

63127-6

63127-679

NO. 63127-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
WILLIAM F. JENSEN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE KIMBERLEY PROCHNAU

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**BRIEF OF RESPONDENT**

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STATE OF WASHINGTON  
COURT OF APPEALS  
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A. ISSUES

1. Is the presumption of vindictive sentencing inapplicable where a different judge imposes sentence after remand?

2. Is the presumption of vindictive sentencing inapplicable where a sentence imposed after remand is 20 years lower than the original sentence?

3. Has Jensen failed to prove vindictive sentencing where the judge on remand imposed higher sentences per count, but where the imposition of higher sentences per counts was the only way to factor into Jensen's sentence the impact of his crimes on his family?

B. FACTS

A jury convicted William Jensen of four counts of solicitation to commit murder after he tried to hire hit men to kill his wife, his daughter, his son, and his sister-in-law. CP 34-38. The State charged one count for each targeted victim. CP 30-32. Jensen's standard range on each count was 180-240 months. CP 41. By law each count would run consecutively, so he faced a total sentence of 60 years (720 months) if the bottom of the range were

imposed on each count. CP 41. If the top of the range were imposed on each count, he faced an 80-year sentence (960 months). The sentencing court imposed four consecutive bottom-range sentences. CP 43.

Jensen appealed. The Washington Supreme Court ultimately held that the unit of prosecution for solicitation to commit murder was each separate solicitation, not each targeted victim, and that there were two solicitations in Jensen's case. State v. Jensen, 164 Wn.2d 943, 954-55, 195 P.3d 512 (2008). Thus, the Supreme Court remanded for resentencing on two counts instead of four counts. State v. Jensen, 164 Wn.2d at 959.

At resentencing, Jensen again faced a standard range sentence of 180-240 months on each count but, since there were only two counts to combine, a bottom-range sentence on each count would yield a total sentence of 30 years (360 months), whereas a top-range sentence on each count would yield a total sentence of 40 years (480 months). Thus, Jensen's sentence range after remand was 20 years shorter than his original sentencing range. The State requested two consecutive 240-month sentences. CP 27; RP 3-4. Jensen asked the court to exercise discretion and impose a 360 month term. RCP 101-02;

RP 14-17. The court followed the State's recommendation and imposed a 40-year sentence (480 months), 20 years shorter than the 60-year (720 months) sentence Jensen had originally received. CP 108; RP 18-19.

Jensen now appeals this standard range sentence.

C. ARGUMENT

Jensen claims that the sentencing court was vindictive when it imposed a standard range sentence upon remand following a successful appeal. His argument turns on the mistaken presumption that because the original sentencing judge imposed four consecutive low-range sentences, each subsequent sentencing court is bound to apply the same per-count sentence unless the State shows changed circumstances. His claims should be rejected for several reasons.

First, the presumption of vindictiveness applies only where the same judge imposes both sentences. Here, different judges imposed the different sentences. Second, the presumption of vindictiveness applies only where the defendant receives a *higher* sentence; Jensen's sentence was 20 years *lower*. Third, circumstances had changed since Jensen's first sentence. At the

first sentencing hearing, the impact of Jensen's crime on his family members was obviously subsumed in the offender score calculation that increased his sentence on a per-count, per-victim basis. After remand, however, the separate impact of his crimes on his wife, his daughter, his son and his sister-in-law had to be separately considered. There is no evidence that the sentencing court acted vindictively.

1. THE PRESUMPTION OF VINDICTIVENESS DOES NOT APPLY TO A SECOND SENTENCE IMPOSED BY A DIFFERENT JUDGE.

A defendant's due process rights are violated if judicial vindictiveness plays a role in resentencing after a successful appeal. In North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), the United States Supreme Court held that a rebuttable presumption of vindictiveness arises when a court imposes a more severe sentence after a successful appeal.

In order to assure the absence of such a [vindictive] motivation, we have concluded that whenever 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 upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is

based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

North Carolina v. Pearce, 395 U.S. at 726.

Jensen argues on appeal that this presumption applies to his resentencing because he was resentenced using a higher per-count sentence than he originally received, and he essentially argues that Judge Prochnau was required to impose no more than 180 months per count. This is not, however, what Jensen told Judge Prochnau. Although Jensen cited to Pearce in his sentencing memorandum, he said that "the caselaw is in conflict" and that a Pearce presumption "potentially arises" when a higher sentence is imposed after appellate remand. CP 101. His brief repeatedly urged Judge Prochnau to exercise her *discretion* to impose 180 months per count. CP 102.<sup>1</sup> He repeatedly used the term "should" rather than the term "must" when referring to his sentencing recommendation. Never did he make the argument that he advances on appeal, i.e. that Judge Prochnau was bound by law

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<sup>1</sup> ("Certainly, Mr. Jensen does not argue that this Court's sentencing authority is only ministerial. Instead, Mr. Jensen argues that given the reasons for reversal, coupled with the exercise in discretion by a fully informed court at the original sentencing, that this Court *should exercise its discretion* by following Judge Jones' lead.") (italics added). See also: RP 16 ("...I would ask the Court to impose the same sentence that Judge Jones imposed per count.").

to impose the same sentence as Judge Jones imposed. In fact, he appears to have disavowed that claim. Thus, his appellate arguments should not be reviewed pursuant to RAP 2.5(a).

Even if reviewed, the claim is meritless. The Pearce presumption does not apply when a new judge presides over resentencing. State v. Parmelee, 121 Wn. App. 707, 710-12, 90 P.3d 1092 (2004) (citing Texas v. McCullough, 475 U.S. 134, 140, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986) and Alabama v. Smith, 490 U.S. 794, 799, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)). The core issue is whether there is a "reasonable likelihood that the increase in sentence is the product of actual vindictiveness." Parmelee, 121 Wn. App. at 711 (quoting Alabama v. Smith, 490 U.S. at 799. When a single judge presides over two sentencing hearings but increases the sentence following the second sentencing hearing even though there has been no change in facts or circumstances, "...it appears that the defendant's successful appeal was the motivation for the increased sentence." Id. The same concerns are not present where different judges impose different sentences, however,

because the second judge had yet to consider the sentence and exercise discretion in meting out an appropriate punishment. The second judge did not

have a personal stake in the first sentence and therefore did not have a personal motive for vindication. ... Because there is not a reasonable likelihood that actual vindictiveness plays a role in sentencing when a different judge imposes a more severe sentence, the presumption of vindictiveness ... [does] not arise ....

Id. at 711-12.

This case is controlled by Parmelee. Jensen was first sentenced by the Honorable Richard Jones. The Honorable Kimberley Prochnau imposed Jensen's current sentence. Thus, the Pearce presumption does not apply so there is no reason in fact or law to *presume* that Judge Prochnau was vindictive when she imposed a lower sentence on Jensen.

2. THE PRESUMPTION OF VINDICTIVENESS DOES NOT APPLY TO A LOWER AGGREGATE SENTENCE; JENSEN'S AGGREGATE SENTENCE IS 20 YEARS LOWER THAN HIS FIRST SENTENCE.

This court has already held that a presumption of vindictiveness applies only where the defendant has received a greater sentence after remand.

In State v. Franklin, 56 Wn. App. 915, 920, 786 P.2d 795 (1989), the defendant was convicted of attempted murder and robbery and sentenced to 411 months, the top of the standard

sentencing range. After a successful appeal reduced his offender score, the sentencing court re-imposed the same 411-month sentence, but this time the court imposed an exceptional sentence in order to reach the 411-month term. Franklin claimed vindictiveness but the Court of Appeals disagreed, noting that the presumption of vindictiveness applies only when a defendant receives a higher sentence, and Franklin had received the same sentence. State v. Franklin, 56 Wn. App. at 920.

The same principles apply where the sentence is an aggregate of multiple counts. In State v. Larson, 56 Wn. App. 323, 783 P.2d 1093 (1989), a jury convicted Larson of murder, rape and arson arising from his attacks on his wife and her children. The trial court imposed consecutive sentences -- an exceptional sentence -- for a total of 363 months: 281 months for murder, 41 months for rape, and 41 months for arson. The sentence was remanded because the court did not enter the required findings. On remand, the court realized that the same sentence could be imposed without an exceptional sentence by imposing 360 months on the murder conviction (a term that was within the standard range for murder) and having the other sentences run concurrently, so the court imposed that new 360-month sentence.

Larson appealed and characterized the new sentence as an increased sentence because the murder term was originally 281 months. The Court of Appeals rejected his arguments, however, because his second sentence was, in the aggregate, less severe than his original sentence. Larson, 56 Wn. App. at 326-27. The court in Larson cited numerous cases which demonstrate that the Pearce presumption of vindictiveness does not arise where a revised aggregate sentence is less than or equal to the original aggregate sentence. Id. at 327-28.

Larson and Franklin have never been repudiated in Washington and recent foreign authority is in accord, too. See People v. Woellhaf, 199 P.3d 27, 32 (Colo.App., 2007). See also State v. Barberio, 66 Wn. App. 902, 906-08, 833 P.2d 459 (1992) (rejecting argument that reduction in offender score and standard range requires proportionate reduction in the length of re-imposed exceptional sentence).

Because Jensen's aggregate 40-year sentence is 20 years lower than the sentence he originally received, he cannot claim that the second sentence is presumptively vindictive.

3. JENSEN'S SECOND SENTENCE WAS WHOLLY REASONABLE IN LIGHT OF HIS CRIME AND ITS IMPACT ON THE FOUR FAMILY MEMBERS HE BETRAYED.

As explained above, Jensen has failed to show that a *presumption* of vindictiveness applies to his resentencing. Without such a presumption, there is no reason to assume that the resentencing judge was vindictive, and Jensen provides no *evidence* that she was.

Jensen also fails to acknowledge a substantial difference between the first and second sentencing hearings that amply explains why the second judge imposed a longer sentence per count than had the first judge. The first sentencing was conducted based on four counts -- one count per victim -- so the sentence necessarily contemplated that Jensen's conduct jeopardized four human lives. The original sentencing judge would have had no cause to inquire into the impact Jensen's crime had on four individuals, and to increase his sentence on account of that fact. The second sentencing hearing was conducted based on two counts -- one per solicitation -- and the two counts were based on the act of solicitation to commit murder, regardless of the number of intended victims. Thus, after remand, the only way the judge could

acknowledge the greater impact of Jensen's crimes was to raise his sentence within the standard range on each count. Nothing precludes the judge from making such a determination of where to sentence within the standard range. Indeed, it seems quite logical that the sentencing court should have discretion to punish more severely a defendant who tries to arrange the killing of four people as compared to a defendant who tries to kill a single person. Since the fact of multiple victims was not inherent in the scoring, as it was at the first sentencing, the court had to impose a higher sentence per count if it wanted to account for this factor in Jensen's sentence.

The sentencing judge was clearly concerned about the impact of Jensen's crimes on his family. Judge Prochnau reviewed the record from the previous sentencing, RP 17, and was aware that she could not impose a higher sentence simply to punish Jensen for appealing. CP 101 (Defendant's Presentence Report, citing Pearce). At the resentencing hearing, Judge Prochnau heard directly from Jensen's wife, RP 5-7, sister-in-law, RP 7-8, daughter, RP 9-12 and son, RP 12-14. Sue Harms, Jensen's former wife, told the court:

Your Honor, I came before this Court four years ago and said I'll never feel safe again. My children and I and my sister will continue to have endless fear for as long as Bill lives. I've enclosed my victim's statement that I made over four years ago. By rereading it, I can really say that I'm extremely scared for my life because of this man, nor do I think he's finished with me yet. . . .

. . . Bill will continue to have a constant need of revenge and won't quit until he fulfills his desire to have me killed. . . .

RP 5-6. Linda Harms, too, implored the court to consider the impact of Jensen's crime on his family.

I would definitely urge this Court to carefully consider the continued safety of Linda Harms, Susan R. Jensen Harms, and his two children, Jenny and Scott. This . . . former King County police officer that was supposed to be an exemplary example of safety and protection and family man, hired a hitman to kill four innocent individuals. . . . the bottom line is that money was exchanged for us to be killed. It has taken a great toll on family members . . .

RP 8. Scott Jensen read from a prepared letter and addressed the defendant and the court:

[Reading] Dear Dad, I'm here to tell you how I feel and your actions have affected me in every aspect of my life. . . . You are so far [sic] away from the father and man I thought as a child was everyone a man could be. . . . I feel hurt, angry, frustrated, confused, sad, embarrassed, and most of all I'm disappointed in you. You [inaudible] all our lives in jeopardy for your own [inaudible] game. What you did will definitely change our relationship forever. I have learned how to become a man without a father. Most of all, dealing with the pain I know my own father wanted my

mother, my sister and my aunt and me dead, were in selfish reasons. This has been hard and will always be a hard thing for me to deal with in my life knowing one of the people who are supposed to protect and guide you in life is one who would rather take it away from you. . . .

RP 12-13.

Before imposing sentence, Judge Prochnau addressed the defendant as follows:

I was struck, as I'm sure everyone was having read about this case, about the incredible, shocking nature of this crime. It's sadly not completely rare for people to hate their spouses and to want to do them harm. Very few people go to the lengths that Mr. Jensen did and was quite so committed to doing his wife harm. It's shocking that one would take the children that you have nurtured, that you have apparently attempted to instruct in religious principles, and shatter their trust quite so wholly as you've attempted to do by attempting to do them this harm as well.

Mr. Jensen, as Judge Jones indicated, greed, malice and hatred brought you down. This was premeditated and quite purposeful. You were swimming in that swamp of evil. . . .

[Your family has] survived in spite of you, and that is a good thing. However, the Court is struck by the fear that they have to live under, the fear in worrying about you getting out and doing this again and struck by what it must be like for a mother to operate under that concern and wonder if one day she might not be around and wondering what that would mean for her children.

The Court, after considering the circumstances of this crime, believes that's [sic] the State's recommendations for sentencing at the high end of the range are extremely appropriate. . . .

RP 17-19. Judge Prochnau's rationale is sensible, not vindictive.

Finally, it should be observed that Judge Jones' original sentence was not meant to be the last word on Jensen's sentence, nor is it clear that Judge Jones would have rejected a higher sentence had he been in Judge Prochnau's position. Judge Jones had no real incentive to weigh the competing value of imposing a low-end versus a top-end sentence against Jensen because, either way, Jensen would have been incarcerated for the remainder of his natural life. Judge Jones' extensive comments at the first sentencing indicate that he believed Jensen to be fully responsible for his crimes, see CP 36-45, but those comments do not establish that he felt a sentence at the bottom of the range should bind a future judge sentencing under different circumstances.

Jensen has failed to establish that Judge Prochnau's sentence was vindictive.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this court to affirm Jensen's judgment and sentence.

DATED this 17<sup>th</sup> day of August, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jeffrey Ellis, the attorney for the appellant, at Law Offices of Ellis, Homes & Witchley, PLLC, 705 Second Avenue, Ste. 401, Seattle, Washington, 98104, containing a copy of the Brief of Respondent, in STATE V. WILLIAM JENSEN, Cause No. 63127-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame  
Name Wynne Brame  
Done in Seattle, Washington

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