



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY BROWN,)
)
 Defendant Below,)
 Appellant,)
) **No. 317, 2020**
 v.)
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

APPELLANT'S OPENING BRIEF

**ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW
CASTLE COUNTY**

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DATE: January 19, 2021

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SUMMARY OF THE ARGUMENT

1. The trial court erred when it sentenced Gregory Brown on both possession of a firearm by a person prohibited and possession of ammunition by person prohibited when the offenses are violations of the same statute and arose out of possession of a single loaded firearm.

NATURE AND STAGE OF THE PROCEEDINGS

The Appellant, Gregory Brown ("Brown") was indicted on charges of possession of a firearm by a person prohibited ("PFBPP"), possession of ammunition by person prohibited ("PABPP"), carrying a concealed deadly weapon ("CCDW"), possession of a firearm while under the influence ("PFWUI") and driving under the influence of alcohol ("DUI"). (A7).

Brown waived his right to a jury trial and a bench trial was held on February 11 2020. D.I.#18. At the conclusion of the State's case, Appellant motioned for a judgement on acquittal for the charges of PFBPP, PABPP and CCDW, however the motion was denied. Brown was acquitted on the charge of CCDW and found guilty of PFBPP, PABPP, PFWUI and DUI. After trial and prior to sentencing the Superior Court raised *sua sponte* whether the two separate convictions of PFBPP and PABPP merged for purposes of sentencing as they stemmed from one loaded firearm. By written Order dated August 31, 2020, the Court granted the State's motion to consider PFBPP and PABPP as separate offenses for sentencing purposes. ("See Order as Ex. A").

Brown was sentenced to 15 years at Level 5 followed by various levels of probation. Brown filed a timely notice of appeal. This is the Opening Brief in support of his appeal.

STATEMENT OF FACTS

On August 22 2019, at approximately 6.30 a.m., Officer Arthur Dreher ("Dreher") of the Middletown Police Department, responded to Millbrook Road in Newark, Delaware, pursuant to a 911 call. (A29). Upon arrival, Dreher encountered a silver sedan with the driver's side door partially open and the engine running. There was a single occupant in the vehicle, later identified as Brown. (A30). Brown appeared to be asleep and woke up after being called a few times. Officers recovered half a bottle of Hennessy in the car, plus a loaded handgun on the seat. (A31). After running a background check, police learned that Brown was prohibited from possessing firearms. (A42). Brown denied ownership of the weapon. The firearm was submitted for fingerprint testing and no fingerprints were found. The firearm was not swabbed for DNA. (A49-50).

After collecting the gun and ammunition, police continued with a DUI investigation based on Brown's slurred speech, physical demeanor and inability to exit the vehicle without assistance. (A43). A search warrant was drafted in order for Brown's blood draw to be administered. (A44). Brown's blood alcohol concentration came back under the legal limit, at 0.04. Additional drug testing was performed and came back positive for THC, benzodiazepine and oxycodone. (A68, A73).

I. THE DOUBLE JEOPARDY & MULTIPLICITY DOCTRINE OF THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 8, OF THE DELAWARE CONSTITUTION WAS VIOLATED BY THE SUPERIOR COURT’S FAILURE TO MERGE APPELLANT’S COUNTS OF PFBPP AND PABPP.

Question Presented

Whether, under the Fifth Amendment to the United States Constitution, and Article I, § 8 of the Delaware Constitution, the crimes of PFBPP and PABPP, in violation of 11 *Del. C.* §1448(b), merge for sentencing purposes when the ammunition is recovered inside the firearm? (Ex. A at p.2).

Standard And Scope Of Review

Issues alleging constitutional errors or misapplication of the law are reviewed de novo. *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

Argument

Brown was arrested while in possession of a firearm loaded with ammunition. At trial, Brown was found guilty of Possession of a Firearm by Person Prohibited (“PFBPP”), and Possession of Ammunition by a Person Prohibited (“PABPP”). After announcing the verdict, the Court raised *sua sponte* whether PFBPP and PABPP should merge for sentencing purposes, since Brown’s ammunition was found inside his gun. (A106). More specifically, the Court posed the question, “whether these *two* separate convictions and separate sentences

under the PDWBPP statute for possession of *one* loaded firearm contravenes the meaning of the statute. And, if the statute embraces dual charges for a firearm and for the ammunition loaded within, whether the statute falls afoul of the Double Jeopardy clauses of the Delaware and United States Constitutions, each of which declares that no person shall be ‘twice put in jeopardy of life or limb’”.¹ Notably, the aforementioned grounds are an issue of “first impression” for our state courts as applied to Delaware’s Possession of Deadly Weapons by a Person Prohibited Statute, 11 *Del. C.* § 1448.

“The protection against double jeopardy is fundamental to our criminal justice system. It is found in the Fifth Amendment to the United States Constitution, in Article I, § 8 of the Delaware Constitution, and in the Delaware criminal statutes.”² The protection of double jeopardy “forbids successive prosecution and cumulative punishment for a greater and lesser included offense.”³ Although the Double Jeopardy Clauses in the Delaware and United States Constitutions are virtually mirror images, it is well established that the Delaware Constitutional protections go further and have shown greater sensitivity to Delawareans’ individual rights.⁴

¹ Ex. A at 2; U.S. Const. amend. V.; Del. Const. art. I, § 8.

² *State v. Willis*, 673 A.2d 1233, 1235 (Del. Super. 1995).

³ *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

⁴ *Jones v. State*, 745 A.2d 856, 864 (Del. 1999).

Under 11 *Del. C.* § 1448, PFBPP and PABPP should merge for sentencing purposes when ammunition is found inside of a firearm because Double Jeopardy precludes multiple sentences for the same offense. The Double Jeopardy Clause protects against: (1) successive prosecutions; (2) multiple charges under separate statutes; and (3) being charged multiple times under the same statute. The third double jeopardy prong, “multiplicity”, is what is at issue here, since Brown is being convicted separately for two violations of the same statute.

As this Court is presented with a novel issue here, how the Federal Courts handle similar situations would be instructive. Specifically, federal courts’ interpretation of 18 U.S.C. § 922(g), which prohibits certain categories of people from possessing firearms. As the Court below found, Federal Courts hold that “simultaneous receipt of more than one weapon covered by [the statute] supports conviction for only one offense” thereunder.⁵ In *U.S. v. Keen*, the Court determined that the defendant could only receive one conviction and sentence for his violation of the statute, § 922(g)(1).⁶ This is because although the court determined that Congress *could* have the power to punish a person under the statute twice, “clear indication of intent to authorize multiple punishments is lacking under § 922(g)(1).”⁷

⁵ *United States v. Frankenberry*, 696 F.2d 239, 245 (3d Cir. 1982).

⁶ *U.S. v. Keen*, 104 F.3d 1111, 1120 (9th Cir. 1996).

⁷ *Id.*

In sum, simultaneous possession of a firearm and ammunition is a single offense. Therefore, Brown's sentences for PFBPP and PABPP must also merge to avoid Double Jeopardy. The sentence imposed in this case should be vacated and the matter remanded for resentencing.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Gregory Brown's conviction should be reversed.

\s\ Santino Ceccotti
Santino Ceccotti, Esquire

DATE: January 19, 2021