

[J-116-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 2 EAP 2005
	:	
Appellee	:	Appeal from the Judgment of Superior
	:	Court entered on 12/17/03 at 936 EDA
	:	2003 affirming the judgment of sentence
v.	:	entered on 3/5/03 in the Court of Common
	:	Pleas, Philadelphia County, Criminal
	:	Division at 0208-0378.
ANDRE JONES,	:	
	:	
Appellant	:	
	:	ARGUED: October 18, 2005
	:	
	:	
	:	

DISSENTING OPINION

MADAME JUSTICE NEWMAN

DECIDED: December 28, 2006

We are asked to decide whether a trial court erred in sentencing Appellant to consecutive terms for burglary and criminal trespass after finding that the offenses did not merge for sentencing purposes.¹ For the reasons that follow, I conclude that the offenses

¹ Section 3502 of the Crimes Code provides that a person is guilty of burglary if he “enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.” 18 Pa.C.S. § 3502(a).

Section 3503(a)(1) of the Crimes Code defines criminal trespass in relevant part as follows:

A person commits an offense if, knowing he is not licensed or privileged to do so, he:

(continued...)

should not merge and that the sentence as imposed by the trial court was appropriate. As such, I respectfully dissent from the Majority Opinion.

The Majority is both correct and fair when it recognizes that the impediment to merger of these offenses is that an element of criminal trespass, knowledge of lack of privilege to enter a building, is not an element of burglary.² The Majority holds that the findings of fact do not establish a sufficient basis to sentence Appellant for both burglary and the lesser-included offense of criminal trespass. I find that result to be contrary to our precedent and the intent of the General Assembly.

In Commonwealth v. Gatling, 807 A.2d 890 (Pa. 2002) (plurality), a plurality of the Court agreed as follows:

To the extent that our merger jurisprudence is confusing, we now definitively state, for bench and bar, the standard for determining when convictions should merge for the purposes of sentencing.

The preliminary consideration is whether the facts on which both offenses are charged constitute one solitary criminal act.

If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not

(...continued)

(i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; or

(ii) breaks into any building or occupied structure or separate secure or occupied portion thereof.

² See 18 Pa.C.S. § 3503(a)(1).

the two convictions should merge.

In order for two convictions to merge:

(1) the crimes must be greater and lesser-included offenses;
and

(2) the crimes charged must be based on the same facts.

If the crimes are greater and lesser-included offenses and are based on the same facts, the court should merge the convictions for sentencing; if either prong is not met, however, merger is inappropriate.

Gatling, 807 A.2d at 899 (spacing modified) (footnote omitted). We further specified that:

One crime is a lesser-included offense of another crime if, while considering the underlying factual circumstances, the elements constituting the lesser crime as charged are all included within the elements of the greater crime, and the greater offense includes at least one additional element that is not a requisite for committing the lesser crime.

Gatling, 807 A.2d at 899 n.9.

In the instant case, Gatling's preliminary consideration for merger, that the facts on which both offenses are charged constitute one solitary criminal act, is met. Accordingly, we then look to the following two criteria: whether the crimes are great and lesser-included offenses and whether the crimes charged are based on the same facts. Here, the second criterion is met, because the crimes charged are based on the same facts relating to the entry of Appellant into the home of Wellons. However, the case *sub judice* fails to meet the

first criterion, that the crimes must be greater and lesser-included offenses. Section 9765 of the Sentencing Code provides:

No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S. § 9765.

The Majority wishes to place a greater emphasis on the underlying factual circumstances, which purport to establish that the criminal trespass in this particular case is a lesser-included offense of the burglary. This analysis would be consistent with the observation by the Gatling plurality that “in a situation where the crimes, as statutorily defined, each have an element not included in the other but the same narrow fact satisfies both of the different elements, the lesser crime merges into the greater-inclusive offense for sentencing.” Gatling, 807 A.2d at 899 n.9. However, the Majority would have us ignore the statutory requirement for merger, which mandates that *all* of the statutory elements of one offense coincide with the statutory elements of the other offense. See 42 Pa.C.S. § 9765.

Burglary is defined as follows:

(a) Offense defined.--A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

18 Pa.C.S. § 3502(a). Thus, the elements to establish burglary include: (1) entering a building (unless the building is open to the public or the actor is privileged to enter); and (2) having the intent to commit a crime in that building.

Criminal trespass is defined as:

(a) Buildings and occupied structures.--

(1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he:

(i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; or

(ii) breaks into any building or occupied structure or separately secured or occupied portion thereof.

18 Pa.C.S. 3503 § (a)(1). Thus, as relevant to the instant case, the elements of criminal trespass include: (1) knowledge of lack of privilege to enter a building; and either (2) entering the building by subterfuge; or (3) breaking into the building.

As the trial court and Superior Court correctly determined, the elements of these two crimes differ, and sentencing thus cannot be merged pursuant to our jurisprudence and the legislative intent as evidenced by 42 Pa.C.S. § 9765. Sentences merge if “the elements of the lesser crime are all included within the elements of the greater crime, and the greater offense includes at least one additional element which is different.” Commonwealth v. Anderson, 650 A.2d 20, 24 (Pa. 1994).

To be convicted of criminal trespass, the person must know that he is not licensed or privileged to enter, whereas a conviction for burglary has no such knowledge requirement.

Therefore, the crime of criminal trespass contains another element that the crime of burglary lacks and cannot be a lesser-included offense of burglary. Burglary requires entry with the intent to commit a crime within, a requirement that criminal trespass lacks. Thus, not every burglary is a criminal trespass, and vice versa.

Accordingly, the lesser crime of criminal trespass does not have all of the elements of the greater crime of burglary, and the sentences should not merge. As such, I respectfully dissent from the Majority Opinion.

Mr. Justice Eakin joins this dissenting opinion.