70065-1

70065-1

NO. 70065-1-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

JEFFRY D. SANDVIG,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

WASHINGTON STATUTES

I. ISSUES

1. The defendant was re-sentenced on three remaining counts when this Court overturned his conviction on a fourth count. The trial court sentenced the defendant to less confinement time at resentencing than it ordered before appeal. Under these circumstances does a presumption of vindictiveness arise so that the defendant's Due Process right was violated?

2. Did the trial court articulate a neutral, non-vindictive reason for the sentence imposed at the resentencing hearing?

3. Has the defendant affirmatively demonstrated the sentence imposed was the result of actual vindictiveness?

II. STATEMENT OF THE CASE

The defendant, Jeffry David Sandvig, was charged with two counts of Rape of a Child Second Degree (counts I and II), one count of Child Molestation Second Degree (count III), and one count of Child Molestation Third Degree (count IV) for acts against his former girlfriend's daughter. T.W. 1 CP 79, 114-115. At trial T.W. testified to numerous acts of sexual contact, and attempted sexual intercourse between herself and the defendant when she was between the ages of 12 and 14. 1 CP 80-81. She described the defendant initially grooming her at age 12 by hugging and

kissing her, and taking pictures of her wearing her mother's clothes. 2 RP 71-75[1]. She also described the defendant telling her stories about a stepfather smelling his stepdaughter's underwear and then masturbating to the smell. The defendant told T.W. he had done the same with T.W.'s underwear. The defendant also had T.W. watch pornographic movies with him. 2 RP 108-109; 3 RP 125-126, 130.

T.W. did not feel right about the defendant having sexual contact with her. When she refused his advances the defendant employed several strategies to gain her cooperation. One strategy was to bribe her with money or shopping trips. The defendant also told T.W. that she hated him because she would not give him what he wanted. When that did not work he would get into arguments with T.W., and then ostracize her for days at a time. The defendant also became abusive toward T.W.'s mother, yelling at her that T.W. was "out of control" and insisting that T.W. go someplace other than their home after school because he could not "handle her." T.W. felt horrible and confused about what the defendant did to her, and

---

[1] The State has made a motion to transfer the report of proceedings from the first appeal in this case, no. 66837-4-I to this appeal. The report of proceedings are referred to in this brief as follows: 1 RP – resentencing hearing, 2-22-13; 2 RP – Vol 1 of trial, February 7 & 8, 2011; 3RP – Vol 2 of trial February 9, 2011.

also about not wanting to do those things with him. T.W. felt that she no longer fit in with the other children at school. 2 RP 82, 84, 97; 3 RP 129-131, 142.

The defendant told T.W. that he could do anything he wanted with her because T.W.'s mother would not give him what he wanted, and T.W. was his "little sex toy." The defendant also told T.W. that if she told anybody about the abuse that it would rip the family apart, that the defendant would go to jail, and that T.W. would feel bad for the rest of her life. T.W. did not tell anyone about the abuse because she was scared and confused about what to do. T.W. eventually did tell her mother in what the defendant had done to her. The defendant had told T.W.'s mother that T.W. was having sexual intercourse with her boyfriend, and accused T.W.'s mother of being a "horrible mom." 3 RP 130-131, 142-147.

The defendant was convicted of all four counts. His standard range for counts I and II were calculated at 210-280 months in prison. The standard range for count III was calculated as 87-116 months in prison. The standard range for count IV was calculated as 60 months in prison. 1 CP 92-94.

At sentencing the prosecutor recommended a mid-range sentence for counts I and II, with the sentences on counts III and IV

to run concurrent. The prosecutor argued that in his time prosecuting sex offenses this case was extraordinary in that the victim testified to multiple acts of "horrendous molestation at the hands of someone who is to be loco parentis to her, someone who should have been a stepfather and father-like figure to this child." The prosecutor also noted that at minimum a sentence of 245 months was warranted, given the defendant's conduct in brainwashing the child in order to perform multiple acts of sexual contact with her, the damage that had been inflicted on the child and the time it would take for the child to heal, if ever. 1 CP 49-50.

The defense argued for a low end sentence. The reasons cited for a low end were that this was a determinate plus sentence, meaning the defendant's release date was not guaranteed by the sentence imposed by the court, and that the defendant would face a difficult time finding housing and employment upon his release as a convicted sex offender. 1 CP 53-54.

The trial judge, Judge Wilson, began by explaining that his discretion was limited to the standard range set by the Legislature. He then commented that his personal practice at sentencing was to begin in the middle of that standard range. The judge stated that he would not increase the defendant's sentence above the middle

of the range because the defendant continued to maintain his innocence. 1 CP 55-56. The court then commented on the specific facts of the case:

> But the facts that are presented to me in this case are beyond the normal child rape cases that I have seen come before me, and it's beyond the normal because this was an act that occurred over a four-year period. And frankly, if anything calls out for the high end sentencing range, this does, given the fact of four years of abuse.
>
> I am stunned, frankly, that this child isn't in worse shape than what she presented here at trial. She has found a way to live with what has happened to her and move on with her life to the best of her ability, but at some point there will be a reckoning....

1 CP 58-59.

The court then sentenced the defendant to 245 months on counts I and II, 116 months on count III, and 60 months on count IV, all counts to run concurrently with each other. 1 CP 96.

On appeal this Court reversed the defendant's conviction on count IV on the basis that the defendant had been deprived of a unanimous verdict as to that count. 1 CP 79-87. After conferring with the victim the State elected not to retry the defendant on count IV. 1 RP 3. As a result the standard range for counts I and II were recalculated as 146-194 months in prison. The standard range for count III was recalculated as 57-75 months. 1 CP 23.

The State recommended a high end sentence of 194 months for counts I and II and 75 months for count III. 1 RP 4. The prosecutor relied on the same reasons articulated for the 245 months sentence at the original sentencing hearing. 2 CP __ (sub 67, State's Resentencing Memorandum). The defense opposed a sentence at the high end, arguing that it was not proportionate to the mid-range sentence imposed when the standard range was higher, and therefore would constitute a presumptively vindictive sentence. 1 CP 41, 43.

Judge Wilson decided the authority relied on by the defense was inapplicable when the defendant's standard range had been reduced after an appeal. He then adopted the State's recommendation, sentencing the defendant to the high end of the new standard range for each remaining count. The judge reasoned that when he originally determined the defendant's sentence he took into account the nature of the crime and its impact on the victim as a reason to impose a lengthy sentence. He made clear that the amount of time imposed was not based solely on where it fell within the standard range, but what amount of time represented a sufficient punishment for the crime. 1 CP 24; 1 RP 8-9.

III. ARGUMENT

A. THE HIGH END SENTENCE IMPOSED AT RESENTENCING WAS NOT PRESUMPTIVELY VINDICTIVE.

The defendant argues the trial court acted vindictively when it sentenced him to a proportionally higher sentence at his resentencing hearing than it did at the original sentencing hearing. Ordinarily the Sentencing Reform Act prohibits an appeal of a standard range sentence. RCW 9.94A.585(1). However, a standard range sentence may be appealed where the issue involved a constitutional question. State v. Sandefer, 79 Wn. App. 178, 180-81, 900 P.2d 1132 (1995), State v. Franklin, 56 Wn. App. 91, 920, 786 P.2d 795 (1989), review denied, 114 Wn.2d 1004 (1990). A defendant has a due process right to be free from a sentence imposed in retaliation for the exercise of the right to appeal his conviction. North Carolina v. Pearce, 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the issue raised here involves a constitutional question, the defendant may challenge his standard range sentence.

In order to safeguard the defendant's right of appeal, the Supreme Court articulated a standard to guide trial courts at

resentencing in Pearce. "[W]enever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Pearce, 395 U.S. at 726.

The presumption that a sentence was vindictively imposed has been limited to the circumstances for which it was designed. Thus it does not apply when the original penalty was imposed after a guilty plea and the subsequent penalty is imposed after jury trial. Smith, 490 U.S. at 801. It does not apply where each sentence was imposed by a different sentencer. Thus no presumption of vindictiveness will apply to a judicially imposed sentence when the earlier sentence was imposed by a jury. Texas v. McCullough, 475 U.S. 134, 140, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986). Nor does the presumption apply when two different judges sentenced the defendant. State v. Parmelee, 121 Wn. App. 707, 90 P.3d 1092 (2004).

Vindictiveness is not presumed where the sentence subsequently imposed is less than the sentence originally imposed. United States v. Campbell, 106 F.3d 64 (5th Cir. 1997) (no

presumption of vindictiveness applied even though the defendant was sentenced to more time on the remaining count after a successful appeal resulted in dismissal of two counts when the total time imposed was less than the time imposed at the original sentencing), United States v. Bay, 820 F.2d 1511 (9th Cir. 1987) (same).

Courts in this state have also refused to apply the Pearce presumption of vindictiveness when an aggregate sentence imposed after retrial is less than that originally imposed. This Court rejected an argument that a reduction in offender score and standard range required a proportionate reduction in the length of sentence after appeal in State v. Barberio, 66 Wn. App. 902, 908, 833 P.2d 459 (1992), affirmed, 121 Wn.2d 48 (1993).

In Larson consecutive sentences totaling 363 months imposed on murder, rape, and arson charges were reversed because they were unsupported by any factual findings. State v. Larson, 56 Wn. App. 323, 324-25, 783 P.2d 1093 (1989), review denied, 114 wn.2d 1015 (1990). On remand the court sentenced the defendant to a standard range sentence of 360 months on the murder charge. The other two counts were run concurrent to that sentence. Although the sentence on the murder charge was

greater than originally imposed on that count, this Court refused to apply a presumption of vindictiveness for two reasons. First the aggregate sentence was less severe than the original sentence. Second, the trial court fully explained its reasons for imposing that sentence Id. at 328.

Similarly, in Franklin the Court did not presume the trial court acted vindictively when it imposed sentence after a successful appeal. There the defendant had been convicted of robbery and attempted murder. The trial court imposed standard range sentences for each offense based on an incorrectly calculated offender score. After a successful challenge to the offender score on appeal the trial court imposed the same amount of time originally imposed as an exceptional sentence. The Court rejected a claim that the second sentence was vindictive because the sentence was not greater than the first sentence. Franklin, 56 Wn. App. at 920.

As in Campbell, Bay, Larson, and Franklin, no presumption of vindictiveness should apply because the sentence was not greater than the original sentence imposed. Because the sentence was not increased at resentencing, the Pearce presumption of vindictiveness does not apply.

The defendant argues that the presumption of vindictiveness applies where there is an increase in relative severity of the sentences imposed, citing United States v. Barry, 961 F.2d 260, 268 (D.C. 1992). BOA at 6. The defendant overstates the actual holding in that case. There the Court of Appeals remanded the case to the trial court because it had not supported its original sentence enhancement with adequate findings. At the second sentence hearing the court did not enhance the sentence, but nevertheless found two factors supported a sentence at the top of the reduced range. The sentence imposed at each sentencing hearing was the same, 6 months. Id. at 262-63. In discussing the defendant's argument that the second sentence was the product of judicial vindictiveness, the Court of Appeals acknowledged "it could be argued" that the court acted vindictively. Id. at 268. Assuming for the sake of argument that a presumption of vindictiveness applied, it was nevertheless rebutted by the trial court "credible, non-vindictive rationale for his resentencing decision." Id. The court did not hold that a proportionally higher sentence was presumptively vindictive even where that sentence was not greater than the sentence originally imposed.

Here, even if the court were to accept the defendant's argument that a presumption of vindictiveness should apply, the record shows the court imposed the sentence it did not because the defendant exercised his right to appeal, but because it felt that a long sentence was warranted by the damage the defendant's actions caused the victim. At the first sentencing hearing the court predicted the impact of the defendant's abuse would one day negatively affect T.W. 1 CP 57. The truth of that prediction came to light when at the second sentencing hearing T.W.'s grandfather reported that T.W. had become isolated from her once close knit family because she took on the guilt and blame for what happened. 1 RP 10. Notably this is exactly what the defendant predicted would happen too when the defendant was trying to convince T.W. to give into his sexual requests and to not tell anyone about the abuse. 3 RP 130. On this record that is a "credible, non-vindictive rationale" for the sentence imposed.

B. THE DEFENDANT HAS NOT ESTABLISHED THAT THE TRIAL JUDGE'S SENTENCE WAS ACTUALLY MOTIVATED BY VINDICTIVENESS.

If a presumption of vindictive sentencing does not apply, then the defendant bears the burden to affirmatively prove actual vindictiveness in order to be entitled to relief from his sentence.

Wasman v. United States, 468 U.S. 559, 569, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). A defendant fails to sustain this burden of proof when he does not identify anything in the record to support a claim the trial court's sentence was the result of retaliation against the defendant. State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007), review denied, 163 Wn.2d 1045 (2008).

The defendant argues that evidence of actual vindictiveness does exist here. BOA at 8-9. He points to comments made by the trial judge at the first sentencing hearing, stating that his practice is to start in the middle of the sentencing range, and consider reasons to either go up or down from that point. 1 CP 56. He argues that since nothing changed between the first and second sentencing hearing, and the judge relied on the same information in each hearing, there was no other reason for the proportionally greater sentence than to punish him for his successful appeal. BOA at 9.

The defendant's argument derives from language in Pearce where the Court held a presumption of vindictiveness may be overcome by identifiable conduct on the defendant's part that occurred after the original sentencing hearing. Pearce, 395 U.S. at 726. The argument should be rejected for two reasons.

First as discussed above, the presumption of vindictiveness does not apply here because the sentence was not greater than the original sentence. Thus the State does not bear the burden to show that evidence exists supporting a non-vindictive reason for the sentence imposed. Rather the defendant must affirmatively show that the sentence imposed was the result of judicial retaliation for the defendant's exercise of his right to appeal. Wasman, 468 U.S. at 569. The facts the defendant relies on do not show the judge imposed the high end sentence to punish the defendant for appealing his convictions. Rather the judge imposed the sentence because in his opinion it was appropriate given the nature and extent of the injury the defendant had caused the victim.

Second, it is not necessary that the court rely on events occurring only between the first and second sentencing in order to establish a non-vindictive reason for the sentence imposed. In Pearce the Court did state that in order to rebut a presumption of vindictiveness the reasons for the sentence imposed must be based on "objective information concerning identifiably conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Pearce, 395 U.S. at 726. The Court later explained that statement was not intended to exhaustively describe

all of the circumstances in which a sentence increase could be justified. McCullough, 475 U.S. at 141. Notably the Court has repeatedly stated that a trial judge should consider all relevant evidence when setting an appropriate sentence. Id. at 142, Smith, 490 U.S. at 801.

Here the trial judge did make it clear that he considered relevant information when setting the sentence. He was careful to acknowledge the defendant had a right to maintain his innocence, and did not base his sentencing decision on his exercise of that right. 1 CP 56. The record of the second sentencing hearing contains no evidence that the judge departed from that position. Given that, and that the trial judge specifically relied on the injury the defendant caused the victim to set an appropriate sentence, the record is devoid of any evidence the sentence imposed was the result of retaliation for the defendant's exercise of his constitutional rights.

IV. CONCLUSION

A presumption of judicial vindictiveness does not apply when the sentence imposed at a second sentencing hearing after appeal is less than that originally imposed. The defendant fails to show

any evidence the sentence was the result of actual vindictiveness.

The State asks the Court to affirm the sentence.

Respectfully submitted on December 4, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: Kathleen Webber
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent