IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH WARNER,	§	
	§	
Defendant Below,	§	
Appellant,	§	No. 35, 2001
	§	
v.	§	Court Below: Family Court
	§	of the State of Delaware in and
STATE OF DELAWARE,	§	for New Castle County
	§	Case No. 9910024290
Plaintiff Below,	§	
Appellee.	§	

Submitted: August 28, 2001
Decided: November 21, 2001

Before VEASEY, Chief Justice, WALSH and STEELE, Justices.

O R D E R

This 21st day of November 2001, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The respondent-appellant, Joseph Warner* ("Warner"), was adjudged delinquent on one count of assault in the second degree by the Family Court on April 24, 2001. This is Warner's direct appeal.

* As required by Supr. Ct. Rule 7(d), we have assigned a pseudonym to the appellant whose appeal arose from a juvenile delinquency proceeding.

(2) On February 17, 1999, John Wray ("Wray") was assaulted by several youths outside his home after attempting to break up a fight involving his teenage son. Both Wray and a neighbor testified that Warner was one of the perpetrators of the assault. Although Wray was not visibly injured in the assault, shortly thereafter he suffered a massive heart attack, arguably triggered by the melee. Warner's sole defense at trial was one of mistaken identity. After hearing testimony from witnesses for both the State and Warner, the Family Court found Warner delinquent of the charge against him.

(3) In this appeal, Warner argues, for the first time, that the State did not prove that the victim sustained "serious physical injury," a material element of the charge of assault in the second degree. 11 *Del. C.* § 612. Although defense counsel moved for a judgment of acquittal twice in the court below, the basis for both motions was that the State had failed to prove that Warner was the perpetrator of the assault. The "serious injury" issue was never presented to the trial court.

(4) This Court will not consider questions which have not been presented to the court below, absent a showing of plain error. *See* Supr. Ct. R. 8, Super. Ct. Crim. R. 52(b). Plain error exists when there is a material defect, apparent on the

record, which deprives an accused of a substantial right or which clearly shows manifest injustice. *Gregory v. State*, Del. Supr., 616 A.2d 1198, 1203 (1992).

(5) Plain error review is not available to Warner, however, because he waived his claim that serious physical injury had not been proven when he conceded that the victim indeed sustained a serious injury that was causally related to the assault. At the conclusion of all evidence, defense counsel made a motion for judgment of acquittal in which he stated: "So I – I certainly concur that the injuries are serious, that there are injuries to Mr. Ray, it occurred in connection with this, I don't think that my client had anything to do with these injuries approximately, and I think the State has failed to prove beyond a reasonable doubt that he was in fact the perpetrator of the injuries that he did sustain." Transcript of Family Court Hearing at 80 (April 24, 2000).

(6) Plain error review extends to claims that are forfeited because they were not raised at trial. *U.S. v. Olano*, 507 U.S. 725, 732-733 (1993). But certain errors may be denied review if they have been waived. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. *U.S. v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted). Decisions following *Olano* have made clear that only forfeited errors are

reviewable for plain error. *U.S. v. Dispoz-O-Plastics, Inc.*, 3d Cir., 172 F.3d 275, 282 (1999); *U.S. v. Meade*, 1st Cir., 175 F.3d 215, 222 (1999).

(7) "As a general matter, a criminal defendant who stipulates to an element of an offense relinquishes his right to test the government's case with respect to the existence of the facts underlying that particular." *Meade*, 175 F.3d at 223. Thus, Warner cannot now challenge the fact that his victim sustained a serious physical injury.

(8) Warner's further attacks on the sufficiency of evidence to sustain his adjudication of delinquency are without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice