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Case Number 103,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAVIER AYALA, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)))))))))))	No. 103, 2018

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATED: May 18, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested on July 27, 2015 and later indicted for the offenses of Possession with Intent to Deliver Heroin, Aggravated Possession of Heroin, Possession of a Firearm and Ammunition by a Person Prohibited, Endangering the Welfare of a Child, and Driving during License Suspension. A1, 12-14. The person prohibited and child endangering offenses were severed before trial. The jury at the first trial on June 8, 2016 was unable to reach a verdict and a mistrial was declared. A5 (D.I. 32). After the re-trial on October 11, 2016, the Defendant was convicted of the controlled substance offenses and traffic offense. A7 (D.I. 45). After the severed trial on November 22, 2016, the Defendant was convicted of the possession of a firearm and ammunition by a person prohibited offenses and the child endangering offense. A10 (D.I. 9). On February 14, 2017, the State moved to have the Defendant sentenced as an habitual offender on the possession of a firearm by a person prohibited offense. A10 (D.I. 11), A127-133.

On February 22, 2018, the Superior Court declared the Defendant an habitual offender and sentenced him to a minimum seven years, six months imprisonment on the possession of a firearm by a person prohibited offense

followed by terms of imprisonment suspended for probation on the remaining offenses and a $100 fine on the traffic offense. [1] A160. Sentence Order attached to Opening Brief as Exhibit B.

A notice of appeal was thereafter docketed on the Defendant's behalf. This is his Opening Brief on appeal.

[1] The controlled substance offenses were merged for sentencing and the imprisonment term of two years was imposed concurrently with the sentence for possession of a firearm by a person prohibited offense. A160. Sentence Order attached to Opening Brief as Exhibit B.

SUMMARY OF THE ARGUMENTS

1. The foundation for the admission of the chemist's testimony concerning the chemical nature of and weight of suspected controlled substances was insufficient and should not have been admitted into evidence because it does not conform with the foundational requirements of geometric sampling for admissibility.

2. The Defendant should not have been sentenced as an habitual offender for the possession of a firearm by a person prohibited offense because the alleged prior felony offenses were no longer offenses for the purpose of habitual offender enhanced sentencing.

STATEMENT OF FACTS

The Wilmington Police Department Drug, Vice and Organized Crime Unit obtained a search warrant to search the Defendant's residence at 1002 Sycamore Street in Wilmington. Prior to the execution of the warrant on July 27, 2015, officers were conducting surveillance on the residence and saw the Defendant leave and drive away in a mini-van. They knew that the Defendant's driver's license was suspended and stopped the mini-van on a nearby street. Officers found a bundle of heroin near the vehicle's center console. The bundle contained fifty small individually wrapped plastic bags with the label "Jaguar Blue" imprinted and weighed about .75 grams in total. (D.I. 48, 10/11/16, pp. 50-58). The Defendant was transported to the police station and the officers proceeded to 1002 Sycamore Street to execute the search warrant. Officers found three rolls of money in a second floor front bedroom. Officers also located bundles of 1236 small individually wrapped packages hidden above the interior doorway in a closet laundry room addition at the rear of the house. (D.I. 48, 10/11/16, pp. 61-88). At the police station during questioning, the Defendant admitted that the suspected heroin was his and his video recorded statement was played for the jury. (D.I. 48, 10/11/16, pp. 90-98). The quantity of suspected heroin that was recovered was examined by a chemist at the Office of Forensic Sciences and determined to be heroin weighing slightly more than

15 grams in total. (D.I. 48, 10/11/16, pp. 178-184).

Police officers also found a loaded .22 cal. semi-automatic revolver hidden underneath a cushion on the sofa in the front living room of the residence. Before finding it there, police had directed that Defendant's wife and eight year old daughter to sit on the sofa while police officers were conducting the search in the residence. During his questioning at the police station, the Defendant also admitted that he had a gun in his residence for protection. (D.I. 13, 11/22/16, pp. 15-35). The Defendant stipulated that he was legally prohibited from possessing a firearm. (D.I. 13, 11/22/16, p. 62).[2]

[2] Due to the severance of the person prohibited firearm and endangering the welfare of a child charges from the controlled substance offenses, (D.I. 32), the testimony concerning the firearm and the presence of children in the home was presented at the severed trial after the Defendant had been convicted of the controlled substance offenses after the first trial.

I. THE FOUNDATION FOR THE ADMISSION OF THE CHEMIST'S TESTIMONY CONCERNING THE AMOUNT OF CONTROLLED SUBSTANCES WAS INSUFFICIENT AND SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

Question Presented

The question is, given the Division of Forensic Science chemist's inability to recall how she had randomly sampled the individual amounts of suspected controlled substances in question in order to determine the quantity by weight of controlled substances in the Defendant's possession, whether her testimony concerning the total amount weight of the controlled substances should have been admitted into evidence. The question was preserved by the Defendant's objection to the admission of that testimony into evidence. A59-68, 125-126.

Standard and Scope of Review

The standard of review is abuse of discretion. *Mason v. State*, 1991 Del. LEXIS 448 (Dec. 27, 1991).

Argument

The forensic chemist from the Division of Forensic Sciences ("DFS") who testified at trial concerning the chemical nature and weight of the suspected heroin that was admitted into evidence at trial did not conduct forensic examination and testing of all of the 1,286 small individual dose bags

of suspected heroin that were seized by police from the Defendant's vehicle and the Defendant's residence. Instead, she inspected and tested 62 of the 1,286 bags and, relying on a laboratory practice, known as "geometric sampling," projected that because 62 of the 1,286 bags were confirmed as heroin, there was as a matter of accepted laboratory practice, she had 95% confidence that 90% of all of the individual dose bags contained heroin weighing in excess of 15 grams. A50-51, 83-89. The Defendant challenged the admissibility of her conclusion during *voir dire* testimony prior to the admission of her trial testimony. A52-59.

The basis of the Defendant's challenge to the admission of her testimony was that geometric sampling requires homogeneity of the packages containing suspected controlled and random sampling of packages for analysis but that she could not recall how she had conducted a random sampling of all of the small packages containing suspected controlled substances. A59-68. The forensic chemist testified that she divided all of the controlled substances into four homogeneous groups based on markings and appearance and then randomly selected from each of the four groups. She testified that she picked out a sufficient number of individual packages from each of the four homogenous groups based on appearance but did not recall how she randomly selected from each group and that, in any event, no accepted method for randomness in geometric sampling was required. A16-23, 28-31, 35, 49-53. The

Superior Court found that her method of forensic analysis was sufficient and admissible, finding that to the extent that the chemist divided the total into four homogenous groups based on package markings and appearance, that selection diminished if not obviated the need for a random selection of samples from each group on which to conduct testing. A59-66. Specifically, the Superior Court observed that,

> "I did not hear statistical samples are rendered invalid if your program for randomness is undermined somehow…. I come back to the principle of homogeneity … if it truly is a homogenous group, it undermines the argument that the randomness has some rigid structure. If it's all the same anyway, then how random you are becomes less important. I guess to the extent that they are a heterogeneous grouping, then randomness would assume more importance because the, because you're not sure you have all the same stuff."

A67.

The Superior Court abused its discretion when it read the requirement of random selection out of geometric sampling if it appeared from testimony that the selection of samples to test came from separate populations that appeared to homogenous. If the chemist relies on geometric sampling in order to forego testing of all available samples of suspected controlled substances, "the State must show how a determination as to the homogeneity of the tested population was made and how the tested samples were randomly selected. *State v.*

Roundtree, 2015 Del. Super. LEXIS 495, at *9. In addition to testifying that no particular method of random selection of samples to be tested was required after the samples had been divided into homogenous groupings, the chemist also testified that she could not recall how the samples had been selected from the individual groupings. The Superior Court found that this sufficient because to the extent that the groupings were homogenous, it correspondingly dispended with the need for the samples from each grouping to be randomly selected. This departs from the two-step foundational requirement for admissibility of substances pursuant to geometric sampling under *Roundtree*: "After the population has been determined, the samples to be tested must be randomly selected. In this case, after counting the bags and making a homogeneity determination, Ms. Newell placed the bags back into a common container and randomly selected the requisite twenty-eight, per the hypergeometric sampling table." *State v. Roundtree*, 2015 Del. Super. LEXIS 495, at *11. The chemist did not testify that she used an acceptable method for random sampling and her testimony concerning the chemical nature of and weight of all of the controlled substances was inadmissible. Her inability to recall and testify as to the basis for her testimony that she randomly sampled each of the homogeneous groupings rendered her conclusion that she randomly sampled the groupings inadmissible. *Fensterer v. State*, 509 A.2d 1106, 1109 (Del. 1986) ("D.R.E.

705 requires that in order to testify as to an opinion, an expert must first identify the facts and data upon which he bases the opinion and his reasons for it. Establishing such a sufficient basis for an expert opinion, then, is a prerequisite to the opinion's admission into evidence").

II. THE DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS AN HABITUAL OFFENDER FOR THE POSSESSION OF A FIREARM BY A PERSON PROHIBITED OFFENSE.

Question Presented

Were the Defendant's prior convictions sufficient predicates to require his sentencing as an habitual offender? The question was preserved for review by the Defendant's on the record arguments and filings opposed to his sentencing as an habitual offender. A134-149, 154-155.

Standard and Scope of Review

The standard of review is *de novo* where no facts are in dispute and the sentencing issue considered implicates the legal effect of the undisputed facts of prior convictions for sentencing enhancement purposes. *Butcher v. State*, 171 A.3d 537, 539 (Del. 2017).

Argument

Subsequent to the Defendant's conviction based on a guilty verdict for possession of a firearm by a person prohibited and possession of ammunition by a person prohibited, the State moved to have the Defendant sentenced as an habitual offender under 11 *Del. C.* § 4214(a). That section provides for an enhanced sentence for "any person who has been 3 times convicted of any felony under the laws of this State … and who shall thereafter be convicted of a

felony…." 11 *Del. C.* § 4214(a). If the offender's fourth felony is a "violent felony" conviction under 11 *Del. C.* § 4201(c), as the Defendant's conviction after trial for possession of a firearm by a person prohibited was, the Defendant would then be subject to an enhanced sentence which required the imposition of a "minimum sentence of ½ of the statutory maximum penalty…," 11 *Del. C.* § 4214(b), in this case seven years, six months imprisonment, which was imposed on the Defendant.[3]

The prior predicate convictions that the State relied on for the Defendant's habitual offender sentencing were:

- Possession with Intent to Deliver Cocaine (1993);
- Possession of a Controlled Substance within 300 feet of a Park (1999);
- Use of a Dwelling for Keeping a Controlled Substance (2009);
- Use of a Dwelling for Keeping a Controlled Substance (2009).

A127-133. In opposing the Defendant's sentencing as an habitual offender, the Defendant admitted that the possession with intent to deliver cocaine offense was a sufficient felony predicate for habitual offender sentencing purposes, but contended that the remaining possession of a controlled substance within 300

[3] In the absence of the habitual offender enhancement, the Defendant would have been otherwise subject to a minimum three years imprisonment under 11 *Del. C.* § 1448(e)(1)a because he had a prior possession with intent to deliver cocaine conviction in 1993.

feet of a park and possession of a controlled substance in a dwelling offenses were not sufficient predicates because they were no longer felonies under the law in effect at the time of the Defendant's sentencing. A134-148, 154-155.

The Superior Court rejected the Defendant's argument, finding that the contested prior convictions were felonies at the time that those convictions occurred although they had been since "taken off the books as part of a substantial revision to the controlled substances law in 2011." A152. The Superior Court therefore found that the prior offenses in question were sufficient predicates to sentence the Defendant as an habitual offender for the current offense of possession of a firearm by a person prohibited. A152. Addressing the Defendant's argument, the Superior Court also found that 11 *Del. C.* § 4215A[4] supported treating the prior abrogated offenses as felony

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[4] (a) Notwithstanding any provision of law to the contrary, if a previous conviction for a specified offense would make the defendant liable to a punishment greater than that which may be imposed upon a person not so convicted, that previous conviction shall make the defendant liable to the greater punishment if that previous conviction was: (1) For an offense specified in the laws of this State or for an offense which is the same as, or equivalent to, such offense as the same existed and was defined under the laws of this State existing at the time of such conviction; or
(2) For an offense specified in the laws of any other state, local jurisdiction, the United States, any territory of the United States, any federal or military reservation, or the District of Columbia which is the same as, or equivalent to, an offense specified in the laws of this State.
(b) This section shall apply to any offense or sentencing provision defined in this Code unless the statute defining such offense or sentencing provision

offenses for the purpose of habitual offender sentencing.

The prior controlled substances that are no longer felonies and no longer defined as offenses under the "Ned Carpenter Act"[5] enacted in 2011 should no longer be considered sufficient predicate offenses to habitual offender sentencing because, under 4215A, they are not "the same as, or equivalent to" offenses that are currently punishable in the controlled substances title. What were previously considered predicate offenses are no longer "the same as, or equivalent to" current offenses, they are no longer offenses and therefore should not qualify as sufficient predicates currently.

The Court discussed the possible effect of 4215A in its recent *Butcher*[6] decision, but as *dicta* because that case implicated sentencing enhancements under the possession of a firearm by a person prohibited statute, 11 *Del. C.* § 1448 (e)(1), while this case implicates sentencing enhancements under the habitual offender sentencing law.[7] In *Watson v. State*,[8] however, also addressed in *Butcher*, the Court recognized that the "[predicate offense] remained a

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or a statute directly related thereto expressly provides that this section is not applicable to such offense or sentencing provision.

Del. C. tit. 11, § 4215A.

[5] 78 Del. Laws, c. 13 (eff. Sept. 1, 2011).

[6] *Butcher v. State*, 171 A.3d 537, 543, n.34 (Del. 2017).

[7] *Id*.

[8] *Watson v. State*, 892 A.2d 366, 370 (Del. 2005).

felony, even though at time of sentencing the defendant's conduct would have constituted a misdemeanor." *Id*. In this case, however, *Watson* is distinguishable because the Defendant's prior conviction does not remain an offense at all.

Permitting the Defendant's prior offenses in question to serve as sufficient predicates for habitual offender sentencing is fundamentally unfair because the predicates in question are no longer offenses.[9] The General Assembly has recognized that the prior conduct defined by the offenses in question should no longer carry their punitive consequences prospectively. Enhanced current punishment based on past conduct that is no longer punishable "fails to differentiate upon reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefore." 11 *Del. C.* § 201(4).

[9] The prior possession within 300 feet of a park offense was repealed in 2011 under the "Ned Carpenter Act." 78 Del. Laws, c. 13, sec. 43. The prior keeping a controlled substance in a dwelling offense under prior 16 *Del. C.* § 4755(a)(5), essentially possession of a controlled substance in a dwelling, was redefined under current 16 *Del. C.* § 4760, but now requires permitting felony controlled substance conduct in a dwelling, not mere misdemeanor possession of a controlled substance in a dwelling. As such, is not "the same as, or equivalent to" the prior offense under 11 Del. C. §4215A.

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's convictions and sentences for aggravated possession of heroin and cocaine should be reversed.

Respectfully submitted,

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