

Original

NO. 35508-6-II

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

STATE OF WASHINGTON,
Respondent,
v.
SIDFREDO E. VALDEZ,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

The Honorable Susan K. Serko, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

The trial court erred in increasing Mr. Valdez's sentence for a conviction that was not challenged on appeal by either party or considered by the Court of Appeals.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where Mr. Valdez challenged only his offender score calculation on one of four counts and only that count was reviewed on appeal, did the trial court lack authority to alter the valid sentence on a count that was not challenged?

2. Did the trial court's increasing the length of a sentence which was not on review on appeal go beyond the scope of the mandate for resentencing?

3. Was the trial court collaterally estopped from imposing a longer sentence for a conviction where the court rejected the argument at the initial sentencing that Mr. Valdez should receive a sentence at the top of the standard range on Count III?

4. Is an increase in a sentence which was not appealed, on remand for resentencing with a lower offender score, impermissible judicial vindictiveness?

C. STATEMENT OF THE CASE

1. Procedural history

Mr. Valdez originally pled guilty, on May 12, 1999, to burglary in the first degree (Count I), two counts of kidnapping in the first degree (Counts II and III), and robbery in the first degree (Count IV). CP 9-20. He was sentenced on November 12, 1999. CP 21-30.

Because the trial court miscalculated Mr. Valdez's offender score for Count II at sentencing, this Court subsequently reversed his judgment and sentence and remanded for resentencing with the correct standard range for Count II. State v. Valdez, COA #34008-9-II (filed August 15, 2006).

Mr. Valdez's offender score had been erroneously calculated as six on all counts except Count III, which was zero. CP 21-30; RP(sent) 3-4. Because Counts II and III were serious violent offenses, the trial court imposed the sentences for these offenses to run consecutively. RCW 9.94A.589(1)(b) (former RCW 9.94A.400(1)(b)). CP 21-30; RP(sent) 3-4.

Under former RCW 9.94.400(1)(b) (now codified at RCW 9.94A.589(1)(b)), however, Mr. Valdez's offender score for Count II should have been four

instead of six. CP 21-30; 42-75. This is because the offender scores for serious violent offenses imposed consecutively are scored without using either as offender score for the other. RCW 9.94A.589(1)(b). The offender score of the serious violent offenses with the highest seriousness level is calculated using prior convictions and other current convictions "that are not serious violent offenses," and "the sentence range for other serious violent offenses shall be determined by using an offender score of zero." RCW 9.94A.520; RCW 9.94A.589(1)(b).

For that reason, the offender score on Count II was reduced to 4 rather than 6.

2. Resentencing hearing

Judge Bruce Cohoe originally sentenced Mr. Valdez. RP 5. On remand, Mr. Valdez was sentenced by Judge Susan Serko. CP 40-52.

Judge Cohoe had sentenced Mr. Valdez to the high end of the standard range for Count II, but to the low end of the standard range for Count III, 51 months, with the two counts running consecutively to one another. CP 21-30; RP 5. The state had requested that Judge Cohoe impose sentences at the

top of the standard range for all counts; Judge Cohoe declined to follow that recommendation except on Count II. RP 5. The prosecutor admitted, "Why he did that I don't know." RP 5.

The prosecutor further represented two things: (1) that Judge Cohoe had increased the sentence of Mr. Vasquez's co-defendant, Mr. McKinney, to the top of the standard range when Mr. McKinney had come back for resentencing sometime earlier; and (2) that the victims, who were not present, wished the court to impose as much time on Mr. Valdez as possible, RP 5, 10-11. Defense counsel disputed that Mr. McKinney's sentences had been increased on remand, and the court admitted that it had not seen the McKinney file. RP 7-8.

Mr. Valdez spoke. He told the court that he wished the Sullivans had come to court so that he could apologize to them personally. RP 11. Mr. Valdez explained to the court the ways in which he had changed in the time since his initial sentencing and the things he had done to improve himself, including education, trade schooling and learning welding. RP 11-12. He was no longer involved in drugs, alcohol or gangs, as he had been at the time

of the crime. RP 12. Mr. Valdez told the court that his mother was sick and was not expected to live more than a year or two. RP 11.

The court indicated that it had looked at some statement describing the incident and at what Mr. McKinney had received, and imposed sentences at the high end of the standard range for Counts II and III, for a total of 164 months. RP 13-14.

The court did not identify any behavior on Mr. Valdez's part which would justify increasing his sentence on Count III.

D. ARGUMENT

- 1. A TRIAL COURT HAS NO AUTHORITY TO ALTER A VALID JUDGMENT AND SENTENCE WHICH WAS NEITHER CHALLENGED NOR CONSIDERED ON APPEAL.**

Mr. Valdez challenged only one of his sentences on appeal, his sentence on Count II. This Court agreed that Mr. Valdez's offender score was miscalculated on Count II and remanded for resentencing with the correct offender score for that count. State v. Valdez, COA #34008-9-II (filed August 15, 2006). The state never argued that the trial court abused its discretion in imposing a sentence at the low end of the standard range on Count III or sought any other affirmative relief.

Under these circumstances, the trial court had no authority to modify the sentence for Count III. As held by the court in State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989), the Sentencing Reform Act (SRA) requires the imposition of a determinate sentence with actual months of custody set forth exactly; such a sentence, if it is valid, is not subject to subsequent modification. As the Shove court held, at the time of sentence, the judge has the information relevant to the sentencing decision available -- criminal history and the particular facts of the crime of conviction. There is no need to modify the sentence after it is imposed.

Here, the sentence imposed on Count III ran consecutively to the sentence imposed on Count II; it was a separate sentence unrelated to the sentence on Count II and did not even affect the offender score on Count III. The trial court erred in modifying this valid sentence for Count III on remand. The court lacked the authority to increase the sentence just as, in Shove, it lacked the authority to shorten the sentence.

2. THE TRIAL COURT EXCEEDED THE SCOPE OF THE MANDATE FOR RESENTENCING.

The trial court exceeded the scope of the mandate in increasing the sentence on Count III where the mandate provided only for correction of the offender score and sentence on Count II.

In State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992), the trial court, after a successful appeal, considered the same factors it had previously considered and rejected initially and sentenced the defendant to an exceptional sentence on remand. In reversing, the Supreme Court noted:

Having declared in the original sentencing that an exceptional sentence was not warranted, and operating at the re-sentencing under the mandate to "re-determine the offender score," the trial court could not, at re-sentencing, impose an exceptional sentence based on aggravating factors which were considered in the prior sentencing and rejected as a basis for an exceptional sentence.

Collicott, 118 Wn.2d at 272. The court reiterated that RAP 12.2 restricts the authority of the trial court, and when the mandate directs the trial court to conduct "further proceedings in accordance with . . . the opinion," it does not have the authority to go outside the mandate.

In State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003), the court distinguished Collicott, because the trial court in Tili had declined to impose an

exceptional sentence at the original sentencing only because it erroneously believed that Tili's sentences would be served consecutively and that therefore an exceptional sentence was unnecessary. The Tili court allowed for reconsideration of an exceptional sentence on remand given that the trial judge was mistaken in his reason for rejecting the exceptional sentence. The opinion remanding the case had expressly held that the defendant's "sentence [was] statutorily required to be served concurrently unless an exceptional sentence [was] imposed." Consequently, Tili allowed for re-sentencing including the imposition of an exceptional sentence.

Given that this Court did not make any decision invalidating any other sentence, the trial court was without the authority to resentence Mr. Valdez to anything but the original sentence on the counts other than Count II.

3. THE TRIAL COURT WAS COLLATERALLY ESTOPPED FROM IMPOSING A HIGHER SENTENCE ON COUNT III ON REMAND.

The Doctrine of Collateral Estoppel applies in criminal cases and prevents re-litigation of issues that have been actually adjudicated previously.

Collicott, 118 Wn.2d at 660 (citing State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968)).

In determining whether collateral estoppel applies in a criminal context, the court determines whether the issue was raised and resolved by the former judgment and then whether the issue being raised in the subsequent proceeding is identical to that sought to be barred. Collicott, at 661.

In Collicott, the court found that collateral estoppel did apply because the judge had previously determined that he would not impose an exceptional sentence, and, subsequently, could not change his mind based on the same arguments that were presented in the first judgment.

Collateral estoppel applies in this situation. The state argued for a sentence at the top of the standard range based on exactly the same record at the first sentencing. The trial court rejected the state's arguments and declined to give anything other than the low end of the sentencing range. Given that, the judge at resentencing was estopped from imposing a higher sentence simply because Mr. Valdez was successful in appealing his offender score on another count. Mr. Valdez's judgment and

sentence should be reversed on Count II and his case remanded for resentencing to a term at the low end of the standard range.

4. THE INCREASED SENTENCE FOR COUNT II AFTER A SUCCESSFUL APPEAL CONSTITUTED JUDICIAL VINDICTIVENESS.

There was nothing in the record at sentencing to suggest any conduct on the part of Mr. Valdez that would justify increasing his sentence on Count III. It was in fact unrebutted at sentencing that Mr. Vasquez had made positive changes in his life since the time of his crime and original sentencing. He expressed his wish to apologize to the victims. The state could not and did not point to any new conduct on his part justifying increasing Mr. Valdez's sentence on Count III.

What the court apparently *did* consider was some unidentified report about the crime, the prosecutor's unsupported report about what had happened in Mr. Vasquez's co-defendant's case and the prosecutor's statements about what he claimed were the wishes of the victims. RP 5, 10-11.

The United States Supreme Court held in North Carolina v. Pearce, 395 U.S. 711, 722-723, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), that because a person

is denied his constitutional right to due process of law if judicial vindictiveness plays any part in sentencing, a presumption of vindictiveness arises where a court imposes a higher sentence after a successful appeal. The Court held that the justification for the higher sentence "must affirmatively appear in the record and must objectively be based on objective information concerning the defendant's identifiable conduct after the original proceeding." Pearce, 395 U.S. at 723-726.

Since the decision in Pearce, the doctrine of judicial vindictiveness has been refined and qualified, but the emphasis has remained on the necessity of justifying an increase in sentence on events or information subsequent to the initial sentencing. In Wasman v. United States, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984), the Supreme Court held that Pearce created a rebuttable presumption, but reiterated that an increased sentence after retrial and conviction following a successful appeal should be justified "by identifying relevant conduct or events that occurred subsequent to the original proceeding."

Then, in Alabama v. Smith, 490 U.S. 794, 798-803, 109 S. Ct. 2001, 104 L. Ed. 2d 865 (1989), the Supreme Court held that a longer sentence may be justified based on evidence that became available at trial which the judge was unaware of at the time of the initial sentencing after a plea that was later withdrawn. The Court construed the Pearce presumption as arising where there is a "reasonable likelihood" that an unexplained increase in sentence is a product of vindictiveness. Smith, 490 U.S. at 798-800.

Federal circuit courts have also emphasized the necessity of conduct arising after the initial sentencing as a basis for increasing a sentence on remand after a successful appeal. For example, in United States v. Resendez-Mendez, 251 F.3d 514 (5th Cir. 2001), the Court of Appeals held that the trial court's justifications of having had more time to review the matter and not being convinced that the defendant was truly sorry were insufficient. 251 F.3d at 518. The court noted that cases in which longer sentences had been upheld involved subsequent criminal activity. Resendez-Mendez, 251 F.3d at 518 (citations omitted). The court reasoned:

No similar newly discovered facts, changed circumstances, or post-sentencing occurrences emerged regarding Resendez or his criminal behavior following his original sentencing. . . .

at 518.

Similarly, in United States v. Rapal, 146 F.3d 661 (9th Cir. 1998), the Ninth Circuit held that the presumption of vindictiveness arising from an increase in sentence was not rebutted where "the only relevant event occurring after the initial sentence was Rapal's appeal." Rapal, 146 F.3d at 664. The court held that:

the record must show more than that the judge simply articulated some reason for imposing a more severe sentence. The reason must have at least something to do with conduct or an event, other than the appeal, attributable in some way to the defendant.

Rapal, at 664.

Washington courts have upheld increased sentences if the increased sentences were justified by conduct which occurred after the initial sentencing. See, State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) (sentence increased after the defendant's fraud in obtaining an erroneous sentence was discovered); State v. White, 123 Wn. App. 106, 97 P.3d 34 (2004) (DOSA not given on resentencing

because of the defendant's drug use and infraction record in prison). Where the record did not provide a justification for an increased sentence after a successful appeal, however, this Court has held that the presumption of vindictiveness was not rebutted. State v. Ameline, 113 Wn. App. 128, 75 P.3d 589 1 (2003).

This Court should reverse Mr. Valdez's sentence on Count III and remand for imposition of the same sentence which was previously imposed and which was upheld on appeal.

E. CONCLUSION

Mr. Valdez's increased sentence on Count III on remand should be reversed and his case remanded for resentencing on that count to the original term at the low end of the standard range.

DATED this 30th day of January, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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