An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-958

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Guilford County
No. 98 CRS 15719

EUGENE TYRONE MILLER

Appeal by defendant from judgment entered 12 October 2000 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 24 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Thomas J. Pitman, for the State.

John J. Korzen, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Eugene Tyrone Miller ("defendant") was charged with first degree murder and was tried capitally. The State presented evidence tending to show that at approximately 10:00 p.m. on the evening of 4 August 1998, James Lattimore, Altina Payne Steele, and Alex Bethea stopped to assist a female pedestrian, who was lying on the side of Penny Road in High Point and bleeding profusely. The three testified that the woman told them that her boyfriend, whom she identified as "Eugene Miller" or "Gene Miller," had shot her. The woman, subsequently identified as Anjanette Craine, died as a result of multiple gunshot wounds inflicted from close range. The

victim had departed from her mother's house, accompanied by defendant in defendant's automobile, shortly before 10:00 p.m. that evening. The victim and defendant were breaking up and the victim was planning to move back to Texas at the time of the homicide. Defendant was subsequently apprehended on 15 October 1998 in Queens, New York.

Defendant testified that four masked men shot the victim while he and the victim were attempting to purchase marijuana. Defendant further testified that he abandoned the victim to pursue the perpetrators and that he did not return to the scene of the homicide because he believed he had been set up for the victim's killing.

Defendant was found guilty of first degree murder. He was sentenced to life imprisonment after the jury found that the mitigating factors outweighed the factors in aggravation. Defendant now appeals to this Court.

Defendant's appointed appellate attorney has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Counsel has complied with the requirements of those cases.

Defendant has filed a handwritten affidavit which we treat as his *pro se* written arguments. In the affidavit he contends that he was denied effective assistance of counsel by trial counsel. He alleges that counsel spoke with him only one time for one hour

about his case during the twenty-six (26) months he was in jail awaiting trial. He also alleges that counsel failed to subpoena witnesses and present a defense. As an example of evidence that could have been presented, he cites an incident two weeks prior to the homicide in which the victim's friend, the friend's mother, and the victim's new boyfriend came to his residence armed with a shotgun.

To establish a claim of ineffective assistance of counsel, a defendant must make a two-part showing: (1) his counsel's performance was deficient; and (2) he was prejudiced by counsel's deficient performance. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). Even if counsel makes serious errors, a reversal is not warranted unless there is a reasonable probability that a different result would have been obtained had the errors not been made. *Id.* at 563, 324 S.E.2d at 248. When a claim of ineffective assistance of counsel is made on direct appeal, the appellate court is bound by the record before it of the trial proceedings. *State v. Milano*, 297 N.C. 485, 496, 256 S.E.2d 154, 160 (1979), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

The record does not support defendant's statement that counsel only spoke with him one time. The record shows that defendant was was represented by two attorneys. Before permitting defendant to testify in his defense, the court made inquiry to determine whether defendant's decision was intelligent and voluntary. Counsel stated to the court that he and defendant had "talked about this issue for

months now." Defendant admitted to the court that counsel's statement was true. In addition, defendant's statement in his affidavit that he received a visit from the victim's new boyfriend two weeks prior to the incident is inconsistent with his trial testimony that he did not know the boyfriend.

Furthermore, counsel did present a defense. To impeach the testimony of the witnesses who testified that the victim told them that her boyfriend, Eugene or Gene Miller, shot her, counsel presented pretrial statements of two of them in which they stated they could not remember the name of the boyfriend or that his name was "Leroy Cowens" or "Leroy Coin." In addition to defendant's testimony, counsel offered the testimony of a witness who testified that the victim and defendant visited him and "seemed happy" about the victim's plans to separate from defendant and return to Texas. The decisions as to what witnesses to call and evidence to offer are within the exclusive province of the trial attorney, after consultation with his client, and will not be second guessed on an ineffective assistance of counsel claim. *State v. Milano*, 297 N.C. at 495, 256 S.E.2d at 160.

Finally, counsel successfully defended defendant's life by presenting evidence of mitigating factors and persuading the jury to find that the mitigating factors outweighed the aggravating factors. *See State v. Lowery*, 318 N.C. 54, 69, 347 S.E.2d 729, 739 (1986).

We have reviewed the assignments of error set out in the record on appeal and we concur with counsel's assessment that they

are without merit. After carefully reviewing the record, we are unable to find error to support a meaningful appeal.

No error.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).