

NO. 77756-0

---

---

**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN EGGLESTON, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend

---

**State's Response to Defendant's Post-Argument Memorandum**

---

GERALD A. HORNE  
Prosecuting Attorney

John M. Sheeran  
Deputy Prosecuting Attorney  
WSB # 26050  
930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2001 OCT 15 P 2:40  
BY RONALD R. CARPENTER  
CLERK

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S POST-ARGUMENT MEMORANDUM REGARDING JUDICIAL VINDICTIVENESS IN IMPOSING THE EXCEPTIONAL SENTENCE. ..... 1

    1. Defendant's reliance on North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969), is misplaced because the "rebuttable presumption of vindictiveness" does not apply when the subsequent sentence is imposed by a different judge. Texas v. McCullough, 475 U.S. 134, 140, 106 S. Ct. 976, 89 L.Ed.2d 104 (1986) ..... 1

B. ARGUMENT..... 1

C. CONCLUSION. ..... 5

## Table of Authorities

### Federal Cases

- Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201,  
104 L.Ed.2d 865 (1989).....3, 4
- Colten v. Kentucky, [407 U.S. 104; 92 S. Ct. 1953;  
32 L.Ed.2d 584 (1972).....4
- North Carolina v. Pearce, 395 U.S. 711, 725, 89 S. Ct. 2072,  
23 L.Ed.2d 656 (1969), overruled in part on other grounds by  
Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201,  
104 L.Ed.2d 865 (1989).....1, 2, 3, 4
- Texas v. McCullough, 475 U.S. 134, 140, 106 S. Ct. 976,  
89 L.Ed.2d 104 (1986).....1, 3, 4
- Wasman v. United States, 468 U.S. 559, 569, 104 S. Ct. 3217,  
82 L.Ed.2d 424 (1984).....3, 4

### State Cases

- State v. Parmelee, 121 Wn. App. 707, 712, 90 P.3d 1092 (2004).....3
- State v. Stein, 165 P.3d 16, No. 31980-2-II (Consolidated),  
No. 32982-4-II (August 7, 2007).....4

A. ISSUES PERTAINING TO APPELLANT'S POST-ARGUMENT MEMORANDUM REGARDING JUDICIAL VINDICTIVENESS IN IMPOSING THE EXCEPTIONAL SENTENCE.

1. Defendant's reliance on North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969), is misplaced because the "rebuttable presumption of vindictiveness" does not apply when the subsequent sentence is imposed by a different judge. Texas v. McCullough, 475 U.S. 134, 140, 106 S. Ct. 976, 89 L.Ed.2d 104 (1986).

B. ARGUMENT.

Defendant's first trial was in 1997, and presided over by Judge Wm. Thomas McPhee. CP 1670-1721. The jury in this first trial convicted defendant of five felonies: first degree assault, two counts of unlawful delivery of a controlled substance, one count of unlawful possession of a controlled substance with intent to deliver, and one count of unlawful possession of a controlled substance. CP 1633-42. A mistrial was declared on the charge of first degree murder when the jury could not reach a verdict as to that charge.

Defendant's second trial, in 1998, was presided over by Judge Leonard W. Kruse. CP 1722-54. First degree murder with aggravating circumstances, and the lesser included offense of second degree murder,

was the only charge in the second trial. Id. The jury convicted the defendant of second degree murder. As noted in defendant's Post-Argument Memorandum, the State had sought an exceptional sentence after the defendant's second trial, but Judge Kruse imposed a standard range sentence.

Defendant's 1998 murder in the second degree conviction, as well as the 1997 assault in the first degree conviction, was reversed by the Court of Appeals. State v. Eggleston, No. 22085-7-II (2001).

Defendant's third trial, in 2002, was presided over by Judge Stephanie Arend. CP 763-809. The defendant was again convicted of murder in the second degree, and assault in the first degree. Again the State sought an exceptional sentence above the standard range, and Judge Arend imposed such.

Defendant argues that imposing an exceptional sentence on the murder in the second degree conviction after his third trial amounted to judicial vindictiveness. See North Carolina v. Pearce, 395 U.S. 711, 722-23, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969) (presumption of judicial vindictiveness arises when a court imposes a longer sentence following a successful appeal).

However, the Pearce presumption does not apply when a different sentencing judge imposed the later sentence. See State v. Parmelee, 121

Wn. App. 707, 712, 90 P.3d 1092 (2004) (there is "not a reasonable likelihood that actual vindictiveness plays a role in sentencing when a different judge imposes the more severe sentence.").

Due process of law requires that a defendant's decision to exercise his right to appeal must play no part in the sentence he receives after a new trial. North Carolina v. Pearce, 395 U.S. 711, 725, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L.Ed.2d 865 (1989). Where a trial court imposes "a more severe sentence upon a defendant after a new trial, the reasons for ... doing so must affirmatively appear." Pearce, 395 U.S. at 726. The trial court satisfies this rule where it provides an on-the-record, logical, and nonvindictive reason for the sentence. Texas v. McCullough, 475 U.S. 134, 140, 106 S. Ct. 976, 89 L.Ed.2d 104 (1986). Otherwise, a presumption arises that the increased sentence is the result of vindictiveness. McCullough, 475 U.S. at 142.

The Pearce presumption, however, applies only where there is a reasonable likelihood that the increased sentence is "the product of actual vindictiveness on the part of the sentencing authority." Smith, 490 U.S. at 799. Where there is no such reasonable likelihood, the burden is on the defendant to show the alleged vindictiveness. Smith, 490 U.S. at 799-800 (citing Wasman v. United States, 468 U.S. 559, 569, 104 S. Ct. 3217, 82 L.Ed.2d 424 (1984)). Where a different sentencer imposes the harsher penalty, the Pearce presumption does not arise because the second sentencer has no stake in the prior sentence. McCullough, 475 U.S. at 140.

Here, a different judge presided over Stein's retrial. Because this judge had no stake in Stein's original sentence, there is no reasonable likelihood that the increased sentence was due to vindictiveness and the Pearce presumption does not apply. McCullough, 475 U.S. at 140.

State v. Stein, 165 P.3d 16, No. 31980-2-II (Consolidated), No. 32982-4-II (August 7, 2007).

The Supreme Court of the United States has concluded that Pearce should not be applied in cases such as this one.

The [Pearce] presumption is also inapplicable because different sentencers assessed the varying sentences that McCullough received. In such circumstances, a sentence "increase" cannot truly be said to have taken place. In Colten v. Kentucky, [407 U.S. 104; 92 S. Ct. 1953; 32 L.Ed.2d 584 (1972)], which bears directly on this case, we recognized that when different sentencers are involved,

"[it] may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty." Id., at 117.

Here, the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence. We read Pearce to require no more, particularly since trial judges must be accorded broad discretion in sentencing, see Wasman, supra, at 563-564.

Texas v. McCullough, 475 U.S. 134, 140, 106 S. Ct. 976, 89 L.Ed.2d 104 (1986).

Without the Pearce presumption, defendant must show actual vindictiveness. Smith, 490 U.S. at 799-800. Defendant has not even attempted to demonstrate actual vindictiveness. Therefore, his claim that

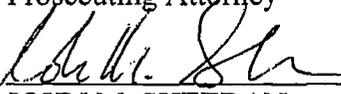
the exceptional sentence was the product of judicial vindictiveness must fail. Further, Judge Arend provided an on-the-record, wholly logical, nonvindictive reason for the exceptional sentence. So, even if this Court were to consider the argument, defendant cannot demonstrate actual vindictiveness.

C. CONCLUSION.

The defendant's convictions should be affirmed and this case remanded for resentencing consistent with current law.

DATED: October 15, 2007.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
JOHN M. SHEERAN  
Deputy Prosecuting Attorney  
WSB # 26050

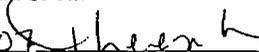
FILED AS ATTACHMENT  
TO E-MAIL

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 OCT 15 P 2:40  
BY RONALD R. CARPENTER

CLERK

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-15-07   
Date Signature