

NO. 43493-8-II

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

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STATE OF WASHINGTON, Respondent

v.

MARX WAYNE COONROD, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00157-3

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. This Court should decline review of Mr. Coonrod's assignment of error because he failed to preserve this issue for review.
- II. In the alternative, this Court should find that Mr. Coonrod has failed to demonstrate manifest error affecting a constitutional right.

B. STATEMENT OF THE CASE

I. Factual Summary

Between November 20, 2006, and January 23, 2007, the appellant (hereafter, "the defendant") entered eight different banks in Clark County, Washington, and demanded money from the bank tellers by force or by threatened use of force, violence, or fear of injury. (CP 1-4). The defendant was successful in five of his attempts to commit bank robbery. (CP 1-4).

II. Procedural History

The defendant was charged by Third Amended Information with five counts of Robbery in the First Degree and three counts of Attempted Robbery in the First Degree. (CP 1-4, 20). The defendant's standard range sentence was 153-195 months confinement. (CP 13). Further, the

State alleged an aggravating factor for each count because the defendant's high offender score resulted in some crimes going unpunished.<sup>1</sup> (CP 13).

On September 10, 2008, the defendant pled guilty before the Honorable Robert Harris, pursuant to a plea agreement. (CP 5, 8, 15). The defendant was represented by defense attorney Jeff Sowder. (CP 14). In exchange for his plea of guilty to one count of Robbery in the First Degree and two counts of Attempted Robbery in the First Degree, the State agreed to dismiss with prejudice four counts of Robbery in the First Degree and one count of Attempted Robbery in the First Degree. (CP 8). Under the plea agreement, the defendant's standard range sentence was reduced to 87-116 months confinement. (CP 8). Both parties were free to argue for any sentence within the standard range. (CP 8). Further, the defendant agreed to pay all costs, fees, and fines, and restitution in an amount to be determined. (CP 8). The defendant entered a *Newton / Alford* plea to the charges. (CP 13-14).

Immediately after he pled guilty, the defendant submitted a handwritten letter to Judge Harris, in which he asked to withdraw his plea, based on a claim that it was procured through "stress and duress." (CP 21). Beyond this assertion, the defendant failed to point to any evidence

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<sup>1</sup> The State filed a Fourth Amended Information on September 16, 2008. The Fourth Amended Information appears to mirror the Third Amended Information in all respects except that the State removed the aggravating factor for each count. (CP 1-4, 20).

which reflected a manifest injustice. (CP 22). In his letter, the defendant also asked the court to appoint him new counsel. (CP 21).

On September 25, 2008, a sentencing hearing was held before Judge Harris. (CP 59). Prior to sentencing, Judge Harris heard the defendant's motion to withdraw his guilty plea. *State v. Coonrod*, No. 38490-6-II, 2010 Wash. App. LEXIS 329, slip. op. at 2 (Feb. 9, 2010).<sup>2</sup> Judge Harris denied the defendant's request to appoint new counsel and required the defendant to argue his motion to withdraw his guilty plea pro se. *Coonrod*, slip. op. at 2. Judge Harris ultimately denied the defendant's motion to withdraw his guilty plea and proceeded to sentencing. *Id.* The State recommended a sentence of 116 months confinement, at the high end of the standard range. (RP 143). Judge Harris sentenced the defendant to a mid-range sentence of 100 months confinement. (CP 63-64).

The defendant subsequently appealed the trial court's denial of his motion to withdraw guilty plea and sentence, arguing the trial court abridged his right to counsel. *Coonrod*, slip. op. at 1. In an unpublished opinion, the Court of Appeals for Division Two vacated the defendant's sentence and remanded the defendant's case to the trial court for appointment of new counsel and for a new hearing on whether the

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<sup>2</sup> While unpublished opinions may not be cited as precedent, the Court may rely on them for facts established in earlier proceedings in the same case involving the same parties. *State v. Seek*, 109 Wn. App. 876, 878 n.1, 37 P.3d 339 (2002).

defendant should be permitted to withdraw his guilty plea. *Id.* at 5. In addition, the Court ordered the trial court to re-sentence the defendant, if his motion to withdraw guilty plea was denied. *Id.*

The Honorable Richard Melnick presided over the subsequent hearing on the defendant's motion to withdraw guilty plea. (RP 68, 92, 115). The defendant was represented by defense attorney Jeff Riback. *Id.* Following a hearing, Judge Melnick denied the defendant's motion, finding the defendant failed to demonstrate a manifest injustice, as required under CrR 4.2(f). (RP 130).

On April 5, 2012, the defendant was re-sentenced before Judge Melnick. (RP 130). In accordance with its previous recommendation, the State recommended a sentence of 116 months confinement. (RP 143). Defense counsel did not object to the State's recommendation; he did not argue that the court must adhere to the 100 month sentence that was previously imposed by Judge Harris; and he did not argue for a sentence of a particular length of time. (RP 143-45, 148-49). Instead, defense counsel simply asked the court to sentence the defendant to credit for time served. (RP 144). Mr. Riback stated:

[a]nd we would simply ask for, I guess, a resentencing. Giving Mr. Coonrod essentially credit for time served, I

guess his early release date at this point is... November 5, 2012.

- (RP 144).

The defendant was vocal throughout the sentencing hearing and he was given two specific opportunities to address the court prior to his sentencing. (RP 149-59). The defendant claimed he was innocent of the charges; he said he was a victim of “Clark County justice;” and he continued to argue in support of his motion to withdraw guilty plea. *Id.* In addition, the defendant challenged his criminal history score (although he eventually conceded his criminal history score had been correctly calculated). (RP 152, 159). The defendant never opposed the State’s sentencing recommendation and he never asked the court to sentence him commensurately with the sentence Judge Harris previously imposed. *Id.*

Judge Melnick advised the parties that he was bound by the plea agreement; however he said he was not bound by Judge Harris’s sentencing. (RP 143, 145). Judge Melnick said he would use Judge Harris’s sentencing “as some guidance.” (RP 145). Judge Melnick followed the State’s recommendation and imposed a standard range sentence of 116 months confinement. (RP 161). Judge Melnick said this sentence “was appropriate.” (RP 163). The defendant did not object to

the sentence Judge Melnick imposed. (RP 161-68). This timely appeal followed. (CP 300).

### C. ARGUMENT

#### I. The Court should decline review of the defendant's assignment of error because he failed to preserve this issue for review.

In his sole assignment of error, the defendant argues the sentence that Judge Melnick imposed must be vacated because it was more severe than the sentence that Judge Harris previously imposed. *See* Brief of Appellant ("Brief"), at 1. The defendant does not dispute that his 116 month sentence was within the standard range and he does not dispute that he did not object to the trial court's imposition of a 116 month sentence.

Under Washington Rule of Appellate Procedure ("RAP") 2.5(a), the appellate court may refuse to review any claim of error that was not raised in the trial court and preserved for review. The policy underlying the rule requiring issue preservation is to promote the "efficient use of judicial resources." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Consequently, "[t]he appellate courts will not sanction a party's failure to point out at [the trial court] an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *Scott*, 110 Wn.2d at 685 (citation omitted).

Here, the defendant failed to preserve this challenge for review. The defendant was extremely vocal with the court throughout the re-sentencing hearing; however, he never challenged the State's recommendation of 116 months confinement and he never objected to the trial court's imposition of 116 months confinement. In addition, when the defendant was asked for his sentencing recommendation, the defendant did not request a 100 month sentence. Instead, he simply asked for credit for time served. It is unclear from the record whether "credit for time served" would be accomplished with a 100 month sentence, with a 116 month sentence, or with an entirely different sentence. Because the defendant did not object to his sentence when it was imposed, because he did not request a sentence of 100 months confinement, and because he did not argue to the court that it must impose the same sentence that Judge Harris previously imposed, the defendant failed to preserve this assignment of error for review and it should not be reviewed by this Court.

II. In the alternative, if this Court finds the defendant's assignment of error is reviewable under RAP 2.5(a)(3), it should find the defendant has failed to demonstrate manifest error affecting a constitutional right.

A defendant may appeal a standard range sentence if the sentencing court fails to comply with constitutional requirements. *Mail*, 121 Wn.2d at 711-13. In addition, RAP 2.5(a)(3) provides that a party

may raise a claim of “manifest error affecting a constitutional right” for the first time in the appellate court. This exception to the rule requiring issue preservation is, however, construed narrowly. *Scott*, 110 Wn.2d at 688. In order for the alleged error to be reviewed by the appellate court, the defendant must demonstrate that the error is “truly of constitutional magnitude” and that the error is manifest (i.e. that it resulted in actual prejudice). *Id.* Constitutional challenges are reviewed de novo. *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006).

The defendant argues that Judge Melnick violated his constitutional right to due process by sentencing him vindictively to a longer sentence than that which was originally imposed by Judge Harris, without presenting evidence that would justify a harsher sentence. *See* Brief, at 4-5. The defendant cites to *North Carolina v. Pearce* to support his argument. *See* Brief, at 7; *citing* 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

In *Pearce*, two defendants were reconvicted for the same offenses and sentenced to longer prison terms, after their sentences were set aside following successful appeals. *Pearce*, 395 U.S. at 713-15. The Court held that a trial court is not constitutionally prohibited from imposing a greater sentence after a new sentencing or trial is ordered after remand. *Pearce*, at

726. However, because due process of law requires that vindictiveness against the defendant must play no part in the subsequent sentence he or she receives, the trial judge who imposes the more severe sentence must affirmatively state on the record his or her reasons for doing so, in order to overcome a presumption of vindictiveness. *Id.*

The Court has subsequently limited the scope of the *Pearce* rule to emphasize that the goal is to prevent the “evil” of a vindictive sentencing judge and not simply “enlarged sentences after a new trial.” *Alabama v. Smith*, 490 U.S. 794, 799, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989) (quoting *Texas v. McCullough*, 475 U.S. 134, 138, 89 L. Ed. 2d 104, 106 S. Ct. 976 (1986)); *see also Wasman v. United States*, 468 U.S. 559, 569-70, 82 L. Ed. 2d 424, 104 S. Ct. 3217 (1984). Accordingly, the Court has recognized several exceptions to the *Pearce* rule, for which vindictiveness will not be presumed. For example, there is no presumption of vindictiveness if the greater sentence 1) is based on new evidence at re-trial, *McCullough*, 475 U.S. 134, 89 L. Ed. 2d 104, 106 S. Ct. 976; 2) is determined by a different jury, *Chaffin v. Stynchcombe*, 412 U.S. 17, 36 L. Ed. 2d 714, 93 S. Ct. 1977 (1973); 3) follows a trial de novo, *Colten v. Kentucky*, 407 U.S. 104, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972); or 4) follows a trial when the first sentence was imposed after a guilty plea, *Smith*, 490 U.S. at 803.

Critical to the facts in the instant case, there is also no presumption of vindictiveness if the greater sentence is imposed by a different sentencing judge. *United States v. Perez*, 904 F.2d 142 (2d Cir.), *cert. denied*, 498 U.S. 905, 112 L. Ed. 2d 226, 111 S. Ct. 270 (1990); *accord State v. Parmelee*, 121 Wn. App. 707, 712, 90 P.3d 1092 (2004), *review denied* 153 Wn.2d 1013, 106 P.3d 762 (2005) (stating there is “not a reasonable likelihood that actual vindictiveness plays a role in sentencing when a different judge imposes the more severe sentence.”). The Court in *Parmelee* explained why vindictiveness will not be presumed when a different judge imposes a more severe sentence. *Parmelee*, 121 Wn. App. at 711-12 (quoting *Smith*, 490 U.S. at 802). The Court stated:

‘[T]he sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness.’ Without an explanation, it appears that the defendant’s successful appeal was the motivation for the increased sentence. Under those circumstances, it is appropriate to apply a presumption of vindictiveness to protect against actual vindictiveness and the chilling effect that perceived vindictiveness may have. The same concerns, however, are not present here because different judges imposed the different sentences. 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 vindictiveness.

- *Id.*

Because vindictiveness will not be presumed when the defendant is re-sentenced by a different judge, the new judge is not required to affirmatively state on the record his or her reasons for imposing a more severe sentence. *See Smith*, 490 U.S. at 799-800; *Parmelee*, at 711-12. Rather, it is the defendant's burden to demonstrate from the record that the re-sentence was the result of "actual" vindictiveness, in order to establish a due process violation. *Id.* "Vindictiveness" is the quality or state of being vindictive, which is defined as

having a bitterly vengeful character: disposed to seek revenge...: intended for or involving revenge...: characterized by an intent to cause unpleasantness, damage, or pain: NASTY, VICIOUS, SPITEFUL.

- WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2553 (1993).

Here, the defendant was re-sentenced by a different judge: Judge Melnick. Consequently, the *Pearce* "presumption of vindictiveness" does not apply in the defendant's case. Because the *Pearce* presumption does not apply, Judge Melnick was not required to set forth reasons on the record for imposing a sentence that was harsher than that which Judge Harris previously imposed. Rather, it is the defendant's burden to establish actual vindictiveness, on the part of Judge Melnick, in order to

establish a due process violation. In his brief, the defendant makes no effort to meet this burden; instead, he erroneously rests his argument on the “*Pearce* presumption.” *See* Brief, at 9. The defendant does state that “there is a realistic likelihood Judge Melnick acted vindictively;” however, beyond this bald assertion, the defendant cites to no evidence from the record to demonstrate actual vindictiveness. *Id.* Because the *Pearce* presumption does not apply in the defendant’s case and because the defendant has failed to establish actual vindictiveness, he has failed to demonstrate that a constitutional due process violation occurred.

In addition, there is no evidence from the record that a due process violation occurred because there is no evidence that Judge Melnick acted vindictively. First, there is no evidence that Judge Melnick had any prior contact with the defendant, or knowledge about his case, before the defendant’s case was remanded to the trial court. Next, there is no evidence that Judge Melnick was in any way “disposed to seek revenge” against the defendant because he had yet to exercise discretion or to consider an appropriate punishment in the case. Further, Judge Melnick had no personal stake in the first sentence and, therefore, no motive for vindictiveness.

Also, the defendant cannot demonstrate that manifest error occurred (i.e. that he was actually prejudiced). The defendant cannot

demonstrate actual prejudice because he was sentenced to a standard range sentence that was expressly contemplated by the plea agreement.

Specifically, the defendant agreed that he could be sentenced to 116 months confinement when he agreed the parties were free to argue for any sentence within the standard range (to wit: 87 - 116 months confinement).

Further, the trial court sentenced the defendant consistently with the sentence that the State recommended at both the first and second sentencing hearing. In addition, the defendant retained the benefit of the plea bargain, wherein five out of eight charges were dismissed, all sentencing enhancements were dismissed, and the defendant's standard range was drastically reduced.

#### D. CONCLUSION

This Court should find the defendant failed to preserve his sole assignment of error for review when he did not object to the sentence that was imposed at the time of sentencing. In the alternative, if this Court finds the defendant's assignment of error is reviewable under RAP 2.5(a)(3), it should find the defendant has failed to demonstrate manifest error of a constitutional magnitude. No due process violation occurred and

the defendant suffered no actual prejudice. For each of these reasons, the defendant's judgment and sentence should be affirmed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

Respectfully submitted:

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