

FILED
SUPREME COURT
STATE OF WASHINGTON
8/31/2018 4:31 PM
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Supreme Court No. 95734-7
Court of Appeals No. 75458-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF APPEAL

Following Ronald Brown's successful appeal, four charges were dismissed and his offender score was substantially reduced.

Nonetheless, on remand, the State requested the trial court impose an exceptional sentence above the standard range on the basis of Brown's high offender score. The court had considered but expressly declined to impose an exceptional sentence on this basis at the first sentencing. But now, in response to the State's request, the court used Brown's offender score as justification to impose an exceptional sentence, despite the significant reduction in the offender score following Brown's appeal. The exceptional sentence was barred by collateral estoppel and was presumptively vindictive in violation of due process.

B. ISSUES PRESENTED

1. Did collateral estoppel bar the court from imposing an exceptional sentence on the basis of Brown's offender score where the court had already rejected an exceptional sentence on that basis?

2. Was the State's request for an exceptional sentence equal in length to the original sentence presumptively vindictive?

3. Was the exceptional sentence presumptively vindictive on behalf of the court?

C. STATEMENT OF THE CASE

Following an incident that occurred in December 2011, Brown was tried by a jury and convicted of two counts of first degree kidnapping, two counts of first degree robbery, two counts of second degree assault, and one count of first degree burglary, all with firearm enhancements. CP 6, 101-02.

At sentencing, Judge Weiss calculated the offender score as 17 for one of the kidnapping counts, zero for the other kidnapping count, and 19 for all of the remaining counts. CP 91. The defense requested a low-end standard-range sentence totaling 572 months. 3/12/13RP 18.

The State requested a sentence at the high end of the standard range. 3/12/13RP 18. At the same time, the State informed the court that it had discretion to impose an exceptional sentence on the basis of Brown's high offender score which resulted in some of the current offenses going "unpunished."¹ Id.

¹ A trial court may impose an exceptional sentence if it finds "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c).

The trial court considered but expressly declined to impose an exceptional sentence, finding that the facts of the case did not warrant it. 3/12/13RP 21. The court imposed a high-end standard-range sentence totaling 638 months (53.17 years). CP 91, 93.

Brown appealed his convictions but not his sentence. The State did not cross-appeal. The Court of Appeals reversed the two kidnapping convictions based on instructional error and vacated the two assault convictions on double jeopardy grounds. CP 59-88.

On remand, the State decided not to re-try the reversed kidnapping counts. CP 38; 6/21/16RP 2-3. The offender score was now 11 for each count. CP 9. The defense requested a low-end standard-range sentence totaling 309 months. CP 27.

Although Brown's offender score was now substantially reduced, the State asked the court to impose an exceptional sentence on the basis of his "high offender score." CP 32-36; 6/21/16RP 25-26. The State requested a sentence of 638 months, which was equal in length to the sentence Brown had initially received, before four of his charges were dismissed. 6/21/16RP 21-22, 25-26.

Judge Weiss agreed to impose an exceptional sentence on the basis of Brown's offender score, although for less time than the State

requested. 6/21/16RP 32-34. The court explained a 638-month sentence was not warranted in light of the sentence that one of Brown's co-defendants had received after Brown's original sentencing. 6/21/16RP 34-35. The court imposed an exceptional sentence totaling 399 months (33.25 years). CP 11, 21-22; 6/21/16RP 36.

Brown appealed again, challenging his exceptional sentence on the basis of collateral estoppel and judicial and prosecutorial vindictiveness. The Court of Appeals affirmed. This Court granted review of all three issues.

D. ARGUMENT

1. Collateral estoppel precluded the trial court from imposing an exceptional sentence on remand where it had considered and rejected an exceptional sentence on the same basis at the original sentencing.

Collateral estoppel precluded the court from imposing an exceptional sentence on remand on the basis of Brown's offender score because the court had already decided that an exceptional sentence was not warranted on that basis. Nothing had changed between the first and second sentencings now to justify imposing an exceptional sentence; in fact, Brown's offender score had substantially *decreased*. The court's original decision not to impose an exceptional sentence was "final" because the Court of Appeals did not reverse Brown's sentence, only

his unlawful convictions. Imposing a standard-range sentence would not work an injustice on the State and is consistent with public policy. Therefore, collateral estoppel applies.

- a. Collateral estoppel bars relitigation of issues already decided.

Collateral estoppel is a long-standing common-law doctrine that applies in both civil and criminal litigation. State v. Morlock, 87 Wn.2d 767, 770, 557 P.2d 1315 (1976); State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). Under this doctrine, “[a] fact or question decided by a prior final judgment binds the parties and all persons in privity with them, and cannot be relitigated by them in either the same or a different cause of action.” Riblet v. Ideal Cement Co., 54 Wn.2d 779, 781, 345 P.2d 173 (1959).

Collateral estoppel promotes judicial finality and economy and prevents inconvenience and harassment of parties. State v. Dupard, 93 Wn.2d 268, 272, 609 P.2d 961 (1980). It should be applied flexibly, consistent with public policy and the ends of justice. Reninger v. State Dep’t of Corrections, 134 Wn.2d 437, 451, 951 P.2d 782 (1998).

Collateral estoppel applies if (1) the issue decided in the earlier proceeding is the same as the issue in the later proceeding; (2) the earlier proceeding ended in a final judgment on the merits; (3) the party

against whom collateral estoppel is asserted is a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. State v. Tili, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003).²

Here, the third element is undisputed. The other elements are also satisfied.

- b. The issue in both sentencings was the same—whether to impose an exceptional sentence on the basis of Brown’s high offender score.

The court faced the same issue in both sentencings—whether to impose an exceptional sentence on the basis of Brown’s offender score.

When a defendant is convicted of multiple offenses, the court may find that his or her “high offender score results in some of the current offenses going unpunished.” RCW 9.9A.535(2)(c). The issue the court must decide is whether these circumstances “constitute substantial and compelling grounds to impose an exceptional sentence.”

² In earlier cases, the Court provided a two-part test in criminal cases: “the first is to determine what issues were raised and resolved by the former judgment, and the second is to determine whether the issues raised and resolved in the former prosecution are identical to those sought to be barred in the subsequent action.” State v. Collicott, 118 Wn.2d 649, 660-61, 827 P.2d 263 (1992) (plurality opinion); see also State v. Peele, 75 Wn.2d 28, 30-31, 448 P.2d 923 (1968).

State v. Alvarado, 164 Wn.2d 556, 568-69, 192 P.3d 345 (2008); RCW 9.94A.535.

Here, Brown was convicted of multiple offenses and, at the first sentencing, his offender score was 19 for most of the counts, well above the top of the sentencing grid. CP 91; RCW 9.94A.510. Yet the court found these circumstances did not warrant an exceptional sentence because the facts of the crime, and Brown's culpability, were not particularly egregious. 3/12/13RP 21.

The issue at the second sentencing was the same for purposes of collateral estoppel. The court was once again tasked with deciding whether Brown's offender score "constitute[d] substantial and compelling grounds to impose an exceptional sentence." Alvarado, 164 Wn.2d at 568-69. The facts of the crime, and Brown's role in the incident, were the same. The only relevant circumstance that had changed was that Brown's offender score had substantially decreased. But this change made an exceptional sentence on the basis of Brown's offender score *less* justified than before.

The change in the offender score due to the dismissal of four charges should not be the basis to reject a collateral estoppel claim. Such a result is contrary to the equitable foundations of the doctrine.

That Brown’s presumptive sentence decreased due to the dismissal of four charges following his appeal distinguishes this case from Tili. There, the presumptive sentence decreased following Tili’s appeal because the appellate court reversed the sentence, not the convictions. Tili, 148 Wn.2d at 356-57. At the original sentencing, the trial court erroneously found Tili’s three rape convictions were separate conduct and imposed consecutive sentences. Id. But the court also said that if the separate conduct determination were reversed on appeal, the court would impose an exceptional sentence on the basis of deliberate cruelty and vulnerability of the victim. Id. When the relevant circumstances had changed—the rapes were no longer considered separate and distinct—collateral estoppel did not bar an exceptional sentence. Id. at 362-63.

By contrast, Brown’s presumptive sentence was lower following his appeal only because four charges were dismissed. The trial court had already determined that an exceptional sentence was not warranted in light of the facts of the crime. Those circumstances had not changed. The sentencing context had changed only in a way that made an exceptional sentence less appropriate. For purposes of collateral estoppel, the “issue” was the same and had already been decided.

- c. The trial court's decision not to impose an exceptional sentence was "final" because the Court of Appeals did not reverse that portion of the sentence.

The trial court's decision not to impose an exceptional sentence at the first sentencing was "final" because that portion of the judgment and sentence was valid when entered and was not challenged on appeal.

It is a basic principle of criminal law that when an appellate court reverses only a portion of a person's judgment and sentence, "the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced" is unaffected." State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (quoting In re Pers. Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980)).

Applying this principle, Washington courts hold that when a trial court imposes an exceptional sentence and that decision is not challenged on appeal, it is final and has preclusive effect on remand if any other portion of the judgment and sentence is reversed. Kilgore, 167 Wn.2d at 33, 37-38; State v. Rowland, 160 Wn. App. 316, 329, 249 P.3d 635 (2011), aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012).

In Kilgore, the defendant was convicted of seven charges and the trial court imposed an exceptional sentence. Kilgore, 167 Wn.2d at 32-33. Kilgore appealed but did not challenge his exceptional sentence.

Id. The appellate court reversed two counts and affirmed the others and the State elected not to re-try the reversed counts. Id. After the mandate issued but before the trial court corrected Kilgore’s judgment and sentence, the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Id. This Court held Kilgore was not entitled to be resentenced in accordance with Blakely because his exceptional sentence was “final” when the appellate court issued its mandate. That is because he had not appealed the exceptional sentence. Id. at 33, 37-38.

Similarly, in Rowland, the defendant was convicted of first degree murder and the trial court imposed an exceptional sentence. Rowland, 160 Wn. App. at 319-20. After the Court of Appeals affirmed and the mandate issued, Rowland successfully challenged his offender score in a personal restraint petition. Id. On remand, the trial court imposed the same length exceptional sentence, although the presumptive sentence had changed. Id. at 321-22. The Court of Appeals held Rowland was not entitled to be resentenced in accordance with Blakely because “while the finality of Rowland’s standard range sentence was disturbed by our remand for resentencing following his successful PRP, his exceptional sentence was not.” Id. at 329.

By contrast, a trial court’s decision to impose an exceptional sentence is not “final” if the entire judgment and sentence is reversed on appeal. State v. Harrison, 138 Wn.2d 550, 561-62, 61 P.3d 1104 (2003). In Harrison, the State breached its plea agreement with Harrison by recommending a sentence based on a different offender score than agreed. Id. at 553. The trial court accepted the State’s calculation of the offender score and imposed an exceptional sentence based on the facts of the case. Id. at 554-55. This Court reversed, holding Harrison was entitled to specific performance for the State’s breach of the plea agreement and must be placed in the position he occupied prior to the breach. Id. Thus, he was entitled to a de novo sentencing hearing at which the trial court could exercise its discretion and decide not to re-impose an exceptional sentence. Id. The original exceptional sentence was not “final” because Harrison’s entire judgment and sentence was reversed. Id. at 561-62.

Here, the trial court expressly decided not to impose an exceptional sentence at Brown’s original sentencing. That decision was not challenged on appeal. The Court of Appeals reversed only a portion of the judgment and sentence—the convictions for first degree kidnapping and second degree assault—and affirmed the remainder of

the judgment. The portion of the judgment and sentence that was not challenged on appeal was “final” when the Court of Appeals issued its mandate. Kilgore, 167 Wn.2d at 33, 37-38; Rowland, 160 Wn. App. at 329. Thus, the trial court was estopped from disturbing its original decision and imposing an exceptional sentence on remand.

- d. Application of collateral estoppel does not work an injustice on the State.

Applying collateral estoppel does not work an injustice on the State. But refusing to apply the doctrine works an injustice on Brown.

The injustice element of the collateral estoppel test is “most firmly rooted in procedural unfairness.” State v. Vasquez, 148 Wn.2d 303, 308-09, 59 P.3d 648 (2002). The question is whether the parties in the earlier proceeding received a full and fair hearing on the issue in question. Id.

Here, the State received a full and fair hearing on the issue at the original sentencing. The State raised the question whether to impose an exceptional sentence. The State did not recommend an exceptional sentence but informed the court it had discretion to impose one.

3/12/13RP 18. The court considered this information and decided to impose a standard-range sentence instead. 3/12/13RP 21.

The injustice element of the collateral estoppel test also “recognizes the significant role of public policy.” Vasquez, 148 Wn.2d at 309. The Court “may qualify or reject collateral estoppel when its application would contravene public policy.” Id.

Imposing a standard-range sentence on Brown cannot contravene public policy. The Legislature enacted the Sentencing Reform Act to promote several significant interests, including ensuring punishment that is proportionate to the seriousness of the offense and the offender’s criminal history and commensurate with the punishment imposed on others committing similar offenses. State v. Pascal, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987); RCW 9.94A.010. “The presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated.” Pascal, 108 Wn.2d at 137-38 (citing David Boerner, Sentencing in Washington § 2.5(b), (c), (d) (1985)).

Brown’s presumptive sentence represents the Legislature’s judgment of what punishment is appropriate, given his present convictions and criminal history. It cannot be contrary to public policy.

Moreover, imposing an exceptional sentence on Brown denies him the full benefit of his successful appeal. Our state constitutional

right to appeal “is to be accorded the highest respect by this court.” State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978); Const. art. I, §22. Allowing a trial court to impose an exceptional sentence after multiple convictions are reversed on appeal and the State elects not to re-try the dismissed charges dilutes the power of this important constitutional right.

e. Collicott was correctly decided and should be affirmed.

This Court’s plurality decision in Collicott is consistent with the analysis above and should be affirmed. State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992) (Collicott II).

Collicott was convicted of three offenses and the trial court found they constituted the same criminal conduct. State v. Collicott, 112 Wn.2d 399, 403, 412, 771 P.2d 1137 (1989) (Collicott I). The court imposed a standard-range sentence but miscalculated the offender score. Id. This Court remanded to the trial court to redetermine the offender score but reversed no other portion of the judgment and sentence. Id. at 412. On remand, the trial court recalculated the offender score, resulting in a lower presumptive sentence, but this time imposed an exceptional sentence, relying on three aggravators. Collicott II, 118 Wn.2d at 653-54, 659.

In its lead opinion, this Court held the trial court was estopped from imposing an exceptional sentence based on factors it had considered but rejected at the first sentencing. *Id.* at 661. “[T]he trial court could not at resentencing impose an exceptional sentence based on aggravating factors which were considered in the prior sentencing and rejected as a basis for an exceptional sentence.” *Id.* at 663-64. The concurring opinion did not express disagreement with this reasoning but stated reaching the collateral estoppel issue was unnecessary to the decision. *Id.* at 679 (Durham, J., concurring). For the reasons provided above, the lead opinion in Collicott II was correct.

2. The State’s request for an exceptional sentence equal in length to the sentence Brown originally received is presumptively vindictive.

Due process prohibits the prosecutor from retaliating against a defendant for exercising his or her right to appeal. State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006); Blackledge v. Perry, 417 U.S. 21, 27-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); U.S. Const. amend. XIV; Const. art. I, § 3.

A presumption of vindictiveness arises when “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” Korum, 157 Wn.2d at 627 (internal quotation marks

and citation omitted). The due process violation lies “not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.”

Bordenkircher, 434 U.S. at 363.

A presumption of vindictiveness arises when the prosecutor unilaterally decides to bring more serious charges against a defendant who exercises his right to appeal. Perry, 417 U.S. at 28-29.

Here, the prosecutor’s action raises a presumption of vindictiveness. The State requested an exceptional sentence on the basis of Brown’s high offender score only after he had successfully appealed, and only after the State had decided to dismiss the two reversed kidnapping charges rather than try to obtain valid convictions. See 3/12/13RP 12; 6/21/16RP 21. Aggravating factors supporting an exceptional sentence are akin to elements of the crime. State v. McEnroe, 181 Wn.2d 375, 382, 333 P.3d 402 (2014). The State’s request for an exceptional sentence was akin to bringing more serious charges against Brown for exercising his right to appeal.

The presumption of vindictiveness may be rebutted by the government if it demonstrates objective evidence justifying the action.

Korum, 157 Wn.2d at 627-28. The prosecutor’s reasons “must affirmatively appear” and “be based upon objective information” not known to the prosecutor at the time of the original charging decision. See Pearce, 395 U.S. at 726.

The State cannot rebut the presumption of vindictiveness. The State requested an exceptional sentence on the basis that Brown’s high offender score resulted in some of the current offenses going unpunished. CP 32-36. These circumstances existed and were known to the prosecutor at the time of the original sentencing. In fact, the asserted justification had *diminished*, given that Brown’s offender score had decreased from a 19 to an 11. CP 9, 91.

3. The trial court’s decision to impose an exceptional sentence is presumptively vindictive.

Due process precludes a trial court from imposing a heavier sentence upon a defendant as punishment for having succeeded in getting his original sentence set aside. North Carolina v. Pearce, 395 U.S. 711, 723-24, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); U.S. Const. amend. XIV; Const. art. I, § 3. A presumption of vindictiveness arises when a judge imposes a more severe sentence after a defendant appeals, unless the judge’s reasons “affirmatively appear” and are “based upon objective information concerning identifiable conduct on

the part of the defendant occurring after the time of the original sentencing proceeding.” Pearce, 395 U.S. at 726.

This Court should hold that in a multi-count case where some counts are dismissed following an appeal, it is presumptively vindictive to impose a sentence on the remaining counts that is greater than what the defendant originally received for those counts.

The “modified aggregate” or “aggregate remainder” approach is more suited to this situation than the “total aggregate” approach applied by the Court of Appeals in this case. Under the “aggregate remainder” approach, when a reviewing court assesses a sentence imposed in a multi-count case after some counts have been dismissed following an appeal, the court disregards the sentence originally imposed on the dismissed counts and then compares the total remaining sentence with the sentence imposed at resentencing. United States v. Monaco, 702 F.2d 860, 885 (11th Cir. 1983); United States v. Markus, 603 F.2d 409, 413 (2d Cir. 1979). If the second sentence is greater than the remainder aggregate sentence originally received, a presumption of vindictiveness arises. Monaco, 702 F.2d at 885.

Applying the “modified aggregate” approach in this situation avoids the risk of judicial self-vindication and vindictiveness that may

naturally arise. Jonathan D. Youngwood, Comment: The presumption of judicial vindictiveness in multi-count resentencing, 60 U. Chi. L. Rev. 725, 750-52 (Spring 1993). The “total aggregate” approach, on the other hand, permits judicial self-vindication by allowing a judge to reaffirm his or her initial sentence, even when the presumptive sentence has decreased following a successful appeal. Id.

The “remainder aggregate” approach is especially appropriate where a court decides to impose an exceptional sentence on remand after some counts are dismissed following an appeal. Under the Sentencing Reform Act, a trial court has virtually unfettered discretion to determine the length of an exceptional sentence, provided it does not exceed the statutory maximum. See, e.g., State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995); State v. France, 176 Wn.2d 463, 470, 308 P.3d 812 (2013) (“The trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence.”) (internal quotation marks and citations omitted).

Where courts have such broad discretion, “it may [be] defensible to presume that a higher sentence at resentencing on a particular count represent[s] a wholly personal decision by the sentencing judge and, thus, one that warrant[s] a presumption of

vindictiveness absent a non-vindictive explanation.” United States v. Fowler, 749 F.3d 1010, 1021 (11th Cir. 2014).

The purpose of the Pearce rule is to counteract the natural possibility that the judge, or the prosecutor, will have a personal stake in the prior sentence and a motivation to engage in self-vindication. Chaffin v. Stynchcombe, 412 U.S. 17, 27, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973). Applying the “aggregate remainder” approach when a court imposes an exceptional sentence after some counts are dismissed following an appeal best protects a defendant against judicial and prosecutorial vindictiveness and self-vindication and best effectuates the purposes of the Pearce rule.

E. CONCLUSION

The trial court’s decision to impose an exceptional sentence on Brown at his resentencing violated the collateral estoppel doctrine and was presumptively vindictive in violation of due process. Brown should be resentenced within the standard range.

Respectfully submitted this 31st day of August, 2018.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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)	
Respondent,)	
)	NO. 95734-7
)	
RONALD BROWN,)	
)	
Petitioner.)	

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