

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff/Cross-Appellant

vs.

DAVID WILLAN

Defendant/Cross-Appellee

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CASE NO.: 2012-0216

**ON APPEAL FROM THE
SUMMIT COUNTY COURT OF
APPEALS, NINTH DISTRICT**

**COURT OF APPEALS
CASE NO.: CA-24894**

**CROSS-APPELLEE DAVID WILLAN'S MOTION TO SUSPEND EXECUTION OF
SENTENCE AND SET BOND PENDING APPEAL**

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Now comes the Cross-Appellee David Willan and hereby requests a stay of the trial court's sentence and a bond pending appeal. On July 25, 2012, this Court, by a four-to-two vote (Pfeiffer and Lanzinger, dissenting; O'Connor not participating), accepted jurisdiction on the cross-appellant's first proposition of law regarding whether Mr. Willan is subject to a mandatory ten-year sentence. This Court originally denied the State's motion to stay the judgment of the Court of Appeals and declined jurisdiction to hear either the appeal or the cross-appeal. The Court subsequently granted the State's motion for reconsideration on the single issue. The motion for reconsideration was based on an alleged conflict with an Eight District Court of Appeals decision. After reversing 61 of 67 counts on sufficiency of the evidence grounds, the Ninth District Court of Appeals ruled that Mr. Willan was not subject to a mandatory ten-year sentence for his remaining convictions, which included a RICO conviction and three felonies of the first degree as predicate acts. The portion of the Court of Appeals' decision dealing with Mr. Willan's sentence was the only unanimous part of the Opinion. Mr. Willan has been incarcerated from December 19, 2007 to March 7, 2008 and December 5, 2008 to date for a total of well over four years.

Ohio Rules of Criminal Procedure No. 46 and Ohio Rules of Appellate Rule No. 8 provide for the release on bail and suspension of execution of a defendant's sentence pending appeal. The general dictates of Rule 46 apply, which included:

- (1) The nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon;
- (2) The weight of the evidence against the defendant;
- (3) The confirmation of the defendant's identity;
- (4) The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence, record of convictions, record of appearance at court proceedings or of flight to avoid prosecution;
- (5) Whether the defendant is on probation, a community control sanction, parole, post-release control, bail, or under a court protection order.

Here, all of these factors weigh in support of granting Mr. Willan bail. First, the non-RICO first degree felonies relate to a single form filed three times. While Mr. Willan signed the form, it was completed by his attorney and his attorney, to this date, believes the form to be accurate. The Court of Appeals upheld Mr. Willan's convictions on the three predicate acts on an entirely different theory than that argued in the trial court. Further, Mr. Willan has already served the time sentenced for those felonies. It is solely his RICO conviction that compels his continued incarceration. In fact, Mr. Willan's co-defendants who stand convicted of many more crimes than Mr. Willan all received sentences significantly less than the time Mr. Willan has already served. The most any co-defendant has served is six months. Despite the State's contention in its Reply brief, Mr. Willan's co-defendant, Mr. Mohler, plead guilty to the charge of engaging in a pattern of corrupt activity as charged in the Indictment. The same Indictment charged Mr. Willan and included first-degree felonies as predicate acts.¹ Further, the crimes of which Mr. Willan stands convicted are non-violent and did not involve a gun. There is also little risk of repetition; the companies in which Mr. Willan was involved are no longer operating. Further, as noted by the Court of Appeals, when running the companies, Mr. Willan consistently sought out experienced counsel and instructed them to do whatever was necessary to maintain compliance with all applicable laws, even if more expensive and more than required by law. (Tr. Vol. 11, 1435-1437, 1439, 1440 and Tr., Vol. 12, 1685-1687.) See also, *State v. Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 3. Mr. Willan operated under the same model when hiring an accounting firm to do the financial records and audits to incorporate into the offering

¹ Mr. Willan incorrectly indicated that Mr. Willan's co-defendant, Mr. Conner, also was subject to a less than ten-year term for a RICO conviction with a first-degree predicate act. However, as Mr. Conner was charged under an Information different than Mr. Willan and Mr. Mohler's Indictment, that statement was incorrect.

circulars. He was advised that the costs would be high but hired the firm because of its reputation for honesty and integrity. (Tr., Vol. 11, 1477, 1478.)

The weight of the evidence consideration is, in this case, more appropriately the strength of the State's argument to overturn the Court of Appeals' Opinion. In that respect, Mr. Willan has clearly demonstrated his strong position as a unanimous Court of Appeals, in a carefully and thoroughly researched and considered manner, has already agreed with his position. The State's arguments in support of its appeal are twofold: 1) The plain language is not ambiguous and requires a ten year mandatory minimum and 2) The Eighth District Court of Appeals decision in *State v. Schneider*, 8th Dist. No. 93128, 2010 Ohio 2089 correctly applied the former ORC § 2929.14(D)(3)(a). All three Judges in the Ninth District Court of Appeals found contrary to the State's position and this Court originally declined jurisdiction.

Regarding the decision in *Schneider*, as noted by the Court of Appeals in the instant case, the Eighth District did not undertake the same analysis as did the Ninth District. The State in *Schneider* advocated different positions regarding the mandatory nature of former ORC § 2929.14(D)(3)(a). At the time of sentencing in *Schneider*, the State did not believe that former ORC § 2929.14(D)(3)(a) provided for a mandatory sentence of ten years. Mr. Willan has set forth his arguments much more extensively in his previously filed Brief.

The final three factors of Rule 46 also all weigh favorably in support of the granting of bail. There is no dispute as to Mr. Willan's identity and Mr. Willan was not on probation, a community control sanction, parole, post-release control, bail, or under a court protection order at the time of his arrest. In fact, his only other criminal conviction was a 1992 misdemeanor because of a check that was not presented until after Mr. Willan had closed the account. He was offered a resolution that involved only a small fine and he accepted a plea on that basis. Further,

he is not a flight risk as his ties to the community and his family are strong. Mr. Willan has always resided in Northeast Ohio and has lived in Summit County for over twenty years and there was extensive testimony at his initial bond hearings regarding the extensive and close ties to his family. While on bail pending trial, Mr. Willan complied with all terms and was present in Court at all scheduled times.

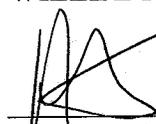
This Court has previously granted such a request on several occasions, including *State v. Garltic* (2009), 122 Ohio St. 3d 1475 which has a similar procedural history. In that case (Case No. 2008-2150), the defendant was originally convicted of aggravated assault and attempted murder. The Court of Appeals reversed and remanded Appellee's conviction for a new trial and the State appealed. This Court granted Mr. Garltic's motion for bond and stayed his sentence. *State v. Garltic* (2009), 122 Ohio St. 3d 1475. In *State v. Wolf* (2008), 118 Ohio St. 3d 1446, this Court granted bond pending appeal and looked at the fact that the defendant had already served the sentence potentially undisturbed by the Court of Appeals ruling. See also *State v. Harrison* (2008), 119 Ohio St. 3d 1405; *State v. Kole* (2001), 91 Ohio St. 3d 1410.

Finally, as noted above, it is important to highlight that not only has Mr. Willan served more time than all his co-defendants *combined*, including those with many more convictions than Mr. Willan, he has also served well over the time for which he was sentenced for the non-RICO convictions that remained after appeal. Three of Mr. Willan's convictions for false representation of securities remained after appeal as well as two other counts, a felony of the third degree and a misdemeanor of the first degree. Mr. Willan was sentenced to a term of three years for each of the false representation of securities and one year and six months respectively on the remaining counts. Those sentences were all ordered to run concurrently. As Mr. Willan has been incarcerated for over four years, he has served the sentences that will be left

undisturbed by this Court's ruling. It is only the ten-year concurrent sentence for Count 1, the RICO charge, that remains to be served. That sentence was ordered to run concurrent with the charges for which Mr. Willan stands convicted.

For the foregoing reasons, Mr. Willan respectfully requests that this Court grant his request to stay the execution of his sentence and to order the trial court to set bail pending the State's appeal in this Court.

Respectfully submitted,
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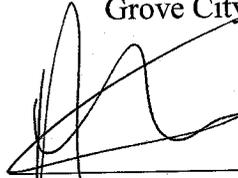
CERTIFICATE OF SERVICE

A copy of the foregoing was served by regular U.S. mail this 2nd day of January, 2013

upon:

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