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

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

Upon Defendant's Motion to Dismiss or Merge Counts 2, 4, 8, 11, 13, 15 and 18. Denied.

Submitted: October 16, 2009 Decided: November 13, 2009

ORDER

Introduction. In this capital murder case, Defendant Millard Price moves the Court to merge or dismiss the eight counts of Possession of a Firearm During the Commission of a Felony (PFDCF), as charged against him in the indictment. Defendant argues that these charges violate his protection under the Double Jeopardy Clause because the State does not allege that he possessed multiple guns during the incident on April 9, 2008. Defendant also argues that four firearms charges merge with the four charges of aggravated menacing. He does not challenge the firearms charges associated with the charges of murder first degree, attempted degree first degree, burglary first degree or car

¹The Court notes that Defendant filed a separate motion to merge or dismiss four of the weapons charges. Although Defendant makes a different argument in this motion, it does not affect the reasoning or outcome of the other motion.

jacking first degree. The State opposes Defendant's motion, arguing that there is no violation of either constitutional or statutory law. Having reviewed the parties' submissions as well as the applicable law, the Court concludes that the motion must be denied.

Discussion of multiple weapons charges. The Delaware Supreme Court has previously addressed the issue of multiple weapons charges when there is only one weapon used in carrying out more than one felony. The Court has found no double jeopardy violation because this charging practice is consistent with the purpose of 11 *Del*. *C.* § 1447, which is to deter the use of a deadly weapon while committing a felony because the weapon increases the chance of harm to the victim.²

Defendant now raises a challenge to the holding of *Graham v. State*³ as it pertains to this case. *Graham* held that aggravated menacing focuses on the victim's perception of threat while PDWDCF focused on actual danger. For this reason, the two crimes could be sentenced separately and did not merge.⁴ Defendant challenges that holding because this case involves a "firearm" instead of a "deadly weapon." The statutory definition of "firearm" includes inoperable and unloaded weapons (as well as operable and loaded

²Nance v. State, 903 A.2d 283, 288 (Del. 2006); Graham v State, 2004 WL 557168 (Del.); Robertson v. State, 630 A.2d 1084 (Del. 1993); Pauls v. State, 554 A.2d 1125 (Del. 1989); LeCompte v. State, 516 A.2d 898 (Del. 1986).

³2004 WL 557168 (Del.)(holding that aggravating menacing and PDWCF, which was based on felony aggravated menacing, could be separately sentenced).

ones).⁵ For this reason, Defendant argues, PFDCF and aggravated menacing merge into one crime because there is no statutory distinction between actual danger and perceived danger from a loaded or inoperable gun. The Court disagrees, first, because an unloaded shotgun can be dangerous to a victim, as can any other unloaded or inoperable firearm.

Second, the Court observes that *Graham* dealt with PDWDCF, whereas this

Defendant is charged with PFDCF. Defendant takes this into account only to the extent
that it confirms his argument. When deciding whether a person has been charged for one
act under two separate statutes, the question is whether each provision requires proof of a
fact which the other does not.⁶ For PFDCF, the State will be required to prove that

Defendant possessed a firearm.⁷ For aggravated menacing, the State will be required to
prove that Defendant intentionally placed another person in fear of imminent physical
injury.⁸ The Court finds that these are different statutory elements⁹ and that these
offenses do not merge.

⁵Title 11 § 222 (12) provides as follows:

[&]quot;Firearm" includes any weapon from which a shot, projectile or other object may be discharges by force or combustion, explosive, gas and/or mechanical means, whether operable or inoperable, loaded or unloaded. It does not include a BB gun.

⁶Nance v. State, 903 A.2d 283 (Del. 2006) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

⁷Title 11 *Del. C.* § 1447A.

⁸Title 11 *Del. C.* § 602(b).

⁹Whalen v. United States, 445 U.S. 684, 691-92 (1980).

The Court need not address the firearms charges associated with felonies other than aggravating menacing because Defendant has not presented any argument to support their dismissal or merger.

Conclusion. For all these reasons, Defendant's motion to merge or dismiss the eight counts of PFDCF against him is **DENIED**.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary

cc: Paula T. Ryan, Esquire
John W. Donahue, Esquire
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