



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TREY M. MILLER, :
 :
 :
 Defendant-Below, :
 Appellant, :
 :
 v. : No.: 241, 2018
 :
 STATE OF DELAWARE, :
 :
 :
 Plaintiff-Below, :
 Appellee. :

Upon Appeal from the Superior Court of the State of Delaware to the Supreme Court of Delaware

APPELLANT’S AMENDED OPENING BRIEF

Respectfully submitted,

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NATURE AND STAGE OF THE PROCEEDINGS

On May 21, 2012, a grand jury indicted Trey Miller (Case No. 1203015202) on the following charges: Burglary in the Second Degree, in violation of 11 *Del. C.* § 825, Burglary in the Third Degree, in violation of 11 *Del. C.* § 824; Theft of a Motor Vehicle, in violation of 11 *Del. C.* § 841A; Theft greater than \$1,500, in violation of 11 *Del. C.* § 841, two counts, Theft less than \$1,500, in violation of 11 *Del. C.* § 841, two counts; Conspiracy in the Second Degree in violation of 11 *Del. C.* § 512, and Criminal Mischief, in violation of 11 *Del. C.* § 811, two counts. (A 22-26).¹

On October 8, 2012, a grand jury indicted Trey Miller (Case No.: 1208012177) on the charge of Robbery Second Degree in, violation of 11 *Del. C.* § 831. (A 27).

On March 5, 2013, pursuant to a plea agreement with the State, Trey Miller pled guilty to the charges of Burglary in the Second Degree, Theft over \$1,500, and Conspiracy in the Second Degree from the Indicted case designated by Case Number 1203015202; and Robbery in the Second Degree from the Indicted case designated by Case Number 1208012177. (A 28-38)(T pg. 2, lns. 8-17). A Presentence Investigation was ordered after the entry of the plea. (A 38)(T pg. 11, lns. 3-4).

¹ “A___” refers to a page of Appellant’s Appendix in support of his Opening Brief. “T___” refers to a pages and lines of the Trial Transcript.

On May 17, 2013, Trey Miller was sentenced in Superior Court before the Honorable Diane Clark-Streett. (A 47-48)(T pg. 7, ln. 14 - pg. 8, ln. 4). On or about October 14, 2014, the Court reviewed Trey Miller's Sentence and he was released from Level V and began serving probation. (A 62-71). On or about January 6, 2015, Trey Miller was found in Violation of Probation. (A 5, 16). On or about April 13, 2016, Trey Miller was found in Violation of Probation. (A 6, 17). On or about, August 4, 2016, a reported Violation of Probation was filed with the Court. (A 7, 17). Because Trey Miller failed to appear at several scheduled hearings, the Violation of Probation hearing on this report, along with additional reports following were not heard for over 1 ½ years. (A 7-10, 17-20).

On or about, March 6, 2018 at the Violation of Probation Hearing, Trey Miller was found to have violated his probation and sentenced to three years of Level V for the Robbery in the Second Degree, from the Indicted case designated by Case Number 1208012177. (A 81) (T pg. 10, lns. 21-22). As to Burglary in the Second Degree from the Indicted case designated by Case Number 1203015202, Trey Miller was found to have violated his probation and sentenced to a total of six years Level V, suspended after three years for one year at Level IV, home confinement suspended after six months for six months of Level III; for the Theft over \$1,500, Trey Miller was sentenced to a total of two years Level V, suspended after one year for one year at Level IV, home confinement suspended after six

months for six months of Level III; and for the Conspiracy in the Second Degree, Trey Miller was sentenced to a total of two years Level V, suspended after one year for one year at Level IV, home confinement suspended after six months for six months of Level III. (A 82-83) (T pg. 11, ln. 3 - pg. 12, ln. 3). The Level V sentences for both cases were to run consecutive and the periods of probation were to run concurrent. (A 83) (T pg. 12, lns. 3-5).

On March 19, 2018, Trey Miller filed a Motion for Modification of Sentence urging the Court to reconsider its sentence. (A 85).

On April 10, 2018, the Court denied the Motion for Sentence Modification. (A 97).

On May 8, 2018, Trey Miller filed a timely Notice of Appeal of the Sentencing Order of the Superior Court dated March 6, 2018, and Order denying Trey Miller's Motion for Modification of the Sentence dated April 10, 2018, in the case of *State of Delaware v. Trey M. Miller*, Case Numbers 1208012177 and 1203015202. This is Trey Miller's Opening Brief in support of his appeal.

SUMMARY OF ARGUMENT

I. Trey Miller's sentence must be vacated and his case remanded for re-sentencing because the Court had a closed mind towards Trey Miller during the sentencing hearing and the sentence appears to be the result of judicial vindictiveness or bias.

STATEMENT OF FACTS

The charges in this appeal occurred when Trey Miller was 19 years of age, his date of birth being, November 5, 1992. (A 1). Specifically, these charges stem from two separate occurrences, which occurred on March 18, 2012 and July 24, 2012. (A 102-106, 107-111).

On or about March 18, 2012, Trey Miller entered and remained unlawfully in a dwelling located at 236 East Delaware Avenue, Apartment 325, Newark, Delaware, with the intent to commit the crime of theft while within the dwelling. (A 109-110). While in the dwelling, Trey Miller and another individual, did take, exercise control over, or obtain the property of another person, consisting of a computer, an Apple Macbook Pro, and Apple iPod, an XBox 360 controller, United States currency, identification cards and debit cards, car keys and a cellphone, along with other miscellaneous property valued at \$1,500 or more, intending to deprive the owner of same or to appropriate same. (A 22-26, 109-110). When Trey Miller and the other individual left the dwelling, they used the keys they found to take a 2007 Nissan Maxima which they ultimately crashed. (A 110).

On or about July 24, 2012, when in the course of committing theft, Trey Miller did use or threaten the immediate use of force upon Karen Dewitt with intent to prevent or overcome resistance of the taking of property or the retention

thereof immediately after the taking. (A 27, 105-106).

On March 18, 2012, Trey Miller was arrested for the Burglary. (A 105). On August 16, 2012, Trey Miller was arrested for the July 24, 2012, Robbery. (A 109-111).

On March 5, 2013, Trey Miller pled guilty to Burglary in the Second Degree, Theft over \$1,500 and Conspiracy in the Second Degree from the Indicted case designated by Case Number 1203015202, and Robbery in the Second Degree, from the Indicted case designated by Case Number 1208012177 and in exchange, the State agreed to dismiss all remaining charges in each Indicted case and recommend the following sentence: for the case designated by Case Number 1203015202, to cap its recommendation at the one year minimum mandatory of the unsuspended Level V term of incarceration with the Key Program, and for the case designated by Case number 1208012177, the State recommended five years Level V, suspended for two years at Level III. (A 29) (T pg. 2, lns. 8-23).

On May 17, 2013, sentencing was held in the Superior Court. (A 40). As to Burglary in the Second Degree from the Indicted case designated by Case Number 1203015202, Trey Miller was sentenced to a total of eight years Level V, with the Key Program, suspended after one year for two years at Level III, Crest Aftercare; for the Theft over \$1,500, Trey Miller was sentenced to a total of two years Level V, suspended for 12 months at Level III; and for the Conspiracy in the Second

Degree, Trey Miller was sentenced to a total of two years Level V, suspended for 12 months at Level III. (A 47-48) (T pg. 8, ln. 16 - pg. 9, ln. 4). On the Robbery in the Second Degree, from the Indicted case designated by Case Number 1208012177, five years Level V, suspended for two years at Level III, Crest Aftercare. (A 46-47) (T pg. 7, lns. 14 - 23). The Level V sentences for both cases were to run consecutive and the periods of probation were to run concurrent. (A 47-48) (T pg. 9, lns. 2-3).

On or about October 14, 2014, Trey Miller was released from Level V incarceration and began serving his period of Level III probation. (A 62-71). While serving probation, Mr. Miller failed to report to probation on October 31, 2016, July 19, 2016, June 6, 2016, and April 25, 2016. (A 73-74) (T pg. 2, ln. 23 - pg. 3, ln. 1). He also failed to report to TASC on October, 24, 2016, September 29, 2016, July 14, 2016, June 27, 2016, June 16, 2016, April 25, 2016, April 21, 2016, April 19, 2016, and April 18, 2016. (A 74) (T pg. 3, lns. 8-19). Trey Miller's urine screens were also positive for opiates and marijuana on July 26, 2016, November 3, 2015, and on July 19, 2015, he refused to take the urine screen. (A 74) (T pg. 3, lns. 5-9).

On April 26, 2016, he was charged with speeding by the Newport Police Department, Newport, Delaware. (A 73) (T pg. 2, lns. 17-18). On May 27, 2016, Trey Miller pled guilty to the speeding charge in Alderman's Court, Newport,

Delaware and was fined \$75. (A 73) (T pg. 2, Ins. 18-20).

On or about June 1, 2016, Mr. Miller was arrested by the Delaware State Capitol Police Department. (A 73) (T pg. 2, Ins. 8-17).

On March 8, 2017, he was arrested by Delaware State Police for reckless endangering first degree. (A 74) (T pg. 3, Ins. 20-22). While the reckless endangering charge was dismissed by a *nolle prosequi*, Trey Miller failed to report the police contact to his probation officer. (A 74-75) (T pg. 3, ln. 22 - pg. 4, ln. 1). Trey Miller was considered to be an “absconder” from probation at various times based on the testimony of his probation officer. (A 73) (T pg. 2, Ins. 11-13).

On March 6, 2018, during a Violation of Probation hearing in Superior Court, the State presented the aforementioned violations, which were admitted by Trey Miller and requested the Superior Court impose the following sentence:

As to the burglary second, six months Level V, no probation to follow. And as to robbery second VOP, six months Level V, no probation to follow. And as to the theft and conspiracy second, discharge unimproved. (A 75) (T pg. 4, Ins. 3-10).

Trey Miller requested that the Court consider that during the time period when some of the violations had occurred, in September of 2016, Trey Miller’s three-month-old daughter had passed away and he was grieving the loss which “sent him into a bit of a decline with regards to drug use.” (A 76) (T pg. 5, Ins. 13-17). Trey Miller specifically asked the Court to consider that he “never received any counseling to deal with the passing of his young, young, daughter.” (A 76) (T pg.

5, lns. 16-20). Trey Miller suggested that more recently, he was working in a mushroom factory and living with his grandparents who he helped provide care. (A 77) (T pg. 6, lns. 7-17). In light of the age and nature of the violations, the time Trey Miller had served in regards to the underlying cases, Miller's suffering from addiction which was compounded by grieving the loss of a child, the fact that he was employable, had family support and a place to reside, Trey Miller requested the Court consider six months of Level V. (A 77) (T pg. 6, lns. 5-6).

When Trey Miller addressed the Court, he suggested that he was not "on the run, [he] was at home," caring for his grandparents. (A 79) (T pg. 8, lns. 8-10). Trey Miller explained he was working and he was attending the American Beauty Academy. (A 79) (T pg. 8, lns. 16-17). Trey Miller attempted to explain he was ready to face the consequences of his actions but pled with the Court not to impose a year of Level V time. (A 79) (T pg. 2, lns. 10-16).

During the hearing, the Court emphasized that Trey Miller did not take probation and the "sentencing seriously." (A 79-80) (T pg. 8, ln. 22 - pg. 9, ln. 1). During sentencing, the Court asked Trey Miller for an explanation regarding why "[e]very time bail is posted for him, he does not come back like he's supposed to do?" (A 78) (T pg. 7, lns. 2-4)). The only explanation Trey Miller was able to provide was grieving for his daughter. (A 78) (T pg. 7, lns. 5-13). Despite the explanation, immediately prior to sentencing, the Court commented on Trey

Miller's family's ability "to post bail for [Trey Miller] in the past when [he had] been picked up on [his] capiases and even though [he was] released on some type of bail on those capiases, [he] did not come back." (A 80) (T pg. 9, lns. 13-17). The Court went on to state that "apparently, [Trey Miller] disregard[s] the Court and everything that the Court has to say to [him] and [his] family is not able to control [him]." (A 80) (T pg. 9, lns. 17-20). The Court stated that Trey Miller previously came to Court crying "bitter tears" and was attempting to "manipulate the Court." (A 80) (T pg. 9, lns. 7-8). Therefore, the Court imposed eight years at Level V, which exceeded the State's recommendation by eight times, in the following manner: three years of Level V for the Robbery in the Second Degree, from the Indicted case designated by Case Number 1208012177; (A 81-82) (T pg. 9, ln. 19 - pg. 10, ln. 2); as to the Burglary in the Second Degree from the Indicted case designated by Case Number 1203015202, six years Level V, suspended after three years for one year at Level IV, home confinement suspended after six months for six months of Level III; for the Theft over \$1,500, two years Level V, suspended after one year for one year at Level IV, home confinement suspended after six months for six months of Level III; and for the Conspiracy in the Second Degree, two years Level V, suspended after one year for one year at Level IV, home confinement suspended after six months for six months of Level III; (A 82-83) (T pg. 11, ln. 3 - pg. 12, ln. 5); the Level V sentences for both cases were to

run consecutive and the periods of probation were to run concurrent. (A 83) (T pg. 12, lns. 3-4).

On March 19, 2018, Trey Miller filed a Motion for Sentence Modification urging the Court to reconsider its sentence. (A 85). Specifically, Trey Miller submitted to the Court that the bases of the violations of probation were technical and not the result of new crimes. (A 87-88). Once again, Miller noted that he had not “received any formal therapy or treatment to deal with the on-going grief and depression dealing with the passing of his daughter.” (A 87-88). Trey Miller also submitted that he would have employment “readily available” in close proximity to his “grandparent’s residence, where he would reside upon completion of any period of Level V sentence.” (A 88). However, Miller noted the employment would only be available for a reasonable period of time. (A 88). He suggested that the totality of circumstances “in terms of applicable mitigating factors,” suggested a more appropriate sentence would be a 12 to 18 month Level V sentence that included the Key program, upon completion of the Key Program defendant would be transferred to probation with monitoring with the TASC program. (A 88-89). Trey Miller submitted that “this type of sentence would ... both punish Miller for his failures on probation but also provide him with in-patient drug treatment.” (A 88).

On April 10, 2018, the Court denied the Motion for Sentence Modification.

(A 97). As part of the Order, the Court stated “since his release Defendant has violated his probation four times and failed to appear in Court on several occasions.” (A 98). The Court noted that on December 17, 2014, August 11, 2016, November 15, 2016, and September 12, 2017, Trey Miller failed to appear in Court. (A 98). The Court also noted that Miller had two capiases prior to his original sentence. (A 98). The Court also discussed Trey Miller’s unrelated criminal history. (A 100). In denying the Motion, the Court explained: “While it is understandable that Defendant wants early release, his record reflects an inability or unwillingness to follow the rules of probation;” and “it does not appear as though his family network is able to get Defendant to abide by the rules of probation or appear on Court dates.” (A 100).

On May 8, 2018, Trey Miller filed the instant appeal of the Sentencing Order of the Superior Court dated March 6, 2018 and Order denying Trey Miller’s Motion for Modification of the Sentence dated April 10, 2018, in the case of *State of Delaware v. Trey M. Miller*, Case Numbers 1208012177 and 1203015202.

ARGUMENT

I. DEFENDANT TREY MILLER’S SENTENCE MUST BE VACATED AND HIS CASE REMANDED FOR RE-SENTENCING SINCE THE COURT HAD A CLOSED MIND WHEN SENTENCING TREY MILLER AND THE SENTENCE APPEARS TO BE THE RESULT OF JUDICIAL VINDICTIVENESS.

A. Question Presented.

1. Whether the lack of consideration of the nature of the offenses, character of Trey Miller or any mitigating factors during the violation of probation proceedings by the lower Court warrant finding Trey Miller’s sentence was the result of a closed mind and judicial vindictiveness or bias? This issue was preserved during the hearing and in his Motion for Sentence Modification. (A 72-73, 86-89).

B. Standard and Scope of Review.

The trial court’s revocation of a Defendant’s probation and the imposition of a sentence is normally reviewed for an abuse of discretion. *Cruz v. State*, 990 A.2d 409, 412 (Del. 2010) (citing *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006)). In considering whether an abuse of discretion occurred, this Court’s “review of a sentence is limited to whether the sentence is within the statutory limits prescribed by the General Assembly and whether it is based on factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind.” *Id.* at 416 (Del. 2010) (quoting *Weston v. State*, 832 A.2d 742, 746 (Del. 2003) (citing *Siple v. State*, 701 A.2d 79, 83 (Del. 1997) and *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992))).

C. Merits of Argument.

While Trey Miller's sentence following the Violation of Probation hearing was within the statutory limits, it was the exercise of a judicially "closed mind" and appears to be the result of judicial vindictiveness or bias. This Court has explained that a sentence is the result of a "closed mind" when the sentence is based on a "preconceived bias without consideration of the nature of the offense or the character of the defendant." *Cruz*, 990 A.2d at 412 (quoting *Weston*, 832 A.2d at 746). When evaluating whether a sentence is the result of judicial vindictiveness, the focus of an analysis is whether the record has been developed sufficiently to support the sentence. *Tramill v. State*, 425 A.2d 142, 145 (Del 1980) (citing *Jacobs v. State*, 358 A.2d 725, 729 (Del. Supr., 1976) (quoting the United States Supreme Court)). The record below is not sufficiently developed to support the excessive sentence. As a result, the sentence appears to be based on a "preconceived bias without consideration of the nature of the offense or the character of the defendant." *Cruz*, 990 A.2d at 412.

During the March 2018 Violation of Probation hearing, the Court manifested a preconceived bias and did not appear to consider the nature of the offenses before the Court, the character of Trey Miller or any mitigating factors. Rather, the Court's explanation for its sentence is limited to general statements relating to Trey Miller and his family. In fact, the record is unclear regarding precisely why the

Court imposed the maximum amount of time possible following the sentencing hearing.

1. The lack of review of the actual violations of probation or the evidence presented by the parties during the sentencing hearing when imposing Trey Miller’s sentence for violating his probation reveals a judicially “closed mind.”

During the Violation of Probation hearing, the Court heard from the State, Counsel for Trey Miller, and Trey Miller. However, none of the statements of these individuals is referenced in the Court’s sentencing order at the hearing or the denial of the Motion for Sentence Modification. Not only is the sentence the Court imposed eight times the recommendation of the State, the Court completely departed from the policies and procedures found in the SENTAC Guidelines without explanation. *See* Delaware Sentencing Accountability Commission, (SENTAC), Bench Book at 156 (2018) (encouraging the court to review aggravating factors before increasing the level of supervision more than one level). While the Court is not bound by the recommendations of the parties when it comes to sentencing or SENTAC Guidelines, due process and faith in the sentencing process requires some level of consistency. *See Osburn v. State*, 224 A.2d 52, 53 (Del. 1966) (stating that due process requires the “imposition of the sentence in the proper fashion”). The Court below failed to acknowledge the recommendation of the State or explain why the ultimate sentence was so much higher than the recommendation. The lack of any acknowledgement or explanation demonstrates

a closed mind during the sentencing of Trey Miller.

When the Court heard from Counsel for Trey Miller, not only did the Court fail to acknowledge the statements, but the Court's comments demonstrated a closed mind. Specifically, the Court limited its inquiry to Trey Miller's failure to appear in Court. While counsel stated that part of the problems with him appearing in Court stem from the suffering of the loss of a child, the record does not suggest this was considered by the Court. (A 87-88). Likewise, the loss of his child is not acknowledged in the Order denying the Motion for Sentence Modification. Nor does the Court address Trey Miller's continued addiction problems as justification for missing court dates and his failure to comply with probation. (A 88). The Court did not address the fact that Trey Miller was working and would be able to return to work upon release if a sentence was reasonable. Essentially, Mr. Miller had employment that was willing to hold his job for a reasonable period of time up to 18 months. The Court's comments and the Order denying the Motion for Sentence Modification do not cast any light on how this mitigating information was considered as part of imposing a Level V sentence. Trey Miller submits that the lack of any review of these facts by the Court supports a finding that the Court acted with a closed mind when imposing the sentence.

The Order denying the Motion for Reduction of Sentence does not explain why the Court departed from the recommendation of the State, disregarded the

comments of Counsel for Trey Miller, and from Trey Miller. Likewise, the Order does not address the departure from the SENTAC Guidelines and lack of review of the SENTAC aggravating factors prior to increasing a sentence on a violation of probation more than one level. Rather, the Court simply states that “it does not appear as though his family network is able to get him to abide by the rules of probation or appear on Court dates.” (A 100). The lack of any references to the specific facts underlying the violations of probation and complete departure from the SENTAC Guidelines for sentencing is suggestive of a judicially closed mind. While there is no direct appellate jurisdiction to review criminal sentences on the basis of the SENTAC guidelines, Trey Miller submits that a complete lack of consideration is relevant to reviewing whether the Court’s sentence was the result of a closed mind. *See Osburn v. State*, 224 A.2d 52, 53 (Del. 1966) (stating that due process requires the “imposition of the sentence in the proper fashion”); *cf Siple v. State*, 701 A.2d 79, 83 (Del. 1997) (holding “Delaware...has not provided for appellate review of criminal punishments that deviate from sentencing guidelines.”) (citations omitted).

2. There is evidence of judicial vindictiveness on this record.

Trey Miller submits that the Superior Court’s focus on his ability to post bail and his family is indicative of judicial vindictiveness. Due process requires that vindictiveness against a defendant play no part in the sentencing process. *See*

Tramill, 425 A.2d at 145 (citing *Jacobs*, 358 A.2d at 729) (quoting the United States Supreme Court)).

“[S]o that a defendant...may be freed of any apprehension of retaliatory motivation on the part of the sentencing judge, the reasons for the more severe second sentence (1) must affirmatively appear in the record and (2) must be based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.”

Id. Further, to prevail, the defendant need not prove actual vindictive conduct. Rather, “merely that it is not demonstrably absent.” *Id.* at 146.

In *Tramill*, the Court noted that the record must include:

1) acknowledgment by the sentencing Judge that the new sentence is more severe, 2) objective details concerning one or more incidents which have occurred *subsequent* to the original sentencing, 3) a statement to the defendant that the increased sentence *results* from the identified conduct, and 4) an indication that the amount of the increase is justified on the basis of the identified conduct.

Id. at 146 (citing *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969) and *Jacobs v. State*, *supra*, (emphasis added))). While these standards apply to cases involving the review of a resentencing of a defendant following a re-trial, due process requires that any sentence be free from judicial vindictiveness or bias, and these standards ensure such. When reviewing the standards discussed in *Tramill* against the record below, the vindictive nature of the sentence becomes apparent. *Id.* at 146.

The record does not reveal any “objective details concerning” any

“incidents which [had] occurred subsequent to the original sentencing.” *Id.* The closest the Superior Court came to providing details relating to its sentence is in the general statements that “since his release Defendant has violated his probation four times and failed to appear in Court on several occasions,” “reflects an inability or unwillingness to follow the rules of probation,” and has an apparent “family network [that] is [un]able to get Defendant to abide by the rules of probation or appear on Court dates.” (A 100). These statements do not provide any specific details about the actual conduct that constituted the violations. Likewise, when the Superior Court denied the Motion for Modification of the Sentence, the Court reviewed a criminal history of events that were entirely unrelated to the violations of probation and all occurred before the violations of conditions of probation were filed with the Court. The record does not contain any “statement to the defendant that the increased sentence results from the identified conduct.” *Tramill*, 425 A.2d at 146. Finally, the record does not contain any “indication that the amount of the increase is justified on the basis of the identified conduct.” *Id.*

However, the record below demonstrates the Superior Court was concerned about Mr. Miller’s prior posting of bail and capias history. (A 80) (T pg. 9, lns. 13-17). It is apparent from the record that the Superior Court perceived the failure to appear as disregard for the Court’s authority. (A 80) (T

pg. 9, lns. 17-20). Trey Miller submits that the manner in which his ability to post bail and failure to appear was emphasized by the Court below suggests that was the actual impetus for the sentence as opposed to the conduct constituting the violations of probation. Therefore, the sentence must be vacated and remanded.

CONCLUSION

For the foregoing reasons, Appellant Trey Miller respectfully requests that the Court vacate his sentences and remand for re-sentencing; and grant such other relief as may be necessary, just or appropriate.

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