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Case Number 126,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUSTIN PARKER,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 126, 2018
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

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: June 1, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested in March 2017, and later indicted for the felony offenses of kidnapping first degree, aggravated menacing, theft of a motor vehicle, felony theft, attempted felony theft, associated possession of a firearm during the commission of a felony offenses for each of these felonies (5 counts), wearing a disguise during the commission of a felony, and conspiracy second degree. (A1, 8-14).

At the end of his four day jury trial in November and December 2017, he was acquitted of the kidnapping, aggravated menacing and associated firearm offenses. D.I. 25. He moved during trial for judgment of acquittal of the additional felony theft and associated firearm offenses on the ground that more than one felony theft conviction was multiplicitous and violated double jeopardy. A15-16(pp. 71-76). After the State rested, he renewed his motion for judgment of acquittal, but it was denied. A17-19 (pp. 131-139). He also renewed the motion in writing after trial. A27-31. D.I. 31.

At the sentencing proceeding, the Superior Court granted his motion in part and found that the attempted felony theft offense was an included offense of the felony theft offense. The Superior Court declined to find that the motor vehicle theft offense and felony theft offense constituted one offense, however. A49-52. The Defendant was sentenced, *inter alia,* to 2 years concurrent

imprisonment at Level V suspended for one year Level III probation on each of the theft of a motor vehicle and felony theft offenses. He was sentenced to three years mandatory minimum imprisonment at Level V on each of the associated possession of a firearm during the commission of felony offenses. He was also sentenced to five years Level V imprisonment suspended for one year Level III probation on the disguise offense and two years imprisonment at Level V suspended for one year concurrent Level III probation on the conspiracy second degree offense. A64-65 [Exhibit B attached to Opening Brief].

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

SUMMARY OF THE ARGUMENT

1. The Defendant was sentenced for theft of a motor vehicle and felony theft based on his course of conduct involving the theft of multiple vehicles. Charging the Defendant with both felony theft of vehicles and the felony of theft of a motor vehicle among those vehicles violated the prohibition against multiplicity in charging offenses rooted in the Double Jeopardy Clause. The State impermissibly divided a single crime into a series of individual units because the alleged theft of a motor vehicle was an included offense of the felony theft under the course of conduct not in dispute.

STATEMENT OF FACTS

Port-to-Port is a business located on Pyles Lane near the Port of Wilmington that ships used vehicles for customers to port locations in Central America and the Caribbean. At any time, hundreds of vehicles waiting for shipment are located within a several acre fenced lot. (D.I. 40, 11/29/17, pp. 37-100).

At about 2 a.m. on March 9, 2017, two New Castle County police officers on tactical surveillance nearby on Rogers Road were approached by Javier Conaway, a security guard at Port-to-Port, who had stopped his vehicle in the middle of the roadway and informed the officers that he had just been held at gunpoint (shotgun) and bound with duct tape by two masked men who had entered the Port-to-Port yard and then locked him in a portable toilet. While he was locked in the portable toilet he was still able to see the two individuals loading some dirt bikes and all-terrain vehicles (ATV) onto a trailer. He told the officers that he freed himself after about a half hour in the portable toilet and then entered a vehicle and fled the lot intending to report the incident at the Wilmington Police Department headquarters. Before arriving there, he saw the New Castle County police officers on Rogers Road and reported the incident to them. (D.I. 37, 11/28/17, pp. 130-161; D.I. 40, 11/29/17, pp. 101-164).

County police officers then responded to the Port-a-Port facility and

found that a hole had been cut in the surrounding fence. It appeared that several vehicles had been removed from the lot and left outside a normally unused gate in the fence that had been locked. Officers had also seen a U-Haul truck being driven away from the area of the Port-to-Port facility into the Oakmont development at about the time that the incident was reported. The truck was located in the Oakmont development and searched. It contained additional dirt bikes and ATVs that had been removed from the Port-to-Port lot. (D.I. 37, 11/28/17, pp. 145-148; D.I. 40, 11/29/17, pp. 17-24, 165-191).

Later that morning, a County Police detective responded to the U-Haul location on Martin Luther King Boulevard in Wilmington where the U-Haul truck had been rented. The Defendant was also there and reported that the same truck he had rented the night before had been stolen sometime during the night from near his girlfriend's residence. (11/30/17, pp. 29-52).[1]

When police officers had located the U-Haul truck in Oakmont containing stolen motor bikes and ATVs, an officer also examined it for forensic evidence. Identification numbers individual to the truck and ordinarily visible had been obscured from view by duct tape. Police removed the duct tape and lifted latent fingerprints from underneath the surface of the duct tape on the

[1] The transcript of this third day of trial, 11/30/17, was not entered in the Superior Court docket.

adhesive portion. (D.I. 40, 11/29/17, pp. 170-189). These latent fingerprints were subsequently compared with the Defendant's known prints and a police forensic fingerprint examiner determined that the recovered latent fingerprints matched the Defendant's known prints. (D.I. 40, 11/29/17, pp. 225-245).

I. THE DEFENDANT SHOULD NOT HAVE BEEN SENTENCED FOR BOTH THEFT OF A MOTOR VEHICLE AND FELONY THEFT AS WELL AS BOTH OF TWO ASSOCIATED FIREARM OFFENSES BASED ON THE SAME COURSE OF CONDUCT.

Question Presented

The question presented is whether the Superior Court erred by sentencing the Defendant for each of two charged offenses of theft of a motor vehicle and felony theft and each of their associated firearm offenses. The question was preserved by the Defendant's motion for judgment of acquittal. (A15-50).

Standard and Scope of Review

The trial court's denial of a motion for judgment of acquittal is reviewed under a *de* novo standard.[2]

Merits of Argument

Based on the undisputed evidence at trial, the Defendant argued that the State had broken down a single offense of felony theft into three separate felony theft offenses – felony theft, attempted felony theft, and theft of a motor

[2] *Priest v. State*, 879 A.2d 575, 577 (Del. 2005) ("We review *de novo* the trial judge's denial of Priest's motion for judgment of acquittal to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find Priest guilty beyond a reasonable doubt of all the elements of the crime").

vehicle. The Defendant argued that charging one offense of felony theft in this manner violated the multiplicity doctrine rooted in the Constitutional protection against double jeopardy because it divided a single continuous act of felony theft into a series of individual, separate units. A17-19, 28-31, 43-49.[3] The States's theory of prosecution was that three separate felony (and associated firearm) offenses were justified by the Defendant's continuous course of conduct because: 1) the Defendant had completed stealing the vehicles that were recovered from the U-Haul truck in the nearby Oakmont development; 2) the Defendant had attempted to steal the vehicles that were recovered just outside the fence of the Port to Port lot; 3) and that one of the vehicles recovered in the U-Haul truck was a stolen motor vehicle because it was a Kawasaki motorcycle. A18 (pp. 136-137).

After the verdict, in its response to the Defendant's post-trial argument, the State conceded part of the Defendant's argument and recognized that under

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[3] *Zugehoer v. State*, 980 A.2d 1007, 1013 (Del. 2009) ("The multiplicity doctrine is one of the protections afforded by the Double Jeopardy Clause of the United States Constitution. The Double Jeopardy Clause protects a defendant against (i) successive prosecutions; (ii) multiple charges under separate statutes; and (iii) being charged multiple times under the same statute. Under the multiplicity doctrine, the State is prohibited from manufactur[ing] additional counts of a particular crime by the simple expedient of dividing a single crime into a series of … units. The courts have looked to legislative intent in determining whether the constitutional protection against Double Jeopardy permits multiple counts in a particular statutory setting") (internal quotations omitted).

the Criminal Code the count of attempted felony theft was an included offense of the charged offense of felony theft.[4] A34-38. The State acknowledged that "the Defendant's actions associated with the Attempted Theft and Theft charges constituted one course of conduct planned to culminate in the theft of multiple pieces of property from Port to Port." A37. However, the State did not concede that the Theft of a Motor Vehicle charge and the Felony Theft also constituted one felony offense. Although the State recognized that the alleged, separate offenses originated from one course of conduct, under the *Blockburger* test,[5] the State maintained that each were constitutionally separate offenses because each contained an element that the other did not.[6] Essentially, the State contended that the felony theft offense did not require proof of a motor vehicle element and the felony theft of a motor vehicle offense did not require proof of a stolen motor vehicle. A37 (fn. 6).

At sentencing, the Superior Court accepted the State's concession that the charged felony theft and attempted felony theft offenses were one offense because the attempt was an included offense of the felony theft. A49, 52. The State continued to maintain, however, that the felony theft of a motor vehicle

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[4] 11 *Del. C.* § 206(a)(2).
[5] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).
[6] *Samuel v. State*, 676 A.2d 906 (Del. 1996) ("Under the *Blockberger* test, the elements of each offense are compared to determine whether one requires proof of a fact that the other does not").

and felony theft charged offenses were separate offenses under *Blockburger* because each contained an element that the other did not and therefore required the imposition of separate sentences. A50. The Superior Court accepted the State's argument and found that *Blockburger* required that separate sentences were required for felony theft of a motor vehicle and felony theft because each offense contained an element that the other did not. A49.

The State and the Superior Court's reliance on the *Blockburger* test was misplaced under the evidence in this case. As an initial matter, the theft of a motor vehicle and felony theft offenses fail the *Blockburger* test under its own terms. While the felony theft offense does not require proof of the theft of a motor vehicle as an element of the offense,[7] the theft of a motor vehicle offense, on the other hand, does not require proof of a felony amount of loss as an element of the offense because it is a felony *per se*, as defined.[8]

More importantly, the *Blockburger* test may be an aid to statutory construction where intent is unclear, but it not a requisite of statutory interpretation and does not supersede otherwise evident statutory intent.[9] It was

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[7] 11 *Del. C.* § 841.
[8] 11 *Del. C.* §841A.
[9] *Johnson v. State*, 5 A.3d 617, 621 (Del. 2010) ("Blockburger is only an aid to statutory construction. It does not negate clearly expressed legislative intent and where, as here, a better indicator of legislative intent is available…."); *see also Poteat v. State*, 840 A.2d 599, 605 (Del. 2003);

clear under the evidence in this case that the felony theft of a motor vehicle offense was not a separate offense from the felony theft offense because, like the attempted felony theft offense and felony theft offense, it was an included offense of the felony theft offense. The General Assembly has made that clear in defining the offense of felony theft: "Theft includes the acts described in this section, as well as those described in §§ 841A-846." Section 841A of the Criminal Code defines theft of a motor vehicle, a felony offense by definition. Thus, the offense of theft of a motor vehicle, a felony offense by definition, is an included offense of felony theft as unambiguously stated under the theft statute.[10] The Superior Court thereby erred in determining that the Defendant

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Stigars v. State, 674 A.2d 477, 482 (Del. 1996).

10 The felony offense of theft of a motor vehicle was enacted into law in 2006. 75 *Del. Laws*, c. 290, § 1. Its intent was not to create a separate, punishable criminal offense apart from theft as previously defined, but to establish the theft of a motor vehicle would be a felony regardless of the monetary value of the motor vehicle stolen: "At present the Delaware statute that criminalizes theft requires, in most circumstances, that the property be valued at greater than $1,000.00 for the crime to be considered a felony. The theft of a motor vehicle often causes great inconvenience and economic hardship to the victim, regardless of the value of the stolen vehicle. In recognition of that fact, this Act will classify all motor vehicle thefts as a felony." 75 *Del. Laws*, c. 290, § 1, Synopsis (2006). As charged, felony theft in this case was a Class G felony. 11 *Del. C.* § 841(c)(1). Theft of a motor vehicle is also a Class G felony. 11 *Del. C.* § 841A(c). For the course of conduct, the offender faces the same range of punishment required by the General Assembly, up to 2 years imprisonment at Level V, 11 *Del. C.* § 4205(b)(7), regardless of theft statute under which he is charged because

was required to be sentenced under the *Blockburger* test for each of the offenses of theft of a motor vehicle and felony theft because, under the course of conduct evident from the undisputed evidence, the theft of the motor vehicle in this case was an included offense of felony theft. The multiplicitous theft and associated firearm charges should be vacated and the Defendant should be resentenced.

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felony theft of a motor vehicle is an included offense of felony theft as statutorily defined.

CONCLUSION

For the reasons and upon the authorities cited herein, one of the Defendant's convictions for felony theft and its associated firearm offense should be vacated.

Respectfully submitted,

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