FILED
Nov. 29, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 28721-1-III
Respondent,	)	
v.	)	
COREY JAVON WILLIAMS,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Corey J. Williams appeals his convictions for two counts of unlawful delivery of a controlled substance and one forgery count. He contends the trial court erred when instructing the jury it must be unanimous to either accept or reject the school bus stop enhancement. The trial court imposed a 24-month sentence enhancement after the jury accepted that aggravating factor. This court stayed this case pending a decision in *State v. Guzman Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012). The *Nuñez* court rejected Mr. Williams' argument that the jury need not be unanimous in rejecting the enhancement. Adhering to *Nuñez*, we reject Mr. Williams' contention. Additionally, we reject his pro se statement of additional grounds for review (SAG). Accordingly, we

affirm.

FACTS

The State charged Mr. Williams with two counts of delivery of a controlled substance, cocaine; one count of possession of a controlled substance, cocaine; and one count of forgery. One of the delivery charges included a special allegation that the crime took place within 1,000 feet of a school bus stop.

Regarding the special allegation, the court instructed the jury:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer "no".*

Clerk's Papers at 37 (emphasis added). Mr. Williams did not object to this instruction.

The jury found Mr. Williams guilty of the delivery charges and the forgery charge, but not guilty of the possession charge. The jury also found one of the deliveries occurred within 1,000 feet of a school bus stop. Mr. Williams' sentence included a 24-month sentence enhancement based on the jury's finding. He appealed.

ANALYSIS

A. Enhancement Instruction

The issue is whether the trial court erred in its school-zone enhancement

instruction. Relying on *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), Mr. Williams argues the court erred in instructing the jury that in order to answer the special verdict form the jury must be unanimous. In short, the *Nuñez* court overturned the *Bashaw* decision when deciding *Nuñez*. We review claimed instructional errors de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

Mr. Williams failed to raise this issue below. This division has decided this claim is not of constitutional magnitude and may not be raised for the first time on appeal. *State v. Guzman Nuñez*, 160 Wn. App. 150, 153-54, 165, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011). The Supreme Court did not address the waiver issue when deciding the unanimity issue. Given this backdrop, we conclude the issue is waived and cannot be raised for the first time on appeal. Even so, in *Nuñez,* our Supreme Court overruled the nonunanimity rule set forth in *Bashaw,* concluding it "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." *Nuñez*, 174 Wn.2d at 709-10. In reaching this decision, the Court noted for aggravating circumstances, under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the legislature "intended complete unanimity to impose or reject an aggravator." *Id.* at 715 (citing RCW 9.94A.537(3)). Applying *Nuñez* here, the trial court properly instructed the jury it had to be unanimous to either answer "yes" or "no." Accordingly, it did not err.

B. Statement of Additional Grounds for Review

In his SAG, Mr. Williams raises the above unanimity issue raised and adequately addressed by his counsel. Thus, we do not reexamine the issue. *See* RAP 10.10(a) (purpose of SAG is to permit appellant, "to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel").

Illegal Search. Mr. Williams contends the forged check was illegally obtained by police after it was seized under a search warrant issued to search his vehicle. Mr. Williams argues probable cause did not exist to support the search warrant. We presume an affidavit supporting a search warrant is valid. *State v. Atchley*, 142 Wn. App. 147, 157, 173 P.3d 323 (2007). Under the Fourth Amendment, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are necessary to the finding of probable cause. *Id.* at 158. In making this determination we generally will not go beyond the four corners of the affidavit. *State v. Jansen*, 15 Wn. App. 348, 350, 549 P.2d 32 (1976). The affidavit is not in our record. We cannot review a Fourth Amendment issue when the record is inadequate. *See State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (refusing to review whether defendant's incriminating statements were inadmissible because the record was unclear as to whether the statements were the product of an illegally obtained search warrant).

Offender Score Calculation. Mr. Williams next contends the court erred in calculating his offender score. Mr. Williams argues an Alaska conviction should not have been counted in reaching his offender score, however, he did not raise this issue at sentencing. Therefore, the issue is waived. *See In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494-96, 158 P.3d 588 (2007) (holding that issue waived when defendant failed to ask the sentencing court to make a discretionary call of any factual dispute). Even so, it appears his 2002 Alaska conviction was not counted. Mr. Williams was on community placement/custody when the current offenses occurred. RCW 9.94A.525(19) states, "If the present conviction is for an offense committed while the offender was under community custody, add one point." The court counted one point for each offense for an offender score of three. Thus, the trial court did not miscalculate his offender score.

Ineffective Assistance of Counsel. Mr. Williams next contends defense counsel was ineffective for failing to object to the special verdict instruction. Washington follows the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to establish ineffective assistance of counsel, Mr. Williams must show (1) defense counsel's conduct was deficient, and (2) the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because the defendant must meet both prongs, a failure to

show either prong will end the inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986). As discussed above, the special verdict instruction was properly given. Thus, defense counsel's failure to object was not deficient and thus, could not have been prejudicial. Accordingly, Mr. Williams' fails to establish ineffective assistance of counsel.

Judicial Misconduct. Lastly, Mr. Williams contends the trial court wrongly instructed the jury to continue deliberations when it could not reach a decision. The presiding juror stood to read the verdicts and then realized one of the verdict forms was not completed. The judge asked if the juror wanted to complete it. The juror apologized for not completing the form and completed it before reading the verdicts. Judicial misconduct generally entails improper conduct and that the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). This situation involved a properly corrected administrative oversight and is not misconduct.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Sweeney, J.

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Kulik, J.