
NO. 34718

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

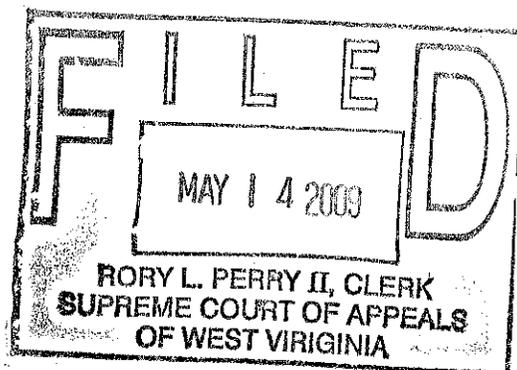
STATE OF WEST VIRGINIA,

Appellee,

v.

SPICY JEAN ALLEN aka SPICY CARTER,

Appellant.



BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE,
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I.

KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW

Spicy Jean Allen aka Spicy Carter (hereafter "Appellant") appeals the August 6, 2008, judgment of the Circuit Court of Mercer County (Knight, C.J.), which denied Appellant's motion for correction of sentence following her conviction by guilty plea to Attempt to Commit Murder, for which she was sentenced to 3-15 years in the penitentiary.¹

On appeal, Appellant contends that her sentence is excessive, and that her defense counsel were ineffective in their representation of her during the plea negotiations and proceedings.

¹Appellant also pled guilty to Delivery of a Controlled Substance under a separate indictment, for which she was sentenced to 1-15 years in the penitentiary. That conviction is not challenged in this appeal.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 20, 2004, Ms. Earlene Mitchell reported her son, Jermaine Mitchell, missing. Later that day, Mr. Mitchell's car was located in a parking building on Princeton Avenue in Bluefield. Upon inspection, police found a large amount of what appeared to be blood in the back floorboard of the vehicle. On April 9, 2004, members of the West Virginia State Police discovered Jermaine Mitchell's body in a remote area of Mercer County.

Bluefield police and West Virginia State Police officers interviewed Appellant on May 19, 2004. After being advised of her rights, Appellant gave two separate audio-recorded statements in which she first denied any knowledge or involvement, but later admitted to witnessing the murder of Jermaine Mitchell in a city parking building on Princeton Avenue. According to Appellant, as she was walking around the building, she saw Kelvin "Rerun" Martin and Bobby Dotson talking with Mr. Mitchell. She said that Dotson struck Mitchell with a pipe wrench, and then Mitchell's body was loaded into his car and transported to an unknown location. Appellant said that Dotson drove Mitchell's vehicle, and Martin followed in Dotson's car. She stated that later that evening, she, Dotson and Martin got together at her apartment and used illegal narcotics.

On December 9, 2004, Appellant admitted that she had lied in her previous interview about the names of the persons who were with her when Mitchell was murdered. After being arrested on drug charges, Appellant gave a final recorded statement to police on April 11, 2005, in which she stated that she and two other individuals had contacted Mitchell about purchasing 50 Dilaudid pills, and discussed robbing him of these pills. When they arrived at the parking building to meet

Mitchell, Appellant said one of the other subjects pulled out a pipe wrench and immediately struck Mitchell in the head, killing him. Appellant claimed that she then left, but said the other two individuals later came to her residence and gave her some of the pills that were taken from Mitchell. (Criminal Complaint, R. 9-10.)² These other persons were not identified in the complaint because the murder was still being investigated.

Appellant was arrested on April 17, 2005, and charged with First Degree Murder. Following a preliminary hearing on April 25, 2005, probable cause was found and Appellant was bound over to the circuit court. (R. 7-8.) On June 15, 2005, the Mercer County Grand Jury returned a four-count indictment charging Appellant with violations of West Virginia Code § 61-2-1, 61-2-12 and 61-10-31, as follows:

THE GRAND JURY CHARGES, COUNT 1: that on or about the 20th day of February 2004, in the County of Mercer, State of West Virginia, SPICY JEAN ALLEN aka SPICY CARTER, committed the offense of "Murder-First Degree" by feloniously, willfully, maliciously, deliberately, intentionally and unlawfully slaying, killing and murdering Jermaine A. "Shorty" Mitchell, against the peace and dignity of the State; and

COUNT 2: The grand jury further charges, that on or about the 20th day of February 2004, in the County of Mercer, State of West Virginia, SPICY JEAN ALLEN aka SPICY CARTER, committed the offense of "Conspiracy" by unlawfully and feloniously conspiring with another to commit the offense of murder-first degree, against the peace and dignity of the State; and

COUNT 3: The grand jury further charges, that on or about the 20th day of February 2004, in the County of Mercer, State of West Virginia, SPICY JEAN ALLEN aka SPICY CARTER, committed the offense of "Robbery-First Degree" by unlawfully and feloniously using violence against Jermaine A. "Shorty" Mitchell, did take, steal and carry away goods and/or United States Currency, against the peace and dignity of the State; and

²References to the record are designated as "R. ____"; references to the transcript of the Plea Hearing in Appellant's case are designated as "Tr. ____."

COUNT 4: The grand jury further charges, that on or about the 20th day of February 2004, in the County of Mercer, State of West Virginia, SPICY JEAN ALLEN aka SPICY CARTER, committed the offense of “Conspiracy” by unlawfully and feloniously conspiring with another to commit the offense of robbery-first degree, against the peace and dignity of the State.

(R. at 21-22.)

On December 21, 2005, the Appellant entered into a Plea Bargain Agreement with the State in which she agreed to enter a “best interests” guilty plea³ to “attempt to commit murder punishable by an indeterminate sentence of 3-15 years in prison.” (R. 70.) Appellant also signed a Petition to Enter Plea of Guilty, Defendant’s Statement in Support of Guilty Plea, and a Plea of Guilty in which she described her plea as “guilty (best interest plea) in attempt to commit murder” with a possible sentence of “3 to 15” years. (R. 65.)

During a hearing held before Judge John R. Frazier on the same day, Appellant entered a “best interests” guilty plea to “attempt to commit murder in the first degree” as a lesser included offense under Count 1 of the indictment, and also pled guilty to delivery of Hydromorphone, a Schedule II controlled substance, as charged in a separate indictment. (See R. 70-73; Tr. 40, Dec. 21, 2005.) Judge Frazier accepted her pleas, and by order entered March 27, 2006, sentenced Appellant to 1-15 years on the drug charge, and 3-15 years in the penitentiary for Attempt to Commit Murder in the First Degree, directing that the sentences run consecutively. The remaining charges in the indictment were dismissed. (See R. 74-75.)

³See Syl. Pt. 1, *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987) (“An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him.”).

Appellant, *pro se*, sent three letters to the circuit court in May of 2006, seeking the appointment of new counsel to appeal her conviction for attempted murder. (R. 80-81.) By order entered June 22, 2006, the circuit court appointed present counsel to represent Appellant on appeal. (R. 82.) On July 20, 2006, Appellant's counsel filed a Motion for Reduction of Sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure, seeking alternative sentencing or concurrent sentences. (R. 83-85.) The circuit court denied this motion, by order entered July 26, 2006. (R. 86.) Appellant then filed a *pro se* Motion for Sentence Reconsideration, asking that her sentences be run concurrently. (R. 109-112.) The circuit court denied this motion, by order entered December 13, 2006. (R. 113.)⁴

On August 1, 2007, Appellant's present counsel filed a Motion for Correction of Sentence pursuant to Rule 35(a) of the West Virginia Rules of Criminal Procedure, alleging for the first time that Appellant had received an incorrect sentence. In this motion, counsel argued—as they do in this appeal—that Appellant should have been sentenced pursuant to West Virginia Code § 61-11-8(b) to 1-3 years in the penitentiary for Attempt to Commit Murder [in the Second Degree], rather than the sentence imposed of 1-15 years under § 61-11-8(a) for Attempt to Commit Murder in the First Degree.⁵ (R. 123-26.) A hearing on this motion was held on October 3, 2007, before Judge David W. Knight, following which he deferred ruling on the motion until he could review the

⁴No appeal had yet been filed, nor had there been a motion filed by counsel to extend Appellant's time to appeal her conviction.

⁵Throughout their brief and in the proceedings below, Appellant's counsel incorrectly cite to this statute. The statute contains subsections numbered (1) and (2), rather than (a) and (b).

transcript of the plea hearing before Judge Frazier.⁶ (R. 127.) After reviewing the plea transcript, Judge Knight denied Appellant's motion for correction of sentence, by order entered August 6, 2008.⁷

It is from this order that the Appellant now appeals.

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's response.

That the Mercer County Circuit Court erred in denying the Petitioner's Motion to Correct Sentence because she was sentenced to the term prescribed by the West Virginia Code for Attempt to Commit Murder in the First Degree, while her Plea Agreement clearly indicates that she pled to Attempt to Commit Murder, which bears a sentence of one(1) to three (3) years in the penitentiary or confinement in jail for not less than six (6) nor more than twelve (12) months and a fine not exceeding five hundred dollars (\$500).

State's Response:

The record reflects that Appellant received the statutorily-prescribed and bargained-for sentence for the offense to which she knowingly and intelligently pled guilty: Attempt to Commit First Degree Murder, a lesser included offense under Count 1 of the Indictment. Therefore, the circuit court did not abuse its discretion in denying her motion for correction of sentence.

That the Petitioner was denied her Sixth Amendment right to effective assistance of counsel because Paul Cassell and Harold Wolfe, III failed to adequately advise her of the difference between penalties in Attempt to Commit Murder in the First Degree and Attempt to Commit a Felony, To-Wit: Murder. The Petitioner's attorneys also failed to object when the Judge kept referring to the Petitioner's

⁶Appellant's counsel did not request that the hearing on this motion be transcribed, so it is not part of the record before this Court.

⁷The actual order and the index to the record indicate that this order was actually entered on August 6, 2008, rather than August 5, 2008, as stated on the copy certified by the circuit clerk.

possible sentence as being three (3) to fifteen (15) years in the penitentiary instead of a much lighter sentence prescribed for the offense pled to by the Petitioner.

State's Response:

Appellant's claims of ineffective assistance of counsel have no basis in fact and are not supported by the record of the plea proceedings. Appellant's defense counsel performed reasonably and competently, and Appellant stated that she was completely satisfied with their representation. In addition, because these claims are being raised for the first time on appeal, they are not ripe for direct appellate review.

IV.

ARGUMENT

A. **APPELLANT RECEIVED THE STATUTORILY-PRESCRIBED AND BARGAINED-FOR SENTENCE FOR THE OFFENSE TO WHICH SHE KNOWINGLY AND INTELLIGENTLY PLED GUILTY: ATTEMPT TO COMMIT FIRST DEGREE MURDER. THEREFORE, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING HER MOTION FOR CORRECTION OF SENTENCE.**

1. **The Standard of Review.**

“In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a de novo review.” Syllabus Point 1, *State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996).

Syl. Pt. 1, *State v. Palmer*, 210 W.Va. 372, 557 S.E.2d 779 (2001) (per curiam).

2. **Appellant Pled Guilty to and Was Convicted of Attempt to Commit First Degree Murder, and Received the Expected and Bargained-for Sentence for That Offense.**

West Virginia Code § 61-11-8 [2002] provides, in relevant part:

Every person who attempts to commit an offense, but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows:

(1) If the offense attempted be punishable with life imprisonment, the person making such attempt shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary not less than three nor more than fifteen years.

(2) If the offense attempted be punishable by imprisonment in the penitentiary for a term less than life, such person shall be guilty of a felony and, upon conviction, shall, in the discretion of the court, either be imprisoned in the penitentiary for not less than one nor more than three years, or be confined in jail not less than six nor more than twelve months, and fined not exceeding five hundred dollars.

Appellant was originally charged in Count 1 of the indictment with First Degree Murder, which carries a sentence of life imprisonment. W. Va. Code § 61-2-2. Accordingly, when she pled guilty to attempting to commit the offense charged in Count 1 of the indictment, she was properly sentenced under this statute to 3-15 years in the penitentiary.

Appellant claims that she was illegally sentenced based on a charge she did not plead to. However, the record of the proceedings below belies her claims. In her Plea Bargain Agreement with the State, Appellant with advice of counsel agreed to enter a “best interests” plea to “attempt to commit murder punishable by an indeterminate sentence of 3-15 years in prison.” (R. 70.)⁸

During the plea hearing, Judge Frazier questioned Appellant carefully regarding her understanding of the offenses to which she was pleading guilty, and the possible sentences she could receive. Excerpts of that hearing show that Appellant clearly understood that she was pleading guilty to Attempt to Commit First Degree Murder, which carries a sentence of to 3-15 years:

THE COURT: And what is the penalty for the offense of attempted . . . I guess it’s first degree murder? Right?

⁸As previously noted, Appellant also agreed to plead guilty to Delivery of Hydromorphone, which carries a sentence of 1-15 years. *See* W. Va. Code § 60A-2-206(b)(1)(K), § 60A-4-401(a)(i).

MR. BOGGESS: Yes.

MR CASSELL: It . . . yes.

THE COURT: I don't know if there's a difference or not.

MR. BOGGESS: Yes, your Honor. Under the attempt section, if you attempt to commit a capital offense then the penalty is 3 to 15 years in the penitentiary. Anything less than a capital offense is 1 to 3. Since she is pleading to attempt to commit a capital offense, the penalty would be 3 to 15 years in the penitentiary.

THE COURT: Is that an indeterminate sentence or a definite sentence?

MR. BOGGESS: I believe it is an indeterminate sentence--

MR. CASSELL: Yes, your Honor.

MR. WOLFE: -- Under the . . . the uh, attempt to commit a felony statute.

THE COURT: Is that correct?

MR. WOLFE: Yes, your Honor.

MR. CASSELL: Yes, your Honor.

THE DEFENDANT: Yes, sir.

THE COURT: So you understand that the penalty for the offense of attempt to commit uh . . . murder in the first degree is an indeterminate sentence of not--

THE DEFENDANT: Yes.

THE COURT: -- less than 3 nor more than 15 years?

THE DEFENDANT: Yes, sir. Yes.

(Tr. 8-9.)

The circuit court also made certain that Appellant understood her two sentences could be made to run consecutively, resulting in an even longer term of incarceration:

THE COURT: Uh . . . but you do understand that those sentences can run consecutively or concurrently?

THE DEFENDANT: Yes, sir.

THE COURT: That's a big factor. Uh, I assume that ya'll have gone over that with her?

MR. CASSELL: Yes, your Honor.

THE COURT: Do you understand those principals?

THE DEFENDANT: Yes, sir.

THE COURT: Concurrent is a good thing from a defendant's standpoint because it means as you are serving one sentence you are serving the other. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So [effectively] that would be like . . . that would be a 3 to 15. But it could be consecutive also and that would . . . and you understand that's in the discretion of the Court?

THE DEFENDANT: Yes, sir.

THE COURT: Which would mean that you would be serving 4 to 30.

THE DEFENDANT: Yes, sir.

THE COURT: Is that correct, Counsel?

MR. CASSELL: Yes, your Honor.

MR. WOLFE: Yes.

THE COURT: And would . . . which is a rather substantial sentence.

THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yes.

THE COURT: And knowing those . . . knowing those penalties do you still wish to enter the . . . these pleas?

THE DEFENDANT: Yes, sir.

THE COURT: And again has anything else been promised that . . . other than what is contained in the written agreement?

THE DEFENDANT: No, sir.

....

THE COURT: Okay, any other questions about the plea agreement or the possible penalties that you could receive?

THE DEFENDANT: No, sir. I understand them. Totally.

(Tr. 10-13.)

Before taking the plea, the circuit court asked Appellant and her attorneys if they had discussed the offense to which she was entering her plea:

THE COURT: . . . As I understand, Counsel, she's pleading to attempt to commit murder in the first degree?

MR. CASSELL: Yes, your Honor.

THE COURT: And have ya'll gone over the elements of that offense?

MR. CASSELL: Yes.

THE DEFENDANT: Yes.

MR. WOLFE: Yes, your Honor.

THE COURT: And uh . . . what are those elements, Counsel? You . . . we'll just make sure that we get those on the record and that she understands all that.

MR. CASSELL: Umm . . . I . . . Ms. Allen would have had to taken a substantial step towards, uh, committing the act of murder in the first degree, which is, uh, requires her to have intent at the time, uh, to commit murder.

THE COURT: And . . . and the murder in the first degree is what we all know what murder in the first degree is. And I assume that's the, uh, intentional, and felonious, and malicious, and deliberate premeditated, uh, killing of another human being.

MR. CASSELL: Yes, your Honor. And I have reviewed that with Ms. Allen last night.

THE COURT: You've reviewed all that with her?

MR. CASSELL: Yes, sir.

THE COURT: I guess since we got to a close to a couple trials that you went through that with her and that . . . that again means the intentional, deliberate, premeditated and malicious taking of another human life without . . . without any excuse. In other words, if I'm being attacked, I can . . . I can kill somebody if in self defense. If I kill somebody in an accident, it's just an accident, but this is . . . this is the intentional, premeditated, and deliberate, malicious taking of another human life.

And you've defined all those terms for her, Counsel?

MR. CASSELL: Yes, your Honor. She understands.

THE COURT: You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And knowing that uh . . . uh very serious offense, do you still wish to plead guilty to attempt to commit that offense?

THE DEFENDANT: I wish to put a best interest plea in for that--

THE COURT: Okay.

(Tr. 18-21.)

After assuring himself that Appellant understood all of the rights she was waiving by entering a plea, Judge Frazier read Count 1 of the indictment charging Appellant with First Degree Murder, then asked her:

THE COURT: As to the lesser included charge therein of attempt to commit murder in the first degree are you guilty or not guilty?

THE DEFENDANT: Guilty, with a best interest plea. For my best interest.

(Tr. 40.)

Appellant then signed a written Plea of Guilty in which she described her plea as “guilty (best interest plea) in attempt to commit murder” with a sentence of “3 to 15” years. (R. 65.) After hearing the State’s summary of the evidence to support the pleas, the circuit court tentatively accepted the plea agreement and Appellant’s pleas, reserving the right to make a final decision after having an opportunity to review the pre-sentence investigation report. (Tr. 50; R. 73.) In its final conviction and sentencing order, the circuit court adjudged Appellant “guilty of Attempt to Commit Murder in the First Degree, a lesser included offense as contained in Count 1 of the Indictment,” and ordered that she be confined in the State penitentiary “for the indeterminate term of not less than three (3) years and not more than fifteen (15) years as provided by law for the offense of ‘Attempt to Commit Murder in the First Degree’ a lesser included offense as the State in Count 1 [of] its Indictment herein hath alleged and by her plea she hath admitted.” (R. 75.) The “law” the court was referring to is West Virginia Code § 61-11-8(1).

3. **There Is No Factual or Legal Basis for Appellant’s Arguments.**

Appellant’s entire argument on appeal appears to be based upon an inartfully drafted order entered by the circuit court following the plea hearing, which described Appellant’s plea as guilty “of the lesser included offense of ‘Attempt to Commit a Felony, To-Wit: Murder,’ as the State in Count 1 of its Indictment No. 05-F-220-F herein hath alleged.” (R. 72-73.) This phrase, “Attempt to Commit a Felony, To-Wit: Murder” appears again in the penitentiary commitment order (R. 77),

but is found nowhere else in the case file. Yet Appellant's counsel have seized on this language in arguing that Petitioner did not plead guilty to attempted First Degree Murder, but to the unspecified felony offense of "Murder" (presumably of the second degree, since there are no other degrees of murder), which carries a sentence of less than life imprisonment. For this reason, they contend that Appellant should be sentenced to no more than one (1) to three (3) years in the penitentiary pursuant to West Virginia Code § 61-11-8(2).

Despite the fact that Appellant clearly stated several times that she was pleading guilty to "Attempt to Commit Murder in the First Degree," her appellate counsel ask this Court to ignore these facts and find that Appellant "in reality" pled guilty to "Attempt to Commit a Felony, To-Wit: Murder, which bears a much lighter sentence." (Appellant's Brief at 5.) This Court should decline their invitation, and affirm the ruling of the circuit court.

The offense of "Murder" is defined by West Virginia Code § 61-2-1 as follows:

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

Appellant was not indicted for Second Degree Murder. She was charged in Count 1 of the Indictment with First Degree Murder, and agreed to enter a "best interests" plea of guilty to "attempt to commit murder punishable by an indeterminate sentence of 3-15 years in prison." (R. 70.) By its reference to the penalty for the offense, the Plea Bargain Agreement demonstrates that Appellant understood she was pleading guilty to attempted First Degree Murder. That is the only "murder" offense that carries a sentence of life imprisonment, and which would therefore trigger the

application of West Virginia Code § 61-11-8(1) in sentencing her to 3-15 years in the penitentiary for its attempt.

Nowhere in the record of the proceedings below is there any discussion of a plea to “Attempted Murder of the Second Degree.” That was not the offer made by the State, nor was it the one accepted by Appellant and her trial counsel. Nevertheless, Appellant argues that because the plea documents do not clearly state “First Degree” Murder, she did not plead guilty to attempting to commit that degree of the offense. This argument completely ignores the record of Appellant’s plea hearing, during which the indictment and plea agreement were discussed with her, and she was repeatedly informed of the correct punishment she faced. Before entering her plea, Appellant said that she understood the terms of her plea agreement, “Totally.” (Tr. 13.)

In *State ex rel. Thompson v. Watkins*, 200 W. Va. 214, 488 S.E.2d 894 (1997) (per curiam), a defendant who pled guilty to two counts of burglary sought a writ of habeas corpus seeking to reduce his sentences. He argued, inter alia, that because the plea agreement contained the words “breaking and entering,” he did not understand the offense to which he was pleading guilty. This Court denied habeas relief, stating:

We reject the argument of petitioner’s counsel that petitioner did not understand he was pleading guilty to burglary. This argument is undermined by the objective facts that appear in the record. The trial court read the plea agreement in open court to the petitioner, indicating the substance of the charges he was pleading to and the penalties. Trial counsel for the petitioner informed the circuit court that he had explained the plea agreement to the petitioner and that petitioner understood the agreement. The petitioner acknowledged at the plea hearing that he understood he was pleading guilty to two counts of burglary, and that he faced a sentence of one to fifteen years confinement on both counts.

200 W. Va. at 220-21, 488 S.E.2d at 900-01 (footnotes omitted).

In his order denying Appellant’s motion for correction of sentence, Judge Knight held:

11. The Court **FINDS** that the transcript of the Plea Hearing is dispositive in this matter, and that the Defendant's affirmations clearly show that she is not entitled to relief. *See* Syl. Pt. 4, *Call v. McKenzie*, 159 W. Va. 191, 220 S.E.2d 665 (1975).
12. The Court **FINDS** that the Defendant pled guilty to the crime of Attempt to Commit Murder-First Degree, as classified under *W. Va. Code*, § 61-11-8, which states, in pertinent part, that "[e]very person who attempts to commit an offense, but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows:
 - (1) If the offense attempted be punishable with life imprisonment, the person making such attempt shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary not less than three (3) nor more than fifteen (15) years.
13. The Court **CONCLUDES** that the penalty for Murder in the First Degree is life imprisonment under *W. Va. Code*, § 61-2-2.
14. The Court **FINDS** that it is clear from the record of this case that it was the understanding of the parties, including the Defendant, that she was pleading guilty to the offense of Attempt to Commit Murder-First Degree, which has a penalty of not less than three (3) nor more than fifteen (15) years— this offense stemming from and being consistent with her original indictment in Count 1 of Murder-First Degree.
15. The Court **FINDS** that the Defendant not only interjected and actively participated in the discussions between the Court and Counsel concerning the plea agreement and the correct penalty in this matter, but, that she also specifically represented to the Court that she "totally" understood the plea agreement and the penalty that she was facing.
16. The Court **FINDS** that Rule 35(a) of the *West Virginia Rules of Criminal Procedure* states that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence."
17. The Court **CONCLUDES** that the sentence imposed in this case is not "an illegal sentence imposed in an illegal manner."

Wherefore, based upon the above, the Court **CONCLUDES** that the Defendant was correctly sentenced on March 27, 2006, to a term of incarceration of

three (3) to fifteen (15) years for the crime of Attempt to Commit Murder-First Degree, in violation of W. Va. Code § 61-11-8.

(R. 138-39; footnote omitted.)

The circuit court's factual findings are not clearly erroneous, and the court did not abuse its discretion in denying Appellant's motion for correction of sentence for the reasons set forth in its order. Appellant received the sentence she expected to receive pursuant to her written Plea Bargain Agreement with the State, with the recommendation and approval of her trial counsel, and in accordance with the applicable statutes. Appellant's present counsel have cited no legal authority supporting their position, and their factual assertions are not supported by the record. This Court should therefore affirm the ruling of the circuit court denying her relief on these grounds.

B. APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE NOT SUPPORTED BY THE RECORD, AND ARE NOT RIPE FOR APPELLATE REVIEW BECAUSE THEY ARE BEING RAISED FOR THE FIRST TIME ON APPEAL.

1. The Standard of Review.

"In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Syl. Pt. 1, *State v. Frye*, 221 W. Va. 154, 650 S.E.2d 574 (2006).

In cases involving a criminal conviction based upon a guilty plea, the prejudice requirement of the two-part test established by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), demands that a habeas petitioner show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Syl. Pt. 6, *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W. Va. 11, 528 S.E.2d 207 (1999).

“It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.’ Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992).” Syl. Pt. 10, *State v. Hutchinson*, 215 W. Va. 313, 599 S.E.2d 736 (2004).

Syl. Pt. 9, *State v. Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (2008) (per curiam).

2. **Appellant’s Counsel Diligently and Effectively Represented Her During the Plea Negotiations and Subsequent Proceedings, and Appellant Was Satisfied With Their Representation.**

On appeal, Appellant claims for the first time that she was denied effective assistance of counsel because her defense attorneys, Paul Cassell and Harold Wolfe III, failed to adequately advise her of the underlying penalties for Attempt to Commit First Degree Murder and Attempt to Commit a Felony, To-Wit: Murder. Appellant now argues that had she known the “actual, much lighter penalty [for] the offense she was pleading to” she would not have agreed that the sentence for that offense was 3-15 years, and would not have taken the plea under those circumstances. (Appellant’s Brief at 11.) Appellant also asserts that her defense attorneys did not provide reasonable assistance because they failed to object when Judge Frazier “incorrectly” referred to 3-15 years as a possible sentence for the crime listed in the plea agreement. Had they done so, she argues that she would have received the “proper” sentence for the offense to which she pled. (Appellant’s Brief at 11-12.)

These claims were never raised in the circuit court. They are based entirely on appellate counsel’s assertions that Appellant did not actually plead guilty to Attempt to Commit First Degree

Murder. However, as demonstrated in Section IV.A. of this Brief, those assertions are erroneous and unsupported by the record. As previously discussed, a review of the transcript of the plea hearing shows that the only offer made to Appellant was to plead guilty to Attempt to Commit First Degree Murder. Consequently, there was no other possible sentence for defense counsel to discuss with her, and no misstatement by the circuit court to which they could have objected.

Appellant was lucky to get the deal that Mr. Cassell and Mr. Wolfe negotiated for her. She was originally charged with First Degree Murder, First Degree Robbery, and two counts of Conspiracy, carrying sentences of life imprisonment, a minimum of 10 years, and 1-5 years in the penitentiary and/or a fine of up to \$10,000, respectively. *See* W. Va. Code § 61-2-2, § 61-2-12(a), and § 61-10-31. In exchange for her “best interest” plea to attempted First Degree Murder, Appellant received a sentence of only 3-15 years and the remaining charges were dismissed. Even though there was a written plea agreement, Judge Frazier in his questions to the prosecutor seemed reluctant to accept Appellant’s plea given the severity of the charges against her and the relative leniency of the terms offered.

THE COURT: What is the basis for this plea agreement allowing a first degree murder charge or a robbery charge, or a felony murder charge to be reduced like this?

MR. BOGGESS: Well, your Honor, there is some question as to whether or not the robbery would be consumed in the first degree murder. Uh, I . . . I . . . I think from a legal or technical standpoint that that, that would ultimately be an issue that we would . . . would face.

As far as reducing this murder first degree to allowing her to plead to the attempt to commit a capital offense, it is our belief that her involvement was this-- was definitely not as the one that actually killed Germaine[sic] Mitchell but her involvement was one that did set up a transaction with Mr. Mitchell which brought him to the scene, at the location where he was killed. She basically set up the deal to get him there to essentially rob him.

THE COURT: Do you believe that she was present there when he was killed?

MR. BOGGESS: Um . . . there's some conflicting statements there but it is our belief that she probably was present, but she was not the one who actually swu . . . did hit the blow that killed Mr. Mitchell.

....

MR. BOGGESS: And . . . and we feel that under the circumstances with regard to Ms. Allen, this is probably the best resolution of this.

THE COURT: Well thank you for that uh, excellent, uh, analysis and outline.

(Tr. 44-46.)

The circuit court also questioned defense counsel regarding their advice and consultation with Appellant regarding the terms of the plea bargain agreement:

THE COURT: Counsel, I have the other plea forms here, could you outline uh . . . for me the uh . . . circumstances under which these forms are gone over with Ms. Allen and the uh . . . and whether or not you are satisfied that she understands all the matters in these forms.

MR. CASSELL: Yes, your Honor. Um, we've both, Mr. Wolfe and myself, had substantial discussion with Ms. Allen about this plea offer that has been made to her. Um, yesterday your Honor, I had traveled to Southern Regional Jail and went over the plea forms with Ms. Allen for approximately three hours. Um, at which time, um, we read the questions together and went over any questions that she had in full detail, your Honor, extensively and I am very confident that Ms. Allen understands, uh, what she is doing and the, uh, constitutional rights that she is, uh, waiving by entering into these pleas.

THE COURT: Ms. Allen, is that what your attorney said there correct about your review and completion of these forms?

THE DEFENDANT: Yes, sir.

THE COURT: Are you representing to the Court at this time that you understand all the matters in these forms including your constitutional rights?

THE DEFENDANT: Yes, sir.

THE COURT: And do you also understand that by entering this plea you're giving up, what we call waiving, all those rights?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

(Tr. 13-15.)

Before taking Appellant's plea, the court inquired further of defense counsel regarding the basis for the plea:

THE COURT: Counsel . . . Counsel, approximately how many conferences have ya'll had, I'm sure it's very many, with Ms. Allen and more importantly to what extent is she aware of the evidence against her in order to change her pleas from not guilty to guilty of these offenses?

MR. CASSELL: Your Honor, we have had multiple meeting with Ms. Allen, uh, far in excess of ten. Perhaps in excess of twenty. Mr. Wolfe and I, ourselves visited her together on three or four occasions. In addition, I have had weekly telephone conversations with her. I know Mr. Wolfe has had some conversations with her also. So we have had extensive contact with Ms. Allen in the preparation of her defense.

Ms. Allen's very aware of the uh . . . evidence against her. We've reviewed the discovery against her. . . . In addition your Honor, we have, uh, had -- hired and retained a private investigator on Ms. Allen's behalf to deal with some alibi issues. Um, we have also retained a, um, medical expert on her behalf. She has seen all the reports from these uh, the private investigator and the expert as well.

And so she has been intricately involved in the defense of this case and knows the facts that are against her and the facts that will be offered in her defense.

THE COURT: So you think she's in a position now to make an intelligent decision whether to accept this plea agreement or go on to trial?

MR. CASSELL: Yes, sir.

(Tr. 21-23.)

Finally, the court questioned Appellant regarding her defense attorneys' representation:

THE COURT: Are you satisfied with your attorneys in this case, Ms. Allen?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel there is anything they have failed to do in representing you?

THE DEFENDANT: No, sir.

THE COURT: Did they do anything that you did not want them to do?

THE DEFENDANT: No, sir.

THE COURT: Do you have any complaints at all about their counsel or representation?

THE DEFENDANT: None.

(Tr. 47.)

The record of the plea proceedings shows that Appellant was represented by competent defense counsel who were diligent in preparing her defense, and who were very effective in securing a favorable plea bargain that allowed her to escape a life sentence for felony murder. Appellant stated that she was satisfied with their representation, and had no complaints. Consequently, this assignment of error is without merit.

3. **Because this Issue Was Not Raised in the Circuit Court, It Is Not Ripe for Direct Appellate Review.**

The record contains no testimony or even any assertion by Appellant herself that she did not understand the offense to which she was pleading guilty or the possible sentence she was facing. Moreover, because Appellant's present counsel failed to raise her claims of ineffective assistance of counsel in the circuit court, there has been no hearing during which Appellant's former defense

attorneys could respond to these allegations. Absent a record, this Court has nothing to review but bare assertions made by her appellate counsel.

This Court has consistently said that “an appellant’s claim of ineffective assistance of counsel is generally not ripe for direct appellate review. *See State v. Miller*, 194 W. Va. 3, 12, 459 S.E.2d 114, 125 (1995).” *State v. Hutchinson*, 215 W. Va. 313, 323, 599 S.E.2d 736, 746 (2004). “In past cases, this Court has cautioned that ‘[i]neffective assistance claims raised on direct appeal are presumptively subject to dismissal.’ *State v. Miller*, 197 W. Va. 588, 611, 476 S.E.2d 535, 558 (1996). *See City of Philippi v. Weaver*, 208 W. Va. 346, 351, 540 S.E.2d 563, 568 (2000). Such claims are more properly raised in a post-conviction collateral proceeding ‘to promote development of a factual record sufficient for effective review.’ *Miller*, 197 W. Va. at 611, 476 S.E.2d at 558.” *Woodson*, 222 W. Va. at ___, 671 S.E.2d at 452. As this Court observed in *Frye*:

When the critical component of a fully developed record is missing, an ineffective assistance claim is all but guaranteed to be denied due to the “‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Miller*, 194 W. Va. at 15, 459 S.E.2d at 126 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052)). We explained the parameters of this presumption in *Miller*:

In other words, we always should presume strongly that counsel’s performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a “wide range.” The test of ineffectiveness has little or nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers’ performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

194 W. Va. at 16, 459 S.E.2d at 127.

Given the applicable standard and the strong presumption that operates in such cases where ineffective assistance of counsel is raised, we conclude, as did the Court in *Miller*, that “we intelligently cannot determine the merits of this ineffective assistance claim without an adequate record giving trial counsel the courtesy of being able to explain his trial actions.” *Id.* at 17, 459 S.E.2d at 128.

Frye, 221 W. Va. at 157-58, 650 S.E.2d at 577-78.

Appellant has failed to rebut the “strong presumption” that her defense counsel’s performance was reasonable and adequate. Accordingly, this Court should deny relief on this ground. Alternatively, the Court should “decline to reach the merits of Appellant’s ineffective assistance claim because the record on appeal is inadequate for such a review. If [s]he so chooses, Appellant may reassert the ineffective assistance claim in a petition for writ of habeas corpus so that a full development of the record may be made before the trial court.” *Woodson*, 222 W. Va. at , 671 S.E.2d at 452 (citations omitted). In a habeas proceeding, if Appellant can demonstrate that she was indeed misled by her attorneys regarding the degree of the offense and its possible punishment, her remedy would be to withdraw her guilty plea and proceed to trial on the original charges.

This Court should not grant Appellant’s request for reduction of sentence because it would violate her written plea agreement with the State, which specified the sentence that Appellant would receive, and deprive the State of the benefit of its bargain.

V.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Mercer County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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By Counsel

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 14th day of May, 2009, addressed as follows:

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