

ORIGINAL

No. 2012-0216

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE SUMMIT COUNTY COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
Appellate Case No. 24894

STATE OF OHIO,
Appellee/Cross-Appellant

v.

DAVID WILLAN,
Appellant/Cross-Appellee.

Cross-Appellant State of Ohio
Memorandum Contra Cross-Appellee
Motion to Suspend Execution of Sentence and Set Bond

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Argument

Now comes Cross-Appellant, State of Ohio, and for the reasons stated herein, respectfully urges this Court deny Cross-Appellee's [hereinafter "Willan"] recent Motion to Suspend Execution of Sentence and Set Bond Pending Appeal. First, case law relied upon by Willan is not applicable to the situation presented by the instant case. Next, a fair reading of Willan's contentions discloses that Willan may be incapable of conforming his behavior to the dictates of the law should he be released. Finally, release on bond at this stage of the proceeding would be demeaning to the Corrupt Activity offense Willan was convicted of at trial.

A. Inapplicable Case Law

Willan relies upon two primary cases to support that an early release on bond would be appropriate in this case. However, the two cases have one element in common that is definitively different from what is presented to the court in this case. Willan first points to *State v. Garltic* (2009), 122 Ohio St.3d 1475 for the proposition that release on bond would be appropriate. While Willan correctly notes that this Court granted the Movant's Motion for an Order to Set Bond, Willan neglects to point out that the Court of Appeals had reversed all the convictions and vacated the entire sentence regarding the defendant in *Garltic*. The appellate court then ordered a new trial. *State v. Garltic* (Cuyahoga cty 2008), 2008 Ohio App. LEXIS 38521 2008-Ohio-4575. Thus, the question of his guilt was still a matter of question; *i.e.* the presumption of innocence. Here, Willan is *not presumed innocent*. Indeed, Willan remains convicted of multiple first degree felonies.

The next primary case upon which Willan relies is *State v. Wolf* (2008), 118 Ohio St.3d 1446. Again, Willan correctly notes that this Court did grant the Movant's Motion for an Order to Set Bond. However, similar to the facts in *Garltic*, Willan fails to point out that the primary charge the Movant had been sentenced for was reversed by the appellate court. *State v. Wolf* (2008), 176 Ohio App.3d 165; 2008-Ohio-1483. The *Wolf* defendant had been convicted of Aggravated Arson and

sentenced to 6 years on that charge. The defendant was sentenced to an additional one (1) and one-half years on the remaining charges. *Id.* The appellate court reversed the Aggravated Arson conviction where the defendant had been sentenced to six years leaving just the one (1) and one-half years intact on the remaining charges. *Id.* While the trial took place in October of 2006, the appellate court did not render its decision until March of 2008. Thus, the *Wolf* defendant had already served the entire portion of the sentence that remained after the appellate decision.

In this case, Willan has not served his entire sentence. The appellate court did not reverse the remaining conviction on the Corrupt Activity charge, a first degree felony. Indeed, the validity of the conviction is not at issue before this or any other court. The only question at issue in this matter is whether the ten year sentence for that charge is mandatory, pursuant to the wording of the sentencing statute. Should this Court's ultimate decision on that question favor Willan, the decision does not mandate his release at that moment. To the contrary, it would only require the trial court to establish an appropriate sentence within the statutory guidelines for a first degree felony. In effect, Willan asks this Court to predetermine that no further incarceration is proper despite his conviction of a first degree felony. Even should this Court hold that the ten year sentence for the Corrupt Activity conviction is not mandatory, it should first be the province of the trial court to determine the range of incarceration remaining to be served by Willan. *See Appellate Rule 8(B).*

*B. Willan Does Not Demonstrate He Will
Conform His Behavior to the Dictates of Law*

Placing great reliance upon the general dictates of *Ohio Rule of Criminal Procedure 46*¹, Willan revisits the convictions that remain after the appellate decision. In conducting that review he expresses absolutely no remorse and accepts no responsibility for the actions he repeated over a

¹ While Willan cites this Court to the dictates of *Appellate Rule 8*, he neglects to identify that, subsequent to this appeal being filed, there was never a Motion to the trial court, and subsequent Motion to the Ninth Appellate District, requesting the suspension of the execution of his sentence and the denial of such Motions by both of those Courts. *Appellate Rule 8* would seem to indicate that such Motions are the initial steps necessary to follow in a matter such as this.

period of years which led a jury to convict him of multiple first degree felonies. Indeed, Willan simply dismisses his role and responsibility by announcing that his attorney, at the time, completed the falsified forms that were submitted to the State. *Willan's Motion at 3*. Willan seems to overlook the fact that the lawyer only filled out the relevant materials based upon information received from Willan. Moreover, Willan was the individual who then signed the documents certifying the information was indeed true and accurate to the best of his knowledge and belief; not the attorney. Willan then points to the convictions of subordinates and associates and contends that it is somehow unfair that he, the leader of the company he used to commit the crimes, was sentenced to more incarceration than his subordinates and associates. *Id.*

Willan claims there is little risk of repetition because the company he used to commit the crime is no longer operating. Willan ignores the fact he used the company to prey upon the general public and there is nothing to prohibit him from repeating similar actions forming some other scheme to interact with the general public. That possibility is heightened where Willan willfully refuses to recognize the nature of his own actions which led a jury to convict him of multiple first degree felonies.

Further, in the guise of “the weight of the evidence against the defendant”, Willan attempts to use this additional Motion as a vehicle to reargue his position on the issue under R.C. 2914(D)(3)(a), which the parties have already briefed to this Court. The State’s response remains unchanged from the arguments contained in the State’s Merit Brief and the State simply incorporates those arguments by reference to the extent necessary here. Again, it should be noted that the merits of Willan’s convictions for the first degree felonies that remain after the appellate decision are not at issue before this Court. The issue is not whether Willan committed the crime, only whether his sentence for the Corrupt Activity offense is mandatory.

C. *Release on Bond Would Demean the Corrupt Activity Conviction*

The purpose of RICO, as stated in its legislative history, is to eradicate organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. *Russello v. US* (1983), 464 US 16 *citing US v. Turkette* (1981), 452 US 576, 588-89. The Corrupt Activity statute was designed as an enhancement to the penalties for certain criminal activity. RC 2923.32 was enacted to criminalize the “pattern of corrupt activity,” and not the underlying predicate acts. Its application depends on the existence of a “pattern of criminal activity” that violates an independent criminal statute. *State v. Dudas* (Lake cty 2009), 2009 Ohio App. LEXIS 825, 2009-Ohio-1001 *citing US v. Neapolitan* (7th Cir. 1986), 791 F.2d 489,495; *See also State v. Dodson* (Butler cty 2011), 2011 Ohio App. LEXIS 5104, 2011-Ohio-6222.

A conviction under RC 2923.32 is treated like a conviction for a specification to the effect that it is meant to provide an enhanced penalty for a crime; it is a penalty that is imposed *in addition* to the sentence for the underlying; *i.e. predicate, crime*. *See, State v. Middcap* (Summit cty 2006), 2006 Ohio App. LEXIS 2854. (emphasis added) Willan’s request appears to proceed on the misunderstanding that the Corrupt Activity conviction is a “stand-alone” crime. To the contrary, a Corrupt Activity conviction can only exist in addition to a set of circumstances that establish the “underlying” predicate felony. *Cf State v. Ford* (2011), 128 Ohio St.3d 398, 2011-Ohio-765.

Willan points out that he has served the sentence established for the predicate acts that remain after the Ninth Appellate District reversed the multitude of other crimes the jury felt he was guilty of beyond a reasonable doubt. The error in his present request to be released is two-fold. First, unlike the principal cases Willan relies upon, his conviction under RC 2923.32 was not reversed by the appellate court. Second, the request proceeds upon the assumption that incarceration in addition to the time already served for the predicate acts is somehow improper.

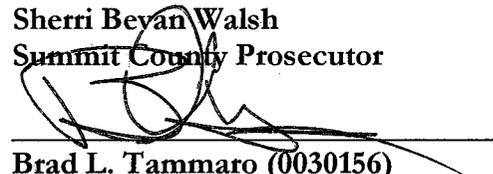
The case law identified above stands as a definitive rebuke to any such assumption. Willan is not presumed innocent and there is certainly no presumption that the trial court will, without question, simply release him after having been convicted of a first degree felony which the General Assembly has deemed should be an *enhancing* penalty to the underlying predicate crimes. Releasing a person convicted of multiple first degree felonies in the middle of serving a sentence makes no sense considering the circumstances that resulted in the very existence of the Corrupt Activity statute under which he has been convicted.

Conclusion

For the reasons stated herein, Cross-Appellant, State of Ohio, respectfully urges this Court deny Willan's instant request to Suspend the Execution of Sentence and Set Bond Pending Appeal.

Respectfully Submitted,

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Certificate of Service

This is to certify that the foregoing **Cross-Appellant State of Ohio Memorandum Contra Cross-Appellee Motion to Suspend Execution of Sentence and Set Bond** was served upon the following by **US Mail**, this 24th day of January, 2013.

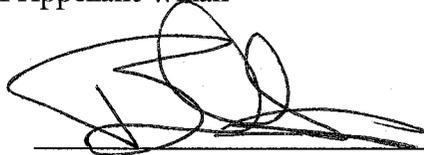
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A handwritten signature in black ink, appearing to read 'Brad L. Tammaro', is written over a horizontal line.

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