

64821-7

64821-7

NO. 64821-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICKY SEXTON,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether the defendant can meet his burden of showing judicial vindictiveness in circumstances where the defendant received a lower sentence on remand following his first appeal, and where the trial court exercised its discretion appropriately in basing the defendant's sentence on his conduct in the present case and his criminal history.

B. STATEMENT OF THE CASE

The defendant, Ricky Ray Sexton, was convicted by a jury in March 2008 of one count of delivery of methamphetamine and one count of possession with intent to deliver methamphetamine based on a series of events that took place on August 3 and 4, 2006. CP 1-22. The trial court imposed a sentence of 70 months on each count, running concurrently, based on an offender score of 6 and a standard range of 60 plus to 120 months for each count. CP 13, 15.

Sexton appealed, and raised claims of ineffective assistance of counsel, sentencing error, and a variety of pro se arguments. This Court rejected these claims, with one exception: that the trial

court should have independently determined whether Sexton's prior convictions for second-degree burglary and theft of anhydrous ammonia were the same criminal conduct for scoring purposes. Accordingly, this Court remanded for resentencing. CP 78-85.

In the meantime, Sexton filed affidavits in the trial court in support of a motion for a new trial, and claimed that the State had withheld exculpatory evidence. More specifically, Sexton filed affidavits purportedly executed by the confidential informant who had conducted the controlled drug buy from Sexton that formed the basis for Sexton's convictions. These affidavits recanted the informant's original statements to the police. CP 32, 34.

The trial court appointed new counsel for Sexton, and an evidentiary hearing on Sexton's motion was held on June 8, 2009. CP 34. At this hearing, the informant testified that "he signed affidavits written for him by Sexton under duress and fear while they were incarcerated together, but those affidavits were false and the information he provided to police had all been true[.]" CP 34. At the conclusion of the hearing, the trial court found that the informant's testimony was credible and that the affidavits were

false, and denied Sexton's motion for a new trial. CP 34-35. This Court then dismissed Sexton's PRP raising these same claims on November 13, 2009. CP 31-35.

The following month, on December 18, 2009, the trial court held a resentencing hearing to address the issue of whether Sexton's prior convictions for burglary and theft of anhydrous ammonia constituted the same criminal conduct. Sexton was represented by yet another attorney. RP (12/8/09) 1-2. After hearing the arguments of both parties, the trial court determined that Sexton's prior convictions for burglary and theft of anhydrous ammonia were the same criminal conduct. RP (12/8/09) 3-5. Accordingly, Sexton's offender score on each count was reduced from a 6 to a 5, and his standard range on each count was reduced from 60 plus to 120 months down to 20 plus to 60 months. RP (12/18/09) 5.

The trial court noted that, given the significant change in circumstances, the court had the discretion to sentence Sexton anywhere within the new range. RP (12/18/09) 5-6. The State asked for the high end of the new range. RP (12/18/09) 7-8. Sexton and his defense attorney argued that the court should

impose 27 or 30 months, because this would be proportionally equivalent to the prior sentence, i.e., near the low end of the range. RP (12/18/09) 8-10. The trial court agreed with the State and imposed 60 months, citing Sexton's prior involvement with methamphetamine and his conduct in the present case as reasons. RP (12/18/09) 11. When Sexton argued that his prior convictions did not involve the manufacture or sale of methamphetamine, the trial court correctly noted that anhydrous ammonia is an ingredient in methamphetamine. RP (12/8/09) 12. Sexton protested that he did not know what the ammonia was for, and claimed that he was "not a meth dealer." RP (12/8/09) 12. The trial court noted, again correctly, that the jury did not believe Sexton in that regard, and that the court did not believe him, either. RP (12/8/09) 12.

The trial court entered an order modifying the original judgment and sentence to reflect the new offender score, standard range, and total sentence of 60 months. CP 29-30. Sexton's counsel filed a motion for another resentencing, alleging that the trial court had misunderstood the nature of Sexton's prior criminal history. CP 114-47. That motion was denied. CP 77.

Sexton again appeals. CP 36-39, 86-88.

C. **ARGUMENT**

SEXTON CANNOT MEET HIS BURDEN OF SHOWING JUDICIAL VINDICTIVENESS BECAUSE HE RECEIVED A LOWER SENTENCE AFTER APPEAL, NOT A HIGHER SENTENCE.

Sexton's sole claim in this second direct appeal is that his sentence of 60 months in prison is the result of judicial vindictiveness. More specifically, he argues that because his sentence is at the high end of the standard range rather than near the low end, as his original sentence was, his "proportionally higher" sentence is the product of judicial vindictiveness. See Brief of Appellant. This claim is wholly without merit, as authority from this Court unambiguously holds that the doctrine of judicial vindictiveness does not apply unless the sentence the defendant receives on remand is actually higher than the original sentence. In accordance with this authority, Sexton's claim fails.

A defendant's due process rights are violated if judicial vindictiveness plays a role in resentencing following 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. But as

this Court has already held, the Pearce presumption of vindictiveness does not apply unless the sentence the defendant receives on remand is actually greater than the original sentence.

In State v. Franklin, 56 Wn. App. 915, 786 P.2d 795 (1989), the defendant was convicted of attempted murder and robbery and sentenced to 411 months in prison, which was the top of the standard range. After a successful appeal resulted in a reduced offender score and standard range, the sentencing court re-imposed the same 411-month sentence, but did so via an exceptional sentence in order to achieve the same result. The defendant claimed vindictiveness, but this Court disagreed, noting that the presumption of judicial vindictiveness applies only if the defendant receives a higher sentence, not the same sentence. Franklin, 56 Wn. App. at 920.

The same principle applies when the sentence results from an aggregate of multiple counts. In State v. Larson, 56 Wn. App. 323, 783 P.2d 1093 (1989), a jury convicted the defendant of murder, rape, and arson arising from his attacks on his wife and her children. The trial court imposed an exceptional sentence and ran the sentences for the three counts consecutively for a total

sentence of 363 months. On appeal, the sentence was remanded because the trial court had not entered the required findings of fact and conclusions of law. On remand, however, the trial court realized that it could impose virtually the same sentence without imposing an exceptional sentence by imposing a higher sentence on the murder count. In the second appeal, this Court rejected the defendant's claim that the new sentence was vindictive because it was, in the aggregate, actually less severe than the original sentence. Larson, 56 Wn. App. at 326-27. The Larson court cited numerous cases demonstrating that the Pearce presumption of vindictiveness does not arise when a revised aggregate sentence is less than or equal to the original aggregate sentence. Id. at 327-28.

Sexton's case is an even less compelling case for vindictiveness than Franklin and Larson. As in Franklin, Sexton succeeded in lowering his offender score and standard range as a result of his first appeal. However, unlike Franklin and Larson, Sexton did not receive the *same* total sentence on remand; rather, he received a *lower* sentence on remand. Therefore, the Pearce

presumption of vindictiveness simply does not arise. Rather, the trial court appropriately exercised its discretion in imposing sentence on remand, given Sexton's criminal history and his conduct in the present case.

Nonetheless, Sexton argues that the trial court's remarks after the re-sentencing hearing was over prove actual vindictiveness. See Brief of Appellant, at 11 (arguing that the trial court's "off-color remarks about Sexton" evidence vindictiveness). This argument should also be rejected.

First, it is clear that neither counsel nor the trial court intended for these remarks to be on the record. Rather, it is apparent that the clerk simply neglected to turn off the audio recording system.¹ RP (12/18/09) 13-14. Second, although it is clear that no one intended for these remarks to be made on the record, there is nothing in these remarks that indicates vindictiveness. To the contrary, the trial court simply indicated that

¹ Sexton incorrectly states that "the *court reporter* continued recording and reported" the remarks. Brief of Appellant, at 8 (emphasis supplied). There was clearly no court reporter present in the courtroom.

the proceedings in this case had "been a journey," that the "last hearing" with Sexton had been a trying experience, and that the court would not be surprised if Sexton alleged ineffective assistance of counsel or filed a bar complaint or a judicial conduct complaint in the future. RP (12/18/09) 13-14. None of these remarks actually disparage Sexton, and indeed, all of them are truthful statements based on the record.²

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. In addition, the court noted that if the range had been 20 plus to

² The fact that the proceedings had "been a journey" is evident based on the length and nature of those proceedings to date. Moreover, the "last hearing" the trial court was referencing was the hearing where the trial court had found that Sexton had forced the informant to execute false affidavits under duress. Finally, the trial court's remarks regarding a claim of ineffective assistance of counsel, a bar complaint, or a judicial conduct complaint were not unfounded, particularly given that Sexton claimed ineffective assistance of counsel in his first appeal, and given the contentious nature of the proceedings in this case.

60 months at the time of the original sentencing, that the court would have imposed 60 months at that time. RP (12/18/09) 9.

Finally, contrary to what Sexton argues, the trial court did not misinterpret his criminal history. When Sexton informed the court during the hearing that his prior drug convictions were for possession, not for dealing or manufacturing, the trial court correctly noted that Sexton had been convicted of theft of anhydrous ammonia, and that anhydrous ammonia was an ingredient in methamphetamine. RP (12/18/09) 11-12. Moreover, when Sexton's counsel filed a motion for another resentencing, the trial court denied that motion "based on the nature of the offense and [Sexton's] criminal history." CP 77.

In sum, Sexton cannot meet his burden of showing either a presumption of vindictiveness or actual vindictiveness that resulted in a more severe sentence on remand. Rather, because Sexton's sentence was lower on remand, and because the trial court appropriately exercised its discretion in imposing that lower sentence on remand, Sexton's claim fails.

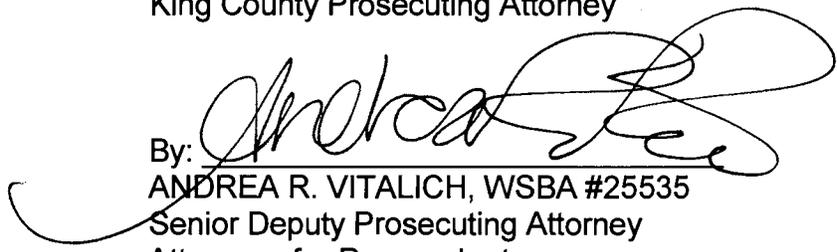
D. CONCLUSION

For all of the foregoing reasons, this Court should affirm Sexton's 60-month sentence for delivery of methamphetamine and possession with intent to deliver methamphetamine.

DATED this 15th day of June, 2010.

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 Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RICKY SEXTON, Cause No. 61721-4-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

Done in Seattle, Washington

6/15/10

Date