

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUPERIOR COURTHOUSE
GEORGETOWN, DE 19947

December 7, 2004

Timothy J. Hembree
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Hembree, Def. ID# 9509002602

DATE SUBMITTED: September 10, 2004

Dear Mr. Hembree:

Pending before the Court is the third motion for postconviction relief which defendant Timothy Hembree (“defendant”) has filed pursuant to Superior Court Criminal Rule 61 (“R. 61”). The motion is time-barred by R. 61(i)(1) and procedurally barred by R. 61(i)(2) and (3). Defendant seeks to avoid the procedural bars by asserting the applicability of R. 61(i)(5).¹ As explained in State v. McKamey, Del. Super., Def. ID# 9406017814, Ableman, J. (Nov. 26, 2003) at 15, aff’d, Del. Supr., No. 613, 2003, Holland, J. (April 14, 2004):

The “miscarriage of justice” or “fundamental fairness” exception contained in

¹In R. 61(i)(5), it is provided:

Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

Rule 61(i)(5) is “a *narrow one* and has been *applied only in limited circumstances*, such as when the right relied upon has been recognized for the first time after a direct appeal.” This exception may also apply to a claim that there has been a mistaken waiver of fundamental constitutional rights, such as a mistaken waiver of rights to trial, counsel, confrontation, the opportunity to present evidence, protection from self-incrimination and appeal. [Footnotes and citations omitted.]

Defendant argues that the Supreme Court first recognized the right he is asserting after his direct appeal in its decision in Word v. State, 801 A.2d 927 (Del. 2002).

In December, 1995, defendant was convicted of charges of assault in the second degree and attempted robbery in the first degree. The crime of robbery in the first degree is defined in 11 Del. C. § 832 as follows:

(a) A person is guilty of robbery in the 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:

- (1) Causes physical injury to any person who is not a participant in the crime; or
 - (2) Displays what appears to be a deadly weapon; or
 - (3) Is armed with and uses or threatens the use of a dangerous instrument;
- or
- (4) Commits said crime against a person who is 62 years of age or older.

Thus, in order to obtain a conviction on a charge of robbery in the first degree, the State must establish a defendant committed the crime of robbery in the second degree plus one or more of the four additional elements set forth in 11 Del. C. § 832. In defendant’s case, the State pursued two of the additional elements, specifically, those contained in subsections (1) and (4). The charge with regard to the attempted robbery was as follows:

Timothy J. Hembree on or about the 30th day of August, 1995, in the County of Sussex, State of Delaware, did attempt to when in the course of committing theft, threaten the immediate use of force upon Warren L. Smith with intent to compel the said Warren L. Smith who is 65 years of age or older to deliver up property consisting of a wallet containing U.S. Currency, and when in the course of the commission of the crime caused physical injury to Warren L. Smith, which acts

under the circumstances as he believed them to be constituted a substantial step in a course of conduct planned to culminate in the commission of the crime of Robbery in the First Degree, in violation of Title 11, Section 531 of the Delaware Code.

The jury specifically, and unanimously, found that there was physical injury to a person who was not a participant in the crime and the person against whom the crime was committed was over 65 years of age. Thus, the subsections of the crime of robbery in the first degree which were established were subsections (1) and (4). Subsection (2), where a defendant displays what appears to be a deadly weapon, was not an additional element of the case at all.

The decisions in the cases of Word v. State, 801 A.2d 927 (Del. 2002), Walton v. State, 821 A.2d 871 (Del. 2002), and State v. McKamey, supra, dealt with situations where the only aggravating factor charged which elevated the crime to robbery in the first degree was that of displaying what appears to be a deadly weapon. Because the State did not prove the existence of that element in those cases, the courts held the respective defendants could not have been found guilty of robbery in the first degree.

These cases are not applicable to defendant's case. Thus, he has not established that an exception to the procedural bars exist. Consequently, this third motion for postconviction relief is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Attorney General's Office