



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THEODORE XENIDIS,)
)
 Defendant Below - Appellant,) Supreme Court No. 279, 2019
)
 v.) On appeal from Superior Court
) ID No. N1801011371 &
) N1802005270
 THE STATE OF DELAWARE,)
)
 Plaintiff Below - Appellee.)

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I. THE SUPERIOR COURT ERRED BY CONSIDERING XENIDIS'S UNCOUNSELED 1991 MARYLAND DUI CONVICTION AS A PREDICATE OFFENSE WHEN SENTENCING HIM AS A FOURTH OFFENDER UNDER 21 Del. C. 4177 (d)(4) FOR HIS DELAWARE DUI CONVICTIONS.

MERITS:

XENIDIS'S MARYLAND CONVICTION WAS UNCOUNSELED

The Superior Court erred by rejecting Defendant's argument that his Maryland conviction was "uncounseled." It is undisputed that the records provided by the State are absent of any indication that Defendant was represented by counsel during his Maryland proceedings. Defendant, in his motion to exclude, asserted that his Maryland guilty plea was uncounseled. Yet, he is faulted for not providing convincing proof of a negative. Defendant's assertion that he was not represented by counsel for his Maryland conviction, in conjunction with the absence of any contrary evidence in the Maryland records, is sufficient proof that his plea was uncounseled. Again, what additional proof was Xenidis expected to present to prove a negative?

XENDITIS'S UNCOUNSELED MARYLAND CONVICTION MAY BE CHALLENGED AS A PREDICATE OFFENSE.

The State's reliance upon *State v. Laboy*¹ for the proposition that an uncounseled prior DUI conviction cannot be challenged is misplaced. In *Laboy*, the Court rejected a claim that under *Alleyne v. United States*,² that the State was required to prove "beyond a reasonable doubt, that a previous Maryland DUI conviction "substantially conformed" to Delaware law. The *Laboy* court did not address whether an uncounseled DUI conviction qualified as a predicate offense.

Here, Xenidis does not contest the historical fact of his Maryland DUI conviction, but claims that his uncounseled conviction cannot qualify as a predicate offense under Delaware's DUI scheme because there is a right to counsel in misdemeanor cases under Article 1, §7 of the Delaware Constitution. The denial of the assistance of counsel is a violation of the due process guaranteed by Article I, §7 of the Delaware Constitution.³

A defendant may not attack a prior state conviction in the course of a federal sentencing or habeas proceeding.⁴ There are two exceptions. The first exception to this rule, based upon *Gideon* and *Burgett*, is where there was a failure to appoint counsel in violation of the Sixth Amendment.⁵ *Burgett* does not apply

¹ *State v. Laboy*, 117 A.3d 562 (Del. 2015)

² *Alleyne v. United States*, 133 S.Ct. 2151 (2013)

³ *Bryan v. State*, 571 A.2d 170, 176 (1990).

⁴ *Custis v. United States*, 511 U.S. 485 (1994), *Daniels v. United States*, 532 U.S. 374 (2001), and *Lackawanna County Dist. Atty. v. Coss*, 532 U.S.394 (2001).

⁵ *Daniels*, 532 U.S. at 382.

to misdemeanor convictions which do not result in a jail sentence.⁶ Even though the federal authority does not apply to this case because no jail sentence was involved, *Burgett*, and its progeny, are instructive authority supporting the proposition that an uncounseled prior conviction failing to meet constitutional standards may not be used to enhance a sentence for a subsequent offense under Article I, §7 of the Delaware Constitution.

ARTICLE I, §7 OF THE DELAWARE CONSTITUTION SHOULD BE INTERPRETED AS AFFORDING THE RIGHT TO COUNSEL IN MISDEMEANOR CASES.

The threshold issue in this case is whether there is a right to counsel in misdemeanor cases under Article I, §7 of the Delaware Constitution. The Superior Court erred by finding that the right to counsel under Article I, §7 of the Delaware Constitution is in lockstep with federal law, namely *Nichols* and *Scott*.⁷ While this Court and the Delaware Superior Court had occasion to consider the application of *Nichols* on the Delaware sentencing scheme, both have done so without examining the issue in the context of a defendant's right to counsel under Article I, §7 of the Delaware Constitution.⁸

Defendant has previously provided persuasive authority supporting his

⁶ *Nichols v. United States*, 511 U.S. 738 (1994), citing, *Scott v. Illinois*, 99 S.Ct. 1158(1979). See also, *State v. Pressley*, 2002 WL 863599 (Del. Super. 2002).

⁷ *Nichols v. United States*, 114 S.Ct. 1921 (1994). *Scott v. Illinois*, 99 S. Ct. 1158 (1979).

⁸ *Morris v. State*, 2002 WL 1241270 (Del. June 4, 2002). *State v. Pressley*, 2002 WL 863599 (Del. Super. 2002).

argument that there is a right to counsel in misdemeanor cases under Article I, §7 of the Delaware Constitution. There is also persuasive authority for rejecting *Nichols* and *Scott* and interpreting our state constitution as providing broader protection than guaranteed by the Sixth Amendment, and that an uncounseled conviction may not be used to enhance the period of incarceration for a subsequent offense.⁹

The State agrees with the Superior Court's opinion that the right to counsel under Article I, §7 of the Delaware Constitution should not be interpreted more broadly than its federal counterpart. Both conduct a textual analysis that result in an erroneous conclusion that the language in Article I, §7 "would suggest a narrower protection" than its federal counterpart. No precedent is provided for this interpretation. More disturbing is the majority's implicit premise that Article 1, §7 is merely a reflection of the minimal constitutional guarantees provided under its federal counterpart. The Superior Court's interpretation is contrary to this Court's

⁹ *State v. Young*, 863 N.W.2d 249 (Iowa, 2015) (a misdemeanor defendant has a right to counsel when he faces the possibility of incarceration under Iowa constitution); *State v. Kelly*, 999 So. 2d 1029 (Fla. 2008); *State v. Hrycak*, 877 A. 2d 1209 (N.J. 2005) (emphasizing the unreliability of uncounseled convictions); *State v. Deville*, 879 So. 2d 689 (La. 2004)(under article 1, section 13 of the Louisiana Constitution, an indigent individual has the right to appointed counsel if he is charge with an offense punishable by imprisonment. Because the Louisiana Constitution affords a greater right to counsel than the federal Constitution, and individuals prior uncounseled misdemeanor conviction punishable by imprisonment cannot be used to enhance his sentence or reclassify his offense.); *Brisson v. State*, 955 P.2d 888 (Wyo. 1998)(prior uncounseled convictions could not be used to "impose or enhance a subsequent prison sentence." The rationale is that prior uncounseled convictions are unreliable.) (noting the clear invitation in *Nichols* that states were free to implement stricter standards); *State v. Sinagoga*, 918 P.2d 228, 241 (Haw. App. 1996), overruled in part on other grounds by *State v. Veikoso*, 74 P. 3d. 575, 583 n. 8 (2003); *State v. Henes*, 763 N.W.2d 502, 505 (N.D. 2009).

decision that the right to counsel under Article I, §7 is broader than under the Fifth Amendment.”¹⁰ Instead, the State seeks an outcome in lockstep with federal authority, and a rejection of a broader right to counsel based upon the plain text of Article I, §7.

The State’s relies upon the Pennsylvania Supreme Court’s determination that Article 1, § 9 of the Pennsylvania Constitution is “coterminous with the Sixth Amendment” to suggest that Delaware must reach the same conclusion.¹¹

The State’s analysis and comparison with Pennsylvania law is flawed. *McCoy* is based upon the constitutional analysis conducted by the Pennsylvania Supreme Court in *Commonwealth v. Arroyo*¹² resulting in the conclusion that Pennsylvania’s right to counsel provision should be interpreted in lockstep with its federal counterpart. *Arroyo* involved virtually the same right to counsel issue addressed by this Court in *Bryan*.¹³ Yet, the Pennsylvania Supreme reached a different conclusion than the *Bryan* Court. *Arroyo* reiterated that Article I, §9 of the Pennsylvania constitution “tracks the protection afforded under the Fifth Amendment.”¹⁴ It concluded that Article I, §9 of the Pennsylvania Constitution is coterminous with the Sixth Amendment for purposes of determining when the right to counsel attaches.

¹⁰ *Bryan v. State*, 571 A.2d 170, 176 (1990).

¹¹ *Commonwealth v. McCoy*, 975 A.2d 586 (Pa. 2009).

¹² *Commonwealth v. Arroyo*, 732 A.2d 162 (Pa. 1999)

¹³ *Id.*

¹⁴ *Arroyo*, at 166.

Pennsylvania's interpretation of the right to counsel under Article I, §9 in *Arroyo* is contrary to this Court's view of the right to counsel under Article I, §7 in virtually identically circumstances.¹⁵ The juxtaposition of the respective state constitutional right to counsel interpretations in *Arroyo* and *Bryan* is persuasive evidence that the Delaware Constitution is not interpreted in accord with its Pennsylvania counterpart.

Defendant has applied the *Jones* criteria in support of the interpretation that Article I, §7 of the Delaware Constitution should be interpreted more broadly.¹⁶ His argument is buttressed by the thorough examination of the issue by the Iowa Supreme Court in *State v. Young*.¹⁷ The State failed to conduct a meaningful evaluation of that decision even though the Delaware and Iowa right to counsel provisions share common language. Instead of addressing the constitutional analysis in *Young*, the State simply dismisses it based upon the alleged different values of each state, i.e., fundamental fairness v. federalism and practicality concerns. Again, the federalism and practicality concerns which informed *Scott*, and thereby *Nichols*, were never relevant to Delaware.

While the Court in *Nichols* found the federal due process clause permitted consideration of uncounseled misdemeanor convictions to enhance subsequent

¹⁵ *Id.*

¹⁶ *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).

¹⁷ *State v. Young*, 863 N.W.2d 249 (Iowa, 2015).

convictions, it rested its decision upon *Scott* to reach that outcome. In *Scott*, the court limited the right to court appointed counsel to those cases in which the defendant actually received imprisonment. In other words, counsel is not required where no loss of liberty is involved. The Court reasoned that economic and efficiency considerations required that the right to counsel be limited to those cases which involved the loss of liberty. It reached this result without any meaningful textual analysis of the Sixth Amendment and how it could be interpreted to reach this result.

The State seeks to affirm a decision interpreting Article I, §7 of the Delaware Constitution as being in lockstep with *Nichols*, which was based upon the minimal constitutional analysis of *Scott*. The State notes the “federalism and practicality concerns of *Scott* and *Nichols*,” which is a tacit acknowledgment that the decision was not based upon a textual analysis of the Sixth Amendment.

States which have rejected the *Scott/Nichols* right to counsel interpretation have placed value on the reliability of uncounseled convictions as the overriding concern. It is fundamentally unfair to allow judges to rely on inherently unreliable uncounseled convictions to enhance an offender sentence. Convictions are only reliable when the proceedings are fair which in turn depends upon representation by counsel.

The United States Supreme Court’s limitation of the constitutional right to

cases in which imprisonment is actually to be imposed makes little sense and is contrary to the values of our state. *Scott* was wrongly decided and the Constitution does mandate counsel in all cases. This Court should not follow *Scott* because it is contrary to the text of Article I, §7 of the Delaware Constitution, as well as our values of fundamental fairness and reliability of convictions. Even minor cases can become more serious and can carry substantial collateral consequences. Therefore, Article I, §7 of the Delaware Constitution should be interpreted as affording the right to counsel in misdemeanor cases.

Assuming that Article I, §7 of the Delaware Constitution provides the right to counsel in misdemeanor cases, then it was a due process violation to enhance Xenidis's sentence based upon his uncounseled Maryland DUI conviction.

DEGREE OF PROOF CLAIM WAS NOT WAIVED

This appeal includes a claim relating to the appropriate degree of proof applicable in this case, including a claim that the Superior Court erroneously applied a conclusive presumption of the validity of the Maryland conviction in violation of *11 Del. C. §306*. Defendant rejects the State's argument that this claim is waived because it was first raised on appeal. The issue did not arise until it was addressed in the Superior Court's decision. Defendant had no basis to raise the claim prior to the Superior Court's decision. Therefore, this claim is fairly raised as it is a response to an issue first addressed in the Superior Court's decision.

CONCLUSION

Article 1, §7 is not merely a reflection of the minimal constitutional guarantees provided under its federal counterpart. It should be interpreted as providing the right to counsel in misdemeanor cases. The denial of the assistance of counsel is a violation of the due process guaranteed by Article I, §7 of the Delaware Constitution. Xenidis's uncounseled Maryland DUI conviction should not qualify as a predicate offense in a sentencing for a subsequent offense.

WHEREFORE, Defendant asks that the Court grant him all relief to which he may be entitled in this proceeding. Defendant is seeking an Order reversing his sentencing for as a DUI fourth offender.

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