

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HARRY J. SMITH,	§
	§
Defendant Below-	§ No. 494, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN98-12-1970 thru
Plaintiff Below-	§ IN98-12-1972
Appellee.	§ IN99-02-0138

Submitted: October 25, 2002

Decided: December 13, 2002

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

ORDER

This 13th day of December 2002, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Harry J. Smith, filed an appeal from the Superior Court's August 5, 2002 order denying his motion for reduction/modification of sentence pursuant to Superior Court Criminal Rule 35(a). The plaintiff-appellee, State of Delaware, has moved to affirm the

judgment of the Superior Court on the ground that it is manifest on the face of Smith's opening brief that the appeal is without merit.¹ We agree and AFFIRM.

(2) In February 1999 Smith was charged by indictment with two counts of Robbery in the First Degree and several related offenses.² In January 2000, Smith pleaded guilty to two counts of Robbery in the First Degree, one count of Possession of a Deadly Weapon During the Commission of a Felony ("PDWDCF") and one count of Possession of a Deadly Weapon By a Person Prohibited ("PDWBPP"). Smith was sentenced to 2 years at Level V on each of the robbery convictions, 2 years at Level V for PDWDCF and 3 years at Level V for PDWBPP.

(3) In this appeal, Smith claims the February 1999 indictment contained a mistake of fact that improperly influenced the sentencing judge to impose a sentence for PDWBPP that was too harsh and in excess of the Truth in

¹SUPR. CT. R. 25(a).

²The charges stemmed from two robberies at the Wilmington Savings Fund Society's branch at Second and Union Streets, Wilmington, Delaware, on December 8, 1998 and December 21, 1998.

Sentencing (“TIS”) guidelines. Specifically, Smith contends that the 3-year Level V sentence was imposed because the indictment incorrectly noted that he had a knife in his possession during a previous robbery in 1979.

(4) Rule 35(a) permits the Superior Court to correct an illegal sentence “at any time.” “The ‘narrow function of Rule 35 is to permit correction of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.’”³ “Relief under Rule 35(a) is available ‘when the sentence imposed exceeds the statutorily-imposed limits, [or] violates the Double Jeopardy Clause’”⁴ “A sentence is also illegal if it ‘is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.’”⁵

³*Tatem v. State*, 787 A.2d 80, 81 (Del. 2001).

⁴*Id.*

⁵*Id.*

(5) Relief is not available to Smith under Rule 35(a) because he does not claim that his sentence for PDWBPP exceeded the statutory limit, constituted double jeopardy or was ambiguous or contradictory. Moreover, his claim would require an examination of the proceedings leading up to the imposition of sentence, which is not permitted under Rule 35(a). In addition, Smith's claim that his sentence is illegal can not rest solely on the allegation that the sentence exceeds the TIS guidelines, since the guidelines are voluntary and non-binding.⁶ There is, finally, no factual basis for Smith's claim, since the indictment does not state that Smith had a knife in his possession during the 1979 robbery, but, rather, that he had a knife in his possession during the December 8, 1998 robbery and was prohibited from doing so because of his previous conviction for the 1979 robbery.

(6) It is manifest on the face of Smith's opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, clearly there was no abuse of discretion.

⁶*Mayes v. State*, 604 A.2d 839, 845 (Del. 1992).

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice