

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS L. MOORE,	§
	§
Defendant Below-	§ No. 294, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. PN01-01-1287
Plaintiff Below-	§ IN01-01-1288
Appellee.	§

Submitted: March 21, 2003

Decided: April 28, 2003

Before **VEASEY**, Chief Justice, **HOLLAND** and **STEELE**, Justices

**ORDER**

This 28<sup>th</sup> day of April 2003, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Thomas L. Moore, was found guilty by a Superior Court jury of the lesser-included offense of Assault in the Third Degree<sup>1</sup> and Resisting Arrest. He was sentenced on the assault conviction to one year incarceration at Level V, to be suspended for decreasing levels of probation, and on the resisting arrest conviction to one year incarceration at Level V, to be suspended for one year at Level II probation. Moore, acting *pro se*, filed an appeal

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<sup>1</sup>Moore was charged originally with Assault in the Second Degree.

from the April 26, 2002 sentencing order of the Superior Court.<sup>2</sup> We find no merit to the appeal. Accordingly, we AFFIRM.

(2) The evidence at trial established that, on January 6, 2001, Officer Jennifer Bunora of the New Castle County Police Department was dispatched to investigate a traffic accident on Welsh Tract Road, Newark, Delaware. She was in uniform and was driving a marked police car. As Officer Bunora arrived at the scene of the accident at about 2:00 p.m., she was flagged down by one Patricia Baldwin. Baldwin reported that she had been driving behind a truck that slid off the road on a sharp curve, hitting a tree. Baldwin, an emergency medical technician, stopped to see if the driver, later identified as Moore, and his passenger needed help. She also reported a strong odor of alcohol in the front seat of the truck. Although Baldwin told Moore that he should stay with the truck until the police arrived, Moore walked away from the scene of the accident saying that he was going to get help to tow his truck.

(3) Following her conversation with Baldwin, Officer Bunora got out of her police car and approached Moore, who was walking down the road. She said she needed to speak with him about the accident and attempted to escort him into

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<sup>2</sup>Moore filed a motion requesting leave to proceed *pro se* and the matter was remanded to the Superior Court for an evidentiary hearing on the motion. On July 11, 2002, this Court adopted the Superior Court's findings of fact and conclusions of law and issued an order permitting Moore to proceed *pro se*. *Moore v. State*, Del. Supr., No. 294, 2002, Veasey, C.J. (July 11, 2002).

the police car. Moore, who was carrying a cooler in one hand and a bag in the other, was uncooperative, refused to get into the police car and refused to answer any questions. Officer Bunora repeatedly asked Moore to get into the police car, with no success. As Officer Bunora grabbed Moore by his arm, a struggle ensued. Finally, Moore was subdued and placed in the police car by Officer Bunora and two paramedics who had arrived by ambulance. During the struggle, Officer Bunora slipped and twisted her knee, which was swollen for two days.

(4) During the course of trial, defense counsel requested the judge to instruct the jury on Assault in the Third Degree<sup>3</sup> as a lesser-included offense of Assault in the Second Degree.<sup>4</sup> In spite of Moore's objection to the instruction, the judge granted the request, determining that there was a rational basis for the instruction since the jury could reasonably conclude on the basis of the evidence presented that Moore had acted recklessly, but had not intentionally injured Officer Bunora. The judge further noted that the decision to request the instruction on the lesser-included offense was a matter of trial strategy that was within the province of defense counsel rather than the defendant.

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<sup>3</sup>DEL. CODE ANN. tit. 11, § 611(1) ("A person is guilty of assault in the third degree when . . . [t]he person intentionally or recklessly causes physical injury to another person . . .").

<sup>4</sup>DEL. CODE ANN. tit. 11, § 612(a) (3) ("A person is guilty of assault in the second degree when . . . [t]he person intentionally causes physical injury to a law-enforcement officer . . .").

(5) In this appeal, Moore claims that the jury delivered an inconsistent verdict on the charges of Assault in the Third Degree and Resisting Arrest.<sup>5</sup> He requests that his conviction for Assault in the Third Degree be vacated.

(6) Moore's claim that the jury rendered an inconsistent verdict is without merit. There is no inconsistency in the jury's finding that Moore intentionally attempted to prevent Officer Bunora from detaining him, but only recklessly caused her physical injury.<sup>6</sup> Moreover, the trial judge correctly instructed the jury on the lesser-included offense of third degree assault, since there was a rational basis in the evidence for a finding by the jury that Moore recklessly caused Officer Bunora's physical injury.<sup>7</sup> Moreover, the trial judge correctly ruled that whether to request the instruction was a matter of trial strategy within the province of defense counsel rather than the defendant.<sup>8</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.<sup>9</sup>

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<sup>5</sup>DEL. CODE ANN. tit. 11, § 1257 ("A person is guilty of resisting arrest when the person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person . . .").

<sup>6</sup>*Davis v. State*, 706 A.2d 523, 525-26 (Del. 1998).

<sup>7</sup>DEL. CODE ANN. tit. 11, §§ 206(c) and 231(c).

<sup>8</sup>*Chao v. State*, 604 A.2d 1351, 1357-58 (Del. 1992).

<sup>9</sup>To the extent Moore's claim can be construed as a claim of ineffective assistance of counsel, this Court will not consider any such claim presented for the first time on direct appeal. *Wing v. State*, 690 A.2d 921, 923 (Del.1996).

BY THE COURT:

/s/ Myron T. Steele  
Justice