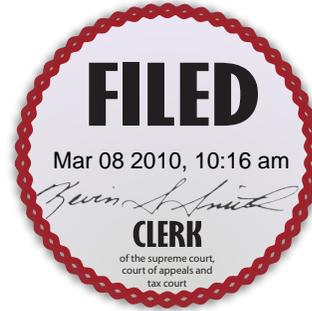


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JORGE GRANADOS,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 43A05-0908-CR-440

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0812-FA-315

March 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Jorge Granados appeals his sentence following a guilty plea to dealing in cocaine, a Class A felony. Granados raises one issue for our review, which we expand and restate as 1) whether Granados waived his right to appellate review of alleged bias or prejudice by the trial judge at sentencing; and 2) whether the trial judge displayed bias or prejudice entitling Granados to resentencing. Concluding Granados did waive the right to appeal his sentence, and waiver notwithstanding, the record does not establish bias or prejudice by the trial judge, we affirm.

Facts and Procedural History

On August 11, 2008, Granados sold cocaine to a police informant in Warsaw, Indiana. The State charged Granados with Count I, dealing in cocaine more than three grams, a Class A felony, and Count II, possession of cocaine more than three grams, a Class C felony. Granados entered into a plea agreement whereby he agreed to plead guilty to Count I in exchange for dismissal of Count II and the dismissal of cocaine dealing and possession charges filed against him in two other cases. The plea agreement provided that Granados would be sentenced to no more than twenty years of executed time but otherwise left sentencing to the trial court's discretion. In addition, the plea agreement provided that Granados "waives the right to appeal sentence." Appendix of Appellant at 63. Granados signed his initials next to this waiver provision and signed his name at the bottom of the plea agreement, which was filed with the trial court on May 28, 2009. The trial court held a guilty plea hearing on June 2, 2009, at which it explained to Granados the terms of the plea agreement and the rights Granados waived therein.

Specifically, the trial court explained, “you have waived your right to appeal the sentence that is imposed by this Court.” Transcript at 11. When asked whether he understood the plea agreement, Granados replied affirmatively.

At a sentencing hearing held on July 2, 2009, the trial court accepted Granados’s guilty plea and the plea agreement. Granados’s counsel noted Granados had several prior misdemeanors but no prior felonies. Prior to imposing sentence, the trial court stated:

The Court would note . . . that the advisory sentence for a Class A Felony is 30 years. The State of Indiana has agreed with you that the maximum period of imprisonment that this Court could impose if it accepts your plea and plea agreement, is 20 years. The State of Indiana has in essence in the Court’s opinion taken into consideration all mitigating factors that this Court could conceivably think might exist. I do note that I’ve reviewed the Statutory mitigating circumstances, note that your incarceration will work a hardship on your dependents. That is not at all uncommon. Had your dependents been relying upon income received from your employment at a legitimate job, I would feel much more strongly about your loss to your family. The Court also acknowledges the non-Statutory mitigating factor that you entered a plea of guilty. . . . I think the State has well acknowledged that in its plea agreement with you. To say nothing, Mr. Granados, of the . . . three cases, maybe four cases that the State of Indiana has agreed to dismiss that involved the same or similar circumstances as in this case and I know that you’re sorry. I think you’re probably sincere about that and I know that you wish you would not have done that. What I don’t know, Mr. Granados, is how many of our children, grandchildren, friends and associates might have been the beneficiaries of the cocaine you were selling. I don’t know that. But I do know that that’s not anything that I think this community needs to have floating around it. Drugs on demand. I don’t live very far from where you reside, Mr. Granados, or did and all I need to do is look out my window and I see cars and people, nice cars, really nice cars, low-riders, thin low profiled tires. Folks having better cars than most other folks and they’re not working. I think I’ve seen you out there, Mr. Granados. I don’t know that I have. But anyway the point is whether you’re sorry, whether you didn’t intend to do it, that doesn’t make any difference. You dealt drugs in this community and shame on you.

Id. at 28-30. The trial court sentenced Granados to twenty years executed with the Department of Correction. Granados now appeals.

Discussion and Decision

I. Waiver of Appellate Review

Our supreme court has held that a defendant may, as part of a written plea agreement, waive the right to review of his sentence on direct appeal. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008). A trial court's "[a]cceptance of the plea agreement containing the waiver provision is sufficient to indicate that, in the trial court's view, the defendant knowingly and voluntarily agreed to the waiver." Id. at 77. Granados's written plea agreement contained a waiver of the "right to appeal the sentence that is imposed by [the trial] Court," tr. at 11, and Granados does not dispute that the waiver was knowing and voluntary and the trial court accepted it. Therefore, Granados has waived the right to appellate review of his sentence.

II. Bias or Prejudice at Sentencing

Waiver notwithstanding, Granados's claim fails on its merits. Granados argues that, to avoid clear injustice, his waiver of appellate review should not be enforced with respect to his claim of bias or prejudice by the trial judge. We need not address in what circumstances a waiver may be disregarded to avoid clear injustice, because the record does not establish bias or prejudice by the trial judge.

"The law presumes that a judge is unbiased and unprejudiced," and "to rebut that presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy." Smith v. State, 770 N.E.2d 818, 823 (Ind. 2002).

Granados contends the trial judge displayed bias or prejudice in the following remarks:

I don't live very far from where you reside, Mr. Granados, or did and all I need to do is look out my window and I see cars and people, nice cars,

really nice cars, low-riders, thin low profiled tires. Folks having better cars than most other folks and they're not working. I think I've seen you out there, Mr. Granados. I don't know that I have.

Tr. at 30. The trial judge made these remarks in the context of discussing the problem of “[d]rugs on demand” in the local community. Id. The judge’s reference to “low-riders,” which Granados claims is a derogatory reference to the Hispanic community, was part of a larger reference to “people” in Warsaw who sell drugs and drive “really nice cars.” Id. Thus, the record does not show the trial judge was prejudiced against Granados based upon his ethnic identity. More problematic is the trial judge’s speculation he may have seen Granados on the street, raising the possibility that the judge formed an opinion of Granados based upon extrajudicial sources. See Liteky v. United States, 510 U.S. 540, 555 (1994) (noting judicial remarks during a trial “may [support a bias or partiality challenge] if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible”) (emphasis in original). However, given the judge qualified the remark by saying he “d[id]n’t know” whether he had seen Granados on the street, tr. at 30, the remark was one brief sentence, and aside from the remarks Granados challenges, the sentencing hearing was otherwise conducted in a professional manner, we cannot conclude the judge’s remarks reveal such a degree of antagonism as to render Granados’s sentencing hearing unfair.

In this regard, we observe the trial judge considered various aggravating and mitigating factors, all of the factors considered are supported by the record and proper as a matter of law, and the resulting sentence was within the statutory range and the cap

imposed by the plea agreement. In addition, Granados's sentence of twenty years is the statutory minimum for a Class A felony, see Ind. Code § 35-50-2-4, so Granados's only available argument for more lenient treatment is that the judge should have suspended part of the sentence. The judge's failure to do so is not evidence of bias. See Cook v. State, 612 N.E.2d 1085, 1088 (Ind. Ct. App. 1993) ("Adverse rulings or the imposition of the maximum possible sentence do not support a claim of bias."). For these reasons, we conclude that notwithstanding Granados's waiver of his right to appeal his sentence, he has not shown bias or prejudice by the trial judge such as would entitle him to resentencing by a different judge.

Conclusion

Granados waived the right to appeal his sentence, and waiver notwithstanding, the record does not establish bias or prejudice on the part of the trial judge.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.