DISTRICT OF COLUMBIA
COURT OF APPEALS

MARLON A. WILSON

V.

UNITED STATES

22-CO-43; 22-CO-843
2014-CF3-11881

Appeal from the Superior Court
of the District of Columbia
Criminal Division

BRIEF OF APPELLANT

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22 D.C. Code 1804a(a)(2); 24 D.C. Code 403.01(b)(7)(c)

PARTIES

Mr. Wilson was represented below by the following: Eli Northrup, DCPDS; Lauren Johnson, Joseph Caleb, Chantaye Redmon-Reid, Deborah Persico, and Michael Madden. The United States was represented by Timothy Shea and David Misler.

WILSON STATEMENT OF THE CASE

Appellant Marlon Wilson was convicted after a jury trial of one count of Robbery; one count of first degree theft, two counts of second degree theft, and two counts of misdemeanor credit card fraud. Prior to trial the United States had served written notice pursuant to 23 D.C. Code 111, claiming that Mr. Wilson had twice been convicted of crimes of violence, which would allow enhanced penalties under 22 D.C. Code 1804a(a)(2) (aka life papers). The convictions listed in the enhancement notice were: Burglary Two, in case 2006-CF2-2806; and Robbery, in case 2005-FEL-5239. The conviction dates for both were September 21, 2007. That's because, although the crimes happened separately, Mr. Wilson pled guilty to both at the same proceeding and was sentenced for both at the same time.

The basic facts supporting the convictions in this case were as follows. On July 6, 2014, Ms. Jamie Piland was at a bar when Mr. Wilson sat next to her and seemed to fiddle with her backpack, which was hung over her chair. Later she discovered that her wallet was missing.

On the same day, Ms. Areksamvia Voznitza was at another bar when Mr. Wilson sat behind her, then left. A short time later she was notified by her credit

card company that her card was used. She then discovered that her wallet was missing.

Mr. Wilson's Robbery conviction was as to Ms. Piland. He was acquitted of robbery as to Ms. Voznitza but convicted of first degree theft.

A new lawyer was appointed for Mr. Wilson's sentencing, due to his complaints against his trial counsel.

At sentencing, Judge Milton Lee addressed the matter of what he believed was the mandatory minimum fifteen year sentence for the robbery conviction, and said that the law required him to impose the sentence, but that it was 'an unpleasant thought.....and it disturbs me, makes me uncomfortable to have to do this....' Tr. 7/15/16 at 25.

Mr. Wilson was sentenced to a total of sixteen years. Fifteen was for the robbery. An extra year was added for the first degree theft. All the other counts ran concurrent. This was the exact sentence requested by the government.

His lawyer at sentencing did not object to the application of the life papers, nor contest the validity of the papers, even though the two convictions happened on the same day.

Mr. Wilson appealed.

On February 15, 2018, DCCA affirmed all the convictions, in an unpublished opinion. In particular, it applied the plain error standard to Mr. Wilson's claims that the life papers were improper, since the sentences happened on the same day. *Wilson v. United States,* 16-CF-750; 16-CO-616, February 15, 2018, 12-15. It was stated that Mr. Wilson could not meet the plain error standard because DCCA had not decided how to treat the apparently anomalous sections of the enhancement statute.

On March 29, 2018, appellate counsel for Mr. Wilson filed a motion to correct an illegal sentence under Super. Ct. Rules 35(a) and 35(b), claiming that the robbery sentence was illegally enhanced under 22 D.C. Code 1804a. In the alternative, the motion argued that the sentence should be vacated under the rule of lenity. The motion also cited the judge's comments at sentencing, in support of the Rule 35(b) motion.

On September 25, 2019, Mr. Wilson's lawyer appointed for his 23-110 motion filed a supplement to the *pro se* motion, adopting the Rule 35 motion and arguing that sentencing counsel provided ineffective assistance because she failed to challenge the applicability of the life papers.

On March 12, 2020, the United States filed an omnibus opposition to the above cited motions.

On January 11, 2022, Judge Milton Lee issued an Order denying any relief. Mr. Wilson filed notice of appeal, through counsel.

Mr. Wilson, acting *pro se,* then filed several motions, including a motion to correct sentence, a request for a hearing, a request for reconsideration, and a 23-110 motion. Judge Lee denied all these motions in an Order filed on October 17, 2022. He interpreted all of them as asking for re-litigation of the sentencing question. Mr. Wilson, through counsel, filed a separate notice of appeal on November 6, 2022. (And one of his own later.)

This Court consolidated the two appeals on November 16, 2022.

ARGUMENT

THE ENHANCEMENT PAPERS SERVED UPON MR. WILSON FAILED TO EXPOSE HIM TO ENHANCED PENALTIES UNDER 22 D.C. CODE 18a(a)(2), THUS, HIS ATTORNEY'S FAILURE TO ARGUE THAT AT SENTENCING WAS INEFFECTIVE ASSISTANCE.

Mr. Wilson's lawyer for sentencing did not object to the judge's apparent conclusion that he was forced by the statute to pronounce a mandatory fifteen year sentence on the robbery charge. She failed to do that, even though the statute is not clear about whether two charges that derived from separate acts

but were sentenced on the same day count as two convictions for purposes of the life papers. This ambiguity is apparent from a simple reading of the statute.

Her failure to object allowed this Court to decide Mr. Wilson's appeal on that issue based upon the plain error doctrine. Since the issue was one that had not been decided by this Court, the division held that there could not be plain error. *Wilson v. United States,* 16-CF-750; 16-CO-616, Feb. 15, 2018, at 12-15.

Thereafter, based upon this aspect of the MOJ in the direct appeal, the trial judge was faced with the issue of whether the life papers filed in the case actually comported with the statute, because Mr. Wilson filed an ineffective assistance of counsel motion, citing sentencing counsel's failure to object to the life papers. The argument was that failure to litigate the matter below subjected the issue to unfavorable plain error review at DCCA.

The trial judge denied relief. In so doing he concluded that Mr. Wilson's preferred interpretation of the enhancement statute would result in absurd consequences. That is, if he had pled at the same time to these charges, but had been sentenced on consecutive days, then that would qualify him for enhancement.

Unfortunately, the *reductio* technique can be applied equally to the judge's and the government's preferred interpretation. Suppose, for instance, that in this

case Mr. Wilson had been convicted of both robberies, occurring an hour apart in separate venues. If separate events, not separate convictions, is the standard, those two stealth robberies would subject Mr. Wilson to a possible life sentence under the enhancement provision at issue here.

The simple truth is that the statute in question is not well drafted because it is unclear. And, importantly, either strict interpretation of the language results in possible absurd results.

The most reasonable way to approach this problem is to think through the matter and give the law an interpretation that saves it from the absurdities set out above.

That interpretation is that for there to be drastic enhancement of statutory maximum sentences, the two convictions referenced must be separated by some period of punishment or a chance for rehabilitation of the offender – or both. In that way, we lose the absurd consequences set out above, which are caused by too literal a reading of the words of the law.

Interpreted in this way, the law makes some sense. Council wanted to add to the possible consequences of crimes done by repeat offenders. But the repeat offenders cannot be people who go on a short duration theft spree, picking several pockets on a single day. Rather, the offender who is the target subject of

the statute is one who had erred, been given a chance to reform, or at least been given punishment, and then reoffended.

It is the duty of an appellate court to interpret a statute in such a way as to avoid absurd results, *even when the language used is clear.* See: *Cardozo v. United States,* 255 A.3d 979, 991-993 (D.C. 2021)(dissent). When a possible interpretation of a statute would lead to absurd consequences which the legislature could not have intended it is to be rejected. *James Parreco & Son v. D.C. Rental Housing Comm'n,* 567 A.2d 43, 46 (D.C. 1989)(citing *United States v. Brown,* 333 U.S. 18, 27 (1948).

Where a literal interpretation of the statute would lead to an absurd result, the court will follow the legislative intent, despite the literal wording. *Moten v. United States,* 81 A.3d 1274, 1277 (D.C. 2013); *Haney v. United States,* 473 A.2d 393, 394 (D.C. 1984).

This statute yields absurd results unless it is interpreted in the way suggested above – calling for two convictions separated by some period of either punishment or a course of rehabilitation, or both.

That being so, Mr. Wilson has shown both prongs ineffective assistance set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Trial counsel should have contested the application of this ambiguous statute. Her failure to do so resulted

in clear prejudice to Mr. Wilson, as his sentence exceeds the statutory maximum for robbery, based upon a false interpretation of the enhancement statute.

THE RULE ON LENITY APPLIES TO MR. WILSON'S SENTENCE HERE, SINCE THE ENHANCEMENT STATUTE IS AMBIGUOUS.

The language of the enhancement statute is (clearly) ambiguous, as demonstrated above and conceded in the MOJ opinion in this case. The trial judge did not apply the rule, because he held that the statute was not fatally ambiguous. See: Order at 9, n. 26.

That conclusion – that the statute did not suffer from a 'grievous ambiguity or uncertainty' is incorrect.

Thus, the rule of lenity should have been applied at the resentencing. See: *In re Richardson,* 273 A. 3d 342, 349 (D.C. 2022). Criminal statutes should be strictly construed and ambiguities should be resolved in favor of the defendant. *Coleman v. United States,* 202 A.3d 1127, 1141 (D.C. 2019). It is appropriate to apply where, as here, a penal statute's language, structure, purpose and legislative history leaves its meaning genuinely in doubt. *Holloway v. United States,* 951 A.2d 59, 65 (D.C. 2008).

IN HIS ORDER DENYING THE INEFFECTIVE ASSISTANCE MOTION THE JUDGE MAKES IT VERY CLEAR THAT HE MISTAKENLY REGARDED THE FIFTEEN

YEAR SENTENCE HE IMPOSED BASED UPON THE ENHANCEMENT STATUTE AS A MANDATORY MINIMUM, AND NOT A MINIMUM MAXIMUM.

One aspect of the entire process involved in Mr. Wilson's sentencing is the fact that the sentencing judge mistakenly regarded the fifteen-year sentence as a mandatory minimum. It is not. Rather, it is a minimum maximum. *Brocksmith v. United States,* 99 A.3d 690, 700-703, n. 13 (D.C. 2014).

The enhancement statute's language precisely tracks that of the robbery statute itself, which establishes a minimum maximum of two years. It does not establish a mandatory two-year sentence. Those defendants who have gotten probation for first offense robbery convictions would be surprised if it were otherwise.

Given the comments the judge made at sentencing, cited above, it is entirely possible that he would not have imposed the fifteen-year sentence had he realized this.

If this Court decides the issue of the applicability of the enhancement statute in Mr. Wilson's favor, the judge will have to reduce the sentence imposed at least to thirteen years, with two years of supervised release. See: 24 D.C. Code 403.01(b)(7)(c).

If it goes the other way, the judge would have had the authority to impose the sentence that he did. However, he will have imposed that sentence based upon a legal mistake, and the case would have to be remanded for him to sentence based upon an accurate understanding of the law. *Brocksmith* at 701, citing *Wallace v. United States,* 936 A.2d 757, 780 (D.C. 2007); *Sanders v. United States,* 975 A.2d 165, 167 (D.C. 2009).

CONCLUSION

WHEREFORE, Appellant Marlon Wilson prays for relief.

Respectfully submitted,

\\\TTH///s

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Service: A true copy of this Brief and appendix has been served upon the USAODC, Appellate, via the Court's electronic service system, this 30th day of June, 2023.

\\\TTH///s

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed April 3, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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T. Heslep
Signature

22-CO-43; 22-CO-843
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