

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D23414
O/kmg

_____AD3d_____

Submitted - May 1, 2009

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
CHERYL E. CHAMBERS
L. PRISCILLA HALL, JJ.

2007-06466

DECISION & ORDER

The People, etc., respondent,
v Harris B. Holmes, Jr., appellant.

(Ind. No. 2872/06)

Robert C. Mitchell, Riverhead, N.Y. (Alfred J. Cicale of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Thomas C. Costello of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Kahn, J.), rendered June 20, 2007, convicting him of robbery in the first degree, assault in the second degree, and menacing in the third degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the County Court did not err in denying his motion to withdraw his plea of guilty to robbery in the first degree based upon his post-plea assertion that the weapon used actually was an inoperable "BB" gun (*see* Penal Law § 160.15[4]; *People v Ladelokon*, 192 AD2d 723; *People v Pettway*, 140 AD2d 721, 722). The defendant's statements on the plea allocution did not negate an element of the crime to which he pleaded, but rather were admissions to elements of the crime (*see* Penal Law § 160.15[4]; *People v Willingham*, 194 AD2d 703. The defendant admitted that he forcibly stole property from the victim while armed with what appeared to be a firearm, and that during the course of the robbery, he struck the victim with what appeared to be a firearm, causing physical injury. Nothing in the defendant's allocution cast "significant doubt" upon the defendant's guilt or otherwise implicated the voluntariness of the plea (*People v Toxey*, 86 NY2d 725).

June 2, 2009

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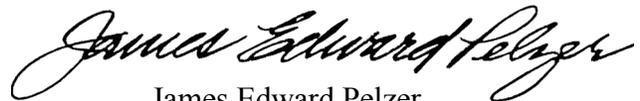
PEOPLE v HOLMES, HARRIS B., JR.

The defendant's contention that he was denied the effective assistance of counsel is without merit. At the plea proceeding, the defendant requested, and was granted, the opportunity to talk to his attorney on numerous occasions. He was completely allocuted, made aware of the consequences of pleading guilty, submitted a signed stipulation withdrawing his application to replace his attorney with new counsel, and openly acknowledged his satisfaction with his attorney (*see People v Rivera*, 180 AD2d 767).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

RIVERA, J.P., ENG, CHAMBERS and HALL, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court