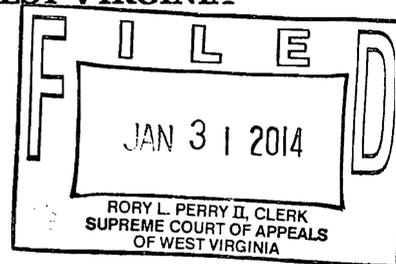


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 13-0779



**STATE OF WEST VIRGINIA**

v.

**CINDY V. ALLMAN**

Appeal from a final order  
of the Circuit Court of Harrison  
County(10-F-79-3)

---

**Petitioner's Brief**

---

**Counsel for Petitioner, Cindy V. Allman**

Jonathan Fittro (WV Bar #7967)

*Counsel of Record*

P. O. Box 1636

Clarksburg, WV 26302-1636

(304) 624-4995

jfittrolaw@yahoo.com

## **ASSIGNMENTS OF ERROR**

THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN SENTENCING THE PETITIONER TO LIFE WITHOUT MERCY BY FAILING TO FIND THAT THE SENTENCE RECOMMENDED BY THE PLEA AGREEMENT WAS CONTRARY TO THE INTERESTS OF JUSTICE.

## **STATEMENT OF THE CASE**

The Petitioner was indicted in the Circuit Court of Harrison County on May 4, 2010, in case number 10-F-79-3. The indictment also named four co-defendants: Alexander Calvin Bosley, Jennie Lynn Bosley, and Jeffery K. Taylor. The seven count indictment specifically charged the Petitioner with Felony Murder in Count 5 and Conspiracy to Commit Burglary in Count 6. The Petitioner pled Guilty to Felony Murder as contained in Count 5 on July 12, 2010 pursuant to a plea agreement in which the State agreed to recommend Mercy. On October 28, 2010, the Circuit Court sentenced the Petitioner to Life without Mercy despite the State's recommendation of Mercy. The Petitioner now appeals this sentence.

## **SUMMARY OF ARGUMENT**

The Petitioner contends that the Court erred and abused its discretion in failing to find that the plea agreement recommendation of mercy was contrary to the interests of justice. The Petitioner contends that because the parties had a joint sentencing recommendation, the Court had an obligation under its role in our adversarial system to give weight to the sentencing recommendation such that it should depart from the recommendation only if the proposed sentence was contrary to the interests of justice. While the Court made findings to support its sentence, it did not expressly find that the interests of justice required a greater sentence than what was proposed in the plea

agreement. Accordingly, the Petitioner argues that the sentence should be reversed and the matter should be remanded to the Circuit Court.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 18(a)(4), Counsel for the Petitioner does not believe that oral argument will be necessary as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

### **ARGUMENT**

**THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN SENTENCING THE PETITIONER TO LIFE WITHOUT MERCY BY FAILING TO FIND THAT THE SENTENCE RECOMMENDED BY THE PLEA AGREEMENT WAS CONTRARY TO THE INTERESTS OF JUSTICE.**

#### **Standard of Review**

“The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997). Further, “Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.” Syl. Pt. 1, *State v. Eilola*, 226 W.Va. 698, 704 S.E.2d 698 (2010).

#### **Argument**

The Petitioner was charged with Felony Murder and Conspiracy to Commit Burglary. Felony Murder carries a sentence of Life, and Conspiracy to Commit Burglary

carries a sentence of not less than one nor more than five years in the penitentiary. Because the Felony Murder sentence so far outweighs the Conspiracy sentence, the Petitioner would contend that this charge was virtually meaningless for the purposes of evaluating the plea agreement in this case. The Petitioner had a right to a trial, and the Petitioner had a right to seek a sentence of mercy from a jury. The Petitioner gave up these rights and pled guilty to Felony Murder in exchange for a recommendation from the State of Mercy.

The Circuit Court's statements explaining its sentence are contained in the sentencing hearing transcript. (Appendix pgs. 200-207). The Petitioner contends that at no point during this discussion does the court give any weight to the sentencing recommendation in the plea agreement. The court did state that it is "always mindful of the terms of plea agreements." (Appendix pg. 202) However, at no point the discussion does the court give any indication that any particular weight was given to the recommendation. The court did not expressly find that the recommendation was contrary to the interests of justice.

The Petitioner contends that in our adversarial system of justice, the trial court has an obligation to be fair and neutral. Counsel for the Defendant is expected to present those facts and arguments favorable to the Defendant. Counsel for the State is expected to present those facts and arguments that serve the interests of the State. The court's role is to balance the interests of the State and the interests of the Defendant, and to apply the law in a fair and neutral manner. "A judge must perform judicial duties impartially and fairly." Commentary, Canon 5, Code of Judicial Conduct.

The Petitioner contends that the court must give some weight to the sentencing recommendations in a plea agreement. The Petitioner concedes that the court may

reject a sentencing recommendation just as it could reject the plea entirely. However, if a joint sentencing recommendation is not entitled to any weight – if the court may reject the sentencing recommendation merely because it may disagree with it, then such a recommendation has no value to the Defendant in a criminal case except to the extent that it might predict what sentence the judge is going to impose anyways. Accordingly, to ensure that a sentencing is fair and impartial, the Petitioner contends that the court must give some weight to the recommendation. If the judge is supposed to be neutral, and the parties agree on what the outcome should be, how can our system justify departure from that outcome?

Having posed that question, the Petitioner concedes that the judge does have a greater obligation than mere neutrality. A judge has an obligation to protect the interests of justice. As such, when a judge determines that a jointly recommended sentence does not serve the ends of justice, the judge must have the power to reject that recommendation. However, the Petitioner contends that the court must conduct that evaluation. It is not merely whether the judge agrees with the sentence, but whether the sentence violates the interests of justice. If the judge determines that the proposed sentence would violate the interests of justice, then the judge should reject it. If the judge determines that the proposed sentence does not violate the interests of justice, then the judge's role as a fair and neutral arbiter should control, and the judge should impose the recommended sentence.

In this matter there is no question that the court disagreed with the recommended sentence. However, there is no evidence to indicate that the court gave the recommendation any weight at all, let alone that the court evaluated the

recommended sentence to determine if it violated the interests of justice. As such, the Petitioner contends that the Court abused its sentencing discretion.

The Petitioner concedes that there is no statute or case law that stand for the proposition that the court must give a joint sentencing recommendation any particular weight. However, the Petitioner contends that this proposition is supported by the court's obligation to be fair and impartial and by the Petitioner's right to due process not only in determination of guilty but also in imposition of sentence. Absent such a rule, the value of a plea agreement containing a sentencing recommendation is of nebulous value to a defendant, and the danger that the defendant will overestimate the value of the plea agreement is great. In this case, the Petitioner gave up her right to a trial and to a jury determination of mercy in exchange for that recommendation. A defendant in a criminal case would has no realistic way of determining whether that recommendation has any value. Indeed, other than those few veteran counsel with lengthy experience with the particular sentencing judge, combined with the ability to make accurate predictions based upon that experience, counsel for the defendant is not in position to accurately predict the value of such recommendations. Accordingly, the Petitioner contends that to protect a Defendants right to due process and to protect a Defendant's right to a fair and impartial sentencing, the court must give the recommended sentence some weight. Because in this matter there is not evidence to show that the court gave the recommendation any weight whatsoever, the Petitioner contends that the sentence should be reversed.

## CONCLUSION

In light of the Circuit Court's error in failing to find that the proposed sentence was contrary to the interests of justice, the sentence in this matter should be reversed, and the matter should be remanded to the Circuit Court for a new sentencing hearing.

**Signed:** Jonathan Fittro  
Jonathan Fittro (WV Bar #7967)  
Counsel of Record for Petitioner

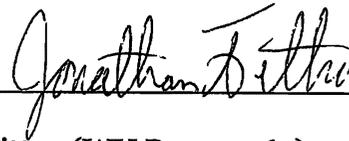
## CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of January, 2014, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Counsel for the State

Laura Young  
Assistant Attorney General  
812 Quarrier Street, 6<sup>th</sup> Floor  
Charleston, WV 25301

Signed: \_\_\_\_\_



Jonathan Fittro (WV Bar #7967)  
Counsel of Record for Petitioner