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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

STATE'S ANSWERING BRIEF

ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: July 2, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

On June 12, 2017, Justin Parker ("Parker") was indicted by a New Castle County Grand Jury on charges of Kidnapping First Degree, Aggravated Menacing, Theft of a Motor Vehicle, Felony Theft, Attempted Theft, Wearing a Disguise During the Commission of a Felony, Conspiracy Second Degree, and five counts of Possession of a Firearm During the Commission of a Felony. A002; A008-14. Following a four-day trial, a jury convicted Parker of Felony Theft, Theft of a Motor Vehicle, Attempted Felony Theft, Wearing a Disguise During the Commission of a Felony, Conspiracy Second Degree, and two counts of PFDCF. A006. The Superior Court sentenced Parker to an aggregate six years incarceration followed by a period of probation.[1] *Exhibit A* to Op. Brf. Parker appealed his convictions. This is the State's Answering Brief.

[1] The Superior Court merged the Attempted Felony Theft and Felony Theft convictions for sentencing. *Ex. A* to Op. Brf.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. Parker's convictions for Theft of a Motor Vehicle and Felony Theft do not violate Double Jeopardy, and they do not merge for sentencing purposes. In Parker's case, Felony Theft was not an included offense of Theft of a Motor Vehicle. The subject of each theft was different – a Kawasaki motorcycle in the case of Theft of a Motor Vehicle, and four off-highway vehicles ("OHVs") in the case of Felony Theft. Each offense requires proof of an element which is not present in the other. As a result, the Superior Court properly sentenced Parker separately as to each offense.

STATEMENT OF FACTS

Port-to-Port Industries is a business that specializes in shipping all types of used vehicles to Central America. B55. The company has a 23-acre facility in New Castle, Delaware, where vehicles are stored and prepared for shipment. B55-56. In the early morning hours of March 9, 2017, Javier Conaway ("Conaway") was working as a security guard at Port-to-Port Industries. B71-72. While on duty at around 12:30 am, Conaway heard something behind him, looked back, and saw a man wearing a mask pointing a shotgun at him. B73. With the assistance of an accomplice, the gunman duct-taped Conaway's hands together and ordered him into a nearby Port-A-Potty. B74-75. One of the two men then backed up a vehicle to block the door of the Port-A-Potty, trapping Conaway inside. B75. From inside the Port-A-Potty, Conaway could see the two men loading all-terrain vehicles ("ATVs") and motorcycles into a transportation container. B75. The two men eventually departed, and Conaway escaped from the Port-A-Potty. B75-76. He cut the tape from wrists and, intending to report the incident to the police, drove his car out of the Port-to-Port Industries facility. While driving on Rogers Road, Conaway saw two New Castle County Police ("NCCPD") officers in a church parking lot, stopped his car, and reported what had just transpired. B76.

NCCPD Sgt. Angela Dolan ("Sgt. Dolan") was dispatched to Port-to-Port Industries to investigate the incident and, while en-route, saw a U-Haul box truck

pull out from Aldrich Lane, which adjoins the Port-to-Port facility, onto Route 9. B49. Police later learned that the U-Haul truck was involved in the Port-to-Port Industries incident. B117. NCCPD officers recovered the U-Haul from the Oakmont neighborhood, which is located next to the Port-to-Port Industries facility. B117. When the police executed a search warrant for the U-Haul, they discovered a ski mask, rope, a latex glove, several pieces of duct tape, and five vehicles (three four-wheelers, a dirt bike, and a Kawasaki motorcycle) in the cargo hold of the truck. B93-94. Port-to-Port Industries personnel verified that the five vehicles found in the U-Haul had been stolen from their facility on March 9, 2017. B64-65.

Parker's fingerprints were found on one of the pieces of duct tape recovered from the U-Haul. B106-07. When interviewed, Parker told police that he had rented the truck the day before the Port-to-Port Industries thefts, but it had been stolen when he spent the night at his girlfriend's house. State's Trial Exhibit 70.

ARGUMENT

THERE WAS NO VIOLATION OF THE DOUBLE JEOPARDY CLAUSE AS THE STATE PROPERLY INDICTED AND TRIED PARKER ON CHARGES OF FELONY THEFT AND THEFT OF A MOTOR VEHICLE. EACH OFFENSE REQUIRES PROOF OF AN ELEMENT NOT REQUIRED BY THE OTHER.

Question Presented

Whether convictions for Felony Theft and Theft of a Motor Vehicle merge when different vehicles are the subject of each theft.

Standard and Scope of Review

This Court reviews "a claim alleging the denial of a constitutional right *de novo*."[2]

Merits of the Argument

In 2006, the General Assembly enacted a stand-alone statute relating to motor vehicle theft.[3] The Theft of a Motor Vehicle statute provides:

> (a) A person is guilty of theft of a motor vehicle when the person takes, exercises control over or obtains a motor vehicle of another person intending to deprive the other person of it or appropriate it.
>
> (b) As used in this section ''motor vehicle'' means an automobile, motorcycle, van, truck, trailer, semitrailer, truck tractor and

[2] *Tucker v. State*, 2012 WL 4512900, at *1 (Del. Oct. 1, 2012) (citing *Norman v. State*, 976 A.2d 843, 857 (Del. 2009)).

[3] 2006 Del. Laws, Ch. 290 (H.B. 374). Theft of a Motor Vehicle is codified in section 841A of Title 11.

> semitrailer combination, or any other vehicle which is self-propelled, which is designed to be operated primarily on a roadway as defined in § 101 of Title 21, and in, upon or by which any person or property is or may be transported. "Motor vehicle" as used in this section shall not include any device that is included within the definitions of "moped," "off-highway (OHV)," "triped," "motorized scooter or skateboard," "motorized wheelchair" or "electric personal assistive mobility device (EPAMD)" as defined in § 101 of Title 21.
>
> (c) Theft of a motor vehicle is a class G felony.[4]

Parker was charged with Theft of a Motor Vehicle because "on or about the 9th day of March, 2017, … [he] did take, exercise control over, or obtain a motor vehicle, [a] Kawasaki motorcycle, belonging to Port to Port International . . . intending to deprive . . . the owner of same, or to appropriate the same."[5] He was also charged with violating 11 *Del. C.* § 841 (Felony Theft), because "on or about the 9th day of March, 2017, . . . [he] did take, exercise control over, or obtain property of Port to Port International . . . consisting of a Suzuki ATV, a Honda ATV and/or a Honda dirt bike or other miscellaneous property valued at $1,500 or more, intending to deprive . . . the owner of same, or to appropriate same.[6]

On appeal, Parker argues that the theft of a motor vehicle in his case "was not a separate offense from the felony theft because . . . it was an included offense

[4] 11 *Del. C.* § 841A.
[5] A010.
[6] A011.

of the felony theft offense."[7] He is mistaken. Theft of a motor vehicle is not an included offense of felony theft because each requires proof of different elements. And, in Parker's case, the vehicles stolen were different as to each charge.

"Double Jeopardy prohibits successive prosecutions and cumulative punishments for greater-and-lesser-included-offenses that are based on the same conduct."[8] When analyzing a double jeopardy claim, this Court employs the *Blockburger*[9] test to determine "whether each provision [of the challenged statutes] requires proof of an additional fact which the other does not."[10] The prohibition against double jeopardy is codified in section 206 of Title 11, which reads, in relevant part:

> (a) When the same conduct of a defendant may establish the commission of more than 1 offense, the defendant may be prosecuted for each offense. The defendant's liability for more than 1 offense may be considered by the jury whenever the State's case against the defendant for each offense is established in accordance with § 301 of this title. The defendant may not, however, be convicted of more than 1 offense if:
>
> > (1) One offense is included in the other, as defined in subsection (b) of this section; or

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[7] Op. Brf. at 11.

[8] *Ingram v. State*, 2015 WL 631581, at *2 (Del. Feb. 11, 2015) (citing *Blake v. State*, 65 A.3d 557, 561 (Del. 2013); *Brown v. Ohio*, 432 U.S. 161, 169 (1977)).

[9] *Blockburger v. United States*, 284 U.S. 299 (1932).

[10] *See, e.g.*, *Hackett v. State*, 569 A.2d 79, 80 (Del. 1990) (quoting *Blockburger*, 284 U.S. at 304 (internal quotes omitted)).

> (2) One offense consists only of an attempt to commit the other; or
> (3) Inconsistent findings of fact are required to establish the commission of the offenses.
>
> (b) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:
>
> > (1) It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; or
> > (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
> > (3) It involves the same result but differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.[11]

Under Delaware law, "[a] lesser-included offense is one that does not require proof of elements beyond those required by the greater offense."[12]

Parker contends, "[t]he State and the Superior Court's reliance on the *Blockburger* test was misplaced under the evidence in this case."[13] He argues that theft of a motor vehicle is an included offense of felony theft because "the theft of a motor vehicle offense . . . does not require proof of a felony amount of loss as an

[11] 11 *Del. C.* § 206.
[12] *Ingram*, 2015 WL 631581, at *2 (citing *Blake*, 65 A.3d at 561; *Brown*, 432 U.S. at 169; 11 *Del. C.* § 206).
[13] Op. Brf. at 10.

element of the offense because it is a felony per se, as defined.[14] Parker misapprehends this Court's application of the *Blockburger* test.

Theft of a motor vehicle requires proof of the following:

- the defendant takes, exercises control over or obtains
- a motor vehicle of another person
- intending to deprive the other person of it or appropriate it.[15]

"Motor vehicle" is a specifically defined term, limited to the following: "an automobile, motorcycle, van, truck, trailer, semitrailer, truck tractor and semitrailer combination, or any other vehicle which is self-propelled, which is designed to be operated primarily on a roadway as defined in § 101 of Title 21, and in, upon or by which any person or property is or may be transported."[16] OHVs are excluded from this definition.[17] Theft, under section 841 requires proof of the following:

- the person takes, exercises control over or obtains
- property of another person
- intending to deprive that person of it or appropriate it.[18]

The State must also prove the value of the item(s) stolen.[19]

In this case, Theft of a Motor Vehicle was not a lesser-included offense of Felony Theft. Theft of a Motor Vehicle required proof of an element not required by Felony Theft, namely a motor vehicle. Moreover, Felony Theft required proof

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[14] Op. Brf. at 10.
[15] 11 *Del. C.* § 841A.
[16] *Id.*
[17] *Id.*
[18] 11 *Del. C.* § 841.
[19] *Id.*

of an *additional* element - the value of the item(s) stolen. The two theft statutes at issue here pass the *Blockburger* test because Theft of a Motor Vehicle requires proof of an element that Felony Theft does not.

Also, the two offenses in this case were not based on theft of the same property. Parker was charged with Theft of a Motor Vehicle based on the factual allegation that he stole a Kawasaki motorcycle, which is a "motor vehicle" under section 841A. He was also charged with Felony Theft, based on the factual allegation that he stole three OHVs, which are not considered "motor vehicles" under section 841A.[20] The indictment in Parker's case tracks the distinction between motor vehicles under section 841A and other property under section 841.

In *Proffitt v. State*, this Court recognized the distinction between section 841 and the Theft of a Firearm statute (11 *Del. C.* § 1451).[21] Proffitt was charged with theft under section 841 for stealing jewelry, money and a VCR during a burglary.[22] He also stole a firearm during the same incident, and was charged with theft of a firearm under section 1451.[23] He was convicted of both offenses and sentenced separately as to each offense.[24] On appeal, Proffitt claimed that "a defendant who,

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[20] The State could not have charged Parker with Theft of a Motor Vehicle for stealing the OHVs, as they are specifically excluded from the section 841A definition of "motor vehicle."
[21] *Proffitt v. State*, 1989 WL 154707, at *1 (Del. Dec. 1, 1989).
[22] *Id.*
[23] *Id.*
[24] *Id.*

during the course of a single incident, steals a firearm and other property cannot be prosecuted for violations of both 11 *Del. C.* § 1451 and 11 *Del. C.* § 841."[25] The Court rejected that argument, holding:

> 11 *Del. C.* § 841 and 11 *Del. C.* § 1451 each requires an element of proof which is not present in the other. Therefore, under the rational [sic] of *Blockburger*, Proffitt could be sentenced separately for his conviction of each offense.[26]

The same reasoning applies here. Felony Theft and Theft of a Motor Vehicle each require proof of an element not required by the other.

Parker also argues that the Court need not apply the *Blockburger* test because "it is not a requisite of statutory interpretation and does not supersede otherwise evident statutory intent."[27] He contends the General Assembly clearly intended to make Theft of a Motor Vehicle an included offense as demonstrated by the following language in section 841:

> Theft includes the acts described in this section, as well as those described in §§ 841A-846."[28]

Parker concludes that the above language renders Theft of a Motor Vehicle an included offense of Felony Theft.[29] His contention is unavailing.

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[25] *Id.*
[26] *Id.* (citing *State v. Skyers*, 560 A.2d 1052 (Del. 1989).
[27] Op. Brf. at 10.
[28] 11 *Del. C.* § 841.
[29] Op. Brf. at 11.

When the General Assembly enacted section 841A, it made a rational distinction between theft of a motor vehicle and theft of other types of property. The synopsis to H.B. 374 states:

> 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.[30]

The synopsis of the bill and the language of the statute demonstrate the General Assembly's intent to separately punish defendants who steal motor vehicles.

The Superior Court correctly applied the *Blockburger* test in Parker's case when it determined that Theft of a Motor Vehicle is not an included offense of Felony Theft. The statutes do not have identical elements, and it is clear that the General Assembly intended to separately punish violations of section 841A.

[30] 2006 Del. Laws, Ch. 290 (H.B. 374).

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

/s/ Andrew J. Vella
ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

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1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 2,565 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549

DATE: July 2, 2018

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the State of Delaware, hereby certifies that on this 2nd day of July, 2018, he caused the attached *State's Answering Brief* to be delivered electronically via File&Serve to the following persons:

Bernard J. O'Donnell, Esq.
Office of the Public Defender
820 North French Street, 3d Floor
Wilmington, DE 19801

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Andrew J. Vella
Deputy Attorney General
ID No. 3549
Department of Justice
820 North French Street
Wilmington, DE 19801
(302) 577-8500