

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

MELVIN WILLIAM DAVIS,

Appellant,

v.

Case No. 5D12-4262

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed August 8, 2014

Appeal from the Circuit Court
for Orange County,
Marc Lubet, Judge.

James S. Purdy, Public Defender, and
Susan A. Fagan, Assistant Public
Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Bonnie Jean Parrish,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

Melvin William Davis was charged with possession of ammunition by a convicted felon and trafficking in hydrocodone. The charges were tried separately, and he was convicted of both charges. Davis argues that the State failed to prove he possessed, the ammunition and the hydrocodone, and that judge entered a vindictive sentence.

While we confirm the convictions, we find the sentences were vindictive, and reverse for resentencing.

Regarding the first issue, the ammunition was found in a backpack located in a hall closet. Davis testified that a friend, Boosie, asked to leave some of his property in the hall closet, and he was permitted to do so. However, the backpack contained a letter addressed to Davis, which is sufficient to prove that the backpack belonged to Davis. Further, when the hydrocodone pills were found, Davis's response that they were only pain pills showed that he knew of their presence and what they were. Moreover, Boosie was never located. The jury was not compelled to believe Davis's testimony about Boosie. Therefore, there was sufficient evidence to establish that the ammunition and hydrocodone belonged to Davis. We affirm Davis's convictions.

Regarding sentencing, when the court participates in negotiations, caution must be taken not to enter a harsher sentence than the court had offered unless something unforeseen in the record justifies a harsher sentence. See *Wilson v. State*, 845 So. 2d 142 (Fla. 2003). Here, the state stated in the record that the court had "extended to Mr. Davis a global offer of 15 concurrent to settle all four of his cases."¹ At the outset of the ammunition case, the court asked how they were doing on Davis's case. Davis's attorney responded that they were in a trial posture and that his client wanted a trial. This should have stopped plea negotiations. However, the court pursued the matter, advising Davis that if he were convicted of any of his offenses, he would probably receive consecutive sentences on the two charges. Davis repeated his request for a trial. The judge responded, "[h]e can have a trial on every one he wants. And he can

¹ These two cases were part of four related cases. Davis was convicted on all the cases.

get consecutive time on every one of them if he gets convicted.” At sentencing on Davis's ammunition conviction, the judge stated: "I would ask you why you did it, but you wanted a trial." Davis was sentenced to fifteen years' incarceration consecutive to a previous conviction.

Before starting the hydrocodone case, the judge informed Davis that if convicted, he could get thirty years' incarceration consecutive to his prior convictions. The judge added, "I'm saying it's possible. I'm not telling you what the sentence is going to be but you've already seen what happened in the last one." Davis was convicted and sentenced to 11.52 years' incarceration consecutive to his other sentences, which was later amended to five years consecutive incarceration. Instead of fifteen years originally offered by the trial court for all four offenses, Davis was sentenced to twenty years on only two cases. Applying the factors in *Wilson*, each factor would suggest a vindictive sentence. We reverse the sentences on each count.

AFFIRMED in part, REVERSED in part, and REMANDED for resentencing before a different judge.

SAWAYA and ORFINGER, JJ., and Senior Judge, HARRIS, C. M., concur.