Indeed, the Superior Court has ruled that a Maryland DUI qualifies as a prior offense for enhanced sentencing.[18]

Superior Court essentially turned a blind eye towards what the court conceded was "probably" a similar statute. (A73). Moreover, the court ignored the certified driving record that showed both that the Maryland DUI conviction was treated by the Division of Motor Vehicles as a conviction under section 4177, which qualifies as a prior offense under section 4177B(e)(1)a., and that Laboy completed "DUI rehab" in 2000, which, even absent a conviction in Maryland, qualifies as a prior offense under section 4177B(e)(1)c. (A118-19). The court likewise ignored the fact that the Delaware Court of Common Pleas sentenced Laboy as a second offender in January 2001, necessarily requiring a finding by the Court of Common Pleas that Laboy had a prior offense under section 4177B(e)(1). (A60). The Court of Common Pleas docket submitted to Superior Court shows that Laboy did not appeal that ruling (A59), and Laboy did not challenge the validity of that conviction in the manner set forth in section 4177B(e)(5). Thus, if a Delaware court of competent jurisdiction sentenced Laboy as a second offender in 2001, he necessarily should have been sentenced as a third offender for the

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[17] 21 *Del. C.* § 4177(a)(1).

[18] *See State v. Dean*, 2014 WL 3048724 (Del. Super. June 5, 2014) (holding that certified copy of driving record is sufficient to prove prior offense and that probation before judgment for a Maryland DUI was a prior offense). *See also Davis v. State*, 2014 WL 1312742 (Del. Super. Feb. 28, 2014) (affirming enhanced sentence where defendant had prior probation before judgment for Driving While Impaired by Alcohol in Maryland).

instant DUI. Although professing to be ruling in "good faith" because of the "doubt I have over the Maryland conviction," Superior Court's own comments show that its ruling was made to "cut [Laboy] a break." (A73). Indeed, the sentencing judge commented that he "may change his mind about the Maryland offense" if Laboy were to commit another DUI. (*Id.*).

The legislature has established a statutory sentencing structure to address the repeated commission of the dangerous act of impaired driving. This structure expressly prohibits the discretion – or "break" – applied by the court below. Thus, Superior Court erred in denying the State's motion to sentence Laboy for a third offense DUI and in sentencing Laboy for a first offense DUI.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court below, and this case should be remanded for sentencing.

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Dated: August 27, 2014

CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on August 27, 2014, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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