EFiled: Jul 20 2018 11:54PM EDT
Filing ID 62263083
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 REPLY BRIEF

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DATED: July 20, 2018

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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.

The State does not dispute in its Answering Brief that the Defendant's actions were part of one course of conduct planned to culminate in the theft of multiple pieces of property from Port to Port. Instead, the State maintains that, although the separate offenses originated from one course of conduct, under the *Blockburger* test,[1] the theft of one motorcycle among a collection of other motorcycles, dirt bikes, and other all-terrain vehicles amounting to a felony offense value was a constitutionally separate offense because each offense contained an element that the other did not.[2]

Carried to its logical conclusion, the import of the State's argument would be that a defendant who stole an automobile valued at $1,501 would be guilty of the separate offenses of felony theft because the stolen property exceeded $1,500 in value, a G felony under 11 *Del. C.* § 841(c) (1), and, concomitantly, an additional offense of felony theft, also a G felony under 11 *Del. C.* § 841A, because the stolen property was a motor vehicle. The State

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[1] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).
[2] *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").

suggests in its brief, however, that this would not be so because the items of stolen property it alleged for each offense in this case were discretely different vehicles, Ans. Br. at 9, but its suggestion again relies on the constitutionally deficient indulgence under Double Jeopardy "that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

Similarly, if a thief entered a business and stole multiple laptop computers and tablets valued at an aggregate felony amount at one time, Double Jeopardy would not permit the State to divide the offense "into a series of … spatial units," *id*. at 169, depending on the value of each piece of hardware, whether more or less than $1,500 in value, thereby intending to aggregate or separate the property in order to achieve maximum punitive effect for the theft offense, but the State has done just that in this case by the "simple expedient" of dividing a cache of Port to Port vehicles recovered in a U-Haul van into motor vehicles (motorcycle) and non-motor (ATV) vehicles.

As its only rationale for this multiplication of the felony theft offense, the State posits in its Answering Brief that this is permitted under Double Jeopardy because the theft of the Kawasaki motorcycle recovered from this van was actually a separate, independent felony offense because it could be defined as a motor vehicle under 11 *Del. C.* § 841A while the remaining property could be

classified as ordinary property taken under 11 *Del. C.* §841. The legal distinction the State attempts to draw, Ans. Br. at 10, is flatly contradicted by the legislative history and design laid out in Delaware's theft statutes, however. The General Assembly has made that altogether clear in defining theft under the Criminal Code. Theft is not defined as multiple, punishable offenses depending on its manner, means, method, or property taken as the State now contends. To the contrary, the General Assembly intended to define theft as one offense and has clearly stated that, "[t]heft includes the acts described in this section [§841], as well as those described in §§ 841A [Theft of a Motor Vehicle] -846 [Extortion] of this title." 11 *Del. C.* § 841(a). If that were not clear and the State's claim in this case prevailed and the manner of theft considered separate and not included offenses, the State could twice convict and punish a defendant for two felony offenses if he committed organized retail theft and the value of the stolen property exceeded $1,500, 11 *Del. C.* § 841B, or twice convict a defendant of the felony of extortion if he instilled fear in committing the offense, 11 *Del. C.* § 846, and the value of the property taken also exceeded $1,500 under 11 *Del. C.* § 841(c)(1). Each of these multiple convictions may satisfy the *Blockburger*[3] test which the State maintains is always dispositive in its brief, but it plainly conflicts with the legislative intent and design that theft is

[3] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

theft regardless of the manner, means, method, or property taken during the theft. The intent and design has been clear since the enactment of Delaware's 1973 Criminal Code:

> Finally, a word must be said about denominating all serious misappropriation of property theft…. All of these crimes are equally serious, and are closely related enough to be treated as different types of the same criminal activity. Accordingly, *theft is defined to include all acts described in §§ 842-46,* and it is appropriate to indict the defendant under § 841.

Delaware Criminal Code with Commentary (1973), § 841.

The theft of a motor vehicle statute, 11 Del. C § 841A, was enacted by the General Assembly in 2006. At the time that it was enacted, the General Assembly not only classified it within the statutes addressing theft, but also revised § 841(a) to explicitly state that the acts described in § 841A, theft of a motor vehicle, were included offenses in the statute defining theft, § 841. This was entirely consistent with its intent expressed in the 1973 Criminal Code and its Commentary which also confirms the legislative intent that thefts addressed, enumerated, and described in the several statutes setting out different means of committing theft are still included offenses of theft.

Although the State maintains in its answering brief that *Blockburger* is always controlling and mandates that the felony theft of a motor vehicle is a

separate, punishable offense from a greater theft, it is evident that the General Assembly intended only that a defendant stealing an automobile face minimum punishment for a felony offense, not that he be punished for multiple felony offenses based on by the "simple expedient of dividing a single crime into a series of … spatial units."[4]

The State's reliance on an unreported decision of the Court, *Proffitt v. State*,[5] is also misplaced. In *Proffitt*, a case addressing a theft of a firearm, the defendant conceded, unlike this case, that *Blockburger* was controlling and apparently raised no contention of a countervailing legislative intent. In the absence of an otherwise controlling statutory intent, *Blockburger* was game end for *Proffitt* because he also apparently conceded that the two offenses, felony theft and theft of a firearm, each contained separate elements. That is not this case. The Defendant in this case does not concede that *Blockburger* is controlling and maintains that the General Assembly intention to consider theft of a motor vehicle as an included offense of theft carrying minimum felony penalty is altogether evident from statutory history since 1973. In addition, the Defendant contended in his opening brief that *Blockburger* is not even applicable to this case under its own terms because, although the felony theft

[4] *Blockburger*, 284 U.S., at 304.
[5] 1989 Del. LEXIS 444.

offense did not require proof of the theft of a motor vehicle as an element of the offense, the theft of a motor vehicle offense did not require proof of a felony amount of loss as an element of the offense because it was classified a felony *per se*, as defined.[6]

Moreover, there are critical distinctions reflecting legislative intent that are evident in this case but that were not raised and addressed in *Proffitt*. In this case, the General Assembly expressly classified theft of a motor vehicle as an included offense of theft: "[t]heft includes the acts described in this section [§841], as well as those described in §§ 841A [Theft of a Motor Vehicle] … of this title." 11 *Del. C.* § 841(a). The legislative intent in *Proffitt* that theft of a firearm was not an included offense, but a separately punishable offense, was much clearer. The theft of a firearm was not classified as a theft offense but was instead classified by the General Assembly with the firearm offenses, evidencing the General Assembly's intent that it be treated more punitively, not as an included offense, but as an independent, punishable offense. The theft of a motor vehicle in this case, on the other hand, is expressly classified as an "include[d]" offense of theft. 11 *Del. C.* § 841(a).

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[6] 11 *Del. C.* §841A(c). An "element of the offense" is defined as "those physical acts, attendant circumstances, results and states of mind which are specifically included within the definition of the offense…." 11 *Del. C.* § 232.

In its Answering Brief, the State never proceeds beyond *Blockburger* in its constrained attempt to detect legislative intent. *Blockburger* is not the destination, however, if another path to ascertain legislative intent is evident. The *Blockburger* test may be an aid to statutory construction if statutory intent is unclear, but it is not a mandate of statutory interpretation as the State suggests, and does not supersede otherwise evident statutory intent.[7] The General Assembly could have made clear when it enacted the motor vehicle theft minimum punishment that it intended every theft of a motor vehicle to be a separate, punishable offense, not an included offense of felony theft. It is not difficult and the General Assembly knows how to do that when it intends multiple punishments for the same offense. *Lewis v. State*, 2005 Del. LEXIS 380, *9 (enacted carjacking statute provided that "nothing in this section shall be deemed to preclude prosecution under any other provision [felony theft] of this Code"); *State v. Cook*, 600 A.2d 352, 355 (Del. 1991) (statute enacting vehicular assault provided that "nothing" in this section "shall be deemed to preclude prosecution" for driving under the influence, an included element of vehicular assault).

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[7] *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); *Stigars v. State*, 674 A.2d 477, 482 (Del. 1996).

The offense of felony theft under section 841 of the Criminal Code expressly defines felony theft of a motor vehicle, section 841A, as an included offense of felony theft. 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. Under these circumstances, the legislative intent being abundantly evident, the State has no justification to parse one continuous felony offense for separate elements and "divid[e] a single crime into a series of … spatial units." *Brown v. Ohio*, 432 U.S., at 169.[8]

[8] *Stigars v. State*, 674 A.2d 477 (Del. 1996) (felony theft is an included offense of robbery notwithstanding *Blockburger* "elements" test); *Lilly v. State*, 649 A.2d 1055 (Del. 1994) (vehicular homicide is still an included offense of murder second degree even if the *Blockburger* "elements" test is not satisfied).

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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DATED: July 20, 2018