IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY SMITH,	§	
	§	
Defendant Below-Appellant,	§	No. 396, 2003
	§	
	§	Court Below---Superior Court
v.	§	of the State of Delaware,
	§	in and for Kent County
STATE OF DELAWARE,	§	Cr. A. Nos. IK02-11-0085; 0087
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: December 29, 2003
Decided: March 17, 2004

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

O R D E R

This 17th day of March 2004, 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, Anthony Smith, was found guilty by a Superior Court judge of Burglary in the Third Degree and Misdemeanor Theft.[1] He was sentenced as an habitual offender[2] to a total of 4 years incarceration at Level V, to be suspended after 3 years for decreasing levels of probation. This is Smith's direct appeal.

[1] Prior to trial, the State dismissed the charge of Possession of Burglar's Tools.

[2] Del. Code Ann. tit. 11, § 4214(a).

(2) Smith's trial 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.[3]

(3) Smith's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Smith's counsel informed Smith 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. Smith was also informed of his right to supplement his attorney's presentation. Smith responded with a brief that raises 10 issues for this Court's consideration. The State has responded to the position taken by Smith's counsel as well as the issues raised by Smith and has moved to affirm the Superior Court's judgment.

[3] *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).

(4) Smith raises 10 issues for this Court's consideration, which may fairly be summarized as follows: a) the State improperly revealed to the judge that he initially had been charged with Possession of Burglar's Tools; b) the officers in charge of the investigation did not collect any fingerprint or other forensic evidence connecting him to the crimes; c) the officer assigned to investigate the case was not the first to arrive at the crime scene; d) there was insufficient evidence generally to support his convictions; e) there was a lack of probable cause for his arrest; f) photographs of the crime scene and pool pumps and the foam packaging from the pool pumps should not have been admitted into evidence at the trial; g) the arrest warrant erroneously listed his address as 221 N. Rehoboth Boulevard, which was near the crime scene; and h) there was no evidence that the property found in his possession was, in fact, the stolen property. Because these claims were not raised in the Superior Court in the first instance, we review them on appeal for plain error.[4]

(5) The evidence at trial established that, during the evening of October 8, 2002, Officer Manuel Rodriguez Diaz and Patrolman Dwight Young of the Milford City Police Department were on routine patrol. Officer Diaz received two

[4] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (Plain error is an error "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.")

reports of an African American man, wearing dark pants and a dark jacket, going door to door in the area of Northwest 10th Street in Milford trying to sell a large, bulky object. He and Patrolman Young proceeded to the area where the man had been observed and saw an individual matching that description, later identified as Smith, carrying a pool pump. The pump had foam packaging material attached to it. Smith also had with him an instruction manual for the pool pump.

(6) After placing Smith in the custody of Patrolman Young, Officer Diaz canvassed a couple of local businesses to see if any of them was missing a pool pump. At a store named Pools and Spas Unlimited, he noticed that the doors to some storage trailers at the back were wide open and that the chains on the gates leading to the trailers were loose enough to permit entry. Mark Henderson, the owner of the business, was contacted. When Henderson arrived, he and Officer Diaz inspected the area. Near one of the trailers they noticed an empty box with foam packaging material beside it, which Henderson stated had contained an above-ground pool pump. There was another opened box close by, with the pump still inside.

(7) Henderson testified that Smith had been employed at the store as a laborer for approximately one month in or about May 2002, but then was let go. He stated that he had observed Smith walking by the store approximately one week

prior to the break-in. He stated that his employees generally knew how the property was secured after business hours and would know that the main store had an alarm, but that the trailers were secured only by unlocked chains on the gates.

(8) Smith's first claim is that the State improperly revealed to the judge that he had been charged initially with Possession of Burglar Tools, a charge that the State dismissed prior to trial. Smith's claim is without any factual support in the record. Even if the State had brought up the charge of Possession of Burglar Tools, Smith has not shown that the judge, who was sitting as the trier of fact, would have been prejudiced by knowledge of the dismissed charge. Smith has demonstrated no error, plain or otherwise, in connection with this claim.

(9) Smith's next three claims are, in essence, that there was insufficient evidence presented at trial to support his convictions. In reviewing a claim of insufficiency of the evidence, this Court determines whether, viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[5] In making this determination, the Court does not distinguish between direct and circumstantial evidence.[6] Under these standards, there clearly was sufficient evidence, both direct and circumstantial, presented at trial to support Smith's convictions of third degree

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

[6] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).

burglary[7] and misdemeanor theft.[8] There was, thus, no error, plain or otherwise, in connection with Smith's claim of insufficiency of the evidence.

(10) Smith's next claim is that there was a lack of probable cause for his arrest. Given the reports of suspicious activity in the area where Smith was observed by the police, Smith's possession of a pool pump, and the fact that a pool pump was missing from Henderson's trailer all clearly constituted probable cause for Smith's arrest.[9] There is, thus, no error, plain or otherwise, in connection with this claim.

(11) Smith's next claim is that the photographs of the crime scene and pool pumps and the foam packaging material introduced into evidence by the State were not relevant to the case. It was within the discretion of the Superior Court judge who presided over the trial to determine the admissibility of evidence.[10] We have reviewed the transcript of the trial and find no support for the proposition that the Superior Court judge abused his discretion by admitting the photographs and the

[7] Del. Code Ann. tit. 11, § 824 (2001) ("A person is guilty of burglary in the third degree when the person knowingly enters . . . in a building with intent to commit a crime therein.")

[8] Del. Code Ann. tit. 11, § 841 (2001) ("A person is guilty of theft when the person takes, exercises control over or obtains property of another person intending to deprive that person of it or appropriate it.")

[9] *Maxwell v. State*, 624 A.2d 926, 928 (Del. 1993).

[10] Del. Evid. R. 403; *Williams v. State*, 494 A.2d 1237, 1241 (1985).

foam packaging material into evidence. We, thus, find no error, plain or otherwise, in connection with this claim.

(12) Next Smith claims prejudice because he did not live at the address listed on the arrest warrant, which was only a couple of doors away from the crime scene. There is no evidence of prejudice, however, since Patrolman Young testified at trial that the address on the arrest warrant was incorrect and that, in fact, Smith lived across town. We, thus, find no error, plain or otherwise, in connection with this claim.

(13) Smith's final claim is that there was no evidence presented at trial proving that the pool pump found in his possession belonged to Henderson. However, Officer Diaz, Patrolman Young and Henderson all testified that the foam packaging material around the empty pool pump box at the crime scene was the same as that attached to the pool pump Smith was carrying at the time of his arrest. In addition, there were photographs admitted into evidence, which showed the pool pumps at the crime scene and the pool pump that was being carried by Smith at the time of his arrest. The obvious purpose of the photographs was to establish that the pool pump in Smith's possession was the one removed from the empty box outside Henderson's trailer. We, thus, find no error, plain or otherwise, in connection with this claim.

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

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