

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAVINCE M. PATRICK,)
) No. 170, 2006
 Defendant Below,)
 Appellant,) Court Below: Superior Court of
 v.) the State of Delaware in and
) for New Castle County
 STATE OF DELAWARE,)
) Cr. ID. No. 0504024696
 Plaintiff Below,)
 Appellee.)

Submitted: January 24, 2007

Decided: March 15, 2007

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 15th day of March, 2007, it appears to the Court that:

(1) Appellant-defendant Lavince M. Patrick appeals his attempted burglary in the second degree¹ and resisting arrest² convictions in Superior Court. Patrick's sole argument on appeal is that that the trial judge erred by finding him guilty of attempted burglary second degree instead of attempted criminal trespass

¹ 11 *Del. C.* § 825 (a) (1). A person is guilty of burglary in the second degree when the person knowingly enters or remains unlawfully in a dwelling with the intent to commit a crime therein.

² 11 *Del. C.* § 1257 (b). 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 or another person or intentionally flees from a peace officer who is effecting an arrest.

first degree,³ a lesser included offense.⁴ Patrick contends that he could not have committed burglary in the second degree because he did not have the requisite intent to commit a crime in a dwelling; therefore, the State could not establish one of the essential elements of attempted burglary in the second degree. Patrick concedes that he fled from a police officer outside a dwelling he attempted to enter while in flight, but argues that by the time he attempted to enter the dwelling, he had already completed the crime of resisting arrest. Therefore, he reasons, he could not have intended, and did not intend, to commit a crime in the dwelling at the time he attempted to enter it unlawfully. After consideration of the record and the applicable statutes, we hold that Patrick engaged in a continuous course of conduct by knowingly and unlawfully attempting to enter the home with the ongoing intention of continuing to resist arrest while inside the dwelling. Therefore, Patrick's conduct established all the essential elements of two crimes: resisting arrest and attempted burglary in the second degree. Accordingly, we affirm.

³ 11 *Del. C.* § 823. A person is guilty of criminal trespass in the first degree when the person knowingly enters or remains unlawfully in a dwelling or building used to shelter, house, milk, raise, feed, breed, study or exhibit animals.

⁴ The main distinction between the crimes of burglary second degree and criminal trespass is whether or not the defendant enters a dwelling with the intent to commit a crime therein. If a person enters a dwelling *without* the intent to commit a crime therein, they would be guilty of first degree criminal trespass. If a person enters a dwelling *with* the intent to commit a crime therein, he is guilty of second degree burglary.

(2) In the early evening of April 30, 2005, the Wilmington Police Department received a call from a concerned citizen reporting a suspicious person peering into vehicles in the 1100 block of Chestnut Street. Uniformed Wilmington Patrolman, Johnny Whitehead, observed Patrick, who matched the reported description, walking westbound on Chestnut Street. Whitehead attempted to stop Patrick for identification, but Patrick ignored him and continued walking at a hurried pace.⁵ Whitehead got out of his car and ordered Patrick to stop. Patrick ran away and Whitehead pursued him. Patrick then ran up the front steps of 1110 Chestnut Street, a dwelling. With Whitehead directly behind him, Patrick opened the screen door and attempted (unsuccessfully) to push in the front door with his shoulder. Whitehead removed Patrick from the steps and arrested him.

(3) A New Castle County grand jury indicted Patrick on attempted burglary in the second degree and resisting arrest.⁶ He waived his right to a jury trial and, after trial, a Superior Court judge found him guilty on both charges. Those convictions qualified Patrick for habitual defender status. Following the trial, the trial judge granted the State's motion to sentence Patrick as an habitual

⁵ There were three outstanding warrants for Patrick's arrest.

⁶ After Patrick's preliminary hearing in the Court of Common Pleas, the charges were reduced to attempted criminal trespass, along with resisting arrest, for trial. The grand jury later indicted him on the original charges, resisting arrest under 11 *Del. C.* § 1257 (b) and attempted burglary second under 11 *Del. C.* § 825 (a) (1).

offender. The trial judge sentenced Patrick to eight years at Level V followed by probation. Patrick appealed.

(4) On appeal, we must consider whether proof that Patrick resisted arrest sufficiently establishes the predicate intent to commit a crime in a dwelling element of the burglary statute, 11 *Del. C.* § 825 (a) (1). The initial issues are: (1) whether the crime of resisting arrest is a “continuing offense” where the intent to commit that crime continues until the suspect is apprehended or ceases resisting; or (2) whether the intent to commit that offense begins and ends the moment the suspect begins evading the police.

(5) The State contends that because Patrick failed to raise the issue of statutory interpretation at his trial, we should review for plain error. Patrick contends that the plain error rule does not apply⁷ because the Superior Court judge raised the issue *sua sponte* before either party could address it. “[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”⁸ Here, if we found that the trial judge misinterpreted the resisting arrest statute while finding Patrick guilty of attempted burglary in the second degree (as

⁷ *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

⁸ *Wainright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

opposed to the lesser offense of attempted criminal trespass), the error would be material, serious and fundamental in its character, and thus, would survive even plain error review. Therefore, it is immaterial whether Patrick specifically raised the issue below because in either case this court reviews questions of law *de novo*.⁹ Because this issue of law involves statutory interpretations, our review is *de novo*.¹⁰

(6) The State contends that Patrick’s ongoing evasion of the police was a continuing offense. Thus, Patrick engaged in a continuous course of conduct by knowingly and unlawfully attempting to enter the home with the ongoing intention of continuing to resist arrest inside the home.¹¹ The State contends that the defendant does not need to form a new, separate intent to resist arrest (apart from his original intent to resist arrest while fleeing on the street) once inside the home, in order to satisfy the element of intent to commit a crime in the dwelling. Rather, the offense of burglary second degree occurs where the defendant intends to

⁹ *Godwin v. State*, 2006 WL 1805876 (Del.).

¹⁰ *State v. Baker*, 720 A.2d 1139, 1144 (Del. 1998).

¹¹ The State cites cases from other jurisdictions to support its position. *See State v. Williams*, 550 A.2d 1298, 1301 (N.J. Super. Ct. App. Div. 1988) (interpreting the New Jersey burglary statute and finding that the “continuing intention to elude police” satisfies the burglary element of “purpose to commit a crime therein.”); *State v. Wallace*, 745 A.2d 216, 219 (Conn. App. 2000) (interpreting Connecticut’s burglary third degree statute to find that the crime of interfering with an officer may serve as the necessary underlying offense); *Nicarry v. State*, 795 So. 2d 1114, 1116 (Fla. Dist. Ct. App. 2001) (holding that running into a house with the intent to hide from pursuing police officers can constitute burglary).

continue committing the underlying crime he was committing before making the unlawful entry.¹²

(7) Patrick argues that once he had begun to flee from the officer outside the dwelling, and by the time he attempted to enter the house on Chestnut Street, he had completed the crime of resisting arrest. Therefore, he could not form the intent to commit a crime within the dwelling when he entered the dwelling continuing his unlawful flight. In other words, Patrick contends that if a defendant commits and completes the crime of resisting arrest outside of a dwelling and before attempting to enter it, then as a matter of law he cannot intend to commit the crime of resisting arrest in the dwelling while unlawfully entering the dwelling.¹³ Patrick contends burglary in the second degree requires an unlawful entry with intent to commit “some independent crime after entering the building illegally.”¹⁴ Patrick urges this Court to hold that the crime of resisting arrest is completed almost instantaneously, and that if the suspect then attempts to enter a dwelling to

¹² *State v. Steele*, 625 N.W.2d 595, 600 (Wis. Ct. App. 2001). Moreover, the State urges that to find otherwise would violate the multiplicity doctrine. The doctrine prohibits the State from splitting a single offense into more than one count by dividing the crime into a series of temporal or spatial units too connected to be logically separated. *Handy v. State*, 803 A.2d 937, 940 (Del. 2002).

¹³ Patrick also claims that because he was charged with resisting arrest rather than attempted resisting arrest, it demonstrates that the offense was completed before he attempted the burglary.

¹⁴ *State v. Larson*, 358 N.W.2d 668, 670 (Minn. 1984) (vacating burglary conviction because trespass may not satisfy the predicate intent requirement of burglary).

elude police, he must form a new, separate intent to commit a crime at the time he enters the dwelling. Therefore, Patrick contends, the facts are clear that the State could not establish the requisite intent under the burglary statute.

(8) Patrick cites cases from other jurisdictions¹⁵ to support his position; however, they are distinguishable from the present case because The non-Delaware cases involve escape statutes rather than resisting arrest statutes. In *Gaskin v. State*, the Florida Court held that the defendant could not be convicted of both burglary and escape because the crime of escape was completed when Gaskin first broke away from the officers and did not continue afterwards. *Gaskin* is distinguishable from this case because Florida's escape statute¹⁶ is different from Delaware's resisting arrest statute.¹⁷ Florida's escape statute requires that a person be in physical custody and then break or depart that custody without authorization; whereas Delaware's resisting arrest statute does not require a person in custody who then escapes. Rather, Delaware's resisting arrest statute focuses on the person's actions while he evades the police officer who is trying to detain him.

¹⁵ See *Gaskin v. State*, 869 So. 2d 646 (Fla. Dist. Ct. App. 2004); See also *Lawhorn v. State*, 898 S.W. 2d 886 (Tex. 1995).

¹⁶ (“Any prisoner confined in any prison, jail, private correctional facility, road camp, or other penal institution, whether operated by the state, a county, or a municipality, or operated under a contract with the state, a county, or a municipality, working upon the public roads, or being transported to or from a place of confinement who escapes or attempts to escape from such confinement commits a felony of the second degree . . .”). FLA. STAT. § 944.40 (1997).

¹⁷ 11 *Del. C.* § 1257 (b).

(9) The Texas Court in *Lawhorn v. State* similarly held that it was legally impossible for the defendant to have intended to commit escape while entering an apartment, because the offense of escape was complete before he entered the apartment. As in *Gaskin*, the escape statute in *Lawhorn* involves breaking away from police custody, an act that completes the moment the defendant breaks free of the police. In comparison, under Delaware law, a person could continue to resist arrest after one evasive action. For example, a person could notice the police coming towards them, turn, run down the street, get into a car, go into a building, etc. Because the escape statutes in *Gaskin* and *Lawhorn* differ from Delaware's resisting arrest statute, those cases are inapposite.

(10) In *State v. Burton*,¹⁸ a case involving similar facts, the Superior Court held that the crime of escape¹⁹ is fundamentally different from the crime of resisting arrest.²⁰ The Superior Court judge noted:

Escape requires only that a person be in physical custody and then break or depart from that custody without authorization. The same is

¹⁸ 2006 WL 1134215 at *2 (Del. Super. April 18, 2006), appeal docketed No. 343, 2006 (Del. June 30, 2006) (Appellant raises the same issue in an appeal currently pending before this Court).

¹⁹ Delaware's escape statute states, "A person is guilty of escape in the third degree when the person escapes from custody, including placement in nonsecure facilities by the Division of Youth Rehabilitative Services." 11 *Del. C.* § 1251. "Custody" is defined as "restraint by a public servant pursuant to an arrest, detention or an order of the court." 11 *Del. C.* § 1258 (2). "Escape" is defined as "departure from the place in which the actor is held or detained with knowledge that such departure is unpermitted." 11 *Del. C.* § 1258 (4).

²⁰ 11 *Del. C.* § 1257 (b).

true under Delaware's criminal code. That is, actions taken after the break or departure from custody are not relevant to the charge of escape because there generally is no "continuous act" of escape. Resisting arrest, on the other hand, is a crime which, depending on the facts of the case, may be a continuing offense or may be an offense that is completed in the happening of one event.²¹

(11) Patrick does not cite any applicable case law supporting his theory that an intent to resist arrest before unlawfully entering a dwelling cannot satisfy the requirement of an intent to commit a crime in a dwelling for a burglary second conviction. The issue of whether or not the crime of resisting arrest is a continuing offense is one of legislative intent. As a public policy matter, we have no doubt that the General Assembly intended to deter people from breaking into homes in order to avoid being arrested. Patrick's ongoing evasion of the police was a continuing offense. He engaged in a continuous course of conduct by knowingly and unlawfully attempting to enter the home with the intent to continue to resist arrest inside the home. Therefore Patrick committed two crimes: resisting arrest and attempted burglary second degree. Accordingly, we affirm the Superior Court's judgment.

²¹ *Burton*, 2006 WL 1134215 at *2.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice