[Cite as *State v. Miller,* 2018-Ohio-5077.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-G-0137**
- vs -	:	
DONNA M. MILLER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Geauga County Court of Common Pleas.
Case No. 2017 C 000002.

Judgment: Affirmed.

James R. Flaiz, Geauga County Prosecutor, Courthouse Annex, 231 Main Street, Suite 3A, Chardon, OH 44024 (For Plaintiff-Appellee).

Katherine E. Rudzik, 26 Market Street, Suite 904, Youngstown, OH 44503 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Donna M. Miller, was indicted on 17 counts, including multiple charges of burglary, attempted burglary, theft, grand theft, breaking and entering, and engaging in a pattern of corrupt activity. She entered a plea of guilty to one count each of Burglary, Attempted Burglary, and Grand Theft. The trial court accepted her plea and sentenced appellant to an aggregate prison term of six years.

{¶2} Appellant filed a notice of appeal from the judgment of conviction; her appointed appellate counsel subsequently filed a motion to withdraw and an accompanying memorandum in support, pursuant to *Anders v. California*, 386 U.S. 738 (1967).

{¶3} As provided in *Anders*, if appellate counsel finds an appeal to be wholly frivolous after a conscientious examination of the case, he or she should advise the appellate court and request permission to withdraw. *Id.* at 744. The request must be accompanied by a brief citing to anything in the record that could arguably support an appeal. *Id.* The appellant must also be afforded an opportunity to raise any additional points he or she chooses. *Id.* The appellate court must then review the entire record to determine whether the appeal is wholly frivolous. *Id.* If the court finds the appeal is wholly frivolous, the court may grant counsel's motion to withdraw and proceed to a decision on the merits. *Id.* If, however, the court concludes the appeal is not frivolous, it must appoint new counsel for the appellant. *Id.*; *see also Penson v. Ohio*, 488 U.S. 75, 83 (1988).

{¶4} In her motion to withdraw and accompanying memorandum in support, counsel states that after reviewing the record she has found no substantial issues to appeal. This court held the motion in abeyance and instructed appellant to file a submission, if she so chose, raising any arguments in support of her appeal. The entry was successfully served on appellant, who did not thereafter file a pro se submission. Accordingly, this court has conducted an independent review of appellant's case.

{¶5} The written plea agreement provides that appellant will plead guilty to one count of Burglary, a felony of the second-degree, in violation of R.C. 2911.12(A)(2) (Count 2); one count of Attempted Burglary, a felony of the third-degree, in violation of R.C.

2923.02(A) and R.C. 2911.12(A)(2) (Count 5); and one count of Grand Theft, a felony of the fourth-degree, in violation of R.C. 2913.02(A)(1) (Count 12). It further provides that "[t]hese counts are amended to cover all the Defendant's conduct in this case." The state agreed to seek leave to dismiss all remaining counts. The agreement did not include a sentencing recommendation.

{¶6} At the plea hearing, the plea agreement was stated on the record in open court, pursuant to Crim.R. 11(F). The trial court engaged in a full and thorough colloquy with appellant to ensure the plea was voluntary, knowing, and intelligent, pursuant to Crim.R. 11(C)(2). The court addressed the constitutional rights appellant agreed to waive by entering the plea, as well as the maximum possible penalties appellant faced for each charge, including post-release control. Appellant informed the court that she had been diagnosed with ADHD, PTSD, bipolar disorder, high anxiety, and depression. The trial court inquired if she felt any of those issues impaired her ability to enter into the plea agreement, to which appellant responded in the negative. Upon inquiry from the court, both defense counsel and the prosecutor indicated they had no concerns about appellant's ability to enter into the plea agreement.

{¶7} The state subsequently set forth the following factual basis, to which appellant did not object:

> What we would have shown at trial is Mrs. Miller, along with her co-Defendant, Raymond Miller, did go around to a number of residences in Geauga County, generally, Miss Miller was complicit in these offenses by either driving Mr. Miller or sometimes acting as a look-out as he entered residences and stole items, and the value of which was greater than $7,500.00. * * * [A]nd also, this was done without permission of the homeowners or the owners of the property that was taken.

{¶8} The trial court deferred sentencing for preparation of a pre-sentence investigation report, including a mental health evaluation. Defense counsel also submitted a sentencing memorandum.

{¶9} At the sentencing hearing, held September 14, 2017, appellant was permitted to address the court with her allocution. Defense counsel recommended imposition of community control sanctions; the prosecution recommended a prison sentence of eight years. The trial court stated it had considered the purposes and principles of felony sentencing, pursuant to R.C. 2929.11, and it applied the relevant sentencing factors, pursuant to R.C. 2929.12, on the record.

{¶10} Appellant was sentenced to a cumulative six-year prison term, authorized by R.C. 2929.14: six years on Count 2, twenty-four months on Count 5, and twelve months on Count 12, all to be served concurrently. The trial court stated it would consider early release to NEOCAP. The court then informed appellant that post-release control would be mandatory for three years and of the consequences for violating conditions of that supervision. The trial court granted appellant credit for 255 days of time served.

{¶11} The prosecutor requested the trial court dismiss "all of the remaining counts." The trial court stated, "the Court will dismiss the remaining counts." In the sentencing entry, however, the trial court only dismissed Counts 1, 3, 4, 6, 7, 8, 9, 10, and 11. Counts 13, 14, 15, 16, and 17 were not dismissed nor were they otherwise mentioned or disposed of in the final entry. On appeal, the matter was temporarily remanded for the trial court to consider whether a clerical error occurred and, if so, to issue a nunc pro tunc entry disposing of Counts 13, 14, 15, 16, and 17. On August 6, 2018, the trial court issued a nunc pro tunc entry dismissing those remaining five counts.

{¶12} Upon review of the record, this court does not find any reversible error and therefore concludes the instant appeal is wholly frivolous.

{¶13} Counsel's motion to withdraw is hereby granted, and the trial court's judgment of conviction is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶14} I respectfully dissent based on my dissenting opinions in similar matters involving *Anders. State v. Christian*, 11th Dist. Trumbull No. 2013-T-0055, 2014-Ohio-4882, ¶21-34; *State v. Spears*, 11th Dist. Ashtabula No. 2013-A-0027, 2014-Ohio-2695, ¶14-19; *State v. Burnett*, 11th Dist. Lake No. 2013-L-053, 2014-Ohio-1358, ¶29-34; *State v. Gibbs*, 11th Dist. Geauga No. 2012-G-3123, 2014-Ohio-1341, ¶37-42; *State v. Smith*, 11th Dist. Lake No. 2016-L-107, 2017-Ohio-4124, ¶16.