

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

December 7, 2005

Joseph R. King

Sussex Correctional Institution
23203 DuPont Boulevard
P. O. Box 500
Georgetown, DE 19947

RE: Defendant ID No. 0202010963
Motion for Postconviction Relief

Dear Mr. King:

On August 5, 2005, the Defendant filed his first Motion for Postconviction Relief in regard to his guilty plea to robbery in the first degree entered on September 4, 2002. The Defendant claims there was insufficient evidence to base a guilty plea to robbery in the first degree because a weapon had not been "displayed" as required by *Walton v. State*, 821 A.2d 8871 (Del. 2003).

I asked that the State respond to the Defendant's Motion by October 15, 2005. If the Defendant chose to reply, he was to do so by November 15, 2005. The State responded but the Defendant has not submitted a reply to the State's position which also included police reports of the robbery and the Defendant's statement which was part of discovery.

For the reasons set forth below, I deny the Defendant's Motion.

PROCEDURAL BARS

In each postconviction ruling, the Court is first required to examine whether the claim is procedurally barred under Rule 61(i) and if so, the bar should be applied. *Younger v. State*, 580 A.2d 552 (Del. 1990).

There are no procedural bars as to the Defendant's Motion.

THE ISSUE

The Defendant pled guilty to robbery in the first degree during a time that the interpretation of the word “displays” in regard to a weapon, was broad.

The history of the evolution of the word “displays” may be found in Judge Ableman's comprehensive review in the decision of *State v. Smith*, 2004 W. L. 1551513 (Del. Super.).

In a nutshell, Mr. King seeks to have his robbery first conviction reduced to robbery in the second degree based upon *Walton v. State*, 821 A.2d 871 (Del. 2003). He argues that there was no basis for the victim's subjective fears because there was no evidence supporting the requirement of an objective, physical manifestation of a weapon.

THE GUILTY PLEA

There was no trial in this case. Defendant pled guilty to three separate criminal cases on September 4, 2002. Not only did he plead guilty to the robbery charge, he pled guilty to a burglary and theft charge as well as two other burglary charges. All the burglaries were third degree charges.

The Defendant submitted the “immediate sentencing form” with his Motion. His record included at least the following: two separate burglary in the second degree convictions and two separate escape after conviction convictions, as well as other felony convictions.

The plea negotiations included a recommendation that the Court sentence him to twenty years on the robbery charge as a habitual offender, to not apply the habitual offender statute to any of the other felonies, and to suspend the time imposed on these other felonies after successful treatment and rehabilitation.

The Court found the recommendation reasonable and sentenced the Defendant to same.

Defendant alleges in his Motion that all he did to commit the robbery was enter a convenience store with his hand in a paper bag and state “you know what time it is”. He argues there was no basis for the victim to subjectively believe he had a gun and no objective physical manifestation that he displayed a weapon.

The discovery tells us what the Defendant knew as to the State's case at the time of the plea. It also provides statements of the Defendant to the police following his arrest.

As to the victim's perception and observations, the report evidences that the Defendant came into the store wearing a gray face mask and gloves. He had a white paper bag covering what the victim thought was a gun. While the victim couldn't see a gun, the Defendant was pointing the bag at the victim. The victim was told to empty the cash register into a plastic bag. He did, as well as putting in approximately 5 packs of Newport cigarettes that the Defendant demanded. The Defendant kept pointing the bag at the victim. The Defendant admitted to the police that although he did not have a gun, he put a bag over his hand to make it look like he had a gun.

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Based on this information, I find that the Defendant made a knowing, voluntary, and intelligent decision to enter his guilty plea to robbery first degree. The discovery evidences that the defendant subjectively put the clerk in fear of a weapon by his objective manifestation of a weapon being hidden in a bag but held in a fashion to objectively communicate what the Defendant intended - give me the money because I'm armed.

I also note that since the Defendant pled guilty, he admitted he committed robbery in the first degree. The Defendant's guilty plea to robbery in the first degree was proper, both then and under *Walton*.

Alternatively, I adopt the reasoning of Judge Ableman in *Smith* wherein she reviews not only the case law but the legislative history of "displays" to conclude that Mr. Smith, in a similar situation, should not retroactively get the benefit of the *Walton* decision. The Supreme Court affirmed her decision. 860 A.2d 911 (Del. 2004).

The Defendant's Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Yours very truly,

T. Henley Graves

THG:baj
cc: Prothonotary
Department of Justice