IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-01-06-2141 through 2142, and
PARRIS MUHAMMAD	)	IN-01-07-0761 through 0762
	)	
	)	
Defendant	)	ID NO. 0106010565

Submitted: July 9, 2004
Decided: August 25, 2004

MEMORANDUM OPINION

Upon Motion of Defendant for Post-Conviction Relief - ***DENIED***

HERLIHY, Judge

Defendant Parris Muhammad has moved for postconviction relief. He was convicted by a jury on April 11, 2002 of (bank) Robbery in the first degree, wearing a disguise during a felony and tampering with physical evidence. These convictions were upheld on appeal.[1]

He raises several issues in his current motion:

1. His counsel was ineffective by not asking for a continuance when the Court made a misstatement during sentencing. The continuance would have been to correct that misstatement.

2. He was sentenced on the basis of an untrue assumption which, he claims, added to his sentence.

3. He is being victimized in an *ex post facto* unconstitutional fashion by a 2003 amendment to the statute setting out the elements of first degree robbery.

4. In a supplemental submission of July 2, 2004 (received by the Prothonotary on July 9th), Muhammad argues that, in effect, there was no basis for the Supreme Court, in its affirmance decision, to say he " fiddled with something under his shirt." Without this incorrect basis, he seems to argue, there was no element of displaying what appears to be a deadly weapon (which would, if true, reduce his conviction to robbery in the second

[1] *Muhammad v. State*, 829 A.2d 137 (Del. 2003).

degree). He claims abuse of discretion and a violation of his constitutional rights.

BACKGROUND

The pertinent factual setting for all of Muhammad's claims are found in these portions of the Supreme Court's opinion affirming his convictions:

> On June 14, 2001, a tall black man wearing jeans, a white T-shirt, and what appeared to be a dreadlock wig robbed a teller at a Wilmington Trust Bank in New Castle, Delaware. According to the bank teller, the robber threw a bag across the counter and said, "Give me all your hundreds and fifties. I have a gun. I will kill you if you don't." The teller complied, because she thought he had a gun. She formed that impression because the robber kept fooling with the bottom of his shirt with one hand, and she could not see what was beneath the shirt.
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> The first issue, whether there was sufficient evidence that Muhammad displayed what appeared to be a deadly weapon, has been the subject of several recent decisions. In *Walton v. State*, this Court reversed a first degree robbery conviction, holding that a person who handed the bank teller a note saying he had a bomb, while holding one hand in his pocket, did not "display what appears to be a deadly weapon" for purposes of the criminal statute. The *Walton* majority held that there must be conduct, in addition to the verbal threat, "that could be viewed objectively as 'display[ing] what appears to be a deadly weapon.'"
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> Muhammad's crime is distinguishable. In addition to his verbal threat, Muhammad fiddled with something under his shirt. Applying *Walton*, we find that Muhammad's actions provided an objective manifestation of the weapon he claimed to have and threatened to use against the teller. As a result, we conclude that there was sufficient evidence to support Muhammad's conviction of first degree robbery.[2]

[2] *Muhammad*, 829 A.2d at 138-39 (citations omitted).

The comments made by the Court at sentencing about which he complains are these:

> The Court: Mr. Muhammad, there's been at least one other robbery sentence today involving a young man who went into a Wawa, not displaying the kind of planning and thought process that obviously went on here. The comment that the prosecutor mentioned, which is the first sentence of your interview with the Presentence officer that, "there was no method to my madness" is peculiar. This offense displayed quite a bit of planning: gun, glasses, the wig, the change of clothes, the whole thing -- in the Court's view, a deliberate selection of a bank in a smaller town where you figured the police reaction wouldn't be the same.[3]

DISCUSSION

Before the Court can consider claims raised in a motion for postconviction relief, it must determine if there are any procedural impediments to doing so.[4] There are procedural bars to all of Muhammad's claims.

A

As to his complaint of ineffective assistance of counsel arising from the Court's sentencing comment, the particular issue which he raises could have been raised on direct appeal. While the issue of ineffective assistance is normally not heard on direct appeal,[5] the complaint that the sentencing Judge misspoke could have been raised on direct appeal. It was not and is now barred.[6] Relief is provided to this procedural ban but it is very

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[3] June 21, 2002 sentencing p. 11.

[4] *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996).

[5] *Lewis v. State*, 757 A.2d 709 (Del. 2000).

[6] Superior Court Criminal Rule 61(b)(2), (I)(2); *Robinson v. State*, 562 A.2d 1184, 1189 (Del. 1989).

limited; it is available to cases where this Court lacked jurisdiction or there is or was a constitutional violation.[7] Muhammad's claim does not meet either of these two criteria.

There are two other potential means of relief from the procedural bar. One is whether reconsideration of this claim, which could and should have been raised on appeal, is warranted in the interest of justice.[8] The Court sees no interest of justice warranting said reconsideration. The other relief from the bar to Muhammad's claim is for him to show cause for it not being raised on direct appeal and that he was prejudiced by that failure to so raise it.[9] While Muhammad does not argue it, he can attempt to meet the cause test by showing either appellate or trial counsel was ineffective for not raising the issue on direct appeal or at the time of sentencing.[10] But as will be indicated below, he cannot show prejudice, even if he could show cause. His failure to meet the prejudice test means this relief to the procedural bar is inapplicable.[11]

He could obtain relief from the procedural bar by showing trial counsel was ineffective for not raising the issue at the time of sentencing.[12] To show that

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[7] Superior Court Criminal Rule 61(i)(5); *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

[8] Superior Court Criminal Rule 61(i)(2).

[9] Superior Court Criminal Rule 61(i)(3); *Gattis v. State*, 697 A.2d 1174 (Del. 1997).

[10] *Dawson v. State*, 673 A.2d 1186, 1192-93 (Del. 1996).

[11] *Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

[12] *Dawson,* 673 A.2d at 1190.

ineffectiveness, he must show that: (1) counsel's actions fell below an objective standard of reasonableness; and (2) there exists a reasonable probability but for counsel's error, the result of his sentencing would have been different.[13]

The Court's remarks at sentencing referenced a gun being used or shown during the robbery. The sentencing judge presided over the trial and knew there was no gun or other weapon actually displayed to the bank teller who was robbed. Assuming the transcript of the judge's remarks is accurate, the Court misspoke.

When it did, defense counsel should have at the appropriate moment reminded the Court that there was no gun. That did not happen. In that narrow sense, there was counsel error. Muhammad, however, says his attorney should have asked for a continuance in order, somehow, to correct the misstatement. There was, however, no counsel error in failing to ask for a continuance. A continuance would have resulted in nothing more than would have an appropriate timely made reminder would have done; the judge would have corrected the misstatement.

While Muhammad can show counsel error, minimal though it is, when his attorney failed to have the misstatement corrected, he still cannot meet the prejudice prong of ineffectiveness. There are several reasons. First, the Presentence report contained a

[13] *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).

summary of the offense.[14] And yet the Presentence recommendation was for a 15-year jail sentence. The Court, however, imposed six years at level 5.

The primary focus of the Court's sentence derived from the extent of planning that went into this bank robbery. All that came out at trial but was confirmed by Muhammad's comments to the Presentence investigator.[15] The Court remarked that about this at sentencing. And while there was no gun, the teller who was robbed, based

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[14] At approximately 11:45 a.m. on June 14, 2001, New Castle City Police responded to a bank robbery at the Wilmington Trust Bank on Delaware Street. The bank teller who was approached by the offender reported the following information. She stated that a black male approached her teller station and indicated that he wanted to cash a check. The offender threw a bag over the counter and told the teller, " I want hundreds and fifties. If you do not do what I say I have a gun and I will kill you." As the teller was placing the money in the bag, the offender stated, " I want the tens and twenties." The teller advised police that as she filled the bag with money, the offender kept his right hand in his right front pants pocket. The bank teller slipped a pack of " bait money" with a concealed red dye pack into the offender's bag. Once the teller filled the bag the offender fled the bank. The bank teller described the offender as being about six feet tall, weighing approximately 200 pounds. Furthermore, she stated that the offender wore a white T-shirt and jeans, a pair of dark sunglasses and a " fake Looking" black dreadlocks wig.

A general broadcast was made on police radio, and an area search was begun. A concerned citizen approached one of the assisting police officers. He stated that a man matching the above description had just changed clothing in the Battery Park bathroom. He pointed out the offender to police, and the offender was taken into custody. Police recovered the black dreadlocks wig and sunglasses in the bathroom. The stolen money was recovered although it was stained with red dye.

[15] " There was no method to my madness. I chose that bank because there were not a lot of police or people around it. I went into the bank and told the teller to " give me the money. I have a gun and I'll kill you if you don't". I wore a dreadlock wig. When I left the bank I went down to Battery Park. I changed in the bathroom there. Afterwards, I went to sit on a bench in the park. I had feelings that a seizure was coming on, I was so nervous. So I went back into the bathroom to rinse my face with cold water. As I was leaving the bathroom, the police arrested me. I had a seizure in the police cell and was taken to Wilmington Hospital. They said I was so loaded with cocaine that I should have died."

on Muhammad's words and actions, thought he had a gun and responded to his demands for money accordingly.

In short, the sentence imposed was not premised on the actual appearance of a gun. Even if counsel had taken the time to correct the misstatement, the sentence would have been the same. Therefore, Muhammad cannot meet the prejudice part of the ineffective assistance test. That being so, this claim of ineffective assistance of trial counsel fails.[16] This failure also explains why there is no validity to a claim of ineffective assistance of appellate counsel on this part of his claim.

Since Muhammad cannot meet the prejudice test of ineffective assistance of counsel, for the same reason he cannot meet the prejudice test under Rule 61(i)(3). As noted,[17] in order to get relief from the ban of procedural default for not raising the issue on appeal, Muhammad must show prejudice. Again, unable to meet that prejudice, that means no relief from the ban.[18]

B

Muhammad's second claim for relief is that he was sentenced based on an untrue assumption. That assumption, of course, is that he actually had a gun. The decision above disproves that any "untrue" assumption led to a more serious sentence. Further, this

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[16] *Stone v. State*, 690 A.2d 924 (Del. 1996).

[17] *Supra*, p. 4.

[18] *Flamer*, 585 A.2d at 748.

claim is barred for the same reasons the earlier related claim is barred. It could have been raised on appeal and was not and Muhammad cannot meet any of the requirements needed for relief from this bar.

C

Muhammad next complains that he was sentenced based on a 2003 amendment to the robbery statute. He was convicted in 2001, and he argues his sentence violates *ex post facto* constitutional protections since, he argues, he is, in effect, serving a sentence for first degree robbery as defined in the 2003 amendment.

Even though Muhammad's claim is unfounded, it is necessary to explain why.

Prior to the 2003 amendment, the portion of the statute defining the elements of robbery first degree which are pertinent to this claim, and pursuant to which he was prosecuted, read:

> (a) A person is guilty of robbery first degree when the person commits the crime of robbery in the second degree and when, in the course of the commission of the crime or of immediate flight therefrom, the person or another participant in the crime:
>
> (2) Displays what appears to be a deadly weapon.[19]

The 2003 Amendment changed subsection (2) and was in direct response to and overturned the Supreme Court's decision in *Walton v. State*[20] and reads:

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[19] 11 *Del. C.* § 832(a)(2).

[20] 821 A.2d 871 (Del. 2003).

> (2) Displays what appears to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon.[21]

The Supreme Court in *Walton* sought to straighten out its conflicting interpretations over the years of what is meant by " displays what appears to be a deadly weapon." The *Walton* iteration of that language must not have pleased the General Assembly.

Muhammad was obviously tried and convicted under the robbery statute as written prior to the 2003 amendment. Without deciding it, most likely he is correct that to convict or uphold his conviction based on the language of the 2003 amendment would be *ex post facto*.

But the Court need not decide that. His conviction was affirmed in an opinion three months after *Walton*. More importantly, however, the Supreme Court in its affirmance referred to *Walton* saying:

> The first issue, whether there was sufficient evidence that Muhammad displayed what appeared to be a deadly weapon, has been the subject of several recent decisions. In *Walton v. State*, this Court reversed a first degree robbery conviction, holding that a person who handed the bank teller a note saying he had a bomb, while holding one hand in his pocket, did not " display what appears to be a deadly weapon" for purposes of the criminal statute. The *Walton* Majority held that there must be conduct, in addition to the verbal threat, " that could be viewed objectively as 'display[ing] what appears to be a deadly weapon.' "
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> Muhammad's crime is distinguishable. In addition to his verbal threat, Muhammad fiddled with something under his shirt. Applying *Walton*, we find that Muhammad's actions provided an objective manifestation of the weapon he claimed to have and threatened to use against the teller. As a

[21] 11 *Del. C.* § 832(a)(2).

> result, we conclude that there was sufficient evidence to support Muhammad's conviction of first degree robbery.[22]

There was, therefore, no *ex post facto* application of the 2003 amendment to his case. Nor did the Supreme Court's interpretation of the pre-2003 statute in his case amount to an *ex post facto* interpretation.

D

In a supplemental claim, Muhammad argues, in effect, that the Supreme Court's language just cited lacks a factual basis. Particularly, he asserts there is no basis for the Supreme Court to say he "fiddled with something under his shirt."

Muhammad's assertion here is totally wrong. The Supreme Court did not idly pick this language or description out of the air. On direct examination the teller who was robbed testified:

> A. He said to give him all the hundreds and 50s. Then when he looked over, I opened my drawer. He said give me your 20s and 10s.
>
> Q. Did you do that?
>
> A. Yes.
>
> Q. Why did you do that?
>
> A. Because he said so, I thought he had a gun.
>
> Q. He told you he had a gun. Did he make any motion that made you believe he might, in fact, have one?

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[22] *Muhammad*, 829 A.2d at 138-39 (citations omitted).

A. Yes.

Q. What was he doing?

A. He kept fooling with down here like this (indicating.)[23]

This testimony satisfied the objective manifestation requirement endorsed in *Walton* and those cases pre-dating *Walton* which adopted the same requirement (and which this Court used in its charge to the jury). The Supreme Court in its *Muhammed* affirmance recognized that, too.

In sum, there was a factual basis to support the Supreme Court's language used in its affirmance opinion.

CONCLUSION

For the reasons cited herein, Parris Muhammad's motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

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J.

[23] Trial transcript, pp. 65-66, 4/9/02.