70065-1

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NO. 70065-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SANDVIG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Joseph P. Wilson, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENT OF ERROR

The sentencing court acted vindictively in imposing on remand a more severe sentence in proportion to the original sentence imposed.

Issue Pertaining to Assignment of Error

Did the sentencing court acted vindictively on remand in imposing a proportionately increased sentence?

B. STATEMENT OF THE CASE

Jeffry Sandvig was convicted of two counts of second degree child rape, one count of second degree child molestation, and one count of third degree child rape. CP 79. Based on an offender score of nine, the Honorable Judge Joseph P. Wilson sentenced Sandvig to a minimum term of 245 months on the two second degree child rape convictions, 116 months on second degree molestation conviction, and 60 months on third degree child rape conviction. The sentences were ordered to run concurrent. CP 42, 56, 92-108. The 245 month sentences for the two second degree child rape convictions were the midpoint between the low end of the standard range, which was 210 months, and the high end, which was 280 months. CP 47, 92-108. In imposing the sentence Judge Wilson stated:

> My position on sentencing is generally to begin in the middle, mid range, treat everyone the same, and tell e reasons to go up or reasons to go down within the standard range. And, that's kind of

> how, in all fairness, I start with all my significant sentencings. I think it's a way to treat everybody on the same plane with different facts that come in front of me.

CP 55.

Sandvig appealed his convictions. This Court reversed the third degree child rape conviction. CP 87.

The State chose not to retry Sandvig, but instead moved to dismiss the third degree child rape charge. The motion was granted. CP 40; RP 2-3.

With the dismissal of the third degree child rape conviction Sandvig's offender score was lowered from a nine to six. CP 23, 42. Based on an offender score of six, the minimum term standard range for the two second degree child rape convictions is 146 to 194 months. Id.

A new sentencing hearing was held on February 22, 2013. The State recommended a high end standard range sentence of 194 months each on the two second degree child rape convictions and 75 months on the second degree child molestation conviction. RP 4.

Sandvig recommended a mid range sentence of 170 months on the two the second degree child rape convictions, proportionally consistent with the previous sentence and Judge Wilson's reasoning articulated that the previous sentencing hearing that he imposes a sentence in the middle of the standard range unless there is a reason for a lower or higher

sentence. CP 41-43; RP 5-6. Sandvig pointed out the only thing different between the first sentencing hearing and the current sentencing hearing was that one conviction was reversed lowering Sandvig's offender score. He argued a new sentence greater than the middle of the standard range would unconstitutionally punish Sandvig for his successful appeal. CP 43-44; RP 5-6.

Judge Wilson followed the State's recommendation and sentenced Sandvig to concurrent sentences of a minimum term of 194 months each on the two second degree child rape convictions---the maximum standard range sentences. CP 75; RP 9. Judge Wilson recognized that when he made his earlier sentencing decision he did not believe the facts of the case justified the high end of the standard range, but that when making that decision he also considered the length of the sentence and not where it fell into the standard rang. RP 8. Judge Wilson reasoned that a 194 month sentence was still a reduction of over four years from the previous sentence, and therefore the high end standard range sentence of 194 months did not shock his conscience. RP 9.

C. ARGUMENT

THE COURT ACTED VINDICTIVELY IN IMPOSING A SENTENCE ON REMAND DISPROPORTIONATE TO THE ORIGINAL SENTENCE FOLLOWING A SUCCESSFUL APPEAL.

When Sandvig's offender score was nine the standard range for each of the two second degree child rape convictions was 210 to 280 months. CP 94. The court imposed 245 months, which was the middle of the range. After his conviction for third degree child rape was reversed, his new offender score was six making the standard range 146-194 months. A proportionate sentence based on the new offender score would have been 170 months. Yet, the court imposed 194 months---the top of the range. The court's vindictiveness is evidenced by its imposition of a proportionately increased sentence on remand.

In North Carolina v. Pearce, 395 U.S. 711, 723, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), the Supreme Court held that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities. Pearce, 395 U.S. at

723. Such information may come to the judge's attention from evidence adduced at the second trial, from a new presentence investigation, from the defendant s prison record, or possibly from other sources. Id

It is a violation of the Fourteenth Amendment, however, for a state trial court to follow an unannounced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Pearce, 395 U.S. at 723-24. "A court is without right to . . . put a price on an appeal. It is unfair to use the great power given the court to determine sentence to place a defendant in the dilemma of making an unfree choice." Id. at 724 (quoting Worcester v. Commission of Internal Revenue, 370 F.2d 713, 718 (C.A. Mass. 1966)).

The Due Process Clause of the Fourteenth Amendment therefore requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And 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 motivation on the part of the sentencing judge. Pearce, 395 U.S. at 725.

To ensure the absence of such motivation, the Court in Pearce held that where the same trial judge presides over more than one sentencing and the defendant's last sentence is more severe than earlier ones, the trial court must expressly state its reasons for imposing a greater sentence. Pearce, 395 U.S. at 726. A trial court's failure to explain its justification for imposing a greater sentence creates a rebuttable presumption of vindictiveness. Alabama v. Smith, 490 U.S. 794, 802, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); State v. Franklin, 56 Wn.App. 915, 920, 786 P.2d 795 (1989). Where the presumption applies, the State must point to an "on-the-record, wholly logical, [and] nonvindictive reason for the sentence." Texas v. McCullough, 475 U.S. 134, 140, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986).

It has been held the Pearce presumption applies not only where there is an actual increase in the sentence but also where there is an increase in relative severity. United States v. Barry, 961 F.2d 260, 268, 295 U.S. App. D.C. 173 (1992). Barry was convicted of one misdemeanor count for possession of cocaine. At the time of sentencing, the United States Sentencing Guidelines 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 in an attempt to avoid exposure and prosecution altogether. Barry, 961 F.2d at

262. At level 8, the Guidelines provided for a sentencing range of 2 to 8 months of imprisonment. Nonetheless, citing evidence of mitigating circumstances, the judge sentenced Barry to a 6-month term. Id. 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. Id.

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 favor of a sentence at the upper limit of the guideline range of 0 to 6 months---Barry's position as mayor and his attempted obstruction of justice. Barry, at 262- 63.

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 Pearce, the Barry 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.

In State v. Barberio, 66 Wn. App. 902, 833 P.2d 459 (1992), this Court held that a reduction in the offender score and standard range did not require a proportionate reduction in the length of the re-imposed exceptional sentence where the sentence entered was in the acceptable range and no showing of vindictiveness was made. Barberio argued the reduction in his offender score and standard range required a proportionate reduction in the length of his reimposed exceptional sentence as a matter of law. Barberio, 66 Wn. App. at 906. This Court held it did not, but notably it pointed out there was no evidence of vindictiveness. Id. at 907-908.

Here, between the first and second sentencing, there were no events that may have thrown new light upon the Sandvig's life, health, habits, conduct, and mental and moral propensities. In fact, Judge Wilson indicated he was making his decision at the second sentencing based on the same information available to him at the first sentencing, including the facts brought out during the trial. RP 8-9. Judge Wilson also stated that unless there was a good reason to do so his practice is to impose a sentence in the middle of the standard range, which is what he did in the

first sentence. Because there were no new events between the first and second sentencing, there was no reason for Judge Wilson to deviate from his standard practice and rationale for imposing a sentence in the middle of the standard range and not proportionately resentence Sandvig to the middle of the standard range other than to punish him for his successful appeal. Under the facts of this case the presumption of vindictiveness cannot be overcome.

Because the Pearce presumption cannot be overcome, this Court should reverse and remand for resentencing before a different judge. See, State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (remanded to different judge "in light of the trial court's already expressed views on the disposition"); accord, State v. Harrison, 148 Wn.2d 550, 559-60, 61 P.3d 1104 (2003) (resentencing before different judge should be the remedy where state breaches a plea agreement and the defense seeks specific performance); State v. Talley, 134 Wn.2d 176, 182, 188, 949 P.2d 358 (1998) (remanded to different judge where it appeared that initial judge may have "prejudged the matter"); State v. Ameline, 118 Wn. App. 128, 134, 75 P.3d 589 (2003) (remand to different judge following improper exceptional sentence); State v. Romano, 34 Wn. App. 567, 570, 662 P.2d 406 (1983) (remanded to different judge where initial sentencing suffered from appearance of unfairness).

D. CONCLUSION

For the reasons stated above, this Court should reverse and remand for a new sentencing hearing before a different judge.

Dated this 28 day of August, 2013.

Respectfully submitted,

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JEFFREY SANDVIG,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF AUGUST 2013.

X Patrick Mayovsky