

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VICTOR RODRIGUEZ,	§	
	§	No. 456, 2001
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Kent County
	§	Cr. ID No. 0005017581
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 7, 2003
Decided: April 7, 2003

Before **VEASEY**, Chief Justice, **WALSH**, **HOLLAND**, **BERGER** and **STEELE**,
Justices, constituting the Court *en Banc*.

ORDER

This 7th day of April, 2003, on consideration of the briefs of the parties, it
appears to the Court that:

1) Victor Rodriguez appeals his convictions, following a jury trial, of second
degree arson, third degree arson, and attempted second degree arson. He also appeals
his convictions, following a guilty plea, of two counts of terroristic threatening.

2) Rodriguez was indicted on four counts of terroristic threatening, eight counts
of arson and one count of misdemeanor theft relating to bomb threats, fires and other
events that occurred during the period from March through early May, 2000. He was

indicted separately on two counts of second degree arson and one count of attempted second degree arson based on fires that he allegedly started on May 19 and 20, 2000.

3) Rodriguez entered into a plea agreement with respect to the first indictment. He pled guilty to two counts of terroristic threatening and the State *nolle prossed* the remaining charges. Rodriguez contends that his guilty plea should be withdrawn because it was involuntary and that his rights were violated when the police showed a picture of him to two witnesses without his counsel being present.

4) Rodriguez waived both of these claims. He filed a motion to withdraw his guilty plea before sentencing, but he withdrew that motion. At sentencing, he confirmed to the trial court that he did not wish to withdraw his guilty plea. Pursuant to Supreme Court Rule 8, absent plain error, this Court will not review claims that were not presented to the trial court. Based on our review of the transcript, we find nothing to suggest that Rodriguez's plea was involuntary or unknowing and, therefore, we find no plain error. Rodriguez's guilty plea, in turn, eliminates his claim relating to events that occurred before the entry of the plea, such as the photographic lineup.¹

5) Rodriguez went to trial on the three arson charges contained in the second indictment. The charges were based on fires discovered on May 19 and 20, 2000.

¹*Downer v. State*, 543 A.2d 309, 312 (Del. 1988).

One fire was in the passenger compartment of a car that was parked at the rear of the Precision Tune repair shop in Dover, Delaware. The Fire Marshal testified that there were scorch marks from the car fire on the wall of the repair shop. Another fire was discovered the following night in a trash dumpster that was located against the back wall of a beauty shop, also in Dover, Delaware. There was no evidence that the dumpster fire in any way damaged the adjacent building. Rodriguez was apprehended within a few minutes after the dumpster fire was discovered, and he confessed to starting both fires.

6) Rodriguez contends that the trial court erred in refusing to instruct the jury on the lesser included offense of reckless burning. As to count one, the automobile fire, and count three, the dumpster fire, the issue is moot because the jury rejected the lesser included offenses of arson third and attempted arson third and convicted Rodriguez as charged. Thus, there is no basis on which to complain about the failure to give instructions on other lesser included offenses.²

7) On count two, the Precision Tune fire, the jury returned a guilty verdict on arson third degree, the lesser included offense of the charged, arson second degree. Rodriguez argues that the jury should have been given the opportunity to select an even less serious charge, reckless burning. The court is obligated to give instructions

²*Viridin v. State*, 780 A.2d 1024 (Del. 2001).

on lesser included offenses only if there is a rational basis in the evidence to acquit the defendant of the more serious crime and convict him of the lesser included offense.³

The difference between reckless burning and arson third is that reckless burning does not require actual damage to property. Here, since the undisputed evidence established damage from the fire, a rational jury could not acquit Rodriguez of arson third and find him guilty of reckless burning. Thus, this claim fails.

8) Finally, Rodriguez argues that the arson and reckless burning statutes are unconstitutionally vague, as applied, because he could have been convicted of a felony, arson third, or a misdemeanor, reckless burning, for the same conduct. This argument lacks merit. There are clear distinctions between the levels of arson and reckless burning. Arson second requires an intentional fire and intentional damage to a building;⁴ arson third requires an intentional fire and reckless damage to a building;⁵ and reckless burning requires a reckless fire and reckless risk of damage to a building or other property.⁶ Conduct that causes damage to a building is arson and

³ 11 *Del.C.* §206(c).

⁴ 11 *Del. C.* §802(a).

⁵ 11 *Del. C.* §801(a).

⁶ 11 *Del. C.* §804(a).

reckless conduct that causes no damage, or causes damage to other property is reckless burning. Thus, the different statutes do not proscribe the same conduct.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court be, and the same hereby are, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice