

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JACOB KEITH,	§
	§
Defendant Below-	§ No. 303, 2000
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN99-05-0075
Plaintiff Below-	§ IN99-05-0076
Appellee.	§

Submitted: March 15, 2001
Decided: April 25, 2001

Before **HOLLAND, BERGER** and **STEELE**, Justices

ORDER

This 25th day of April 2001, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Jacob Keith, was found guilty by a Superior Court jury of Robbery in the First Degree and Possession of a Firearm During the Commission of a Felony. On the robbery conviction, Keith was sentenced to 4 years incarceration at Level V, to be suspended after 2 years for 2 years of Level II probation. On the conviction for possession of

a firearm, Keith was sentenced to 5 years incarceration at Level V, followed by 6 months of Level II probation. This is Keith's direct appeal.

(2) Keith's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(3) Keith's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Keith's counsel informed Keith of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Keith was also informed of his right to supplement his attorney's presentation. Keith responded with five issues for this Court's

¹*Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

consideration. The State has responded to the position taken by Keith's counsel as well as the issues raised by Keith and has moved to affirm the Superior Court's judgment.

(4) Keith raises five issues for this Court's consideration. He claims: i) the Superior Court erred in permitting hearsay testimony about the statement of an unidentified bystander on the issue of whether he had a gun, erred in permitting testimony concerning whether people inside the store where the robbery occurred could see outside the store and erred in permitting a detective to testify concerning witnesses' descriptions of his vehicle;² ii) there was insufficient evidence to support a finding by the jury that he had a gun during the robbery; iii) it was unfair to sentence him on the basis of his prior criminal record when he had no criminal record for twenty years prior to this offense and was employed for sixteen of those years; iv) trial counsel provided ineffective representation; and v) the Superior Court abused its discretion in not permitting him to discharge his trial counsel.

²Keith's counsel states in his brief that Keith objects to all of the Superior Court's evidentiary rulings; however, we have included only those instances where the Superior Court ruled in favor of the State.

(5) The evidence at trial was that on April 22, 1999 eleven men's Claiborne suits with a value of \$4,375.00 were stolen from the Strawbridge & Clothier department store at the Christiana Mall, New Castle County, Delaware. According to Bernard Bulos, manager of loss prevention, the store had surveillance cameras and a videotape system. Keith was recorded leaving the store with the stolen merchandise. A store employee, Cheryl Miller, was also recorded running out of the store in pursuit of the perpetrator, then returning to the store in an emotional state and being comforted by another store employee, Kathy Gordon. Two of the stolen suits were eventually recovered by the police and were identified by Mr. Bulos. Kathy Gordon testified that, after the perpetrator exited the store with the stolen suits, she heard someone shout that he had a gun. Cheryl Miller testified that the perpetrator pointed a gun at her after she followed him out of the store. William Truex, who was shopping at the store at the time of the robbery, testified that he saw the perpetrator with the merchandise outside the store and that he pointed a gun at a woman who ran out of the store. Mr. Truex testified that he was familiar with firearms and that he believed the gun was a revolver. Mr. Truex also testified that he saw the license plate of the

perpetrator's car as it drove by his truck in the parking lot. Finally, Detective Mark Hawk of the Delaware State Police testified that, based upon witness descriptions of the perpetrator's car and license plate, he was able to trace ownership of the car to Keith and that a subsequent search of Keith's home yielded two of the stolen suits. Detective Hawk also testified that Keith admitted to taking four suits from the store after viewing the videotape of the incident, but denied having a gun.

(6) Keith's claim that the Superior Court erred in permitting hearsay testimony concerning an unidentified bystander's statement is without merit. The Superior Court admitted Ms. Gordon's testimony that she heard someone shout that the man had a gun under the present sense impression exception to the hearsay rule. We can not say that the Superior Court abused its discretion in so ruling.³ The testimony was also cumulative of other, non-hearsay testimony, rendering any error harmless in any case. Keith's claim that the Superior Court erred in permitting testimony concerning whether people inside the store could see outside the store is also without merit because the

³*Culp v. State*, Del. Supr., 766 A.2d 486, 489 (2001) (The Supreme Court reviews the Superior Court's determination to admit or exclude evidence under an abuse of discretion standard.)

record reflects that the testifying witness, Ms. Gordon, was competent to offer such testimony. Also without merit is Keith's claim that Detective Hawk should not have been permitted to testify concerning witnesses' descriptions of the perpetrator's vehicle. The Superior Court judge permitted the testimony for the limited purpose of explaining the investigating officer's subsequent actions in tracking down the defendant. As such, the testimony was not hearsay and the Superior Court was within its discretion to admit it.⁴

(7) Keith's second claim that there was insufficient evidence to support the jury's finding that he had a gun during the robbery is also without merit. The applicable standard of appellate review is whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.⁵ On the first degree robbery charge, the prosecution was required to prove that Keith "display[ed] what appear[ed] to be a deadly weapon."⁶ On the charge of possession of a deadly weapon, the prosecution was required to prove that Keith was "in possession of a firearm during the commission of a

⁴*Id.*

⁵*Barnett v. State*, Del. Supr., 691 A.2d 614, 618 (1997).

⁶11 Del. C. § 832(a) (2).

felony.”⁷ Two eyewitnesses, Ms. Miller and Mr. Truex, testified that Keith pointed a gun at Ms. Miller. Mr. Truex testified that he recognized the gun as a revolver. This testimony alone is sufficient to sustain the jury’s finding of guilt on the charges of first degree robbery and possession of a deadly weapon during the commission of a felony.

(8) Equally without merit is Keith’s claim that it was unfair for the judge to consider his past criminal record at the time of sentencing. Under the relevant criminal statutes, the Superior Court judge was required to consider any past convictions at the time of sentencing.⁸ Moreover, Keith does not argue that his sentences exceeded the statutory limit. This Court will not interfere with a sentence within statutory limits “unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability.”⁹ There is no such evidence in this record.

⁷11 Del. C. § 1447A(a).

⁸11 Del. C. § 832(b); 11 Del. C. § 1447A(c).

⁹*Walt v. State*, Del. Supr., 727 A.2d 836, 840 (1999) (quoting *Mayes v. State*, Del. Supr., 604 A.2d 839, 843 (1992)).

(9) Keith, finally, claims that his counsel provided ineffective assistance at trial and that the Superior Court abused its discretion in not permitting him to discharge his counsel. This Court will not consider on direct appeal any claim of ineffective assistance of counsel that was not raised below.¹⁰ The record indicates that Keith filed a written motion to discharge his counsel prior to the sentencing hearing and that he moved orally at the sentencing hearing to have his counsel discharged. The Superior Court denied the motion as untimely and as lacking in merit. We find that the Superior Court was within its discretion to deny Keith's motion as untimely.¹¹

(10) This Court has reviewed the record carefully and has concluded that Keith's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Keith's counsel has made a conscientious effort to examine the record and has properly determined that Keith could not raise a meritorious claim in this appeal.

¹⁰*Wing v. State*, Del. Supr., 690 A.2d 921, 923 (1996).

¹¹We do not reach the question whether the Superior Court abused its discretion in dismissing the motion on the merits. If Keith pursues a motion for postconviction relief and includes a claim of ineffective assistance of counsel, we will address fully the merits of the claim at that time.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice