

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.

07 MAY -14 PM 1:13  
COURT OF APPEALS  
DIVISION II  
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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ARGUMENT IN REPLY . . . . .	1
1. A TRIAL COURT HAS NO AUTHORITY TO ALTER A VALID JUDGMENT AND SENTENCE WHICH WAS NEITHER CHALLENGED NOR CONSIDERED ON APPEAL . . . . .	1
2. THE TRIAL COURT EXCEEDED THE SCOPE OF THE MANDATE FOR RESENTENCING . .	12
3. THE TRIAL COURT WAS COLLATERALLY ESTOPPED FROM IMPOSING A HIGHER SENTENCE ON COUNT III ON REMAND . .	13
4. THE INCREASED SENTENCE FOR COUNT II AFTER A SUCCESSFUL APPEAL CONSTITUTED JUDICIAL VINDICTIVENESS . . . . .	15
B. CONCLUSION . . . . .	18

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Ameline</u> , 113 Wn. App. 128, 75 P.3d 589 1 (2003) . . . . .	15
<u>State v. Collicott</u> , 118 Wn.2d 649, 827 P.2d 263 (1992) . . . . .	14
<u>State v. Hall</u> , 35 Wn. App. 302, 666 P.2d 930 (1983) . . . . .	4
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996) . . . . .	4, 5, 10
<u>State v. Harrison</u> , 148 Wn.2d 550, 61 P.3d 1104 (2003) . . . . .	13, 14
<u>State v. Larson</u> , 56 Wn. App. 323, 783 P.2d 1093 (1989) . . . . .	3, 4
<u>State v. Shove</u> , 113 Wn.2d 83, 776 P.2d 132 (1989) . . . . .	1
<u>State v. White</u> , 123 Wn. App. 106, 97 P.3d 34 (2004) . . . . .	9
 <u>FEDERAL CASES</u>	
<u>Jones v. Thomas</u> , 491 U.S. 376, 105 L. Ed. 2d 322, 109 S. Ct. 2522, <u>reh'g denied</u> , 106 L. Ed. 2d 627 (1989) . . . . .	8, 9
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969) . . . . .	6

TABLE OF AUTHORITIES -- cont'd

Page

Pennsylvania v. Goldhammer,  
474 U.S. 28, 88 L. Ed. 2d 183, 106 S. Ct. 353  
(1985) . . . . . 8-10

United States v. Crawford,  
769 F.2d 253 (5th Cir. 1985),  
cert. denied, 474 U.S. 1103 (1986) . . . . . 7, 8

United States v. Fogel,  
829 F.2d 77 (D.C.Cir. 1987) . . . . . 5-8, 11

United States v. Pimienta-Redondo,  
874 F.2d 9, 16 (1st Cir.),  
cert. denied, 493 U.S. 890 (1989) . . . . . 2, 3

RULES, STATUTES AND OTHERS

David Boerner,  
Sentencing in Washington, (1985) . . . . . 3

A. ARGUMENT IN REPLY

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, which was calculated with an erroneous offender score of six rather than four; the offender scores for his remaining convictions were correct and unchallenged. Specifically, his offender score remained the same on Count III, and Count III remained consecutive to his sentence on Count II. The only erroneous sentence was the sentence for Count II, and the only issue addressed by this Court on appeal was the offender score on Count II. There was no error or recalculation that needed to be done by the trial court on Count III as a result of the appeal.

Under these facts, in his opening brief, Mr. Valdez argued that the trial court had no authority to modify the sentence for Count III, citing State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989), which held that a valid sentence is not subject to subsequent modification. Here as in Shove, at the time the sentence was initially imposed, the judge had available the information relevant to the

sentencing decision -- criminal history and the particular facts of the crime of conviction. There was no need to modify the sentence after it was imposed.

The state cites a number of cases in support of its argument that "by appealing a portion of a sentence, the defendant in effect challenges the entire sentencing plan and, thus, has no legitimate expectation of finality of any discrete part of the original sentence." Brief of Respondent (BOR) 9-10. These cases, however, are misconstrued, inapplicable or support Mr. Valdez's position.

First, the state cites a number of federal cases which consider appeals under principles of law that are not consistent with the Sentencing Reform Act in Washington. In Washington, other current convictions relate to one another in only two regards: whether they are to be served concurrently or consecutively and as offender score for purposes of calculating the standard ranges. RCW 9.94A.525; RCW 9.94A.589. For example, in the cited case of United States v. Pimienta-Redondo, 874 F.2d 9, 16 (1st Cir.), cert. denied, 493 U.S. 890 (1989), the court upheld the trial court's imposing the same

length of sentence on remand where consecutive sentences were reversed. In upholding, the sentence, the appeals court relied on the authority of the trial judge under the relevant sentencing scheme to consider the overall sentencing package and to impose a sentence that would suit not only the offense but the individual defendant. United States v. Pimienta-Redonono, 874 F.2d at 16. It is precisely this kind of sentencing based on the characteristics of each individual defendant that was rejected in enacting the SRA, in favor of sentences based on the actual crimes of conviction, criminal history and the circumstances of the crime. David Boerner, Sentencing in Washington, § 9.16 (1985).

Second, the state mischaracterizes the holdings of cited cases. In State v. Larson, 56 Wn. App. 323, 783 P.2d 1093 (1989), the case cited for the proposition that a defendant cannot expect "to benefit from the terms of a sentence which is contrary to statute," the trial court erroneously imposed consecutive sentences. BOR 9. On remand to correct this error, the trial court increased the length of the sentences which were then imposed

concurrently. Even with the increase, however, the time to be served was less than the time imposed for the erroneous consecutive sentences. Most importantly, the trial court would have given longer sentences at the outset had the court known that the sentences would run concurrently. Under these circumstances, the reviewing court held that there was no double jeopardy problem and that a defendant cannot expect to benefit from a sentence that is contrary to statute. Here, of course, there was nothing contrary to statute about Mr. Valdez's sentence on Count III; the offender score was properly calculated and it was properly imposed to run consecutively to Count II. This puts Count III under Shove rather than Larson because Mr. Valdez *did* have the right to expect finality in his properly-imposed sentence which was *not* contrary to statute.

State v. Hall, 35 Wn. App. 302, 666 P.2d 930 (1983), the second case cited for the proposition that a defendant has no right to benefit from a sentence that is contrary to statute, involved resentencing after the trial court improperly

imposed a period of probation for only three hours. a sentence which was held to be contrary to statute.

In State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996), cited for the proposition that a defendant is on notice that his sentence might be modified on appeal, the defendant pled guilty under a plea agreement which was premised on his having only two prior convictions. BOR 10. After the state discovered that the defendant actually had four prior convictions, he was resentenced with a correct offender score and the trial court increased his sentences. The Hardesty court held that the increase was properly based on the defendant's fraud on the court.

Again, unlike the case cited by the state, Hardesty, Mr. Vasquez has not committed any fraud on the court. The only reason for the resentencing was that the state and court miscalculated his offender score on a different conviction.

In United States v. Fogel, 829 F.2d 77 (D.C.Cir. 1987), another case cited by the state, the holding of the federal Court of Appeals was that the trial court's increase in the length of probation on reconsideration violated double

jeopardy. The defendant had originally been sentenced to a probationary term of twelve months house arrest, but the trial court on its own motion increased the term of probation to three years. Although the original judgment did not specify that the underlying sentence had been suspended, the court held that that deficiency could be remedied without increasing the period of probation, and that to increase probation violated double jeopardy. Fogel, 829 F.2d at 89-90.

The state cites the language in the Fogel decision, that "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." Fogel, 829 F.2d at 85 (quoting North Carolina v. Pearce, 395 U.S. 711, 721, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969)). This quotation, however, was cited in the context of a case where a conviction was reversed and the case retried. Fogel, at 85.

The Fogel court went on hold that "the application of the double jeopardy clause to an increase in a sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence." Fogel, at 87. The Fogel court

noted that the "primary purpose of the [double jeopardy] clause is to protect the finality of judgments." Fogel, at 88.

The clause applies to "multiple punishment" because, if it did not apply to punishment, then prohibition against "multiple trials" would be meaningless; a court could achieve the same result as a second trial by simply resentencing a defendant after he has served all or part of the initial sentence. . . . Similarly, if a court can increase a defendant's sentence after service has begun, for any reason, or for no reason at all, then the interest in protecting a defendant from being compelled to live in a continuing state of anxiety is lost. . . . It would seem to follow that a defendant has, barring any awareness to the contrary, an expectation of finality in the severity of a sentence that is protected by the double jeopardy clause.

Fogel, at 88. The Fogel court then noted that the increase in length of the probationary sentence in Fogel's case was not necessary to bring the sentence into compliance with any statute and that the defendant had not appealed his conviction or challenged his original sentence. Fogel at 89. The court then concluded that

after a defendant is sentenced, he is entitled to have a legitimate expectation that the district court has reviewed all of the relevant circumstances, and has finally determined the severity of punishment that should be imposed on the defendant. A later discovery that the sentence is technically defective, for reasons

unrelated to the length of the sentence, is not relevant to, and does not affect that expectation. . . . The purpose of the double jeopardy clause is to protect the defendant against multiple trials and punishment. It is not intended to be a requirement that all sentences be technically correct in every aspect or else be subject to revision upward.

Fogel, at 89-90.

The Fogel court distinguished the facts of the case from the facts in United States v. Crawford, 769 F.2d 253 (5th Cir. 1985), cert. denied, 474 U.S. 1103 (1986), because the error in Crawford -- the failure to allow the government allocution at sentencing -- affected the entire sentence because the court decided the length of sentence on incomplete information. In Fogel, the error did not affect the severity of the sentence and therefore the defendant's expectation of finality was unaffected by the error. Fogel, at 89, n.11.

In Pennsylvania v. Goldhammer, 474 U.S. 28, 88 L. Ed. 2d 183, 106 S. Ct. 353 (1985), the defendant had been convicted of 110 total counts of forgery and theft. At sentencing, the trial court imposed a five-year probationary sentence on one count and suspended all of the remaining sentences. The defendant appealed and had 34 counts vacated because the statute of limitations had run; the vacated

counts included the one count where probation had been imposed. In Jones v. Thomas, 491 U.S. 376, 105 L. Ed. 2d 322, 109 S. Ct. 2522, reh'g denied, 106 L. Ed. 2d 627 (1989), the defendant had received consecutive sentences for robbery and felony murder based on the robbery. The conviction for robbery was vacated and the time the defendant had served on the robbery was fully credited toward the felony murder sentence and the Supreme Court held that this cured any double jeopardy problem. Thomas, 491 U.S. at 385-386.

These two decisions are clearly distinguishable from Mr. Valdez's case. In Goldhammer and Thomas the error on appeal had an impact on the remaining sentences. In Goldhammer, the implication was that the trial court wished to impose one probationary sentence for all convictions and erroneously chose a conviction that would later be vacated. In Thomas, the second sentence was not increased at all, and the defendant was fully credited for time served on the vacated sentence.

In State v. White, 123 Wn. App. 106, 97 P.3d 34 (2004), the trial court refused to impose a DOSA on remand and added probation to the defendant's

misdemeanor convictions after the defendant's sentence was reversed based on a miscalculated offender score. The trial court refused to impose a DOSA on remand because of the number of infractions the defendant had while in prison. Thus, the court in White had reasons based on conduct after the original sentence to deny a DOSA on remand and to proceed to resentencing on a premise that the defendant should be sentenced as if he were not entitled to special sentencing consideration.

In summary, the cited cases all involve circumstances in which the reversal by the appellate court changed the circumstances such that the original sentence as a whole was affected. In Larson, the trial court's initial choice of the proper length of sentence reflected the fact that the court believed the sentences would be served consecutively. In Hall, the three-hour probationary period was not long enough to comply with the statutory requirement that the defendant report to his community corrections officer. In Hardesty, the original sentence and offender score was a result of the defendant's fraud on the court. In Goldhammer,

the trial court would not have suspended the sentences if it had known that the one conviction for which probation was imposed would be vacated. In White, the court would not have imposed a DOSA and no probation time had the court known that the defendant would receive 57 infractions in prison.

None of these cases hold that in the absence of a factor which alters the entire premise of sentencing, a sentence which was not appealed or considered on appeal is subject to increase on remand to correct a deficiency in another sentence.

In Fogel, the court recognized the principle argued by Mr. Valdez on appeal: "A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence." Fogel, at 82 (citing Untied States v. Pridgeon, 153 U.S. 48, 64, 38 L. Ed. 2d 31, 14 S. Ct. 746 (1894)).

Here, there was nothing invalid about the sentence in Count III. It had the correct offender score; it was consecutive to Count II. It was not

appealed. Mr. Valdez was entitled to finality, and the trial court erred in increasing the sentence on remand.

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

The state argues that this Court, in Mr. Valdez's prior appeal "placed all counts back before the trial court for sentencing," and that increasing the sentence for Count III therefore did not exceed the scope of the mandate. BOR at 14.

This is incorrect. The unpublished opinion of this Court reads as follows:

*Sidfredo Valdez appeals his sentence for first degree kidnapping. He argues that (1) his sentence exceeded the authorized sentencing range because it was based on an erroneously calculated offender score; and (2) because his sentence is, therefore, facially invalid, the trial court erroneously denied his motion for resentencing as untimely. The State concedes this error. Accepting the State's concession, we vacate Valdez's sentence and remand for resentencing.*

(emphasis added).

Thus, the trial court exceeded the scope of the mandate in resentencing Mr. Valdez on Count III, which was not considered on appeal. Indeed, Mr. Valdez could not have challenged any of his other

sentences because such a challenge would have been time-barred.

The plain language of the decision addresses only Count II and remands for resentencing on that specific sentence. Resentencing on Count III exceeded the scope of that mandate.

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

The state agrees that Doctrine of Collateral Estoppel applies in criminal cases. BOR 16. The state argues, however, that under State v. Harrison, 148 Wn.2d 550, 61 P.3d 1104 (2003), it should not apply in Mr. Valdez's case because an appellate court's reversal of one sentence destroys the finality of the judgment. BOR 17.

Harrison, of course, is a case in which the appellate court reversed an exceptional sentence because the prosecutor breached its plea agreement with the defendant to recommend a standard range sentence. On remand the trial court felt it was bound to once again impose an exceptional sentence. The Harrison court held that the defendant was entitled to specific performance of his plea agreement and to reconsideration de novo of his

sentence, and that collateral estoppel could not bar such de novo consideration.

Obviously, in Harrison, to hold that the trial court was estopped from consideration of the prosecution's proper recommendation de novo on remand would deny the defendant the benefit of his appeal and the reversal of his sentence. But nothing in Harrison grants the trial court the right to reconsider an issue that it previously considered and ruled on which was not reversed on appeal.

Further, the Harrison court did not overrule State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992), but merely described its holding as dicta.

It is undisputed that Judge Cohoe considered the state's request for a sentence at the high end of the standard range for Count III at the original sentencing and instead imposed the low end of the standard range. The sentence on Count III did not run concurrently with Count II and Judge Cohoe had every incentive to impose the sentence he felt was proper at the time of the original sentence. The facts did not change between the original sentence hearing and the resentencing hearing when Judge

Serko second-guessed Judge Cohoe and increased Mr. Valdez's sentence.

Collateral estoppel principles apply to preclude relitigation because this Court did not reverse Count III and resentencing did not require the trial court to take any action on Count III.

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

Mr. Valdez's argument on appeal is not that an increase in sentence under every circumstance is vindictive. His argument is that an increase in sentence without justification because of something which occurred after the original sentencing or information which came to light after the initial sentencing is presumptively vindictive. See Opening Brief of Appellant (AOB) at 11-14. His argument is that if the record did not provide a justification for an increased sentence after a successful appeal, 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).

In Mr. Valdez's case, there was nothing in the record at the resentencing hearing to suggest any conduct on his part that would justify increasing

his sentence on Count III. No new facts arose during a retrial for the crime; there was no retrial. Further, it was unrebutted at sentencing that Mr. Vasquez had made positive changes in his life since the time of his crime and original sentencing. The state could not and did not point to any new conduct on his part justifying increasing Mr. Valdez's sentence on Count III.

In its brief, the state cites only the facts of the case, the wishes of the victims, the sentence of Mr. Valdez's co-defendant, the prosecutor's recommendation and "the original intent of Judge Cohoe when it imposed a high-end sentence on Count III." BOR 23-24. The facts of the case had not changed, nor had the wishes of the victims or the prosecutor's recommendation. Those were all considered by Judge Cohoe when he imposed a sentence at the low end of the standard range on Count III, not the high end. In fact, Judge Cohoe's original intent was to impose the high end of the standard range on one of the two kidnapping counts (Count II) and the low end on the other (Count III). As for why Mr. Valdez's co-defendant was sentenced as he was rumored to have been sentenced, it was unknown.

This is not a case where the defendant was tried again after a guilty plea was withdrawn, where a jury imposed a more serious sentence, or where there was an intervening criminal conviction. See, BOR 20, n.6. This is not a case where individual sentences were increased because the court erroneously believed that two sentences would be served consecutively and therefore imposed shorter sentences.

And although the state argues that Mr. Valdez's sentence was not increased on Count III, it clearly was. BOR 21-22. This is because Count III was separate from Count II and ran consecutive to it.

This Court should reverse Mr. Valdez's sentence on Count III and remand for imposition of the same sentence which was previously imposed. The sentence for Count III was not challenged on appeal and not considered by this Court on appeal. The only reason that it was increased was that Mr. Valdez was before the court for resentencing on Count II, and the court used the opportunity to increase the sentence. Because there was no justification for the increase in sentence -- other than that Mr. Valdez's sentence on another

conviction was being decreased -- it was vindictive and unconstitutional.

**A. 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 3<sup>rd</sup> day of May, 2007.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I certify that on the 3<sup>rd</sup> day of May 2007, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

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