

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

16-904

STATE OF LOUISIANA

VERSUS

RICKY WAYNE MILLER

AKA RICKY MILLER

**APPEAL FROM THE
FIFTEENTH JUDICIAL DISTRICT COURT
PARISH OF VERMILION, NO. 58118
HONORABLE LAURIE A. HULIN, DISTRICT JUDGE**

**D. KENT SAVOIE
JUDGE**

Court composed of D. Kent Savoie, Van H. Kyzar, and David E. Chatelain*,
Judges.

AFFIRMED.

* Honorable David E. Chatelain participated in this decision by appointment of the Louisiana Supreme Court as Judge Pro Tempore.

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Ricky Wayne Miller
Ricky Wayne Miller

SAVOIE, Judge.

On January 12, 2016, Defendant, Ricky Wayne Miller, entered a guilty plea to possession of clonazepam with the intent to distribute, a violation of La. R.S. 40:969(A)(1), in district court docket number 58118.² On May 13, 2016, as part of the plea agreement, Defendant was sentenced to five years at hard labor to run concurrently with all of the sentences imposed at the May 13, 2016, proceeding.³ A motion to reconsider sentence was not filed.

Defendant appeals assigning the following errors⁴:

1. The trial court erred in imposing consecutive sentences in violation of the plea agreement set forth on the record at the time of the pleas of guilty.
2. Trial court [sic] rendered assistance below that guaranteed by the Sixth Amendment of United States Constitution by failing to object to the court's failure to impose sentences in compliance with the plea agreement.

FACTS

At the guilty plea proceeding, the State set forth a factual basis for the charge. The State explained that during the execution of an arrest warrant, a routine search was conducted. During the search, a pill bottle with eighteen "green" pills was found on Defendant.

²The court minutes mistakenly indicate that the proceeding was held on January 11, 2016, but the transcript indicates it was held on January 12, 2016.

³The remaining charges in the bill of information were dismissed.

⁴In addition to the present appeal, Defendant has two pending appeals, 16-907 and 16-908. The trial court provided this court with a separate record for each of its docket numbers, and each has been assigned a separate docket number for appeal. The three docket numbers were addressed at the same plea and sentencing hearings. This court granted Defendant's motion to consolidate but only for purposes of briefing and consideration. Defendant and the State submitted a single brief each addressing all three docket numbers.

ERRORS PATENT

In accordance with La.Code Crim.P. art. 920, all appeals are reviewed for errors patent on the face of the record. After reviewing the record, we found no errors patent present.

ASSIGNMENT OF ERROR NUMBER ONE

Defendant complains that the plea agreement was breached. In the transcript of the January 12, 2016 proceeding, the plea agreement was set forth in open court. It provided a sentencing cap of twenty-five years at hard labor, and the State agreed that it would not file a multiple offender bill. Additionally, the following pertinent exchange occurred:

[COURT]: All right. So Docket No. 58075, 58080, 58133, 59219, 59221, 59224, 59253, 59259, and 59572 are all going to run concurrent?

MS. YOUNG: Correct, with Docket No. 58118.

[COURT]: All right. That's what's agreed upon?

MS. YOUNG: Correct.

[COURT]: And then the Court will decide whether or not to run 58118 concurrent or consecutive, after the sentencing Hearing [sic]?

MR. HAMILTON: That is correct, Your Honor.

[COURT]: Is that correct?

MS. YOUNG: Correct

The following exchange occurred between the trial court and Defendant:

Q. Is that your deal, Mr. Miller?

A. What's the other docket number? What's the --

Q. Which one?

A. The one that y'all are going to decide after, to run it.

Q. That's the dope charge, 58118. It looks like they're running -- the forgeries, the unauthorized use, the burglaries, are going to all run together. And then I will decide whether or not the drug charge should run at the same time or to run consecutive. But all in all, y'all have agreed to a cap of 25 years.

A. Right.

Q. Is that your deal?

A. Yes, ma'am.

Q. Is that what you want?

A. I mean, it's pretty much the best I can get.

Q. Is that what you want?

A. Yes, ma'am, yes, ma'am.

A sentencing hearing was held on May 13, 2016, at which the trial court imposed the following sentences⁵:

- (1) Theft of a firearm (district court docket number 59219) - seven years at hard labor without the benefit of parole, probation, or suspension of sentence to run concurrently with the sentences imposed in docket numbers 58080, 58133, 59221, 59259, and 58075;
- (2) Unauthorized use of a motor vehicle (district court docket number 58080) - five years at hard labor⁶;
- (3) Theft between \$750.00 and \$5,000.00 (district court docket number 58133) - three years at hard labor;
- (4) Simple burglary (district court docket number 59221) - seven years at hard labor;
- (5) Simple burglary (district court docket number 59259) - seven years at hard labor;

⁵Although the record in this case indicates that the sentencing transcript is included, it appears the clerk mistakenly included another copy of the guilty plea proceeding. Thus, we are referencing the sentencing transcript in 16-907.

⁶At sentencing, the trial court mistakenly refers to the charge as unauthorized use of an access card.

- (6) Six counts of forgery (district court docket number 58075) - seven years at hard labor on each count to run concurrently with each other;
- (7) Simple burglary (district court docket number 59572) - seven years at hard labor to run concurrently with the sentence imposed in district court docket number 58118;
- (8) Simple burglary (district court docket number 59224) - nine years at hard labor to run consecutively to “all of the previous docket numbers mentioned by this court”;
- (9) Simple burglary (district court docket number 59253) - nine years at hard labor to run consecutively to docket number 59224; and
- (10) Possession with intent to distribute schedule IV, clonazepam, (district court docket number 58118) - five years at hard labor to run concurrently to “all of the docket numbers mentioned here today.”

Defendant concedes that the trial court complied with the twenty-five year sentencing cap. However, Defendant argues that the plea agreement was broken stating “the charges prosecuted by Assistant District Attorney Ayo would run concurrent to each other and the judge would decide whether to run the sentence for the charge prosecuted by Assistant District Attorney Roger Hamilton, Jr. concurrent or consecutive.” Defendant argues that the trial court failed to order all of the sentences (except the drug charge) run concurrently. Defendant urges that, since the plea agreement was breached, “all of the sentences imposed in the convictions before the court on May 13, 2016,” should be vacated and remanded to the trial court for resentencing. Upon remand, Defendant requests that the sentence imposed in district court docket number 58118 be ordered to run concurrently to all of the other sentences imposed. Defendant argues that a failure to do so would be a violation of *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969). Defendant prays that his sentences be set aside and that he be resentenced in accordance with the plea agreement.

In its brief to this court, the State concedes the matter should be remanded to the trial court for resentencing in compliance with the plea agreement. Additionally, the State is in agreement with Defendant that all of the sentences imposed on May 13, 2016 should be vacated and remanded for resentencing. The State writes, in pertinent part:

This Honorable Court should, as Appellate Counsel argues, should [sic] be remanded to the Honorable Laurie A. Hulin for resentencing in compliance with the Plea Agreement of the State and Defense Counsel. Thus, on sentencing the trial judge should look to each Docket Number and the appropriate sentence, running the Docket Number under Assistant District Attorney, Ted L. Ayo, concurrent with each other and deciding whether the Docket Number of Assistant District Attorney, Roger P. Hamilton, Jr., should run concurrent or consecutive to that sentence.

Docket No. 58080-Unauthorized Use of a Motor Vehicle (R.S. 14:68.4), Imprisoned with or without hard labor for not more than ten (10) years;

Docket Nos. 59259, 59253, 59224 and 59221 - Simple Burglary (R.S. 14:62), imprisoned with or without hard labor for not more than twelve (12) years;

Docket No. 58133 - Theft between \$750.00 and \$5,000.00 (R.S. 14:67), imprisoned with or without hard labor for not more than five (5) years;

Docket No. 58075 - Six (6) counts of Forgery (R.S. 14:72), imprisoned with or without hard labor for not more than ten (10) years. As these are six (6) counts, the trial judge could run the counts concurrent or consecutive to each other;

Docket No. 59219 - Theft of a Firearm (R.S. 14:67.15), imprisoned with or without hard labor for not less than two (2) years nor more than ten (10) years, without the benefit of probation, parole or suspension of sentence (Emphasis added). [sic]

Docket No. 58118 - Possession with the Intent to Distribute Clonazepam (R.S. 40:969(A)(1), imprisoned with or without hard labor for ten (10) years.

The State does not agree with Appellant's argument that (footnote 3) the total maximum sentence would be twenty-two (22) years. As stated above, the six (6) counts of forgery could be run consecutively to one another and concurrent with all other docket numbers, with the exception of the drug case, which can run consecutively; or the sentence under the Theft of a Firearm can be imposed without benefit.

As noted above, Defendant has no complaint about the sentence imposed in district court docket number 58118, and he requests the same sentence be imposed. Because the trial court imposed the agreed upon sentence, no correction is needed.

Additionally, the request by Defendant and the State that all of the sentences imposed on May 13, 2016 be vacated is groundless. Neither one offers case law nor a statute to support the notion that this court should vacate all of the sentences from the separate district court docket numbers which are not subject to this appeal. In *State v. Lemelle*, 06-2975 (La. 9/14/07), 964 So.2d 316, which is cited by Defendant, the supreme court held that the sentences imposed by the trial court, which did not comply with the plea agreement, should be vacated and remanded for resentencing. However, there was no indication the vacated sentences were not in the motion for appeal. Additionally, on application for writ of review in *State v. Tanner*, 12-773, 12-777 (La.App. 3 Cir. 10/7/13) (unpublished opinion), writ denied, 13-2599 (La. 1/23/14), 130 So.3d 953, which is cited by Defendant, both of the sentences that were vacated for failure to comply with the plea agreement were properly before the court; the appellate court ordered the docket numbers to be consolidated.

Accordingly, this assignment of error is denied.

ASSIGNMENT OF ERROR NUMBER TWO

Defendant complains that his attorney was ineffective for failing to object to the breach of the sentencing agreement at the conclusion of sentencing. Defendant explains:

As noted earlier, the Direct Appeal contained only three of the ten docket numbers that were before the court. However, appellate counsel for Ricky Miller urges this court to not penalize Appellant for this oversight as the Direct Appeal filing was filed pro se. If this bars remand for resentencing on all docket numbers, or at least on all docket numbers where consecutive sentences were imposed, under the assignment of error, it is asserted that had trial counsel objected at sentencing to the trial court's failure to sentence in accordance to the terms of the plea agreement, Appellant would not have been sentenced to the three consecutive sentences.

In order to prove an attorney was ineffective, a defendant must show his attorney was deficient, and he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

The record before this court does not reflect that Defendant's trial attorney objected to any of the sentences imposed or filed a pleading seeking to correct the sentences to those agreed upon in the plea agreement. However, the trial court did not err in complying with the plea agreement when it imposed the sentence in district court docket number 58118. Thus, Defendant's attorney was not ineffective for failing to object in this case. Additionally, the failure of counsel to object at the time of sentencing does not preclude review of the alleged claim that the trial court failed to comply with the plea agreement. Furthermore, the other sentences imposed as part of the plea agreement are not before this court in this appeal. *Cf. State v. Ervin*, 45,068 (La.App. 2 Cir. 3/17/10), 33 So.3d 986.

Accordingly, this assignment of error is denied.

DECREE

The Defendant's sentence should be affirmed.

AFFIRMED.