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68032-3

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I
PROCLAMATION



NO. 68032-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARCUS WILLIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CRAIGHEAD

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A sentence within the standard sentencing range for an offense cannot be appealed absent an error of law or a constitutional violation. Willis entered a valid guilty plea to his charges, knowing that the sentencing court was not bound by a joint recommendation made by the parties. At sentencing, Willis received a legal, standard range sentence above the joint recommendation. Should Willis' claim that the court's standard-range sentence violated his right to due process be barred where there is no evidence of a due process violation?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Willis pled guilty to Burglary in the Second Degree (Burglary 2),¹ Assault in the Third Degree, Domestic Violence (Assault 3, DV),² and a Violation of the Uniform Controlled Substances Act (VUCSA).³ CP 6-25. The joint recommendation from the State and defense counsel was for 68 months on the

¹ King County No. 10-1-03195-9 SEA.

² King County No. 10-1-03566-1 SEA.

³ King County No. 10-1-03566-1 SEA.

Burglary 2, 60 months on the Assault 3, DV and 75 months on the VUCSA delivery, concurrent with each other. CP 26. The recommendations for the burglary and assault charges reflected the high end of the standard range on each charge; Willis' standard range on the VUCSA was 60-120 months. CP 25. These standard ranges were the result of Willis' criminal history: Willis had 11 points, two points over the maximum scoreable points under the sentencing guidelines. CP 25; *2011 Washington State Adult Sentencing Guidelines Manual*, 43.

At sentencing, the Court imposed a 100-month concurrent sentence on the VUCSA, and followed the joint recommendation on the other two cases. CP 30.

2. SUBSTANTIVE FACTS

On January 22, 2010, Willis sold an undercover police officer \$50 worth of crack cocaine, and was arrested. CP 19, 20. He subsequently pled guilty to the delivery and two other felonies. CP 6-25; RP 5-21.⁴

⁴ The verbatim report of proceedings consists of only one volume, and will be referred to as follows: RP (6/14/2010 and 7/2/2010).

3. FACTS OF PLEA AND SENTENCING

Willis pled guilty on June 14, 2010 to all three felonies discussed above. CP 6-25. *Paragraph (h)* of the *Statement of Defendant on Plea of Guilty*, informed Willis that the sentencing judge could exceed the agreed recommendation:

The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range...

If the sentence is within the standard range, no one can appeal the sentence.

CP 10. This same statement included Willis' standard range of 60-120 months. CP 7. At the plea hearing, the prosecutor repeated this admonishment to Willis:

And do you understand that though the judge will listen – the sentencing judge will listen to everyone's recommendation as to what your sentences should be, here she doesn't have to follow anyone's recommendation and could sentence you up to the maximum allowed by law on each case?

RP 12-13. In response, Willis said, "Yes." RP 13.

Near the conclusion of the plea colloquy, Willis' defense counsel added that he had reviewed all of the statements with Willis and was satisfied that Willis understood the consequences of the pleas. RP 19. The court then conducted its own colloquy, asking Willis if he understood everything the prosecutor had asked; Willis

again responded by saying, "yes." RP 19. After receiving assurances that Willis understood the consequences of his plea, and that his attorney had had ample opportunity to speak with his client and review the plea, the court found that Willis had made a "knowing, intelligent, and voluntary waiver" of his rights as to each case, and was "aware of the consequences of [his] pleas." RP 20. After reviewing the *Statement of Defendant on Plea of Guilty* with the prosecutor, his attorney and the court, Willis signed the document on the record. RP 12-13; CP 16.

At Willis' sentencing hearing on July 2, 2010, both the State and defense counsel presented their agreed recommendation. RP 22-31. The sentencing court told Willis, after his allocution, that she had reviewed the probable cause certification in his 2004 case and looked at the facts of the current assault case as well, and "really questioned whether [Willis] had learned anything from that 2004 experience." RP 29-30. Willis then told the court that he was not "going to excuse anything," but that the victim in the case "told some lies." RP 30. After hearing Willis provide his explanation, the court gave her reasoning for the imminent sentence:

...I look at the crimes before me here and I look at your history, and I – and I've listened to you, and I must say that I'm not convinced that you are able to

make the kinds of changes that would be necessary for me to feel like people will be safe with you, in particular that women will be safe with you.

RP 32. The Court then imposed 68 months on the burglary charge, 60 months on the assault charge, and 100 months on the VUCSA case, concurrent with each other. CP 30; RP 32-33.

Willis set a motion asking the sentencing court to modify his Judgment and Sentence and grant specific performance of the agreed recommendation; this motion was denied by the sentencing court. CP 40.

C. ARGUMENT

BECAUSE THE COURT'S SENTENCE IS WITHIN THE STANDARD RANGE AND DID NOT INVOLVE A CONSTITUTIONAL VIOLATION, WILLIS' CLAIM IS BARRED ON APPEAL

Willis claims that the sentencing court's departure from the mutually-agreed recommendation was a violation of due process, because the court considered Willis' other criminal history in rendering its sentence, voicing a concern that Willis had learned nothing from his prior convictions. Absent a constitutional violation, or an error of law, the length of a superior court's standard range sentence is not subject to appellate review. Sentencing judges,

therefore, have nearly unlimited discretion to sentence defendants within the standard range. By considering Willis' criminal history and failure to improve in determining his appropriate sentence, the sentencing court acted within its discretion; the claim should be barred.

RCW 9.94A.585(1) prohibits appeals of sentences within the standard range: "a sentence within the standard sentence range... for an offense shall not be appealed." Case law has also long supported the prohibition against appealing standard range sentences and the Washington Supreme Court has enforced those rules, holding that as long as the punishment falls within the correct sentencing range established by the Sentencing Reform Act of 1981 and does not involve a constitutional violation, a standard range sentence is not subject to appellate review. State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003).

The court has further held that a sentencing judge need not even state the reasons that justify the length of the sentence imposed. State v. Ritchie, 126 Wn.2d 388, 395, 894 P.2d 473 (1995). In State v. Mail, a case cited by Willis, the court of appeals described the discretion of a sentencing judge to impose a sentence within the standard range as "nearly unlimited."

121 Wn.2d 707, 711 n.2, 854 P.2d 1042 (1993). The same case makes clear that a sentencing court may consider multiple sources of information in rendering a standard range sentence:

...the sentencing court must consider information presented pursuant to [the pertinent SRA statute at the time], but may also consider other sources of information in arriving at a sentence within the standard range.

Mail, at 711.

Willis cites In re Persinger v. Rhay, 52 Wn.2d 762, 329 P.2d 191 (1958) and In re Moon v. Cranor, 35 Wn.2d 230, 212 P.2d 775 (1949) to argue that the sentencing judge committed a due process violation when she considered his criminal history. Both In re Persinger and In re Moon are cases where the defendants were sentenced to felony charges when they pled guilty only to misdemeanor crimes. Id. In both cases, the courts rightly ruled that a defendant should be sentenced for the crime to which he actually pled guilty. In re Persinger at 767 and In re Moon at 231. Here, Willis pled guilty to a felony drug delivery, was sentenced to a felony drug delivery, and his ultimate sentence was well within the standard range for a felony drug delivery with an offender score as high as Willis's. Thus, the cases Willis cites do not apply to the facts here.

Willis cites State v. Goldberg, 123 Wn. App. 848, 99 P.3d 924 (2004) to support the proposition that a standard range sentence may be appealed where there is a constitutional violation. While Goldberg does stand for this proposition, it is not applicable here. Goldberg concerned an ineffective assistance of counsel claim, where the defense counsel failed to object at sentencing to comments made by the prosecutor; while the court found no ineffective assistance, the claim was at least properly raised on appeal because ineffective assistance is a constitutional claim. Id. Willis, on the other hand, relies on a due process argument to invoke the requisite constitutional claim, but provides no authority supporting his contention that a sentence within the standard range violates due process merely because the court considered the defendant's criminal history in its determination of an appropriate sentence.

Here, Willis indicated to the plea court and the prosecutor that he understood all of the rights he was giving up, including the right to appeal a standard range sentence. He even stated that he understood that the sentencing court was not bound by the joint

recommendation and could, in fact, sentence him anywhere within the standard range. The sentencing court, in its discretion, imposed a sentence squarely within that range. CP 10; RP 12-13. In reaching its sentence, the sentencing court relied on the recommendation of the parties, a review of Willis' extensive criminal history,⁵ Willis' own allocution, community safety concerns, and the court's fact-based belief that Willis had learned nothing from his past convictions.

There is no due process right to specific performance of a plea agreement, and Willis knew that prior to entering his plea. There is no due process right that prohibits a sentencing judge from considering the criminal history of a defendant prior to rendering sentence. As such, there is no due process violation in this case and the appeal is barred by RCW 9.94A.585(1).

⁵ Willis' offender score of "11" was an aggravating factor that actually could have been the basis for an *exceptional sentence upward*:

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
... (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

RCW 9.94A.535(c).

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm the sentencing court's standard-range sentence.

DATED this 4 day of October, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

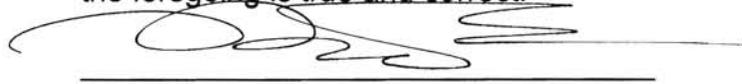
By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V.MARCUS WILLIS, Cause No. 68032-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

10-04-12

Date