

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RASHAUN MILLER,	§
	§
Defendant Below-	§ No. 274, 2013
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 1001009884
Plaintiff Below-	§
Appellee.	§

Submitted: November 15, 2013
Decided: January 14, 2014

Before **HOLLAND**, **BERGER**, and **RIDGELY**, Justices.

ORDER

This 14th day of January 2014, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Rashaun Miller, was convicted in 2010 of one count each of Possession with Intent to Deliver Heroin and Possession of a Firearm During the Commission of a Felony. The Superior Court sentenced Miller to a total period of fifteen years at Level V incarceration to be suspended after serving ten years for decreasing levels of supervision. This Court affirmed

Miller's convictions and sentence on direct appeal.¹ Thereafter, Miller filed a motion for postconviction relief asserting that both his trial counsel and appellate counsel were constitutionally ineffective. The Superior Court denied Miller's motion. This appeal followed.

(2) Miller's appointed counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Miller's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Miller's attorney informed him of the provisions of Rule 26(c) and provided Miller with a copy of the motion to withdraw and the accompanying brief. Miller also was informed of his right to supplement his attorney's presentation. Miller filed several points for this Court's consideration. The State has responded to Miller's points, as well as to the position taken by Miller's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally

¹*Miller v. State*, 25 A.3d 768 (Del. 2011).

devoid of at least arguably appealable issues that it can be decided without an adversary presentation.²

(4) The record reflects that, in January 2010, police officers with the Governor's Task Force received information from a cooperating individual (CI), who was not a past-proven reliable source of information, about a drug transaction scheduled to occur on January 14, 2010 between 11:00 AM and 1:00 PM in the parking lot of the Town Court Compton Townhouses in Wilmington. The CI informed officers that two young, black men, one nicknamed "O," would back into one of four identified parking spaces. The officers set up surveillance in the area. Around 11:38 AM, they observed a 2003 Infinity G35 back into one of the four parking spaces specified by the informant. Officers simultaneously confirmed with the CI, who was watching nearby and was on a cell phone, that the Infinity observed by officers was the correct vehicle. When the officers pulled into the lot and blocked the Infinity's egress, the two occupants of the car attempted to flee on foot. Officers observed what appeared to be a large quantity of drugs and a handgun in plain view through the open driver's side door. The two occupants were quickly apprehended.

(5) Miller, the driver, and his codefendant, Tavar Smith, were arrested. Miller was charged with eight criminal offenses, including Trafficking in Heroin.

² *Penon v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

Miller filed a motion to suppress in June 2010, which the Superior Court denied. In order to preserve his right to appeal the denial of his suppression motion, Miller agreed to a stipulated bench trial. In exchange for Miller's waiver of his right to a jury trial and his stipulation to the facts established at the suppression hearing, the State agreed to dismiss all but two charges against Miller and to recommend a sentence of ten years in prison. On direct appeal, this Court affirmed Miller's convictions finding that the CI's tip was sufficiently reliable to establish reasonable suspicion of criminal activity to justify Miller's seizure.³

(6) In October 2011, Miller filed a motion for postconviction relief, which he later was permitted to amend. Miller argued that both his trial counsel and his appellate counsel were ineffective. Specifically, Miller asserted that trial counsel was ineffective because she: (i) failed to challenge the officers' reliance on an uncorroborated tip; (ii) failed to challenge his warrantless seizure and arrest for lack of probable cause; (iii) failed to challenge the lack of exigent circumstances for the warrantless search of his vehicle; (iv) failed to file a speedy trial motion; (v) failed to file a "Franks" motion; (vi) failed to file a "Flowers" motion; (vii) failed to adequately cross-examine the arresting officer at the suppression hearing; (viii) failed to timely provide Miller with a copy of the suppression hearing transcript; and (ix) failed to challenge his conviction on a charge to which his codefendant

³ *Miller v. State*, 25 A.3d at 773-74.

previously had pled guilty. Miller also argued that his appellate counsel was ineffective for failing to challenge alleged misstatements by the Court in its opinion on Miller's direct appeal. After obtaining responses from Miller's trial counsel and appellate counsel, as well as from counsel for the State, the Superior Court Commissioner recommended that Miller's motion be denied. The Superior Court adopted the Commissioner's report and recommendation and denied postconviction relief on April 24, 2013. This appeal followed.

(7) Miller enumerates two arguments for this Court's consideration on appeal. First, he contends that the Superior Court erred in denying his motion for postconviction relief and related motions. Second, Miller asserts that both his trial counsel and appellate counsel provided constitutionally ineffective assistance of counsel.

(8) An application for postconviction relief alleging ineffective assistance of counsel must establish that: (i) trial counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different.⁴ A "reasonable probability" means a probability that is sufficient, considering the totality of the evidence, to undermine confidence in the outcome.⁵

⁴ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

⁵ *Id.* at 694-95.

A defendant must set forth and substantiate concrete allegations of actual prejudice⁶ in order to overcome the “strong presumption” that counsel’s representation was professionally reasonable.⁷

(9) Miller’s first three claims of ineffective assistance of trial counsel all relate to his attorney’s alleged failure to challenge the limited information provided by the CI and the fact that there was neither probable cause nor exigent circumstances to justify the officers’ warrantless seizure, search, and arrest. Miller’s arguments, however, ignore this Court’s holding in his direct appeal that probable cause was not the relevant standard to apply under the circumstances of Miller’s case.⁸ The only issue was whether the officers had reasonable suspicion to stop Miller at the time that they blocked his vehicle.⁹ Miller’s attorney filed the suppression motion arguing that the police lacked reasonable suspicion to stop him. The Superior Court rejected counsel’s argument, and we affirmed on appeal. Trial counsel did not commit any error for failing to argue lack of probable cause for a warrantless arrest or lack of exigent circumstances for a warrantless search.

⁶ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁷ *Strickland v. Washington*, 466 U.S. at 689.

⁸ *Miller v. State*, 25 A.3d at 771 (“The issue to be decided in this appeal is whether Miller’s seizure was proper, not whether there was probable cause for his arrest (*Draper*) and not whether the warrantless search of his vehicle (*Tatman*) was justified.”).

⁹ *Id.*

(10) Miller’s next three claims assert that trial counsel was ineffective for failing to file a speedy trial motion, for failing to file a motion for a *Flowers* hearing,¹⁰ and for failing to file a motion for a *Franks* hearing.¹¹ None of Miller’s claims, however, reflect any error by his trial counsel. As the Superior Court noted, there was no legal basis for any of the motions identified by Miller. We agree with that analysis and find no merit to Miller’s claims of ineffectiveness.

(11) Miller next contends that counsel was ineffective for failing to adequately cross-examine the arresting officer at the suppression hearing about his testimony regarding the CI’s tip that the alleged perpetrators would park in one of four identified parking spaces. According to Miller, this testimony was not credible because the officer did not include this information in his police report nor did he supply this information during his testimony at Miller’s preliminary hearing. Miller argues that counsel did not impeach the officer regarding his belated disclosure of this information. The transcript of the suppression hearing, however, contradicts Miller’s assertion. Counsel did, in fact, cross-examine the arresting officer about his belated disclosure regarding the CI’s information identifying the parking spaces and his failure to include that information in his police report or in

¹⁰ *State v. Flowers*, 316 A.2d 564 (Del. Super. 1973) (establishing a procedure for the trial court to determine if a CI has information that would “materially aid the defense” and thus require the State to disclose the CI’s identity).

¹¹ *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (requiring a hearing when a defendant has made a “substantial preliminary showing” that the police knowingly or “with reckless disregard for the truth” relied on a false statement to establish probable cause).

his testimony at the preliminary hearing. Thus, there is no factual basis for this allegation of ineffective assistance.

(12) Miller's eighth argument is a single sentence claiming that trial counsel was ineffective for failing to give him "a significant amount of time to prepare proper defend [sic] to decide whether to accept plea, stipulated trial or jury trial." To the extent Miller is contending that trial counsel did not adequately explain to him the consequences of rejecting the State's plea offer, we find that the record clearly contradicts Miller's assertion. Prior to the suppression hearing, the Superior Court engaged Miller in an extensive colloquy about the State's plea offer and the potential consequences to Miller of accepting or rejecting the plea. The record supports the Superior Court's finding that Miller knowingly and voluntarily rejected the State's plea offer in favor of proceeding with the suppression hearing. Moreover, the transcript of the stipulated trial reflects that Miller knowingly and voluntarily waived his right to a jury trial in favor of accepting a stipulated bench trial and the State's agreement to dismiss several charges and recommend a lesser sentence. The record reflects that Miller's allegation of ineffective assistance to be entirely unsubstantiated.

(13) Miller's final claim of ineffective assistance with respect to his trial counsel is difficult to understand. He appears to fault his attorney for allowing him to be convicted of the same drug charge to which his co-defendant Smith already

had pleaded guilty. Miller seems to assert that he could not be convicted of the same offense as his codefendant unless they both were convicted of conspiracy as well. There is no merit to this argument. The State charged Miller and Smith as coconspirators in the same indictment. Smith's plea agreement had no impact on the prosecution of Miller's charges. The State agreed to dismiss the conspiracy charge against Miller (as well as several other charges) in exchange for Miller's agreement to proceed with the stipulated bench trial on two remaining drug and weapon charges. Miller's allegation of ineffective assistance has no merit.

(14) Miller's final argument is that his appellate counsel was ineffective for failing to challenge this Court's reliance on factually inaccurate information regarding the description of the vehicle and the parking spaces provided by the CI. It is not entirely clear what "inaccurate information" Miller is referring to in this Court's opinion on appeal. The Court did not find, as a matter of fact, that the CI provided a description of the suspect vehicle. Miller misreads the Court's opinion. Furthermore, the Court's finding that the CI told police that the suspect vehicle would park in one of four parking spaces is supported by the testimony of the arresting officer at the suppression hearing. Accordingly, appellate counsel did not commit any error in failing to challenge this finding.

(15) This Court has reviewed the record carefully and has concluded that Miller's appeal is wholly without merit and devoid of any arguably appealable

issue. We also are satisfied that Miller's counsel has made a conscientious effort to examine the record and the law and has properly determined that Miller could not raise a meritorious claim in this appeal. The Superior Court did not abuse its discretion in denying Miller's motion for postconviction relief or his related motions for counsel and an evidentiary hearing.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland
Justice