

FILED  
MARCH 26, 2013  
Court of Appeals  
Division III  
State of Washington

NO. 310612-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

JONATHON VILLEGAS, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 11-1-00572-4

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BRIEF OF RESPONDENT

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## **I. STATEMENT OF THE CASE**

On May 30, 2011, the defendant, a “Florence” gang member, shot Jamie Tovar, a member of the rival “West Crips” gang. (07/12/12, RP 4, 8). This followed an earlier altercation between a fellow “Florence” gang member, Juan Ramirez and Torres and another “West Crips” gang member. After that altercation, Ramirez texted the defendant asking him to meet him and to bring a “toy” which is gang nomenclature for gun. The defendant brought a gun, met the defendant, and while driving in Kennewick was talking about looking for “crabs” which is a common derogatory term for rival gang members. The defendant saw Tovar, and yelled “Florence” which is a common practice for shooting or assaulting rival gang members. (07/12/12, RP 13-17).

The defendant then shot Jamie Tovar.

The State originally charged the defendant with one count of Drive By Shooting, and one count of Assault in the First Degree with a firearm enhancement and an aggravating circumstance of gang involvement. (CP 1-2).

A plea agreement was reached where the State would dismiss the Drive By Shooting where Juvenal Torres was the victim, and reduce the Assault in the First Degree charge to Assault in the Second Degree with the firearm enhancement and gang aggravating circumstance with the

State recommending seven years and the defendant allowed to argue for a sentence within the standard range. (CP 10-11, 15).

One June 14, 2012, the defendant plead guilty to the Amended Information. It started with defense counsel stating “enter a plea of guilty to the assault two with the enhancement and the aggravating circumstance.” (06/14/12, RP 2).

During the colloquy, the Court told the defendant:

COURT: Okay. To prove those charges against you, the State would have to prove you intentionally assaulted another individual, a human being, with a deadly weapon; at the time you did this, you were armed with a firearm and the – and the offense -- that is the assault -- was committed directly or indirectly benefitting your involvement in a street gang.

So do you understand what the State would have to prove if this went to trial?

DEFENDANT: Yes Your Honor.

06/12/12, RP 4).

The court then put the sentencing range on the record. The State then added:

The fact that he’s pleading guilty to the aggravating gang circumstance means the prosecutor could ask the Court and the Court can impose a sentence above nine months for the assault in the second degree, and it will be the State’s intent, in fact, to ask for a total sentence of seven years.

(06/14/12, RP 5).

Defense counsel then told the court that she had fully discussed it with the defendant so that he understands the recommendation that the State could go above the sentencing range with our plea to the aggravating circumstance. (RP 06/14/12, RP 5).

The court then asked the defendant himself if that was his understanding. The defendant answered, "Yes, Your Honor." (RP 06/14/12, RP 5-6).

The court then summarized the plea agreement, that the prosecuting attorney is going to recommend a total of seven years; however, at sentencing the defendant is free to argue for a sentence within the standard range. The court asked, "Is that your understanding, Mr. Villegas?" and the defendant answered, "Yes, Your Honor." (06/14/12, RP 6).

Later the State summarized the factual basis for the gang aggravator:

MR. MILLER: Your Honor, the factual basis should also include that the defendant had been contacted by a member of his own gang or somebody affiliated in a gang that the defendant was a member of; that this third person was actually – who actually pled guilty to his involvement in this gang shooting contacted the defendant and told him about an interaction this third person had with the rival gang member earlier in the evening in Kennewick.

The defendant came to the scene with his gun, did find a the rival gang members, including the one that had the

altercation with the guy from his own gang, and that that was the motivation of shooting the victim.

Miss Rodriguez, by the way, has done an excellent job on this case, and one reason we amended from assault two down to assault one (sic) is that she did point out the members of the rival gang shortly afterwards retaliated with felony assaults against the defendant's gang member and actually in Franklin County received considerably less sentences than the defendant is facing.

But we think that factual basis meets the statutory criteria of the gang aggravator.

THE COURT: Okay. Mr. Villegas, did Mr. Miller recite the facts correctly relating to this plea of guilty here?

THE DEFENDANT: Yes, Your Honor.

(06/14/12, RP 8).

Defense counsel did then state that there would be a different recitation for sentencing, so the court clarified.

“COURT: Okay. But for purposes of the plea, you're accepting the facts that Mr. Miller has recited, is that correct Mr. Villegas?

DEFENDANT: Yes, Your Honor.” (06/12/12, RP 8).

A sentencing hearing was held on July 12, 2012. Testimony was taken from the defendant's juvenile probation officer and the investigating detective on the case.

At the end of the hearing, the court stated that it appears that he pled guilty to the Amended Information with both a firearm enhancement and a gang enhancement. (07/12/12, RP 4).

Defense counsel answered, “Yes, that was the offer from the State.” (07/12/12, RP 34).

The court then found:

And I’m going to impose the sentence of 84 months as recommended by the prosecutor. I think it’s fair. It is outside the standard range, but it is not outside the authority of the Court. It is right in the middle of what I think is an exceptional sentence, and that I think fits in this particular factual pattern.

These drive-by shootings, Mr. Villegas, I want you to know just scare the community to death. Every crime that is charged in Washington has an allegation that indicates it’s against the peace and the dignity of the community, and I don’t know one crime that’s worse than these drive-by shootings. It scares everyone, and it’s extremely dangerous, and I think that this is a fair recommendation. I don’t think it’s a harsh one under the circumstances. I just think it’s a good, firm, fair sentence. And so I’m going to accept that recommendation. And technically what it is is a nine-month sentence, a 36 months enhancement, and 39 months exceptional sentence, and it’s based upon the agreed aggravating factors that were addressed at sentencing – or at the change of plea, and of course, reinforced here today by testimony. Are there any questions?

(07/12/12, RP 36-37).

## **II. ARGUMENT**

### **1. THE DEFENDANT STIPULATED TO FACTS IN SUPPORT OF THE AGGRAVATING FACTORS.**

The defendant apparently concedes that the prosecutor's statement at the guilty plea hearing established a factual basis for the finding of the gang aggravating factor.

The defendant only claims he did not stipulate to those facts. However, immediately after the recitation of the facts that the defendant concedes establish a factual basis for the gang aggravator, the Court asked:

“COURT: Mr. Villegas, did Mr. Miller recite the facts correctly relating to this plea of guilty here?

DEFENDANT: Yes, Your Honor.” (06/14/12, RP 8).

The court then turned to defense counsel and asked if she had anything to add. She stated that while his recitation was different than hers, she would save it for sentencing. However, the court immediately clarified any possible ambiguity by asking:

“COURT: Okay. But for purposes of the plea, you're accepting the facts that Mr. Miller has recited; is that correct, Mr. Villegas?

DEFENDANT: Yes, Your Honor.” (06/12/12, RP 8).

The defendant also understood the significance of his stipulation. Defense counsel stated that the defendant and she fully discussed this and

understood that they could go above the sentencing range with our plea to the aggravating circumstances. (06/12/12, RP 5).

The defendant then said that he also had that understanding. (06/12/12, RP 5).

The defendant incorrectly cites *State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006). There, the guilty plea included the following language with the emphasis added by the State Supreme Court: “stipulate to real and material facts as written in the certification for determination of probable cause and the prosecutor’s summary *without stipulating that those facts are a legal basis for an exceptional sentence.*” (Emphasis added by Court). *Id.* at 285.

There is no such language in the present case. Instead, the defendant on two different occasions specifically said that the facts for the gang aggravator were correct and that for the purposes of the plea, he was accepting the facts that the prosecutor had recited.

The defendant offers no authority for vacating or ignoring a defendant’s verbal statement that the facts were correct and that he was accepting for the purpose of the hearing.

In fact, the record in the present case offers stronger evidence that the defendant knowingly stipulated to the facts supporting the aggravating factor than a simple signature on a written stipulation.

His counsel stated that she had fully discussed it with the defendant and that he understood that the State would be able to “go above the sentencing range with our plea to the aggravating circumstance.” (RP 06/14/12, RP 5). It is telling that there is no claim of ineffective assistance of counsel or any claim that defense counsel did not do as she told the court.

The record also shows that the defendant himself agreed to the facts with direct answers to questions from the court. Again, after the recitation of the unchallenged facts supporting the gang allegation, the defendant twice stated that the facts were accurate and that he accepted them. (06/14/12, RP 8).

**2. DEFENDANT WAIVED HIS RIGHT TO A JURY**

The defendant argues on appeal that while he waived his right to a jury when he pled guilty, he somehow did not waive his right to a jury on the gang aggravator. However, this argument was contradicted by the facts of the case. The guilty plea did not separate the crime from the gang aggravator. It is telling that the defendant does not argue that he did not waive his right to a jury on the firearm allegation/enhancement which is factually closer to the gang aggravator than the underlying crime.

It is important to remember that this was a global agreement. The defendant was originally charged with First Degree Assault for the assault against Tovar and Drive By Shooting with Juvenal Torres as the victim. The defendant successfully convinced the prosecutor to dismiss the Drive By Shooting and reduce the First Degree Assault to Second Degree Assault. This reduced the total sentencing range from 111-147 months plus five years of firearm enhancement to three to nine months plus three years of enhancement. In other words, the exceptional sentence of seven years is still dramatically less than the original sentencing range of 14 years, three months, to 17 years, 3 months which also had the option of a sentence above the sentencing range.

**3. TRIAL COURT'S EXTENSIVE FINDINGS WERE SUFFICIENT FOR EXCEPTIONAL SENTENCE.**

The defendant selectively takes portions of the sentencing hearing to argue that the findings did not support an exceptional sentence. For example, he states that the sentencing judge correctly found that the defendant had not stipulated to the aggravating factor in the plea agreement, yet after argument concluded, that because Villegas pled guilty to the Amended Information, including the gang aggravator allegation "it's not really for me to decide whether or not he should get a gang

enhancement. It's only a matter of how much that ought to be, if any." (App. Brief at 17).

However, the defendant left out the sentencing court's finding that the stipulation may be in the record, just not on the form and that the defendant argued at sentencing that they entered an *Alford* plea on the gang aggravator. (07/12/12, RP 27). The sentencing hearing also included statements from defense counsel "but, you know we took the deal and are at the Court's mercy." (07/12/12, RP 28), and "The way I see it, Your Honor, is that when we enter a plea to the allegation, you're within your discretion to give whatever sentence that you want within that." (07/12/12, 23).

There was also the following colloquy:

THE COURT: I think you unlock an exceptional sentence by stipulating –

MS. RODRIGUEZ: Right.

THE COURT: -- to the aggravating factors. So now it's just a matter of argument. So I think we're limited to the facts of the crime.

MS. RODRIGUEZ: Any my understanding, and correct me if I'm wrong, I don't know if we lock in an exceptional sentence –

THE COURT: No, no, no. You just unlock the possibility. Otherwise it would have to be a jury finding under the federal case. So I think that I guess what the Court would

have available to it is the bottom of the standard range to the top of the class of the felony we're in.

MS. RODRIGUEZ: Yes.

THE COURT: OK

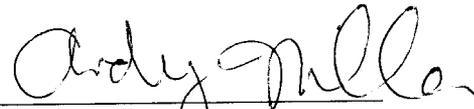
(07/12/12, RP 23).

Further, the court's extensive findings when it pronounced sentence do indeed meet the requirements of an exceptional sentence. The findings are cited verbatim in the State's statement of the case. (07/12/12, RP 36-37).

### **III. CONCLUSION**

The defendant stipulated to facts that support the finding of a gang aggravator. The defendant showed an understanding and agreement that the sentencing court could sentence above the sentencing range based on the defendant's stipulation. The court made appropriate findings. Therefore, the Judgment and Sentence should be affirmed.

**RESPECTFULLY SUBMITTED** this 26th day of March 2013.



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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

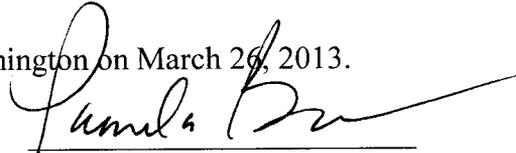
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Signed at Kennewick, Washington on March 26, 2013.



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