

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Cody L. Johns
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Defendant, *pro se*

Re: State of Delaware v. Cody L. Johns
I.D. No. 0904004783

Submitted: June 21, 2011
Decided: July 12, 2011

On Defendant's Motion to Correct an Illegal Sentence.
DENIED.

Dear Mr. Frawley & Mr. Johns:

FACTS AND PROCEDURAL HISTORY

In this case, Defendant Cody Johns's ("Defendant") Motion to Correct an Illegal Sentence arises from his convictions for Aggravated Menacing, Reckless Endangering First Degree and two counts of Possession of a Firearm During the Commission of a Felony.¹ These convictions were the result of an

¹ State's Resp. at 2.

April 6, 2009 encounter that started when Defendant entered and unlawfully remained at his mother's residence.² Defendant possessed a firearm while in the residence and pointed it at his mother's boyfriend, Howard Junginger.³ Defendant then fled the residence when the New Castle County Police arrived.⁴ The police chased Defendant and located him waist deep in a creek in a dark wooded area;⁵ Defendant then placed the gun under the water and shot at the pursuing police officers.⁶

As a result of the incident inside the residence, Defendant pled guilty to Aggravated Menacing and Possession of a Firearm During the Commission of a Felony.⁷ Additionally, based upon his firing of the weapon at police, Defendant also pled guilty to Reckless Endangering First Degree and to a separate count of Possession of a Firearm During the Commission of a Felony.⁸ Defendant was sentenced to 1 year incarceration at Level V for the Aggravated Menacing, 1 year incarceration at Level V for Reckless Endangering First Degree, and two separate sentences for 3 years incarceration at Level 5 for the separate charges of Possession of a Firearm During the Commission of a Felony.⁹

CONTENTIONS OF THE PARTIES

Defendant contends that his sentences for Aggravated Menacing, Reckless Endangering First Degree, and two counts of Possession of a Firearm During the Commission of a Felony are illegal and violate his protection against Double Jeopardy.¹⁰ Defendant argues that Aggravated Menacing is a lesser offense included in Reckless Endangering First Degree because both offenses require proof of the same facts.¹¹ He also argues that he was prosecuted for multiple criminal offenses arising out of the same

² State's Resp. Ex. A at 1.

³ State's Resp. at 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Def.'s Mot. to Correct an Illegal Sentence at 2.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 7.

occurrence because the charges for Possession of a Firearm During the Commission of a Felony were only one occurrence and should merge.¹²

The State responds that the offenses to which Defendant pled guilty were distinct because the underlying conduct occurred at different locations, times, and included separate victims.¹³ The State acknowledges that Defendant correctly articulates the law governing lesser-included offenses, but maintains that the Double Jeopardy Clause is inapposite because the offenses arose out of separate circumstances and with separate victims.¹⁴

STANDARD OF REVIEW

Pursuant to Superior Court Criminal Rule 35(a), a Court may correct an illegal sentence “at any time.”¹⁵ A sentence may be illegal if *inter alia*: 1) it exceeds statutorily authorized limits; 2) it violates the Double Jeopardy Clause; 3) it is ambiguous with respect to the time and manner in which it is to be served; 4) it is internally contradictory; omits a term required to be imposed by statute; 5) it is uncertain as to its substance; or 6) it is a sentence that the judgment of conviction did not authorize.¹⁶

Pursuant to 11 Del. C. § 206(a), when “the same conduct may establish the commission of more than one offense, the defendant may be prosecuted for each offense,” unless one offense is included in the other, one offense consists only of an attempt to commit the other, or inconsistent findings of fact are required to establish the commission of the offenses.¹⁷ At the same time, the Double Jeopardy Clause protects a defendant from successive prosecutions, multiple charges under separate statutes, and being charged multiple times under the same statute.¹⁸ Thus, a single offense divided into multiple counts would violate the Delaware and U.S. Constitutional protections against Double Jeopardy.¹⁹

¹² *Id.*

¹³ State’s Resp. at 2.

¹⁴ *Id.*

¹⁵ Super. Ct. Crim. R. 35(a).

¹⁶ *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998).

¹⁷ 11 Del. C. § 206(a).

¹⁸ *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006).

¹⁹ *Id.* The Delaware Constitution’s prohibition on Double Jeopardy is effectively identical to that of the United States Constitution. *See* Del. Const. art. I, § 8 (“[N]o person shall be for the same offense twice put in jeopardy of life or limb.”).

Whether or not one offense may be included in another, for Double Jeopardy purposes, is governed by 11 Del. C. § 206(b), which provides that an offense can be merged if it: 1) is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; 2) consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or 3) 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.²⁰

DISCUSSION

While Defendant has correctly identified the principles regarding merging lesser offenses, he has overlooked the fact that the conduct underlying his convictions was distinct and that the offenses occurred at different times, locations, and included different individuals all together. Thus, Defendant's convictions for Aggravated Menacing and Reckless Endangering First Degree may not be merged; crimes may only be merged if they arise out of the same occurrence.²¹

In any case where conduct is a separate crime, each crime can be separately punished.²² The conduct in this case was separate because defendant first threatened his mother's boyfriend, in his mother's home, and then, during his flight from the scene of this offense, shot at the pursuing police officers while in the woods.²³ As stated, "the State may charge multiple crimes for multiple victims where the crime is one against people[.]"²⁴ Not only does this case involve different victims, but also different times and different locations, thereby establishing distinct crimes which may be separately punished.

Since the Defendant's sentence was imposed for distinct crimes arising out of different occurrences, Defendant's argument that the crimes can be merged must fail. It necessarily follows that each of the separate charges for

²⁰ 11 Del. C. § 206(b).

²¹ *Poteat v. State*, 840 A.2d 599, 601 (Del. 2003).

²² *Bowers v. State*, 933 A.2d 1249, 1249 (Del. 2007).

²³ State's Resp. at 2.

²⁴ *Wright v. State*, 994 A.2d 745, 746 (Del. 2010).

Possession of a Firearm During the Commission of a Felony were based on distinct conduct and underlying felonies and do not violate the Double Jeopardy Clause. Accordingly, Defendant's sentence was proper and is not susceptible to correction under Rule 35.²⁵

CONCLUSION

For the reasons stated above, this Court concludes that Defendant pled guilty to two distinct felonies and, consequently, two separate charges of Possession of a Firearm During the Commission of a Felony. It follows that Defendant's Double Jeopardy claims are without merit. Accordingly, Defendant's Motion to Correct an Illegal Sentence is **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary

²⁵ See *supra* text accompanying note 15.