IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	
	)	
v.	)	Cr. A. No. #IK00-10-0170
	)	
	)	
	)	
PATRICK S. WALTON,	)	
I.D. No. 0009015219	)	

Submitted: January 3, 2002
Decided: January 17, 2002

ORDER

On the State's Motion to Declare Defendant
an Habitual Offender under 11 *Del. C.* § 4214(b). Granted.

John R. Garey, Esquire and Stephen R. Welch, Jr., Esquire, Deputy Attorneys General, Department of Justice, Dover, Delaware, Attorneys for the State.

Sandra W. Dean, Esquire, Assistant Public Defender, Dover, Delaware, Attorney for the Defendant.

WITHAM, J.

State of Delaware v. Patrick S. Walton
I.D. No. 0009015219
January 17, 2002

Before the Court is the State's motion to have Patrick S. Walton ("defendant") declared an habitual offender under 11 *Del. C.* § 4214(b), as well as the defendant's objection to the motion and the parties' letter memoranda in support of their positions. The Court has little discretion in this matter. The Delaware Supreme Court has found that the application of § 4214(b) to the class of felons enumerated therein is not so disproportionate as to constitute cruel and unusual punishment. In addition, the defendant has not shown the facts necessary to invoke a claim for abuse of prosecutorial discretion.

Claims of the parties

The State has moved to have the defendant declared an habitual offender under 11 *Del. C* § 4214(b) in order to enhance his sentence to a non-discretionary life sentence without parole. This is due to defendant's most-recent felony conviction for Robbery I. Defendant has two prior felony convictions for Burglary II.

The defendant opposes the State's motion on two grounds. First, it is alleged that as applied to the defendant the punishment required by 11 *Del. C.* § 4214(b)would constitute cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution, as well as the Delaware Constitution. Secondly, defendant asserts that the filing of the habitual offender petition here is an abuse of the State's discretion.

Eighth Amendment

An Eighth Amendment analysis of cruel and unusual punishment involves two issues. The first is the proportionality of the sentence and the second pertains to the

method or mode of punishment.[1] The U.S. Supreme Court has determined that a prison sentence is not a cruel or unusual mode of punishment;[2] therefore, the Court's Eighth Amendment analysis will only consider the issue of proportionality.

Proportionality

The Defendant argues that this Court must conduct a proportionality analysis because, as applied to him, the imposition of a mandatory life sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. Defendant cites *Solem v. Helm*[3] and *Willams v. State*[4] for the proposition that the Court must perform a three-prong proportionality analysis *for each individual* when § 4214(b) is applied. The defendant argues that his record is one conviction shorter than the defendant in *Solem*, and like the defendant there, his crimes have all been property offenses with no use of weapons or violence. Defendant argues that no force was used in the robbery. Defendant's prior convictions have only utilized threats of force. Because the mandatory sentence was disproportionate in *Solem*, it is so here.

The Court cannot agree for two reasons. First, the Delaware Supreme Court has already performed the extended proportionality analysis required by *Solem v. Helm* for

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[1] *Harmelin v. Michigan,* 501 U.S. 957 (1991).

[2] *State v. McLaughlin*, Del. Super., 1997 WL 718658 at *2, Terry, J. (Letter Op.)(citing *Harmelin* at 965).

[3] *Solem v. Helm*, 463 U.S. 277 (1983).

[4] *Williams v. State*, Del. Supr.,539 A.2d 164 (1988).

"*all persons* convicted of three of the offenses enumerated in 11 *Del. C.* § 4214(b)"[5] and found that section constitutional as to this class of individuals. Defendant is a member of the enumerated class and "a proportionality analysis is not required for review of a sentence under the statute."[6]

Moreover, in *Harmelin v. Michigan* the U.S. Supreme Court partially overruled *Solem v. Helm*, and abrogated the requirement of a three-prong proportionality analysis every time a statute like the one at issue here is employed.[7] Writing the judgment of the Court, Justice Scalia noted that although one cannot say "there is no proportionality requirement,"[8] the *Solem* case carried the proportionality analysis requirement too far.[9] Justice Kennedy, writing for the plurality, stated that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only

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[5] *Williams* at 179 (emphasis added).

[6] *Summers v. State*, Del. Supr., No. 563, 1999, 2000 WL 1508771 (Sept. 15, 2000) (*per curium)*.

[7] *Harmelin, supra.*; *McLaughlin* at *2.; *see also McKinney v. Delaware*, D. Del., Civ. A. No. 97-340, 2000 WL 1728276, Sleet, J. (May 3, 2000)(Mem. and Order)(citing *Harmelin* at 965-66 and noting that *Harmelin* overruled in part *Solem*); *but see Andrade v. California Attorney General* (9th Cir.2001) 270 F.3d 743 (holding that *Harmelin* did not establish a new proportionality analytical framework, and finding "Justice Kennedy based his analysis on the more serious nature of Harmelin's offense," and concluding "that *Solem* remains good law after *Harmelin"*); *State v. Rivera*, Del. Super., 1997 WL 528275, Silverman, J. (July 31, 1997) (Op. and Order) (using three-prong *Solem* analysis to find the application of § 4214(b) constitutional in that case).

[8] *Harmelin at 990.*

[9] *Id.*

extreme sentences that are 'grossly disproportionate' to the crime."[10] This is the primary legacy of *Harmelin.* If the § 4214(b) sentence has been declared a "proportionate" sentence for the enumerated class of crimes using the stricter *Solem* standard, then it certainly cannot be grossly disproportionate so as to fail under *Harmelin.* Furthermore, since *Harmelin*, the Delaware Supreme Court has upheld § 4214(b), stating it is "settled Delaware law that the imposition of an habitual offender sentence pursuant to 11 *Del. C.* §4214(b) is not unconstitutionally disproportionate."[11]

Because a proportionality analysis is not required each time § 4214(b) is applied, there must be something to suggest "gross disproportionality" between the sentence and the triggering crime. Unless defendant can show that he pled guilty to prior § 4214(b) crimes on the basis of behavior that does not constitute the elements of those crimes, there is nothing in the present record to suggest the existence of "gross disproportionality" in the application of § 4214(b) here.[12]

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[10] *Id.* at 1001.

[11] *Davis v. State*, Del. Supr., No. 283, 1993, 1994 WL 10980 at *2, Moore, J. (Jan. 12, 1994) (ORDER).

[12] *See Morales v. State*, Del. Supr., 696 A.2d 390, 395 (1997) (citations omitted).

> Where a guilty plea forms the basis for an underlying conviction, many courts require the prosecution to provide not only the underlying indictment or information, but also the text of the guilty plea, in order to determine whether the defendant was charged with and admitted to conduct that would establish [the elements] of the felony conviction. We adopt this standard of proof as appropriate to be used in Delaware by the sentencing judge when considering habitual offender status involving any prior predicate felony convictions. This requirement recognizes that the crime(s) with

Andrade v. Attorney General of the State of California[13]

Defendant has submitted this case for the Court's review, presumably because the *Andrade* Court found *Solem* to be good law. In addition, the defendant in *Andrade* had less felony convictions than the defendant here (six in *Andrade* versus five here). For this reason, defendant believes a proportionality analysis under *Andrade* and *Solem* will preclude application of § 4214(b). However, *Andrade's* interpretation of *Solem* is against the weight of authority. The most important argument against defendant's position, however, is that in *Williams* the Delaware Supreme Court did the "extended *Solem* proportionality analysis" for all cases enumerated in § 4214(b) and found the statute constitutional. *Williams* is mandatory authority for this Court. *Andrade* is not.

Also, *Andrade* can be distinguished, as the State points out, for the reason that "*Andrade* is not factually analogous to the present case because it involved predicate offenses which were misdemeanors that were 'enhanced' to felonies and then used as the basis for habitual offender sentencing." If the triggering felony here had been so "enhanced," defendant may have had an argument regarding gross disproportionality

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> which a defendant is charged and the crime(s) to which he or she ultimately pleads guilty in a plea bargain can be, and often are, quite different.

But see McRae v. State, Del. Supr., No. 505, 2000, 2001 WL 1175349 at *5 (Oct. 1, 2001) (ORDER) (*per curium*) (finding that defendant does not need to be given opportunity to admit or deny his previous convictions at a hearing where the State notified defendant that his criminal record was available for inspection prior to the trial held on the third triggering felony, and where State stated at close of trial that it intended to seek habitual offender status at sentencing).

[13] 9th Cir., 270 F.3d 743 (2000).

(see footnote 12); however, there is no question that the triggering felony here was an extremely serious felony that involved the threat of violence. Moreover, defendant has used forceful or threatening behavior in the commission of prior crimes, and his threatening behavior is escalating.

No Other Distinguishing Facts

Even if the Court wished to distinguish the case at bar from prior Delaware Supreme Court cases analyzing proportionality, the triggering conviction in this case is more severe than the triggering conviction in most of the Delaware cases upholding the application of this statute.[14]

Prosecutorial Discretion

"[A]buses of prosecutorial discretion in this area of the law generally involve either selective prosecution, which is a denial of equal protection, or vindictive prosecution, a violation of due process."[15] Defendant maintains that the State abused its discretion here. The State denies that any facts have been pled that would show abuse of discretion.

Defendant notes that the prosecutor has discretion in deciding whom to charge as an habitual offender, and the State in using its discretion must use factors which are

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[14] Note that here defendant *Walton's* prior convictions were for Burglary II (2 counts in 1994), Burglary II (and Burglary III in 1996) and the triggering conviction for the bank robbery was Robbery I (2001). In addition, *Walton* has additional felony counts for Theft (2 counts in 1991) and Forgery II (2000)); *se e.g. Hembree v. State*, Del. Supr., No. 95, 1996, 1997 WL 33103 at *2 (Jan 7, 1997) (ORDER) (*per curium*); *Williams, supra.; McLaughlin, supra.*

[15] *Albury v. State*, Del. Supr., 551 A.2d 53, 61, n. 13 (1988).

rationally related to legitimate State objectives. It is argued that defendant has never used a weapon nor inflicted physical injury on anyone; therefore, no legitimate state objective can be identified which makes him more deserving of a life sentence than others not so charged (although eligible).

Defendant states the wrong test by which the prosecutor's actions must be judged as to selective enforcement. Although selective enforcement is an equal protection issue, the standard cited by defendant is that by which the *statute* itself should be judged in order to determine if it violates due process or equal rights guaranties.[16] The Delaware Supreme Court has already determined that § 4214(b) does not violate these rights.[17]

Moreover, the cases cited by defendant, *Wayte v. United States*[18] and *United States v. Batchelder*[19] set forth the correct standard or test by which selective enforcement claims must be proven. It is important to note that defendant does not have to make "out a full prima facie case in order to be entitled to discovery."[20]

To obtain an evidentiary hearing on the claim of selective enforcement defendant

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[16] *Brank v. State*, Del. Supr., 528 A.2d 1185 (1987).

[17] *Ward v. State*, Del. Supr., 414 A.2d 499 (1980); *see also Williams, supra.* (discussing State's legitimate interest in punishing recidivists more severely than first-time offenders).

[18] 470 U.S. 598 (1985).

[19] 442 U.S.114 (1979).

[20] *Wayte* at 625 (emphasis added) (citations omitted).

is obligated to make a threshold showing of discriminatory prosecution.[21] He "must present 'some evidence tending to show the existence of the essential *elements* of the defense.'"[22] Defendant

> must show first that he is a member of a recognizable, distinct class. Second, he must show that a disproportionate number of this class was selected for investigation and possible prosecution. Third, he must show that this selection procedure was subject to abuse or was otherwise not neutral.[23]

In the instant case, defendant has alleged no facts in support of any of these elements. The most that defendant has alleged is that there are certain improper reasons for prosecutorial selection;[24] however there is no suggestion or facts to show that these were the reasons for the State's motion *sub judice*. Defendant has also not alleged any facts which would show a due process violation by ill will, personal animus or vindictiveness of the prosecution.

Conclusion

It appears that under Delaware Law, § 4214(b) does not violate the Eighth Amendment's prohibition against cruel and unusual punishment as to the defendant.

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[21] *State v. Wharton*, Del. Super., 1991 WL 138417, Barron, J. (June 3, 1991) (Opinion).

[22] *Wayte* at 623-24 (emphasis added).

[23] *Id.* at 626.

[24] Defendant alleges that the following "are not legitimate reasons for Prosecutorial selection: (a) the defendant received a lenient sentence in a prior case and then committed another offense, (b) the State has a strong case and a high probability of conviction or (c) the case has received pre-trial publicity and the Department of Justice wishes to appear 'tough on crime.'"

Unless defendant can show that he pled to behavior that does not constitute a crime enumerated in § 4214(b), there are no facts to suggest the existence of "gross disproportionality" in the application of § 4214(b) here.

In addition, defendant has not alleged facts to entitle him to discovery regarding an alleged violation of the equal protection clause by selective prosecution. Nor had defendant alleged any facts to show a due process violation by ill will, personal animus or vindictiveness on the part of the prosecution.

For the foregoing reasons the State's Motion to have the defendant declared an habitual offender pursuant to 11 *Del. C.* § 4214(b) should be ***GRANTED***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

oc: Prothonotary
cc: John R. Garey, Esquire
Stephen R. Welch, Jr., Esquire
Sandra W. Dean, Esquire