

65366-1

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NO. 65366-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW WILLIAMS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY P. CANOVA

BRIEF OF RESPONDENT

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A. ISSUES

1. An appellate court will not ordinarily review a claim of error that was not raised below. To obtain review under the exception for manifest error affecting a constitutional right, the defendant must show actual prejudice from the claimed error. Williams received a shorter sentence following remand for resentencing. While he asked for an even lower sentence, he did not object to his new sentence on the basis of judicial vindictiveness. Has Williams failed to show the requisite prejudice to obtain review on his claim of judicial vindictiveness?

2. When a trial court imposes a harsher sentence on remand following a successful appeal, a rebuttable presumption of judicial vindictiveness arises. Williams originally received a total sentence of 309 months of confinement, based on sentences at the low end of the standard range. Following a reduction of his offender score, and a concomitant reduction in his standard range, Williams was sentenced to a total sentence of 280 months, the middle of the standard range. Has Williams failed to show that he received a harsher sentence on remand?

B. STATEMENT OF THE CASE

Defendant Matthew Williams was charged by information and amended information with five counts of Robbery in the First Degree and one count of Burglary in the First Degree. Three of the robbery counts, as well as the burglary count, included a firearm allegation. CP 1-18.

Williams pled guilty to three counts of first-degree robbery, each with a firearm enhancement, in return for the State's dismissal of the remaining counts. CP 19-28, 39. His standard range for each robbery conviction, based on an offender score of 9, was 129-171 months. CP 20, 45. In addition, 60 months had to be added to each count for the firearm allegation. CP 20, 47. The State agreed to recommend the low end of the standard range on each count, 129 months, to be served concurrently, plus three consecutive 60-month terms for the firearm enhancements, for a total of 309 months. CP 22, 43.

On June 11, 2004, the Honorable Gregory P. Canova sentenced Williams to the agreed-upon 309 months. CP 44-52. Williams did not appeal. On December 29, 2009, pursuant to a collateral attack, the Washington Supreme Court vacated Williams's

sentence and remanded the case to the trial court for resentencing.
CP 53-54.

The resentencing hearing took place on March 26, 2010, before Judge Canova. RP 1.¹ This time, the parties agreed that the correct offender score was 7, resulting in a standard range of 87-116 months on each count of robbery.² RP 2, 4; CP 77-79.

The State recommended "what would be the closest to what it had recommended before, which is the 116 months, which is now the high end of the range." RP 3. Williams asked the court to impose the low end of the range, 87 months. RP 4-5.

The trial court chose a sentence that fell between the recommendations of the parties -- 100 months on each robbery count. RP 7. Judge Canova explained his reasons for choosing this sentence:

Under the circumstances of this case, the Court doesn't feel that the low end of the sentencing range is an accurate reflection of the crimes of which Mr. Williams was convicted.

¹ The verbatim report of the resentencing proceedings on March 26, 2010, will be referred to in this brief as "RP."

² The parties had learned that a juvenile assault conviction that had counted for two points in the offender score should not have been counted, because that conviction had been vacated. RP 2.

On the other hand, the Court doesn't feel the top of the sentencing range is appropriate, either, given the sentence enhancements of -- totally 180 months -- three, 60 month sentences on Counts 1, 4 and 6, as were previously imposed and as the law requires, must be run consecutively.

The Court is therefore going to impose a [sic] 100 months on Counts 1, 4 and 6, to run concurrently, and will re-impose the 60 month firearms enhancement as to each of those three counts, those enhancements to run consecutively.

That makes the total sentence 280 months.

RP 6-7. The judgment and sentence on resentencing reflects this amount of time. CP 58.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ACT VINDICTIVELY WHEN IT IMPOSED A SHORTER SENTENCE ON RESENTENCING.

Williams complains that the trial court imposed a sentence in the middle of the standard range upon resentencing, while the court had originally imposed a sentence at the low end of the range. He argues that the second sentence is proportionately higher, and thus more severe, than the original sentence. From this, he concludes that a presumption of judicial vindictiveness arises.

This conclusion is invalid. Williams's total sentence decreased from 309 months to 280 months after the offender score was reduced by two points. This does not raise a presumption of judicial vindictiveness.

a. Williams Failed To Preserve This Claim.

As an initial matter, Williams failed to preserve this claim for appellate review. An appellate court may refuse to review a claim of error that was not raised in the trial court. RAP 2.5(a). Courts make an exception for "manifest error affecting a constitutional right." RAP 2.5(a)(3).

This exception, however, is a narrow one. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). "Manifest" requires a showing of actual prejudice, i.e., a showing that the error had practical and identifiable consequences in the proceedings below. Id. at 935. Because Williams got a *shorter* sentence on resentencing than he got the first time, he cannot show that he was prejudiced by judicial vindictiveness. This Court should decline to review the alleged error.

b. The Trial Court Did Not Act Vindictively.

A defendant's constitutional right to due process of law is violated when judicial vindictiveness plays a role in resentencing following a successful appeal. State v. Parmelee, 121 Wn. App. 707, 708, 90 P.3d 1092 (2004). A rebuttable presumption of vindictiveness arises when a court imposes a more severe sentence after a successful appeal. Id. (citing North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed.2d 656 (1969)). The presumption arises only where there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness. Id. at 711 (citing Alabama v. Smith, 490 U.S. 794, 799, 109 S. Ct. 2201, 104 L. Ed.2d 865 (1989)).

Concerns about judicial vindictiveness arise when a judge, after a successful appeal, increases the previously-imposed sentence without explanation. Parmelee, 121 Wn. App. at 711 (citing Smith, 490 U.S. at 802). Trial judges must nevertheless be accorded broad discretion in sentencing. Id. at 712 (citing Texas v. McCullough, 475 U.S. 134, 140, 106 S. Ct. 976, 89 L. Ed.2d 104 (1986)).

Washington courts have refused to find a presumption of vindictiveness where a defendant's sentence was *not increased* after a successful appeal. The trial court in State v. Franklin, 56 Wn. App. 915, 786 P.2d 795 (1989), review denied, 114 Wn.2d 1004 (1990), had imposed concurrent standard-range sentences of 144 months for robbery, and 411 months for attempted murder. Id. at 917. Upon resentencing following a successful appeal resulting in a decreased offender score, the standard range for the attempted murder was adjusted to 277.50 to 369.50 months. Id. at 918. The trial court nevertheless imposed the original 411 months as an exceptional sentence. Id. The appellate court rejected Franklin's claim of judicial vindictiveness, concluding that "no such presumption is raised as the sentence was not increased." Id. at 920.

The cases on which Williams relies do not support his position. In State v. Ameline, 118 Wn. App. 128, 75 P.3d 589 (2003), the sentencing court originally imposed a sentence of 164 months for second-degree murder. Id. at 130. The court reimposed the same sentence following a second trial that resulted from a successful appeal. Id. But following another appeal and a third trial, and without relying on any new facts, the court imposed

an exceptional sentence of 240 months. Id. at 131. The appellate court found a rebuttable presumption of vindictiveness under these circumstances, and remanded for resentencing. Id. at 133, 134.

Similarly, in United States v. Resendez-Mendez, 251 F.3d 514 (5th Cir. 2001), the trial court imposed a higher sentence (71 months versus the original 57 months) following a successful appeal and remand for resentencing. Id. at 515. Again, the appellate court found a presumption of vindictiveness. Id. at 518-19.

Williams cites to no appellate case finding a presumption of vindictiveness where a trial court imposed a *lower* sentence upon remand following a successful appeal.

Indeed, cases from the federal courts do not support Williams's claim. In United States v. Arrington, 255 F.3d 637 (8th Cir.), cert. denied, 534 U.S. 1049 (2001), the defendant's guideline range was 77-99 months. Id. at 638. The trial court imposed the low end of the range -- 77 months. Id. Following appeal and remand for resentencing, the guideline range was adjusted to 63-78 months. Id. The court again sentenced Arrington to 77 months. Id.

Arrington claimed that the new sentence was presumptively vindictive, because his first sentence was at the bottom of the guideline range, while his second sentence was near the top of the new range. Id. at 638-39. He pointed out that there were no new facts to support the second sentence. Id. at 639. The appellate court rejected this claim:

Arrington's post trial sentence was exactly the same as his sentence on remand. Since a more severe sentence was not imposed, Arrington cannot make out a claim of vindictiveness. . . . Just because Arrington was sentenced at the bottom of the original range does not mean that he had a right to be sentenced at any particular point in the recalculated guideline range. He was sentenced within the guideline range, and no presumption of vindictiveness arose because he was not sentenced at his preferred point in the applicable range. Moreover, we have examined the resentencing transcript and find no hint of vindictiveness.

Id. (citation omitted).

In United States v. Moore, 997 F.2d 30 (5th Cir.), cert. denied, 510 U.S. 1029 (1993), the defendant was originally sentenced to 54 months for assaulting a federal officer. Id. at 33. This sentence was arrived at by a four-level upward departure based on serious bodily injury to the victim. Id. The sentence was reversed on appeal, because the named victim did not qualify as a "victim" under the relevant statute. Id. On remand, the trial court

again imposed 54 months, achieving the same four-level upward departure on a different basis. Id.

Moore argued that the penalty imposed on resentencing was a result of judicial vindictiveness. Id. at 37. The appellate court rejected this claim, holding that, where the penalty on remand is not harsher than the original sentence, there can be no claim of vindictiveness:

Moore received the exact same sentence on resentencing. Because Moore did not receive a harsher sentence on remand, he is clearly not entitled to any presumption of vindictiveness.

Id. at 38.

In United States v. Hagler, 709 F.2d 578 (9th Cir.), cert. denied, 464 U.S. 917 (1983), the defendant was convicted of thirteen counts of credit card fraud. Id. at 579. The court sentenced him to one year on Count 15, with sentence suspended as to the remaining counts. Id. Hagler's convictions on five of the counts, including Count 15, were reversed on appeal. Id. On remand, the trial court sentenced Hagler to one year on Count 16, suspending sentence on the remaining counts. Id.

Hagler again appealed, arguing that the resentencing amounted to judicial vindictiveness. Id. Again, the appellate court refused to find such a presumption:

In this case there is no net increase in his punishment. He remained convicted of eight of the thirteen counts after his first appeal and we find no suggestion of vindictiveness on this record. Indeed, we sense that in the resentencing the district judge attempted -- as he had attempted after the trial -- to construct a sentence that would combine prison custody, fine, restitution and probation, as a balanced package geared to the particular defendant whom he had before him.

Id.

These cases refute Williams's claim of judicial vindictiveness. Williams's sentence following his successful collateral attack was reduced from 309 months to 280 months. The sentence imposed on remand is thus not harsher than the original sentence. Moreover, there is no evidence in the record of judicial vindictiveness on resentencing. The Pearce presumption does not arise under these circumstances. Williams's claim should be rejected.

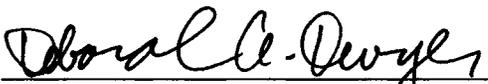
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence.

DATED this 7th day of November, 2011.

Respectfully submitted,

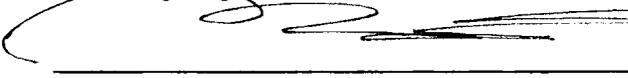
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Elaine L. Winters**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. MATTHEW WILLIAMS**, Cause No. **65366-1-I**, in the Court of Appeals for the State of Washington, Division I.

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



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Done in Seattle, Washington

11-07-2011

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