IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
Plaintiff,)	
v.)	ID No. 1110013673
BENJAMIN E. JACKSON,)	
Defendant.)	

MEMORANDUM OPINION

This is an appeal from Appellant's conviction in the Court of Common Pleas for resisting arrest. The Information filed in that court alleges that Appellant resisted attempts by Wilmington Police Corporal Schupp to arrest Appellant. Jackson argued below that there was no evidence that Cpl. Schupp attempted to arrest him; instead, according to Jackson, all of the evidence showed that it was Wilmington Police Corporal Steele who was involved in his arrest. At the close of the evidence Jackson moved for a judgment of acquittal, which the trial judge denied. The jury then found Jackson guilty of the resisting charge. Jackson now appeals from the denial of his motion for judgment of acquittal.

The Attorney General's Information charged Jackson with misdemeanor resisting arrest.¹ The relevant portion of the Information reads in its entirety:

BENJAMIN E. JACKSON, on or about the 19th day of October, 2011, in the County of New Castle, State of Delaware, did intentionally attempt to prevent CPL Alexis L Schupp of the Wilmington PD from effecting an arrest or detention of himself, by pulling his body and arms from officer s [sic.] while being ordered to place his hands behind his back.

Jackson correctly points out that there is no evidence that Cpl. Schupp attempted to arrest him or that Jackson ever "pull[ed] his body and arms" from Cpl. Schupp. Rather it was Cpl. Steele who was involved in the fracas with Jackson. On October 19, 2011 several Wilmington police officers responded to the 900 block of Marshall Street because of a complaint of a neighborhood dispute. Jackson was one of the individuals involved in the dispute. The officers attempted to calm the crowd, and as part of this effort Cpl. Steele told Jackson to be quiet and go back into his residence. Jackson kept up the yelling and disregarded Cpl. Steele's instructions, which the corporal repeated several times. Finally Corporal Steele told Jackson he was under arrest. Corporal Steele testified that after he told Jackson he was under arrest

Jackson was on the top step with an open screen door, as I approached him he went back in at the same time another gentleman pulled him back into the house. As I entered the house the second gentleman shut the door on my chest.

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Jackson was also charged with misdemeanor disorderly conduct. That charge is not a subject of this appeal.

Several officers followed into the building and assisted Cpl. Steele in arresting Jackson. The State's recitation of pertinent facts in the argument section of its brief confirms the centrality of Corporal Steele's role. According to the State:

[A] number of officers were dispatched to the 900 block of Marshall Street Wilmington to respond to a neighborhood dispute. As the officers were attempting to investigate the dispute, Jackson continuously argued with and yelled at the neighbors. Officer Steele asked Jackson to stop and go into his residence on three different occasions. After Jackson failed to comply with Steele's request the third time, Steele told Jackson he was under arrest and Jackson, in response, fled into his residence. A struggle ensued between Jackson and approximately five to six Wilmington police officers in which Jackson would not submit to police orders to place his hands behind his back but instead attempted to hide his hands by digging them into the couch.

There was no evidence that Cpl. Schupp, who partnered with Cpl. Steele in the Uniform Service Community Policing Unit, was involved in the arrest or attempt to subdue Jackson. Corporal Schupp agreed at trial that Corporal Steele was "ordering around" Jackson and that Corporal Steele told Jackson he was under arrest. Importantly Corporal Schupp testified that it was Corporal Steele, not him, who was involved with Jackson in the conduct alleged in the information. According to Schupp, "Mr. Jackson was fighting with Officer Steele as Officer Steele was attempting to put handcuffs on him, refusing to put hands behind his back. * * * [I] wasn't involved in the altercation."

The State never sought leave to amend the information to provide that Jackson resisted the efforts of Corporal Steele, not Corporal Schupp, to arrest

him. Thus the issue before the trial judge when faced with Jackson's motion for Judgment of Acquittal was whether there was sufficient evidence in the record, taken in the light most favorable to the State, to allow a reasonable trier of fact to find Jackson guilty beyond a reasonable doubt of resisting Schupp's attempt to arrest Jackson. In denying the motion the trial judge did not point to any evidence that Schupp was actually involved in Jackson's arrest. Rather he seems to have applied an agency analysis in which the jury could find that Steele was acting as an agent of Schupp and therefore Jackson's conduct in resisting Steele was in effect resisting a putative arrest by Schupp. The trial judge reasoned:

In this particular case I'm going to let the jury decide. When I did a sidebar the State designated Officer Steele as the chief investigating officer but during the trial there was [sic] questions that some witnesses testified that officer Schupp was the chief investigating officer, so if that's the case, he's the primary officer charged with the investigation and arrest of the defendant. So, you two can both make appropriate arguments and your closing statements as soon as we bring the jury in, but I'm going to let them decide whether that's proof beyond a reasonable doubt and whether, what I've heard at trial, that Officer Schupp was, in fact, the primary chief investigating officer. If that's the case then he's directing Officer Steele's actions in the arrest of the defendant and it would fall within that bailiwick, so, looking at the diminimus [sic] standard under Rule 29(a) I'm going to deny the motion for judgment [of] acquittal.

Unfortunately no transcript of the instructions to the jury was prepared, so this court is unable to tell what the jury was instructed on this agency theory. The purpose of an indictment or an information is to provide notice to the defendant of the conduct constituting the crime with which he or she is charged.² Once the State learned that it was not Defendant's interaction with Cpl. Schupp, which constituted the crime, the State apparently followed the advice of the late Molly Ivins and decided to "dance with them that brung you." In other words, it did not seek to amend the information. It was therefore left with the allegation that Defendant's interaction with Cpl. Schupp constituted misdemeanor arresting.

As discussed above, there is absolutely no evidence in the record that Cpl. Schupp arrested Defendant or that Defendant ever resisted any attempts to arrest him (because there were no such attempts by Cpl. Schupp). The trial judge implicitly recognized this when he ruled that the case could go forward on some sort of agency theory. The rationale was that Cpl. Schupp was in charge at the scene and, therefore, any arrest of someone at the scene was legally an arrest by Cpl. Schupp, irrespective of whether the corporal was ever involved. The trial court did not identify any authority supporting this analysis in it bench ruling, and the state has supplied none on appeal. The court finds, therefore, that under the facts presented here the State may not rely upon some sort of agency theory to rescue its failure of proof. Accordingly the motion for judgment of acquittal should have been granted.³ The judgment of

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² Keller v. State, 425 A.2d 152, 155 (Del. 1981)

³ Coleman v. State, 2002 WL 455022 (Del.)(Reversing conviction when the "State's failure to include Coleman's 'diassapearance' in its information before trial impermissibly denied her the very notice that an indictment or information is intended to provide.")

the court below, solely as it relates to Defendant's conviction for misdemeanor resisting arrest, is **REVERSED.**

Date: January 15, 2014

John A. Parkins, Jr.

John A. Parkins, Jr. Superior Court Judge

oc: Prothonotary

cc: Michael B. DegliObizzi, Esquire, Wilmington, Delaware -Attorney for the State Jonathan Layton, Esquire, Wilmington, Delaware - Attorney

for the Defendant