

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

BRUCE WAYNE MILLER

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 683 MDA 2012

Appeal from the Judgment of Sentence February 28, 2012
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0000425-2011

BEFORE: MUNDY, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J.

Filed: March 12, 2013

Bruce Wayne Miller appeals from the judgment of sentence entered against him following his open guilty plea to a charge of delivery of a controlled substance (oxycodone).¹ He was sentenced to a term of 13 – 36 months' incarceration to be followed by 24 months' special probation.² Miller claims the trial court failed to sentence him in accordance with his negotiated plea agreement, he was sentenced more than 90 days after his guilty plea in violation of Pa.R.Crim.P. 704, the trial court committed a

* Retired Senior Judge assigned to the Superior Court.

¹ 35 P.S. § 780-113(a)(30).

² There is no indication in the record why the probation is designated as "special."

variety of sentencing errors. Miller's counsel has filed an **Anders**³ brief, indicating Miller's appeal is frivolous. Counsel has also filed a motion to withdraw. Miller has availed himself of his right to file with this Court a *pro se* brief in support of his claims. After a thorough review of the submissions by the parties, relevant law, and the official record, we cannot agree with counsel that the appeal is wholly frivolous. Therefore, we are required to remand the matter for the filing of an advocate's brief and for a hearing.

The official record reveals that on September 16, 2010, Miller sold 59 oxycodone pills to a confidential informant. He was arrested on February 3, 2011 and charged with delivery of a controlled substance (oxycodone) with intent to deliver and possession of a controlled substance. It appears that Miller obtained the drugs in question through prescriptions from a doctor because of his having been in a car accident.

On July 11, 2011, Miller pled guilty to one count of delivery of a controlled substance. A presentence investigation was ordered. Prior to sentencing, Miller agreed to cooperate with the authorities and became a confidential informant. Because of his cooperation, the target was apprehended. His sentencing was continued twice to allow Miller to complete his cooperation with the police. Miller's cooperation with the police

³ **Anders v. California**, 386 U.S. 738 (1967).

was also detailed in a sentencing memo filed with the court prior to sentencing.

Miller was sentenced on February 28, 2012. After explaining the circumstances regarding Miller's sale of drugs, Defense Counsel stated, "I would ask the Court if you would seriously consider the understanding we have with the Commonwealth in regard to the possibilities for sentencing." See N.T. Sentencing, 2/28/12 at 4. A discussion was then held off the record and the nature of the "understanding" was never detailed.

Thereafter, the sentencing court noted Miller's explanation for committing the crime as well as his familial circumstances. The court weighed those factors "heavily" in his favor, but it also noted that Miller had committed two sexual crimes as a teen and had been denied parole three times. *Id.* at 7. The court believed the denial of parole in the past indicated Miller had additional problems. Miller was then sentenced to 13 to 39 months' incarceration followed by two years' special probation. This timely appeal followed.

In his *pro se* brief, Miller claims he had an agreement with the Commonwealth that because of his cooperation with the authorities, he would receive some form of house arrest, rather than a sentence of incarceration.⁴ He also claims that the sentencing judge relied upon false

⁴ Because this agreement took place after his open guilty plea, it was not referenced there.

information in sentencing him. If either of these contentions is true, Miller's appeal would not be properly classified as wholly frivolous, therefore, an **Anders** brief would be inappropriate.

After Miller pled guilty, but before he was sentenced, he cooperated with the authorities and became a confidential informant. His cooperation proved fruitful and the target was arrested. The notes of testimony from his sentencing hearing indicate that some form of agreement was presented to the court. Miller claims the agreement provided that in exchange for his cooperation, he would not be incarcerated. However, the discussion of the agreement, which presumably related the specifics of the agreement, was held off the record. **See** N.T. Sentencing, 2/28/12, at 4. The **Anders** brief indicates the Commonwealth agreed not to oppose Miller's request for house arrest. The Commonwealth's brief indicates any cooperation took place after the guilty plea and does not otherwise address the substance of the agreement. Neither Counsel's nor Miller's statement regarding the nature of the agreement are evidence. **See Commonwealth v. McBride**, 957 A.2d 752, 788 (Pa. Super. 2008) (It is fundamental that matters attached to or contained in briefs are not evidence.) The sentencing court has failed to author a Pa.R.A.P. 1925(a) opinion, so the official record is bereft of independent information from the sentencing court.

We are not a fact-finding court, and we cannot determine which version of the cooperation agreement is accurate. Because we cannot

determine the terms of the agreement, we cannot conclude that Miller's claim is wholly frivolous.

Regarding sentencing, Miller claims the sentencing court relied on erroneous information in determining his sentence of incarceration.

The Court: Mr. Miller, all of those things weigh heavily in your favor. Obviously, the arrest for the rapes, more importantly, the fact that when I looked over the record I see that you were refused parole three different times and that you maxed out on the state sentence, which tells me that there is a problem besides the arrest that you had afterwards in '09 and '10 and this one.

N.T. Sentencing, 2/28/12 at 6-7.

The above quote represents the only reasoning given by the sentencing court for incarcerating Miller. The record does not reveal what the arrests in "'09 and '10" were or what the disposition of the charges were. More importantly, the record does not explain why Miller was denied parole. The sentencing court believes the repeated denials were a result of Miller's actions or conduct while incarcerated. However, the official record does not provide that information. Miller claims he was denied parole because there was a policy in place that certain crimes required a prisoner to serve at least 85% of the maximum sentence and that his three parole denials were a result of that policy, not because of any improper behavior on his part.

[P]rior to imposing sentence "[a] sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' " **Schwartz**, 418 A.2d 637, 640-641 (quoting **United States v. Tucker**, 404 U.S. 443, 446, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)).

Nevertheless, the discretion of a sentencing judge is not unfettered; a defendant has the right to minimal safeguards to ensure that the sentencing court does not rely on factually erroneous information, and any sentence predicated on such false assumptions is inimicable [sic] to the concept of due process. ***United States v. Tucker, supra; Townsend v. Burke***, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948).

Commonwealth v. Rhodes, 990 A.2d 732 (Pa. Super. 2009).

Because the record does not reveal the source of the sentencing court's statement regarding Miller's parole status, we cannot determine whether the sentencing court relied upon erroneous information in determining Miller required incarceration. Therefore, we cannot say that this issue is wholly frivolous.

In light of the foregoing, we are required to deny counsel's motion for withdrawal and remand this matter for a hearing. We believe it is important to state this decision does not hold Miller is entitled to relief, but recognizes that, based on the state of the official record, we cannot determine whether Miller is entitled to relief. Because Miller has raised issues of possible merit, we cannot agree that the appeal is wholly frivolous.

Motion to withdraw as counsel denied; *pro se* motion for appointment of counsel denied as moot.

Judgment of sentence vacated. Case remanded for proceedings consistent with this decision. Jurisdiction relinquished.