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STATE OF WASHINGTON

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COA No. 68032-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MARCUS WILLIS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF KING COUNTY

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF APPEAL**

Marcus Willis entered a plea of guilty as part of a resolution by plea of three cause numbers. The sentencing court departed significantly upward from the prosecutor's recommended sentence on the charge of delivery of a controlled substance, however, based on facts relating solely to a different count of conviction. This was a violation of Mr. Willis' constitutional right to a fair sentencing hearing and he seeks relief.

## **B. ASSIGNMENT OF ERROR**

The sentencing court violated Mr. Willis' right to due process of law by increasing his sentence based on facts relating to a different count.

## **C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

In exchange for Mr. Willis' pleas of guilty to charges instituted in three separate cause numbers, the State agreed to, and at sentencing did recommend, certain sentences for each count of conviction. However, the sentencing court departed upward from the prosecutor's recommendation of 75 months on the VUCSA count, imposing 100 months incarceration based on facts relating to Mr. Willis' conduct in a different one of the causes, his conviction for third degree assault (domestic violence). Did the trial court violate Mr. Willis' constitutional due process right to have his sentence for the crime of conviction determined solely by facts relating to that count?

#### **D. STATEMENT OF THE CASE**

Marcus Willis was charged by information with one count Violation of the Uniform Controlled Substances Act, Delivery of Cocaine, per RCW 69.50.401(1)(2)(a). CP 18. Prior to trial, Mr. Willis indicated his willingness to accept the State's plea offer on that charge (King County no. 10-1-00306-8 SEA), along with negotiated pleas of guilty to a charge of second degree burglary in King County no. 10-1-03195-9 SEA, and to a charge of third degree assault (domestic violence) in King County no. 10-1-03566-1 SEA.

The parties' global resolution by plea of the three causes included the prosecutor's agreement to recommend a total term of incarceration of 75 months, comprised of concurrent prison terms of 75 months on the VUCSA count (based on an agreed offender score of 11 and a standard range of 60+ to 120 months); 68 months on the burglary count; and 60 months on the domestic assault case. The latter two recommendations represented the top of the standard range sentences for those counts. CP 6-26; 6/14/10RP at 11-13.

At sentencing on July 2, 2010, the deputy prosecutor performed the State's promises to recommend the agreed concurrent terms on the three causes and the total combined term of 75 months, as part of the agreement. 7/2/10RP at 22-24. However, the trial court, based on concerns that Mr.

Willis' conduct on the domestic violence assault, in King County no. 10-1-03566-1 SEA, did not show that he had "learned anything" between a prior, 2004 incident and the current assault, imposed 100 months incarceration on the VUCA count, departing upward from the agreed recommendation of 75 months on that charge. 7/2/10RP at 32-33; CP 27-35.

Mr. Willis' *pro se* CrR 7.8(b) motion to modify his sentence, in which he argued that he was entitled to specific performance, was denied. Supp. CP \_\_\_, Sub # 49. He appeals. CP 38.

#### **E. ARGUMENT**

##### **THE SENTENCING COURT VIOLATED MR. WILLIS' DUE PROCESS RIGHTS.**

##### **1. The trial court imposed a sentence of 100 months on the VUCSA count based facts inhering in a different count of conviction.**

Before imposing sentence below, the trial court questioned Mr. Willis' counsel as to whether 75 months was "sufficient given this gentleman's history and the conduct in these cases." 7/2/10RP at 25. Defense counsel, focusing on that sentence, which was agreed in the drug case, noted that Mr. Willis' current VUCSA offense involved a minor quantity of drugs and the facts showed he was not normally a drug dealer, but was attempting to gain funds to support his family. 7/2/10RP at 25. Counsel also noted Mr. Willis' previous participation and good performance in a

CCAP (Community Center for Alternative Programs) enrollment, and stated that parties agreed that 75 months was a substantial sentence for the conviction. 7/2/10RP at 25-26.

When questioned by the court, Mr. Willis acknowledged that he had made bad decisions in the past, and stated that he was committed to becoming a better person because he did not want “to get to a point where I’m on drugs and I kill myself.” 7/2/10RP at 26-28.

The trial court ultimately decided to not follow the State’s recommendations, and based its departure from the prosecutor’s recommendation of 75 months on the VUCSA count, on facts inhering in the current domestic assault conviction. 7/2/10RP at 29.

**2. The sentencing court violated Mr. Willis’ due process right to have the severity of his sentence determined based on facts inhering in the crime for which he was being sentenced.** The Court of Appeals reviews a trial court’s decision on a CrR 7.8(b) motion for relief from judgment for abuse of discretion. State v. Smith, 159 Wn. App. 694, 699, 247 P.3d 775 (2011).

Generally, a defendant may *not* appeal a standard range sentence. State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); RCW 9.94A.585. Exceptions to this rule exist, however, for challenges to the court’s sentencing procedures and for violations of due process. See State

v. Goldberg, 123 Wn. App. 848, 852, 99 P .3d 924 (2004) (standard range sentence may be appealed where constitutional violation is alleged).

Mr. Willis urges this Court that a constitutional principle applies to the present sentencing and appeal. The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. 14. Mr. Willis contends that this due process protection is violated, despite the trial court's authority to impose a sentence within the standard range, where a court bases its sentence on one count of conviction on facts relating to an entirely different, unrelated count.

Here, after the State made its recommendation of 75 months and after the prosecutor noted that the sentence recommended on the current assault count was at the top of the standard range, the sentencing court was dissatisfied. The court first stated it had reviewed the probable cause determination from Mr. Willis’ 2004 domestic violence conviction,<sup>1</sup> which the court described as “hair-raising.” 7/2/10RP at 29.

Based on concerns that Mr. Willis’ conduct on the current domestic violence assault, in King County no. 10-1-03566-1 SEA, did not show that he had “learned anything” between the prior, 2004 incident and

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<sup>1</sup> The information and the prosecutor’s pre-sentence report indicate that Mr. Willis was convicted in 2004 in King County of fourth degree assault (domestic violence) and third degree rape of a child (domestic violence). CP 21; CP 23.

the current assault, the court imposed 100 months incarceration on the VUCA count, departing significantly upward from the agreed recommendation. 7/2/10RP at 32-33; CP 27-35.

However, in a criminal case, the court is only empowered to enter a sentence prescribed for the crime charged. In re Persinger v. Rhay, 52 Wn.2d 762, 329 P.2d 191 (1958); In re Moon v. Cranor, 35 Wn.2d 230, 212 P.2d 775 (1949). Mr. Willis argues that the trial court's sentence of 100 months on the VUCSA conviction was imposed because of the court's frustration that it could not impose a higher sentence than the top of the standard range on the current domestic violence assault conviction. Mr. Willis argues that this sentencing determination violated due process, that he may appeal the sentence, and that he is entitled to re-sentencing.

#### **F. CONCLUSION**

Based on the foregoing, Mr. Willis respectfully requests that this Court reverse the judgment and sentence of the trial court and remand his case for re-sentencing.

Respectfully submitted this 30<sup>th</sup> day of August, 2012.

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 68032-3-I
	)	
MARCUS WILLIS,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> MARCUS WILLIS 737447 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF AUGUST, 2012.

X \_\_\_\_\_ 

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