

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY PATRICK,)	
)	
Defendant Below-)	No. 355, 2020
Appellant,)	
v.)	
)	
STATE OF DELAWARE,)	
)	
Plaintiff Below-)	
Appellee.)	

**ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE**

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

The State of Delaware generally adopts the Nature and Stage of the Proceedings as contained in Appellant Corey Patrick's March 8, 2021 Opening Brief.

This is the State's Answering Brief in opposition to Patrick's direct appeal of his Kent County Superior Court drug and firearm convictions.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in allowing limited evidence of the ongoing drug investigation of Patrick. Without some background information as to why the police followed Corey Patrick on August 26, 2019, and seized him at a Walmart parking lot, there would be a chronological and conceptual void in the State's case-in-chief leading to potential jury confusion. Evidence of an ongoing drug investigation of Patrick was relevant to show why Patrick, his vehicle, and residence were being searched by the police. The drug investigation was evidence inextricably intertwined with the police seizure of contraband drugs, drug paraphernalia, a large amount of cash, and a firearm Patrick was prohibited from possessing.

II. DENIED. Eleven *Del. C.* § 1448(a)(9) does not require a nexus between a prohibited person's possession of a semi-automatic firearm and a controlled substance; it requires that the two possessions occur "at the same time." The rationale in *Lecates v. State*, 987 A.2d 413, 419 (Del. 2009) of a *per se* violation governs, not the physical availability and accessibility requirement announced in *Mack v. State*, 312 A.2d 319, 322 (Del. 1973).

III. DENIED. Patrick's two separate convictions under different subsections of 11 *Del. C.* § 1448 did not amount to a due process multiplicity violation. Proof of different statutory elements was required for the two distinct

convictions. The multiplicity doctrine protects against being charged multiple times under the same statute. Patrick's conviction for Possession of a Firearm by a Person Prohibited under 11 *Del. C.* § 1448(a)(1) required proof that he was a convicted felon who knowingly possessed a firearm. The separate conviction for Possession of a Deadly Weapon by a Person Prohibited under 11 *Del. C.* § 1448(a)(9) required proof that Patrick knowingly possessed a semi-automatic firearm while he at the same time possessed a controlled substance.

STATEMENT OF FACTS

Beginning in May 2019, the Kent County Drug Unit (A-24) conducted a drug investigation (A-31) of Corey M. Patrick. (A-76). For a little over three months, law enforcement maintained surveillance of Patrick and his daily activities. (A-76-77). Delaware State Police Detective (“DSP”) Timothy Howard (A-76), identified the motor vehicle Patrick drove as a gray GMC Terrain. (A-18, 76-77). There was both police physical surveillance of Patrick’s movements and electronic surveillance when the Drug Unit affixed a global positioning monitoring (GPS) unit to Patrick’s motor vehicle. (A-78-79). As a result of the ongoing police surveillance and inquiries into the Department of Motor Vehicles and other information sources, the police determined that Patrick resided at Apartment G-304, 309 Tollhouse Place, in the Village of Westover, Dover, Delaware. (A-43-44, A-77).

On August 26, 2019, Dover Police Department Detective Robert Cunningham obtained a search warrant for Patrick’s third floor Dover apartment. (A-43-44). That same date DSP Detective Patrick Schlimer from the Kent County Drug Unit (A-15), was conducting surveillance of Patrick at the Christiana Mall in New Castle County. (A-17). Darlene Ryder, the mother of three of Patrick’s children, and one year old Corey Patrick, Jr. were with Patrick at the mall. (A-18, 22).

Detective Schlimer followed Patrick as he drove the dark gray GMC Terrain southbound into Kent County that afternoon. (A-18,23). In the area of White Oak Road in Dover, Schlimer observed Patrick pick up two more of his children, a five and six-year old. (A-19, 23). Schlimer watched Patrick drive to the Camden Walmart (A-18), where Patrick exited the vehicle and went into Walmart. (A-19). Darlene Ryder remained in the front passenger seat and the three children sat in the backseat. (A-20).

When Patrick exited the Walmart around 5:30 P.M. (A-25-26), DSP took Patrick into custody. (A-21, 30). DSP Detective Brian Holl, who was working with the Kent County Drug Unit, transported Patrick back to Troop #3. (A-27-30).

Holl did a weapons patdown of Patrick before placing him in the police vehicle. (A-30). On his person Patrick had “close to \$1,000” cash and two cell phones. (A-30). Detective Holl testified, “I most frequently find multiple cell phones on defendants who are drug-dealing,” and added, “. . . normal people carry one cell phone. . . .” (B-1).

At State Police Troop #3, Detective Schlimer searched Patrick’s vehicle. (A-38). In the driver side vehicle’s door the police officer observed “several bundles” of heroin in bags with a red ink “Angry Duck” stamp. (A-39-40; B-20). In the vehicle’s backseat, there was a book bag containing seven pink 10-milligram oxycodone pills and “a little over \$3,600” cash. (A-40-41). It was Schlimer’s

opinion that both the heroin (B-5), and the oxycodone pills (B-6) were possessed with the intent to distribute. (B-5-6).

As a result of the August 26, 2019 search warrant at Patrick's apartment, Dover Police Detective Robert Cunningham testified that there was male clothing in the apartment master bedroom; the bedroom also had a partial walk-in closet. (A-44). On the top shelf of the bedroom closet was a man's size shoe box (A-46-47) containing a black Glock 388 semi-automatic handgun (State's Exhibit # 20). (A-44-45, 53; B-12). The police also located a firearm magazine containing two rounds with the firearm. (A-55, 63; B-12).

Other shoe boxes in the bedroom closet contained heroin packaging. (A-47; B-11). There was also men's clothing in the closet (A-47-48, 51-52), including a black Calvin Klein man's jacket. (A-48, 54). Inside the man's jacket (State's Exhibits # 14 and 15) pocket were 33 bags of heroin, which had a red stamp picture of Daffy Duck above the words "Angry Duck." (A-48-49, 54, B-11). The jacket pocket also contained several strips of Suboxone, a heroin alternative. (B-11, 13). Cunningham estimated that each of the 33 bags of heroin discovered in the jacket pocket weighed approximately 0.007 grams. (B-14). It was Cunningham's opinion that the heroin was packaged for distribution (A-57), and that the Suboxone was also possessed for distribution. (B-13).

The police located a black safe on the closet floor that contained over \$5,300 cash. (A-49, A-90). More heroin was discovered elsewhere in the apartment. (A-86, 88-89). Heroin was recovered from a pair of male jeans lying on the bed (A-86, 88), and from a black fanny pack on a table near the apartment entrance. (A-86, 89). A total of 46 bags of heroin was found in Patrick's apartment. (A-86; B-20-21).

The 31 bags of heroin found in the vehicle door (State's Exhibit # 3) weighed approximately 0.212 grams. (B-20, 23). The 46 bags of heroin (State's Exhibit # 17) located in Patrick's apartment weighed approximately 0.327 grams. (B-20-21, 24). It was the opinion of DSP Detective Howard that the heroin collected in the investigation was possessed for distribution. (B-22).

Patrick elected not to testify at his February 2020 jury trial. (B-28-29). Patrick did have three prior Kent County Superior Court felony drug convictions in 2010, 2013 and 2015. (A-6).

I. EVIDENCE OF AN ONGING DRUG INVESTIGATION WAS PROPERLY ADMITTED

QUESTION PRESENTED

Was evidence that the Kent County Drug Unit was conducting a drug investigation of Patrick prior to his 2019 arrest admissible?

STANDARD AND SCOPE OF REVIEW

The Superior Court’s admission of evidence that Corey Patrick was the subject of an ongoing drug investigation by the Governor’s Task Force and the Kent County Drug Unit prior to being taken into custody is reviewed on appeal for an abuse of discretion.¹

MERITS OF THE ARGUMENT

Patrick argues that the trial judge abused his discretion in allowing evidence “that Patrick had been the target of an ongoing drug investigation. . . .” (Opening Brief at 9). He is mistaken. The facts and circumstances of this case show that the Superior Court did not abuse its discretion in allowing evidence regarding the drug investigation of Patrick.

On February 18, 2020, the first day of Patrick’s Superior Court jury trial , the second prosecution witness, DSP Detective Holl (A-27), testified that he was

¹See *Hines v. State*, ___ A.3d ___, 2021 WL 787464, at * 6 (Del. Feb. 17, 2021); *Jones v. State*, 940 A.2d 1, 9-10 (Del. 2007).

assigned to the Kent County Governor's Task Force. (A-27). When the prosecutor next asked, "What is the Governor's Task Force?," Patrick's defense counsel objected. (A-27). While conceding that ". . . the question about his assignment and all are obviously relevant and harmless," defense stated that he wanted to avoid any reference to the Task Force rounding up fugitives because that "would imply prior criminal conduct by Mr. Patrick. . . ." (A-28).

The prosecutor responded to this defense trial objection by stating, ". . . he wasn't a fugitive. He was being rounded up, he was taken into custody pursuant to a warrant. . . ." (A-28). The Superior Court Judge overruled the defense objection and stated:

He was picked up for a warrant. If he was actually picked up on a warrant, you can actually ask those questions. That is pertinent and proper. It may be prejudicial, but so be it. But you can certainly address it on cross-examination if he was not a fugitive as such.

(A-28).

Detective Holl then explained that when he searched Patrick at the Camden Walmart on August 26, 2019, Patrick "had a large amount of money on his person and he had two cell phones." (A-30). On cross-examination defense counsel asked the detective, "So this was a drug investigation?," and he answered, "Yes." (A-31).

On the second day of trial, February 20, 2020, DSP Detective Howard, the chief investigating officer, mentioned the drug investigation of Patrick beginning

in May 2019, without further defense objection. (A-76).

The May to August 2019 investigation evidence into Patrick's drug activities was not evidence of other uncharged crimes or prior bad acts, but merely background information regarding the reason the State Police followed Patrick's vehicle from New Castle County to the Camden Walmart and took Patrick into police custody on August 26, 2019.² Without the limited prior investigation background information the jury would be left to speculate why the police were following Patrick and taking him into custody that day. As this Court stated in *Sanabria*, during police officer testimony about an investigation, "[b]ackground information may be necessary to give the jury a complete picture at trial and to ensure the jury is not confused in a way that would be unfavorable to the prosecution."³ That was the case here.

Indeed, when defense counsel objected to the prosecutor's questioning regarding the Governor's Task Force (A-27), defense counsel also acknowledged that the police witness' duty assignment was "obviously relevant and harmless. . . ." (A-28). The ongoing drug investigation of Patrick (A-31) was relevant evidence as to why the police were following Patrick on August 26, 2019 and seized Patrick and his motor vehicle that day.⁴ All relevant evidence is admissible

² See *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2009).

³ *Id.* at 112.

⁴ D.R.E. 401.

unless excluded by a court rule or state statute.⁵

Likewise, evidence of the ongoing drug investigation prior to August 26, was material to answer the question why Patrick was followed by the police and seized in a Walmart parking lot.⁶ The prior investigation evidence was also probative of why Patrick was followed and searched by the police.⁷

Moreover, the evidence of the ongoing drug investigation was inextricably intertwined with the crimes for which Patrick was being tried.⁸ With no explanation for why Patrick was followed and seized by the police there would be a conceptual void in the State's presentation of its case in a logical, linear fashion for the jury to understand.

The ongoing drug investigation explained why the police followed Patrick and seized him in Camden. Without some explanation for the police conduct the jury might be confused about the evidence or misapprehend why events unfolded as they did.

⁵ D.R.E. 402. *See Kiser v. State*, 769 A.2d 736, 739 (Del. 2001).

⁶ *See State v. McLaughlin*, 514 A.2d 1139, 1141 (Del. Super. 1986).

⁷ *See Kiser*, 769 A.2d at 740.

⁸ *See Pope v. State*, 632 A.2d 73, 76 (Del. 1993); *Ellison v. State*, 2002 WL 31681699, at * 1 (Del. Nov. 27, 2002) (potential jury confusion if a chronological and conceptual void in the State's presentation of evidence); *State v. Powell*, 2010 WL 5551737, at * 4 (Del. Super. July 27, 2010) (exclusion of evidence of an earlier robbery attempt at a different location prior to a fatal shooting of a police officer would create a chronological and conceptual void with potentially significant jury confusion); *see also Everett v. State*, 1998 WL 977124, at * 1 (Del. Nov. 23, 1998)

Once the jury saw physical evidence that Patrick was a heroin dealer, information that there was a prior and continuing drug investigation of the suspect was hardly an unanticipated revelation.

Under these circumstances, the Superior Court did not abuse its discretion by allowing limited reference to the ongoing drug investigation.

II. THE EVIDENCE WAS SUFFICIENT TO PROVE POSSESSION OF A DEADLY WEAPON BY A PERSON PROHIBITED

QUESTION PRESENTED

Was the evidence sufficient to prove Count 4 of the Indictment , which charged Patrick with Possession of a Deadly Weapon by a Person Prohibited (PDWBPP) in violation of 11 *Del. C.* § 1448(a)(9)?

STANDARD AND SCOPE OF REVIEW

Appellate review of a trial judge’s denial of a defense motion for judgment of acquittal is *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the essential elements of Possession of a Deadly Weapon by a Person Prohibited in violation of 11 *Del. C.* § 1448(a)(9) beyond a reasonable doubt.⁹

MERITS OF ARGUMENT

Count 4 of Patrick’s October 7, 2019 Indictment charged him with Possession of a Deadly Weapon by Person Prohibited (PDWBPP) in violation of 11 *Del. C.* § 1448(a)(9), which states that a person is prohibited from possessing a deadly weapon “if the deadly weapon is a semi-automatic or automatic firearm, or a handgun” and the person “at the same time, possesses a controlled substance in

⁹ See *Wiggins v. State*, 227 A.3d 1062, 1065 (Del. 2020); *Ways v. State*, 199 A.3d 101, 106 (Del. 2018).

violation of § 4763, or § 4764 of Title 16.” (A-7). Count 4 of the Indictment stated:

COREY M. PATRICK, on or about the 26th day of August, 2019, in the County of Kent, State of Delaware, did knowingly own, possess or control a deadly weapon which is a semi-automatic or automatic firearm and at the same time did possess a controlled substance, heroin, and/or Suboxone, and/or oxycodone, and/or marijuana, in violation of section 4763 of Title 16.

(A-7).

When the State rested (A-96) following the presentation of its case-in-chief, the defense moved for a judgment of acquittal as to all counts of the Indictment. (A-97-109). After hearing the State’s response (B-25-27), the Superior Court Judge reserved his decision until after the State reopened its case. (B-27). The defense renewed the motion for judgment of acquittal once the evidence was completed, and the next morning, February 21, 2020, the trial judge ruled on the defense acquittal motion as to Counts 1 through 7 of the Indictment. (A-112-15).

Relying upon *Mack v. State*,¹⁰ the trial judge granted the defense motion of a judgment of acquittal as to Count 1 - Possession of a Firearm During the Commission of a Felony (PFDCF). (A-6, A-113-114).

¹⁰312 A.2d 319, 322 (Del. 1973) (“We hold that a felon is in ‘possession’ of a deadly weapon, within the meaning of § 468A, only when it is physically available or accessible to him during the commission of the crime.”).

However, recognizing the distinction highlighted in *Lecates v. State*,¹¹ that “Possession of a deadly weapon by a person prohibited is a *per se* violation of 11 *Del. C.* § 1448, and the more limited PDWDCF possession definition (requiring physical availability and accessibility) does not apply to PDWPP”, the trial judge denied the defense motion for acquittal as to Counts 2-4, and ruled:

As to Counts 2, 3 and 4, as the parties should be aware, the Delaware law has moved away from the availability and accessibility test as set forth in *Mack*. The test in the context of Possession of a Deadly Weapon by a Person Prohibited case, as in this situation, the Court notes that in *Lecates* the Court held that establishing Possession of a Deadly Weapon by a Person Prohibited does not require presentation of evidence that a deadly weapon was physically available and accessible at the specific time of the arrest.

The Court explained that a person was in constructive possession of a firearm when the person, number one, knew the location of the gun; number two, had the ability to exercise dominion and control of the gun; and, number three, intended to guide the destiny of the gun. Somewhat archaic language, I might add as a footnote.

Therefore, a reasonable jury in this case could find, based upon the evidence in this case, that the defendant was guilty of Counts 2 and 3 and 4.

(A-114-15).

Here, Patrick only challenges the sufficiency of the evidence to convict him of Count 4 of the Indictment (A-7), PDWBPP, in violation of 11 *Del. C.* § 1448(a)(9), Cr. A. No. IK19-09-0349, a conviction for which Patrick received a

¹¹ 987 A.2d 413, 419 (Del. 2009)

suspended sentence of 12 months Level II concurrent probation. (October 14, 2020 Sentence Order at 3, attached as Op. Brf. Ex. C). Patrick argues, “Because § 1448(a)(9) was not enacted until after *Lecates* and because § 1448(a)(9) is akin to PDWDCF in that it does not prohibit possession *per se*, the rationale in *Lecates* does not apply and Patrick’s conviction of his third count of PDWBPP should be reversed.” (Opening Brief at 23).

Patrick adds, “. . . to sustain a conviction under § 1448(a)(9), the State must show possession of a firearm by the prohibited person and a nexus between the firearm and the drugs.” (Opening Brief at 26). In support of this nexus requirement argument, Patrick cites *Thomason v. State*,¹² a 2005 Arkansas Court of Appeals decision interpreting *Ark. Code Ann. § 5-74-106(d)* (Repl. 2002). The Arkansas criminal statute discussed in *Thomason* is found in a section of the Arkansas Code dealing with weapons possession during controlled substance offenses. *Ark. Code Ann. § 5-74-106(d)* provides: “It is a defense to this section that the defendant was in his or her home and the firearm or other implement or weapon was not readily accessible for use.” Thus, while the Arkansas Court of Appeals in *Thomason* found, “It is a defense to a prosecution for simultaneous possession if the defendant was in his home and the firearm was not readily accessible for use,” the basis for this determination is the existence of a specific

¹² 208 S.W.3d 830, 833 (Ark. App. 2005).

Arkansas statute providing such a defense.¹³ No such statutory defense appears to exist in Delaware.

Furthermore, Patrick is incorrect in claiming that 11 *Del. C.* § 1448(a)(9) requires “a nexus between the firearm and the drugs.” (Opening Brief at 26). *Lecates* states, “Possession of a deadly weapon by a person prohibited is a *per se* violation of 11 *Del. C.* § 1448.”¹⁴ Thus, it was a *per se* violation for Patrick, a convicted felon, to constructively possess a firearm when he was also in possession of a controlled substance. Eleven *Del. C.* § 1448(a)(9) does not impose a statutory requirement of “nexus” between the drugs found in Patrick’s vehicle in Camden and the firearm discovered by police in his Dover apartment.¹⁵

On appeal, Patrick is arguing for a “nexus” requirement that does not exist in the Delaware statute at issue [11 *Del. C.* § 1448(a)(9)] in order to argue that *Mack*, not *Lecates*, is the controlling legal analysis. But, “[i]n *Lecates*, the Court clarified the distinct standards of possession when analyzing the sufficiency of evidence

¹³ *Id.*

¹⁴ *Lecates*, 987 A.2d at 419. *See also* *Blenman v. State*, 2016 WL 889551, at * 5 (Del. Mar. 8, 2016) (“Establishing PFBPP does not require evidence that the weapon was physically available and accessible to the defendant at the time of arrest.”).

¹⁵ *Compare* *Elmore v. State*, 2015 WL 3613557, at * 1 (Del. June 9, 2015) (search in motel lobby revealed contraband on defendant’s person and loaded shotgun found later in motel room); *Triplett v. State*, 2014 WL 1888414, at * 1 (Del. May 9, 2014) (defendant seen leaving house where loaded revolver found in jacket inside the house).

supporting convictions of Possession of a Deadly Weapon During the Commission of a Felony and Possession of a Weapon by a Person Prohibited.”¹⁶

Eleven *Del. C.* § 1448(a)(9) criminalizes possession by persons prohibited of “a semi-automatic or automatic firearm, or a handgun,” when that prohibited person is in possession of a controlled substance in violation of § 4763, or § 4764 of Title 16.” 11 *Del. C.* § 1448(a)(9) contains no nexus requirement between a prohibited person’s possession of a semi-automatic firearm and also a controlled substance other than that the two possessions occur “at the same time.” Patrick is attempting to add a “nexus” requirement that does not exist in the Delaware statute.¹⁷ Eleven *Del. C.* § 1448(a)(9) does not contain any requirement of a “nexus” between the firearm and the drugs. When Patrick possessed drugs in his vehicle and constructively possessed the firearm in his apartment bedroom closet, he was in violation of 11 *Del. C.* § 1448(a)(9). “In the context of a person-prohibited charge, possession may be actual or constructive.”¹⁸

¹⁶ *Weston v. State*, 2010 WL 376895, at * 1 n. 10 (Del. Jan. 5, 2010).

¹⁷ *See State v. Clayton*, 988 A.2d 935, 936 (Del. 2010) (“The phrase ‘intended to guide the destiny of the gun’ is not a required element of the constructive possession jury instruction when a defendant is charged with Possession of a Firearm by a Person Prohibited.”).

¹⁸ *Stevenson v. State*, 2018 WL 1136524, at * 2 (Del. Mar. 1, 2018). *See also Bessicks v. State*, 2017 WL 1383760, at * 2 (Del. Apr. 13, 2017).

After the trial judge granted the motion for judgment of acquittal as to Count 1 of the Indictment (A-113-14), the remaining Indictment counts were renumbered in the jury instructions, and the original Count 4 became Count 3. (B-31). As to renumbered Count 3, the PDWBPP charge in violation of 11 *Del. C.* § 1448(a)(9) (B-31), Patrick's jury was instructed that the State had to prove three elements: (1) Patrick possessed the semi-automatic firearm; (2) the defendant was a person prohibited in possession of a controlled substance; and (3) the defendant acted knowingly. (B-32). This jury instruction did not mandate proof of any "nexus" between the firearm and the drugs because 11 *Del. C.* § 1448(a)(9) contains no such requirement. Therefore, the Superior Court properly denied Patrick's motion for a judgment of acquittal on the count that he violated 11 *Del. C.* § 1448(a)(9). (A-114-15).

III. THERE WAS NO MULTIPLICITY VIOLATION

QUESTION PRESENTED

Were two separate convictions for Possession of a Deadly Weapon by a Person Prohibited (PDWBPP) when there was only one firearm seized by police a violation of the multiplicity doctrine of the United States Constitution Fifth Amendment double jeopardy clause?

STANDARD AND SCOPE OF REVIEW

When a claim is not presented to the Superior Court in the first instance, the contention is waived unless the Appellant can establish plain error.¹⁹

MERITS OF ARGUMENT

Patrick argues here for the first time that his two separate convictions for Possession of a Firearm by a Person Prohibited (PFBPP) [Count 2 of Indictment (A-6)], and Possession of a Deadly Weapon by a Person Prohibited (PDWBPP) [Count 4 of Indictment (A-7)] when only one firearm was recovered by the police violate the multiplicity doctrine of the double jeopardy protection of the Fifth Amendment to the United States Constitution. This claim of a constitutional violation was not fairly presented to the Superior Court; thus, the objection has been waived and the matter may now only be reviewed on appeal for plain error.

¹⁹ Del. Supr. Ct. R. 8; *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.), *cert. denied*, 479 U.S. 869 (1986).

Del. Supr. Ct. R. 8.

To be plain, the error must affect substantial rights, generally meaning that it must have affected the outcome of the trial.²⁰ An unobjected to error amounts to plain error when it is “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”²¹ “Such errors occur where there are material defects apparent on the face of the record that (1) are basic, serious and fundamental in their character, and (2) clearly deprive an accused of a substantial right or show manifest injustice.”²² In demonstrating that a forfeited error is prejudicial, the burden of persuasion is on the defendant.²³ “Plain error should be, by definition, blatant, and such as to require a trial judge to intervene spontaneously even in the absence of an objection.”²⁴ No such error occurred here.

“Double jeopardy, as a constitutional principle, provides the following protections: (1) against successive prosecutions; (2) against multiple charges under separate statutes; and (3) against being charged multiple times under the same

²⁰ *Olano*, 507 U.S. at 732-34; *Wainwright*, 504 A.2d at 1100.

²¹ *Damiani-Melendez v. State*, 55 A.3d 357, 359 (Del. 2012) (quoting *Wainwright*, 504 A.2d at 1100). See also *Dougherty v. State*, 21 A.3d 1, 3 (Del. 2011).

²² *Sudler v. State*, 2013 WL 6858417, at * 1 (Del. Dec. 26, 2013).

²³ *Olano*, 507 U.S. at 734; *Brown v. State*, 897 A.2d 748, 753 (Del. 2006); *Stevenson v. State*, 709 A.2d 619, 633 (Del. 1998).

²⁴ *Morales v. State*, 133 A.3d 527, 533 (Del. 2016) (Strine, C.J., Concurring).

statute.”²⁵ The third double jeopardy protection is the multiplicity doctrine.²⁶ A State is prohibited by the multiplicity doctrine from dividing a single crime into a series of units to manufacture additional counts.²⁷

“Multiplicity occurs when an individual is charged with more than one count of a single offense.”²⁸ “When the same conduct violates two statutory provisions, the first step in a double jeopardy analysis is to determine whether the legislature intended that each violation be treated as a separate offense.”²⁹ Thus, “. . . cumulative punishments for a single occurrence are not double jeopardy where the legislature expresses an unambiguous intent for that single occurrence to accrue such liability.”³⁰ Thereafter, “. . . when addressing the multiplicity issue in a given circumstance ‘the primary inquiry must be one of statutory construction and whether there exists clearly expressed legislative intent to impose multiple punishments.’”³¹

There was no multiplicity violation in Patrick’s separate convictions for

²⁵ *Williams v. State*, 796 A.2d 1281, 1285 (Del. 2002).

²⁶ *Hickman v. State*, 2018 WL 2069050, at * 2 (Del. May 2, 2018) (no plain error in multiple forgery counts).

²⁷ *See Zugehoer v. State*, 980 A.2d 1007, 1013 (Del. 2009) (3 counts of home improvement fraud merged).

²⁸ *Carletti v. State*, 2008 WL 5077746, at * 3 (Del. Dec. 3, 2008).

²⁹ *Fink v. State*, 817 A.2d 781, 788 (Del. 2003).

³⁰ *State v. Brown*, 2020 WL 5122968, at * 1 (Del. Super. Aug. 31, 2020) (citing *State v. Cook*, 600 A.2d 352, 356 (Del. 1991)).

³¹ *Brown*, 2020 WL 5122968, at * 2 (quoting *Nance v. State*, 903 A.2d 283, 286 (Del. 2006)).


violations of Counts 2 and 4 of the Indictment. (A-6-7). Count 2 charged Possession of a Firearm by a Person Prohibited (PFBPP) in violation of 11 *Del. C.* § 1448(a)(1). The statutory provision prohibited a convicted felon from possessing a deadly weapon (including a firearm). To convict for PFBPP the State had to prove knowing possession of a firearm by a prohibited person (a convicted felon). (A-6; B-32).

Count 4 of the Indictment charged Possession of a Deadly Weapon by a Person Prohibited (PDWBPP) in violation of 11 *Del. C.* § 1448(a)(9). (A-7). To prove this separate offense the State must establish that a person knowingly possessed a semi-automatic firearm in this case at the same time he possessed a controlled substance. (B-43).

Because Counts 2 and 4 are defined by different statutory provisions and require proof of different elements, there was no multiplicity violation when Patrick was separately convicted under Counts 2 and 4 of the Indictment.

CONCLUSION

The judgment of the Superior Court should be affirmed.



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Dated: April 7, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY PATRICK,)	
)	
Defendant Below-)	No. 355, 2020
Appellant,)	
v.)	
)	
STATE OF DELAWARE,)	
)	
Plaintiff Below-)	
Appellee.)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 7th day of April 2021, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on April 7, 2021, she did serve electronically the attached State's

Answering Brief properly addressed to:

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Carvel State Office Building
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Wilmington, DE 19801



Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

John Williams
Notary Public


Member of the Delaware Bar
authorized to act as a Notary Public
pursuant to 29 Del. C. § 4323 (a) (3)

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)
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1. This Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times Roman 14-point typeface using Microsoft Word.
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