

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHNNY McQUEEN, JR.,

Appellant.

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STATE OF WASHINGTON  
BY [Signature] DEPUTY  
COURT OF APPEALS  
DIVISION II

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Bryan Chushcoff, Judge

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APPELLANT'S OPENING BRIEF

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Plm 12/27/08.

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A. ASSIGNMENT OF ERROR

Appellant's state and federal due process rights were violated by prosecutorial vindictiveness at the resentencing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

At the first sentencing, the court imposed a standard-range sentence of 150 months in custody, rejecting the prosecutor's argument that a sentence of 171 months. After McQueen successfully attacked the sentence on collateral review, on remand the prosecutor argued that the court should increase McQueen's sentence from 150 months to 171 months. Does a presumption of prosecutorial vindictiveness apply and is reversal required?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Johnny McQueen, Jr., was charged by amended information with two counts of second-degree assault, a count of first-degree robbery and a count of making a false or misleading statement to a public servant. CP 6-8; RCW 9A.36.021(1)(a); RCW 9A.56.190; RCW 9A.56.200(1)(iii); RCW 9A.76.175. The prosecution also alleged that the crimes were aggravating by the fact that McQueen's offender score would be above 9 points and that his prior unscored misdemeanor or foreign criminal history resulted in a presumptive sentence that was clearly too lenient. CP 6-8; RCW 9.94A.535. On November 12, 2004, the Honorable Bryan Chushcoff sentenced McQueen to a standard-range sentence of 150 months in custody for the felonies, based upon an offender score of 14.

CP 82-86; 1RP 15-17.<sup>1</sup>

McQueen filed an appeal and, on December 22, 2005, this Court affirmed in an unpublished opinion after proceeding on a motion on the merits to affirm. CP 94-99, 101-07. The mandate was issued on May 4, 2006. CP 108-109.

Less than a year later, McQueen filed a personal restraint petition and, on November 27, 2007, this Court granted that petition in part. CP 110-11. On January 31, 2008, this Court's Certificate of Finality was issued and the case remanded for resentencing. CP 112-13.

Resentencing was held before Judge Chushcoff on March 14, 2008. RP 1. After the hearing, Judge Chushcoff reimposed a sentence of 150 months. CP 116-28. McQueen appealed and this pleading follows. CP 133-46.

2. Sentencing and resentencing proceedings

When the parties first appeared for sentence on November 12, 2004, the prosecutor argued that the court should impose a sentence at the high end of the standard range for all of the offenses and run them concurrently for a total of 171 months. 1RP 5. The prosecutor said that, although he had charged aggravating factors, he was not seeking an exceptional sentence "at this time." 1RP 6. The prosecutor relied on the fact that McQueen's offender score was a "14" as a "justification" for

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<sup>1</sup>The verbatim report of proceedings consists of 2 volumes, which will be referred to as follows:

the first sentencing proceeding on November 12, 2004, transferred from appeal 32592-6-II by this Court's order on December 4, 2009, as "1RP;"  
the resentencing proceedings of March 14, 2008, as "2RP."

asking for the high end sentence. 1RP 6. He also argued that McQueen had several gross misdemeanors which were not included in the calculation and that he was on drug court supervision at the time he committed the offense. 1RP 6.

Most important to the prosecutor, however, was that McQueen had gone to trial and “lie[d] about his participation” in the crimes by telling the jury “a story” about not being involved. 1RP 6. While the prosecutor claimed he was not faulting McQueen for exercising his right to go to trial, the prosecutor said “[t]here was no suggestion” that McQueen was “contrite” about his guilt. 1RP 6-7.

Counsel disputed that contention, noting that McQueen had taken responsibility for several felonies by pleading to some forgeries. 1RP 11. Counsel also noted that McQueen was suddenly going from having previously been in custody only 6 months at a time and never having gone to prison to something far more serious. 1RP 11. Counsel also argued that the prosecutor was not correct that McQueen “minimized his involvement” in the case, because McQueen admitted a lot of things with which he was charged. 1RP 12. Counsel pointed out that McQueen’s crimes were not nearly as serious as most first-degree robberies and second-degree assaults, and urged the court to impose 129 months, which was “not by any means insignificant.” 1RP 12.

Judge Chushcoff agreed that this was “one of the least serious” first-degree robberies he had seen but said that it was “particularly disturbing” to the court that McQueen seemed “rather unconcerned” in how he committed the crime and seemed to think “whatever’s out there is

free for you to take.” 1RP 14-15. The judge said the prosecutor had a “very good point” in noting that McQueen had lots of criminal offenses, a point which made the court say it had to ask if McQueen was just “kind of a dumb guy” making stupid mistakes or had made a “life-style decision” to just take from people whenever he felt like it. 1RP 14-15. The court felt McQueen seemed like the latter. 1RP 14-15.

The court concluded that, even though the crimes were, comparatively, not very serious, a mid-range sentence of 150 months in custody was appropriate, based upon the court’s belief that McQueen would likely commit more crimes if “out.” 1RP 16. It imposed 84 months on the assault charges, to run concurrently with the robbery, and 90 days suspended for the false statement offense. 1RP 17.

In his personal restraint petition, McQueen argued, *inter alia*, that his double jeopardy rights and the doctrine of merger were violated when the force which was used to elevate the charge of robbery to first-degree was the same force used for the assaults. See CP 110-11.<sup>2</sup> The prosecution conceded - and this Court agreed - that each of the second-degree assault charges merged into the robbery conviction because the victims in the assaults and robbery were the same and the force used in the robbery was the assaults. CP 110-11.

On remand, resentencing proceedings were held before Judge Chushcoff on March 14, 2008. RP 1. The same prosecutor who had

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<sup>2</sup>McQueen also argued that there was insufficient evidence to prove that force was used sufficient to support a first-degree robbery conviction. See CP 110-11. This Court rejected this argument based upon its conclusion that the same ground had been argued and rejected in the direct appeal. See CP 110-11.

appeared at the first sentencing noted that the standard range was still the same because McQueen's offender score went from 14 to 10 points. RP 4.

Despite the change in the offender score and the previous sentence of 150 months imposed by the court, the prosecutor asked the court to increase McQueen's sentence to 171 months in custody. RP 5. The prosecutor argued that the court should do so even though the court had not accepted the arguments for such a sentence at the previous sentencing. RP 5. The prosecutor raised new grounds, which were that McQueen, in the prosecutor's "opinion, clearly went beyond what is normally required" to commit first-degree robbery by assaulting two security officers when only one assault was required for first-degree robbery. RP 5.

In response, counsel argued for a sentence at the bottom of the standard range. RP 8-9. He disputed the state's apparent contention that the application of the merger doctrine somehow meant there were "two assaults that he is getting away with" because the Court of Appeals decision clearly indicated that the force used in the assaults was the same as the force used to effectuate the robbery. RP 9. Counsel argued that the court "shouldn't go up" on the sentence. RP 9.

The court then noted, "[t]he State wants 171, and I gave him 150." RP 9. The court said that, when it originally sentenced McQueen, it was thinking that McQueen's crimes were essentially "kind of a glorified shoplift that went really bad" and 120 months in custody was "plenty." RP 10. The court said however, that it had been concerned that McQueen had ten felonies in less than four years plus the current crimes and the court had thought "what do we have to do to slow this guy down a little bit." RP

11. The court agreed with McQueen that the robbery charge was “a little bit overexaggerated,” given the facts of the case. RP 15. The court said that it thought what it had sentenced McQueen to at the previous sentencing was “a reasonable thing,” because the facts of the case called for a low end sentence and “[a]ll of the prior criminal history puts you back in the middle.” RP 17. The court then imposed the same sentence of 150 months in custody. RP 17-18.

D. ARGUMENT

MCQUEEN’S DUE PROCESS RIGHTS WERE VIOLATED ON  
REMAND BY PROSECUTORIAL VINDICTIVENESS

The state and federal due process clauses prohibit the government from punishing a defendant for exercising his constitutional rights. See Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); State v. Bonisisio, 92 Wn. App. 783, 790, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999). While there is no federal constitutional requirement for states to establish “avenues of appellate review of criminal convictions,” once established, it is “fundamental” that there must be no attempt to punish the defendant for availing himself of those options. Blackledge, 417 U.S. at 25. Such “vindictiveness” on the part of either the court or the prosecution is constitutionally prohibited. See United States v. Goodwin, 457 U.S. 368, 372-85, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982); State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006).

In this case, this Court should reverse, because McQueen’s due process rights were violated by prosecutorial vindictiveness at the resentencing hearing.

As a threshold matter, this issue is properly before the Court. While, in general, a defendant may not appeal a trial court's decision to impose standard range sentence, a defendant may raise challenges such as the one presented here regarding the procedures used at the sentencing. See e.g., State v. Henderson, 99 Wn. App. 369, 993 P.2d 928 (2000); RCW 9.94A.585(1).

Prosecutorial vindictiveness occurs “when ‘the government acts against a defendant in response to the defendant’s prior exercise of constitutional or statutory rights.’” Korum, 157 Wn.2d at 627, quoting, United States v. Meyer, 258 U.S. App. D.C. 263, 810 F.2d 1242 (1987), cert. denied, 486 U.S. 940 (1988). There are two kinds of such vindictiveness: actual and presumptive. Korum, 157 Wn.2d at 627. Actual vindictiveness is difficult to prove and usually must be shown in order to challenge a prosecutor’s pretrial acts such as adding new or greater charges when plea negotiations break down. See Korum, 157 Wn.2d at 627-29.

For post-trial and remand situations, however, a presumption of vindictiveness applies whenever “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” Korum, 157 Wn.2d at 627, quoting, Meyer, supra. Once the presumption is established, the state may only rebut it by presenting “objective evidence justifying the prosecutorial action.” Id., quoting, Meyer, 810 F.3d at 1245.

Here, a presumption of vindictiveness applies. Such a presumption can apply whenever a defendant successfully appeals or collaterally attacks a conviction or sentence. See, e.g., North Carolina v. Pearce, 395 U.S.

711, 724-25, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). This is because “imposition of a penalty upon the defendant” for successfully appealing or filing a successful collateral attack would violate due process. 395 U.S. at 724. As a result, “vindictiveness against a defendant for having successfully attacked” a prior sentence or conviction “must play no part” in sentencing on remand. 395 U.S. at 26.

In Blackledge, *supra*, the Court addressed not the vindictiveness of a trial court which had been overturned on review but rather that of a prosecutor who filed increased charges against a defendant after an appeal. 417 U.S. at 27. The court found that prosecutorial vindictiveness was a real possibility, because a prosecutor “clearly has a considerable stake” in discouraging appeals, which will “require increased expenditures of prosecutorial resources before the defendant’s conviction becomes final, and may even result in a formerly convicted defendant’s going free.” 417 U.S. at 27-28. Indeed, the Blackledge Court found, it was immaterial whether there was evidence that the prosecutor had actually “acted in bad faith or maliciously,” because the issue was not whether “actual retaliatory motivation” existed but instead the effect of the *fear* of such vindictiveness:

since the fear of such vindictiveness may unconstitutionally deter a defendant’s exercise of the right to appeal or collaterally attack his first conviction due process also requires that a defendant be freed of apprehension of such a retaliatory motive

on the part not only of the judge, but the prosecutor. Blackledge, 417 U.S. at 28, *quoting*, Pearce, 395 U.S. at 725.

Put another way, a person is entitled to pursue his rights to appeal

or collateral attack “without apprehension that the State will retaliate.” Blackledge, 417 U.S at 28. As a result, due process mandates that the “potential for vindictiveness” not be allowed, and a presumption of vindictiveness will apply to proceedings on remand, should the government act in a way which appears to raise that issue.

Here, a presumption of vindictiveness applies. In filing his successful personal restraint petition, McQueen exercised his rights under Article 1, § 13 of the Washington constitution, which guarantee citizens the “privilege of the writ of habeas corpus” in this state. See, e.g., In re Personal Restraint of Runyan, 121 Wn.2d 432, 439-40, 853 P.2d 424 (1993). The personal restraint petition procedures contained in RAP Title 16, rules 16.3-16.15, were enacted to ensure and coordinate the various means of seeking redress pursuant to that right. See id. In addition, the rules expand the traditional habeas rights, providing a rule-based right to relief where the constitutional right might not avail. See id.

Thus McQueen’s exercise of his constitutional and statutory rights led to the remand for resentencing. At that resentencing, the very same prosecutor who was present at the initial sentencing asked the court to *increase* Mr. McQueen’s sentence on remand from the 150 months McQueen had previously been ordered to serve. RP 5. Rather than advocating that the court should stay with its initial order despite the 4 point difference in the offender score, the prosecutor urged the court to *add* 21 months - nearly two years - to McQueen’s sentence, even though the only new “fact” known about McQueen’s situation was that he had succeeded in his collateral attack.

Further, the prosecutor asked the court to increase McQueen's sentence even though the prosecutor's initial request for a sentence of 171 months was based in large part on McQueen's offender score being 14 and the offender score was now four points *less*. See IRP 6.

The prosecution cannot rebut the presumption of vindictiveness which arises in this case. Without any additional facts justifying it, the prosecutor asked the court to increase his sentence by nearly two years on remand. The only possible reason for that request, given the new, reduced offender score, was the prosecution's frustration that McQueen had exercised his rights to collaterally attack the conviction and sentence. And in making that request, the prosecutor effectively urged the court to commit violations of McQueen's due process rights. See, e.g., State v. Ameline, 118 Wn. App. 128, 75 P.3d 589 (2003). This Court should hold that McQueen's due process rights were violated at resentencing and should reverse and remand for a new resentencing, at which the prosecutor should be ordered to honor McQueen's due process rights.

E. CONCLUSION

For the reasons stated herein, this Court should reverse..

DATED this 27th day of December, 2008.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

to Mr. Johnny McQueen, DOC 835093, Red Rock Corr. Ctr, 1752 E. Arica Rd., Eloy, AZ. 85231.

DATED this 27th day of December, 2008.

  
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