

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE                    )  
  )  
                  v.                            ) ID 0804009949A  
  )  
MILLARD PRICE,                         )

*Upon Defendant’s Motion to Dismiss, or in the alternative, Merge the Possession of a Firearm Charges into a Single Count because they Violate the Protection Afforded by the Double Jeopardy Clause.  
DENIED.*

Submitted:    October 16, 2009  
Decided:      November 9, 2009

**ORDER**

In this capital murder case, Defendant has moved to dismiss four counts of possession of a firearm during the commission of a felony (PFDCF), or, in the alternative, to merge them into one count. Each PFDCF count is related to one count of aggravated menacing against four different individuals. Defendant relies on the general rule that under the Double Jeopardy Clause, multiple punishments are not imposed for two offenses arising out of the same occurrence unless each offense requires proof of a fact the other does not.<sup>1</sup> The State argues that Double Jeopardy is

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<sup>1</sup>*Whalen v. United States*, 445 U.S. 684, 691-92 (1980).

not violated when a defendant is charged with PFDCF for each time the defendant used the firearm in a different felony, even if there was only one firearm.<sup>2</sup>

The Court is satisfied that this issue was resolved in *Graham v. State*.<sup>3</sup> The *Graham* Court observed the general rule that multiple punishments “are not imposed for two offenses arising out of the same occurrence unless each offense requires proof of a fact which the other does not.”<sup>4</sup> However, the rule does not apply where there is “clear legislative intent” to require multiple punishments for the same offense. The *Graham* Court found evidence of a clear legislative intent to permit cumulative sentencing for aggravating menacing and possession of a deadly weapon during the commission of a felony (PDWDCF) or PFDCF<sup>5</sup> in the synopsis to the bill adopting the aggravating menacing statute:

This bill will close a loophole in Delaware’s criminal law. Currently it is difficult to convict individuals who unlawfully threaten another with a gun of Reckless Endangering because in order to do so the State may have to prove that the gun was loaded. Unless the gun is fired or the

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<sup>2</sup>*Nance v. State*, 903 A.2d 283, 288 (Del. 2006).

<sup>3</sup>2004 WL 557168 (Del. Supr.).

<sup>4</sup>*Whalen*, 445 U.S. at 691.

<sup>5</sup>PDWDCF and PFDCF are both Class B felonies, which typically carry a statutory 2-year minimum sentence. *See* 11 *Del. C.* § 4205(b)(2). However, for a defendant found guilty of PFDCF, the General Assembly has established a three-year minimum sentence. A defendant found guilty of PFDCF and having two prior convictions shall receive a minimum sentence of five years.

police recover the gun, the State may be unable to do so. This bill will remove the necessity of proving that a gun used to criminally menace another was loaded. The wording of the bill is similar our already-existing Menacing statute (11 Del. C. § 602).<sup>6</sup>

That is, the focus of the aggravated menacing statute is on the victim's perception of the threat rather than on the actual risk of danger. The weapons statute is designed to deter the possession of a deadly weapon or firearm during a felony, and thereby decrease the danger to the victim.<sup>7</sup> The weapons statute does not even require that the victim even be aware of the weapon.

The Graham Court also reasoned that since the Court in *Poteat v. State* had ruled that aggravating menacing is a lesser-included offense of first degree burglary and that cumulative sentences were permitted for PDWDCF and first degree burglary,<sup>8</sup> it would be illogical to hold that cumulative sentences are not appropriate for PDWDCF and aggravating menacing.<sup>9</sup> The same reasoning pertains to PFDCF. Defendant has not shown that charging Defendant with four counts of PFDCF associated with the four counts of aggravated menacing violates Double Jeopardy.

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<sup>6</sup>*Graham v. State* at \*2.

<sup>7</sup>*Id.*

<sup>8</sup>840 A.2d 599 (Del. 2003).

<sup>9</sup>*Graham* at \*2.

For all these reasons, Defendant's motion to dismiss or to merge the weapons charges is Denied.

IT IS SO ORDERED.

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Richard F. Stokes, Judge

Original to Prothonotary

cc: Paula T. Ryan, Esquire  
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