



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYSHAUN REMBERT, )  
 )  
 Defendant Below, )  
 Appellant, )  
 )  
 v. ) No. 436, 2024  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

**STATE'S ANSWERING BRIEF**

Date: February 14, 2025

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## NATURE OF PROCEEDINGS

On April 8, 2014, Tyshaun Rembert (“Rembert”)<sup>1</sup> pled guilty to Drug Dealing (Heroin). (A57-59).<sup>2</sup> The Superior Court sentenced him to five years of Level V incarceration, suspended for eighteen months of Level III probation. (B-23).

On March 13, 2015, the Superior Court found Rembert in violation of the terms of his probation. (B-1). The court gave him the same sentence.<sup>3</sup> (B-28).

On March 4, 2016, the Superior Court found Rembert had violated the terms of his probation a second time. (B-1). The court sentenced him to five years at Level V (with credit for seventeen days previously served), suspended for five months at the Level IV VOP Center, followed by one year of Level III probation.<sup>4</sup> (B-31).

On November 22, 2016, Rembert was arrested and charged with, *inter alia*, Drug Dealing.<sup>5</sup> (B-12). Rembert pled guilty to Drug Dealing on February 16, 2017 (A57-59), and the court sentenced him that day to eight years at Level V, suspended for one year of Level IV Residential Substance Abuse Treatment, suspended upon

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<sup>1</sup> According to his Delaware driver’s license, Mr. Rembert’s first name is actually spelled “Tyshun.”

<sup>2</sup> “D.I. [6833]” refers to docket items in Superior Court Criminal case I.D. No. 1402006833 (B-1).

<sup>3</sup> The court also sentenced Rembert to Home Confinement for violating the terms of his probation in a 2012 case.

<sup>4</sup> Rembert was discharged as unimproved from probation in his 2012 case.

<sup>5</sup> “D.I. [4805]” refers to docket items in Superior Court Criminal case I.D. No. 1611014805. (B-12).

successful completion for eighteen months of Level III Aftercare. (B-34). The court also found Rembert had violated the terms of his probation in his 2014 case for a third time and sentenced him to four years at Level V (with credit for one day served), suspended for eighteen months of Level III Aftercare. (B-40).

On November 3, 2017, Rembert was arrested and charged with Possession of a Controlled Substance.<sup>6</sup> (B-22). He pled guilty on November 17, 2017, and was ordered to pay a fine. (B-22). On November 21, 2017, the Superior Court found that Rembert had violated the terms of his probation in his 2014 and 2016 cases. (B-40). The court deferred sentencing for a TASC evaluation. (B-42). On December 19, 2017, the Superior Court sentenced Rembert as follows: (i) for drug dealing in his 2016 case, to seven years at Level V (with credit for 50 days previously served), suspended upon completion of the Key Program for eighteen months of Level III probation; and (ii) for drug dealing in his 2014 case, to four years at Level V (with credit for one day previously served), suspended for eighteen months of Level III probation. (B-40). Rembert appealed, and this Court affirmed on April 27, 2018.<sup>7</sup>

On June 7, 2023, the State charged Rembert by information for Possession of a Firearm By a Person Prohibited (“PFBPP”), Possession of Ammunition By Person

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<sup>6</sup> "D.I. \_\_\_\_" refers to docket items in the Court of Common Pleas Criminal case I.D. No. 1710019414 (B-22).

<sup>7</sup> *Rembert v. State*, 2018 WL 2017924 (Del. Apr. 27, 2018).

Prohibited (“PABPP”), Endangering the Welfare of a Child, Illegal Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Possession of Marijuana. (A4-6). On March 25, 2024, Rembert moved to sever the prohibited charges from the rest of the counts. (D.I. 2 at A1).<sup>8</sup> One day later Rembert pled guilty to PFBPP. (A1).

Based on a filing by Rembert, the court held oral argument on July 11, 2024, on the issue of whether Rembert’s two prior convictions for Drug Dealing qualified as violent felonies under 11 *Del. C.* § 4201(c)(1) for purposes of enhanced sentencing under 11 *Del. C.* § 1448(e)(1)c. (D.I. 13 at A2; A22-43). The Superior Court reserved decision on the issue. (A42). Rembert submitted a supplement to his oral argument. (A44-45). The State filed its response. (A46-81).

On September 13, 2024, the Superior Court determined Rembert was subject to a mandatory minimum sentence of ten years. (A84). The court found the statutory provisions required the imposition of this mandatory minimum, which the court otherwise would not have imposed. (A85, 87, 93). The court also noted the aggravating and mitigating factors of prior bad conduct, custody status at the time of the offense, and cooperation with the prosecutor. (A85-86). Finally, the court found that Rembert had violated his probation and resentenced him for Case No. 16-

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<sup>8</sup> “D.I. \_\_\_\_” refers to the Superior Court Criminal docket item numbers in *State v. Tyshaun Rembert*, ID No. 2302008359B.

12-0106 to two years, three months at Level V, which took into consideration time served, suspended for one year Level III, and for Case No. 14-03-0266 to four years Level V, suspended for one year Level III. (A93).

Rembert has appealed and filed a timely brief. This is the State's answering brief.



## SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. Rembert pled guilty to Drug Dealing pursuant to 16 *Del. C.* § 4754(1) in both 2014 and 2017. Both of his guilty pleas reflect violation of Section 4754(1), not Section 4754(a). Two other cases from the 2011-2017 time period describe convictions under Section 4754(1) or (2), further evidencing that the Section 4754 subsections were denominated as (1), (2) and (3), and not as (a), (b), and (c) as Rembert contended. Rembert now makes a new argument that he was never convicted under the version of § 4754 that was codified at the time of his 2023 PFBPP violation and that the enhancement provisions of the version of Section 4201(c) in effect at the time of his 2023 PFBPP violation are somehow inapplicable. Rembert failed to present this argument to the Superior Court, which means that he has waived this argument under Rule 8. In any event, Rembert's new argument—that the Drug Dealing statute was restated in 2019, so the enhancement provisions in Section 1448(e)(1)c are inapplicable—fails because it is contrary to the plain language of the statute. Moreover, 11 *Del. C.* § 211(a) forecloses his argument, and Rembert's arguments defy logic.

## STATEMENT OF FACTS

Rembert pled guilty to Possession of a Firearm By a Person Prohibited (“PFBPP”) on March 26, 2024. (D.I. 6 at A1; A9-10; A14; A18-19). During the plea hearing, trial counsel indicated that Rembert understood he was pleading guilty to a Class C felony that was punishable by up to fifteen years of incarceration. (A9). On the Truth-in-Sentencing Form, trial counsel listed the minimum mandatory times of three, five, and fifteen years that applied to a violation of 11 *Del. C.* § 1448. (A9, 19). Trial counsel asked the court to defer sentencing and for a PSI to be issued. (A9). Trial counsel also stated that “[t]here are possible arguments about what an appropriate enhancement ought to be, if any, so that needs to be looked at.” (A9). In response, the court suggested that the parties confer on briefing. (A15). Trial counsel emphasized that the PSI needed to be completed first, which prompted the court to agree. (A15).

On May 22, 2024, Rembert submitted a letter motion arguing that his prior convictions were not violent felonies under 11 *Del. C.* § 4201, and thus no minimum mandatory sentence applied. (A20-21). He also argued there was a “substantial lack of clarity” about what the Delaware Legislature intended to classify as a Section 4201 violent conduct and hence the “most just result” was to find that his prior offenses were not violent felonies under Section 4201(c). (A21).

At the sentencing hearing, the Superior Court found that the statutory language at the time of Rembert's offense required the court to impose the minimum mandatory term of ten years (A84); however, the court noted that if it were not constrained to impose this minimum mandatory term, it would have ordered a lesser sentence. (A85). In addition, the court listed the aggravating and mitigating factors of prior bad conduct, custody status at the time of the offense, and cooperation with the prosecution. (A85-86).

## ARGUMENT

### I. THE SUPERIOR COURT PROPERLY FOUND THAT REMBERT'S TWO PRIOR CONVICTIONS WERE VIOLENT FELONIES THAT WARRANTED A MINIMUM MANDATORY SENTENCE OF TEN YEARS FOR HIS CONVICTION OF POSSESSION OF A FIREARM BY A PERON PROHIBITED.

#### Question Presented

Whether Rembert's 2014 and 2017 convictions for Drug Dealing under 16 *Del. C.* § 4754(1) qualify as "violent felonies" under 11 *Del. C.* § 4201(c)(1) for purposes of enhancement under 11 *Del. C.* § 1448(e)(1)c. and thus required a minimum mandatory sentence of ten years for PFBPP. The State addressed this question, and Rembert's trial court arguments (which differ from his current arguments), at A46-A81.

#### Standard and Scope of Review

Deciding whether a prior conviction qualifies as a predicate violent felony under 11 *Del. C.* § 1448(e)(1)c. is a question of law, which this Court reviews *de novo*.<sup>9</sup> In addition, this Court "review[s] statutory construction issues *de novo* to determine if the Superior Court erred as a matter of law in formulating or applying

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<sup>9</sup> *Butcher v. State*, 171 A.3d 537, 539 (Del. 2017); *Sommers v. State*, 2010 WL 5342953, at \*1 (Del. Dec. 20, 2010) (citation omitted).

legal precepts.”<sup>10</sup> This Court has previously held that Section 1448(e)(1) is unambiguous.<sup>11</sup> “When the General Assembly's ‘intent is reflected by unambiguous language in the statute, the language itself controls.’”<sup>12</sup>

### **Merits of Argument**

Many of the facts and legal principles pertinent to this appeal are undisputed, including the following:

- “On March 26, 2024, Rembert pled guilty to the offense [of] Possession of a Firearm by a Person Prohibited, (‘PFBPP’).”<sup>13</sup>
- The date of the offense to which Rembert pled guilty was February 16, 2023.<sup>14</sup>
- “Generally, PFBPP is a class D felony which, upon conviction, carries a sentencing range of 0-8 years in prison and a presumptive sentence of up to 12 months at level 2 or level 3 probation.”<sup>15</sup>

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<sup>10</sup> *Butcher*, 171 A.3d at 539; *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998) (citing *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993)).

<sup>11</sup> *Butcher*, 171 A.3d at 539; *Ross v. State*, 990 A.2d 424, 429 (Del. 2010); *see also Sommers*, 2010 WL 5342953, at \*2.

<sup>12</sup> *Butcher*, 171 A.3d at 539; *Ross*, 990 A.2d at 428 (citing *In re Adoption of Swanson*, 623 A.2d 1095, 1096–97 (Del. 1993)).

<sup>13</sup> Opening Br. at 3 (footnote omitted).

<sup>14</sup> Opening Br. at 6.

<sup>15</sup> Opening Br. at 6.

- “However, pursuant to 11 *Del. C.* § 1448 (e) (1) (c), if the defendant was ‘convicted on two or more separate occasions of any violent felony,’ PFBPP is elevated to a Class C felony and a mandatory-minimum sentence of ‘[t]en years at level V’ must be imposed.”<sup>16</sup>
- Section 1448(e)(3) defines a ‘violent felony’ as ‘any felony so designated by § 4201(c) of this title[.]’<sup>17</sup>
- “[T]he convictions that are properly used as predicates for an enhanced sentence must . . . be for the specific crimes *currently* listed in section 42[01](c).”<sup>18</sup>
- “Rembert had been convicted of drug dealing as defined in § 4754 (1) on April 8, 2014 and on February 16, 2017.”<sup>19</sup>
- “On February 16, 2023, the date of the offense in this case, §4201(c) designated drug dealing pursuant to 16 *Del. C.* § 4754 (*I*) as a violent felony.”<sup>20</sup>

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<sup>16</sup> Opening Br. at 6

<sup>17</sup> Opening Br. at 6 (footnote omitted).

<sup>18</sup> Opening Br. at 8 (emphasis in original), quoting *Butcher v. State*, 171 A.3d 537, 538 (Del. 2017).

<sup>19</sup> Opening Br. at 3.

<sup>20</sup> Opening Br. at 6 (emphasis in original).

Rembert argued to the trial court that enhancement of his sentence was inappropriate because the statute governing his prior convictions (Section 4754) “came into being as part of the Ned Carpenter Act” which “does not have a subsection (1), instead it has subsections (a), (b), and (c).” (A21). Thus, Rembert argued, the reference in Section 4201(c) to Section 4754(1) was “a callout to a statute subsection that did not and does not exist.”<sup>21</sup> But this argument was factually incorrect.<sup>22</sup>

While the Ned Carpenter Act used the letters (a), (b) and (c) to reference the subsections of Section 4754,<sup>23</sup> the statute as codified referenced its subsections as (1), (2) and (3).<sup>24</sup> (A64). In fact, when Rembert pled guilty to aggravated possession of drugs in 2014 and 2017, both of those guilty pleas reflected violation of Section 4754(1), *not* Section 4754(a). (A61, 71, 74). Two other cases from the 2011-2017 time period describe convictions under Section 4754(1) or (2) (*not* Section 4754(a))<sup>25</sup>, further evidencing that the Section 4754 subsections were denominated

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<sup>21</sup> Opening Br. at 6.

<sup>22</sup> Opening Br.. at 3.

<sup>23</sup> See 78 Del. Laws c. 13, § 42.

<sup>24</sup> 1 Del. C. § 211 expressly permits Delaware Code Revisors to “[r]enumber and rearrange sections or parts of sections” of the Code.

<sup>25</sup> *State v. Flowers*, 2020 WL 1171019 (Del. Super. Ct. Mar. 11, 2020) (referencing a 2013 violation of Section 4754(1)); *State v. Clark*, 2024 WL 3026459 (Del. Super. Ct. June 17, 2024 (referencing a pre-2017 conviction under Section 4754(2)).

as (1), (2) and (3), and not as (a), (b), and (c) as Rembert contended. Thus, the trial court properly denied Rembert’s argument that the mandatory minimum sentence set forth in Section 1448(e)(1)c did not apply to his prior Section 4754 convictions. (A84).

On appeal, Rembert makes a new argument—that on the date of Rembert’s PFBPP violation, “16 *Del. C.* § 4754 (*I*) did not exist. Rather, drug dealing was defined at that time by 16 *Del. C.* § 4754 (*a*).”<sup>26</sup> Rembert also argues that “the State sought to enhance Rembert’s penalties to ten years based upon two prior convictions for Drug Dealing under 16 *Del. C.* § 4754 (*I*)—one from April 8, 2014, and another from February 16, 2017—arguing that they were convictions of a violent felony.”<sup>27</sup>

Rembert’s argument is no longer that the subsections of Section 4754 were not denominated as (1), (2) and (3) in 2014 and 2017 when he committed his violations of that statute (as he had argued to the trial court). Rather, he now concedes that “as early as September 1, 2011, § 4754 was codified” using subsections (1), (2) and (3).<sup>28</sup> But, he contends, on December 15, 2019, Section 4745 was “recodified”, with the substance remaining the same, but the syntax

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<sup>26</sup> Opening Br. at 6 (emphasis in original).

<sup>27</sup> Opening Br. at 6 (emphasis in original).

<sup>28</sup> Opening Br. at 7.



changed.<sup>29</sup> He contends that he was never convicted under the version of Section 4754 that was codified at the time of his 2023 PFBPP violation, and that the enhancement provisions of the version of Section 4201(c) in effect at the time of his 2023 PFBPP violation (which included violation of Section 4754(1) as a “violent felony”) are somehow inapplicable.<sup>30</sup> This argument was not presented to, and was thus not addressed by, the trial court. Rembert has not offered any reason for his failure to advance this argument in the trial court, nor has he explained why the interest of justice require this argument to be raised now. Accordingly, under Supreme Court Rule 8, this argument is waived.<sup>31</sup>

In all events, Rembert’s claim fails on the merits. As he concedes, Section 11 *Del. C.* § 1448(e)(1)c. requires an enhanced sentence for his PFBPP conviction if he committed two prior “violent felonies” as defined by the version of § 4201(c) in force at the time of the PFBPP offense.<sup>32</sup> At the time of Rembert’s PFBPP offense, Section § 4201(c) listed as a violent felony the following:

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<sup>29</sup> Opening Br. at 8.

<sup>30</sup> Opening Br. at 8-9.

<sup>31</sup> *Pollard v. State*, 284 A.2d 41, 45 (Del. 2022); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Rembert’s claims do not implicate the fairness of the trial and are thus not within the “plain error” exception to Supreme Court Rule 8. *Wainwright*, 504 A.2d at 1100.

<sup>32</sup> Opening Br. at 6.

<u>Title 16, Section</u>	<u>Crime</u>
4754(1)	Drug Dealing – Aggravated Possession; Class D Felony

It is also undisputed that, in 2014 and 2017, Rembert pled guilty to, and was convicted of, violations of 16 *Del. C.* § 4754(1), constituting in each case “Drug Dealing.”<sup>33</sup>

Rembert’s sole argument is that, because the Drug Dealing statute (16 *Del. C.* § 4754) was restated (albeit with identical substance) in 2019 (*i.e.*, between the time of his 2014 and 2017 Drug Dealing convictions and his 2023 PFBPP offense), the enhancement provisions in Section 1448(e)(1)c. are inapplicable—even though Section 4201(c) continued to define Drug Dealing in violation of Section 4754(1) as a “violent felony.” There is no support for this argument, and it is contrary to the plain language of the statute, which clearly provides that prior violations of Section 4754(1) are considered “violent felonies” for purposes of the enhancement of Section 1448(e)(1)c.

Rembert’s argument also appears to be foreclosed by 11 *Del. C.* § 211(a), which provides that the repeal of a statute shall not have the effect of releasing or

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<sup>33</sup> Opening Br. at 3; A 57-58; A71-72.

extinguishing any penalty, unless that statute expressly so provides.<sup>34</sup> Section 211(a) has been held not to apply to Section 4201(c) because it is a definitional statute.<sup>35</sup> Here, however, Rembert does not base his argument on a change to Section 4201(c)—that statute defined Drug Dealing in violation of 16 *Del. C.* § 4754 or 4754(1)<sup>36</sup> as a “violent felony” continuously from June 1, 2012, to July 30, 2023.<sup>37</sup> Rather, Rembert contends that the 2019 amendment restating and renumbering 16 *Del. C.* § 4754—the statute defining the crime of Drug Dealing and classifying it as a Class D felony—means that his prior convictions for violation of that statute are no longer “violent felonies” defined by 11 *Del. C.* § 4201(c), *even though Section 4201(c) was materially unchanged during the relevant period.*<sup>38</sup>

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<sup>34</sup> Section 211(a) states: “The repeal of any statute creating, defining events set forth under the laws of this State, shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as remaining in full force and effect for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.”

<sup>35</sup> *State v. Edgar*, 2016 WL 6195980, at \* 3 (Del. Super. Ct. Oct 21, 2016).

<sup>36</sup> The amendment changing the reference from Section 4754 to Section 4754(1) was approved June 2, 2015. 80 *Del. Laws*. C. 28, § 1.

<sup>37</sup> 78 *Del. Laws* c. 252, § 9; A77-81. At some point thereafter, the reference to “Section 4754(1)” was changed to its current version, which is “[Former] Section 4754(1).”

<sup>38</sup> Rembert does not and cannot claim that the 2015 change to Section 4201(c) changing the Drug Dealing reference from “Section 4754” to “Section 4754(1)” affected his right in any way, as his 2014 violation of Section 4754(1) necessarily violated Section 4754.

Rembert's reading is impermissible under Section 211, as it argues that the repeal (and substantively identical restatement) of the prior version of Section 4754 has the effect of "releasing or extinguishing" a penalty that Rembert would otherwise incur as a result of his violations of that statute.

Finally, Rembert's argument also defies logic. To accept it, the Court would have to rule that, as a result of the 2019 recodification of Section 4754 to eliminate Section 4754(1), the portion of Section 4201(c) which continued to define Drug Dealing as a "violent felony" became surplusage. This is contrary to rules of construction which require that "[w]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible."<sup>39</sup> Thus, to the extent that there was any ambiguity in the interplay of Sections 4754 and 4201 after the recodification of Section 4754 in 2019, which restated the substance of what had been denominated as Section 4754(1) to a new (but substantively identical) Section 4754(a), the ongoing reference in Section 4201(c) to Section 4754(1) must refer to former Section 4754(1). Otherwise, the reference to "Section 4754(1)" which continued to be included in Section 4201(c) would have

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<sup>39</sup> *Chase Alexa, LLC v. Kent Cty. Levy Court*, 991 A.2d 1148, 1152 (Del. 2010) (quoting *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994)).

no meaning. Indeed, this conclusion was reached by the Delaware Code Revisors, who changed Section 4201(c) to reference “[Former] 4754(1).” This change was not made through legislation, but instead was a non-substantive clarification made by the Revisors pursuant 1 *Del. C.* § 211. (B 44).

In sum,

- 11 *Del. C.* § 1448(e)(1)c. imposes a mandatory sentence for possession of a firearm by persons convicted of two or more violent felonies.
- “Violent felonies” are defined in 11 *Del. C.* § 4201(c); at the relevant time (Rembert’s possession of a firearm), Section 4201(c) defined the following as a “violent felony”: “4754(1) – Drug Dealing – Aggravated Possession; Class D Felony.”
- Rembert pled guilty to that crime in 2014 and 2017.
- Rembert’s primary argument is that at the time of Rembert’s possession of a firearm, Section 4754(1) did not exist. But this is irrelevant. It existed in 2014 and 2017, and Rembert was convicted of violating it.
- Thus, at the time of Rembert’s possession of a firearm, he was a “prohibited person” who had been convicted of two violent felonies specifically listed in Section 4201(c) as of the date of his firearm possession – Drug Dealing in violation of 16 *Del. C.* § 4754(1). He was

thus subject to the mandatory minimum sentence of Section  
1448(e)(1)c.

## CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's imposition of Rembert's mandatory ten-year sentence.

Respectfully submitted,

*/s/ Kenneth J. Nauchbar*

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Date: February 14, 2025

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