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JUL 20 2010

King County Prosecutor  
Appellate Unit

NO. 64821-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICKY SEXTON,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sharon Armstrong, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE PEARCE PRESUMPTION OF VINDICTIVENESS APPLIES HERE.

In his opening appellate brief, Sexton argued the Pearce<sup>1</sup> presumption of vindictiveness applies because he received a proportionately increased sentence on remand vis-à-vis the new standard range. The state responds that the Pearce presumption does not apply, because Sexton actually received a lower sentence of 60 months as opposed to 70 months. Brief of Respondent (BOR), at 5-8 (citing State v. Franklin, 56 Wn. App. 915, 786 P.2d 795 (1989), and State v. Larson, 56 Wn. App. 323, 783 P.2d 1093 (1989)). Franklin and Larson notwithstanding, however, federal cases have held the Pearce presumption applies under circumstances here. See e.g. United States v. Barry, 961 F.2d 260, 295 U.S. App. D.C. 173 (1992); United States v. Alizondo, 91 Fed. Appx. 32, 2004 WL 435457 (C.A.9 (Cal.)), vacated on other grounds, 543 U.S. 1104, 125 S. Ct. 1000, 160 L. Ed. 2d 1019 (2005).<sup>2</sup>

In Barry, former Washington D.C. mayor Marion Barry was convicted of one misdemeanor count for possession of cocaine. At

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<sup>1</sup> North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

the time of sentencing, the United States Sentencing Guidelines (USSG) provided for a base offense level of 6 for cocaine possession, but the judge enhanced this by two levels after determining that Barry “employed subterfuge and false testimony – his own and that of others – in an attempt to avoid exposure and prosecution altogether.” Barry, 961 F.2d at 262. At level 8, the USSG provided for a sentencing range of 2 to 8 months of imprisonment. Nonetheless, citing “evidence of mitigating circumstances operating in [Barry’s] favor,” the judge sentenced Barry to a 6-month term. Barry, 961 F.2d at 262.

On appeal, the court affirmed Barry’s conviction but remanded for resentencing on grounds the district court had not adequately explained how Barry’s perjured grand jury testimony was calculated to obstruct justice for the crime of conviction, i.e. cocaine possession. Barry, 961 F.2d at 262.

On remand, the judge noted he was unable to enhance the offense level by two for obstruction of justice, as Barry’s perjured testimony had not actually related to the crime of conviction. Nevertheless, the judge found there were two factors that militated in

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<sup>2</sup> In S.S. v. Alexander, 143 Wn. App. 75, 93, 177 P.3d 724 (2008), this Court adopted the “majority approach” which allows citation to unpublished federal court decisions without restriction.

favor of a sentence at the upper limit of the guideline range of 0 to 6 months, namely Barry's position as mayor and his attempted obstruction of justice. Barry, at 262-63. And while the judge previously considered Barry's efforts at rehabilitation as a mitigating factor, the judge concluded that, in light of the reduced sentencing level, Barry's rehabilitative efforts were not sufficient to overcome the combined effects of the considerations previously mentioned, *i.e.* breach of trust and obstruction of justice. Barry, at 263.

Barry again appealed his sentence, arguing *inter alia* that the proportionately increased sentence in relation to the new range violated his right to due process and showed vindictiveness by the sentencing judge. Barry, 961 F.2d at 268. In discussing North Carolina v. Pearce, the court noted:

In Pearce, the defendant had been given a more severe sentence on remand than he had received initially. Barry, by contrast, was awarded the same sentence – six months – in each instance. It could be argued, of course, that Pearce nevertheless applies here because the appellate decision required the district court to reduce the sentencing offense level; the reasoning being that under such circumstances, the award of the same penalty on remand is tantamount to an increase in its relative severity.

Barry, 961 F.2d at 268.

The court nevertheless recognized that Pearce does not foreclose the possibility of increased sentences on remand. Rather, it requires that a court explain its choice of an enhanced sentence to ensure that the more severe sentence is not motivated by vindictiveness. In Barry's case, the court concluded the judge provided an entirely credible, non-vindictive rationale for his sentencing decision. Barry, 961 F.2d at 268.

The import of the Barry decision here is that although Barry received the same sentence *lengthwise*, the court nevertheless recognized that it could be argued "*of course*" that Pearce nevertheless applied because imposition of the same sentence – despite the reduced range – amounted to an increase in its relative severity. See also Alizondo, 91 Fed. Appx. 32, 2004 WL 435457 (2004) (assuming but not deciding Pearce presumption applied under similar circumstances).

Just as the same-length sentence re-imposed in Barry amounted to an increase in its relative severity, the imposition of the high end in Sexton's case amounted to an increase in its relative severity. The Pearce presumption therefore applies, and the state's argument to the contrary should be rejected.

Alternatively, the state responds that the reasons given by the sentencing court rebut the presumption of vindictiveness:

Furthermore, the reasons given by the trial court for imposing a 60-month sentence demonstrate that the trial court exercised its discretion appropriately and without vindictiveness. Specifically, the trial court found that Sexton's conduct in the present case, when coupled with his prior involvement with drug offenses, was a sound basis to impose 60 months. RP (12/18/09) 9.

BOR at 9 (emphasis added).

The problem with this argument, however, is that the judge was not as vague as the state suggests. Rather, the court specifically referenced Sexton's alleged "prior involvement in methamphetamine sale and, manufacture[" RP 11. As was later brought to the judge's attention, however, Sexton in fact had no prior convictions for sale or manufacture. Brief of Appellant (BOA) at 10. Yet, the court maintained the same sentence. As a result, unlike the judge in Barry, the judge here did not give an entirely credible, non-vindictive rationale for her sentencing decision.<sup>3</sup>

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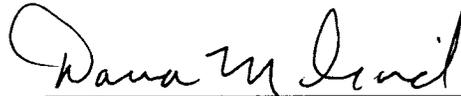
<sup>3</sup> And contrary to the state's argument, the court's reference to the theft of ammonia conviction does not undo its misunderstanding of Sexton's actual priors as involving the sale and manufacture of methamphetamine. See BOR at 10.

B. CONCLUSION

For the reasons stated herein and in the opening appellate brief, this Court should remand for resentencing before a different judge.

Dated this 19<sup>th</sup> day of July, 2010.

Respectfully submitted  
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