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NO. 95734-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD RICHARD BROWN,

Petitioner.

SUPPLEMENTAL
BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

At the original sentencing, the court found that an exceptional sentence was factually justified, but the court exercised its discretion not to impose one. The sentence was reversed on appeal. When the defendant was re-sentenced on the basis of a lower offender score, the prosecutor recommended an exceptional sentence equal to the original sentence. The court instead imposed an exceptional sentence that was 19½ years shorter than the original sentence.

(1) Did the decision on re-sentencing involve the same issue as the original sentence, so as to render collateral estoppel applicable?

(2) After the original sentence was reversed, was it still a "final judgment," so as to render collateral estoppel applicable?

(3) Does the court's reduction of the sentence after appeal give rise to a presumption of vindictiveness?

(4) Does the prosecutor's recommendation that the court re-impose the same sentence after appeal give rise to a presumption of vindictiveness?

II. STATEMENT OF THE CASE

The facts are set out in the Brief of Respondent at 2-5.¹

III. ARGUMENT

A. THE EXCEPTIONAL SENTENCE IS NOT BARRED BY COLLATERAL ESTOPPEL.

The defendant claims that the trial court was collaterally estopped from imposing an exceptional sentence on remand. Resolution of this claim requires analysis of the elements of collateral estoppel.

Before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262–63, 956 P.2d 312 (1998).

¹ The defendant has two other proceedings pending in this court. He filed a personal restraint petition, which was dismissed by the Court of Appeals. A motion for discretionary review of that dismissal was denied by this court's commissioner, under cause no. 95421-6. As of the filing of this brief, the time for moving to modify that denial has not expired.

The defendant also filed a motion for new trial in the trial court. That motion was transferred to the Court of Appeals, which then transferred the case to this court. It remains pending under cause no. 95331-7.

These requirements apply to criminal cases as well. They are “not to be applied with a hypertechnical approach, but rather with realism and rationality.” State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003). In the present case, the first two requirements are lacking. The issue decided at the first sentencing is *not* the same as the issue at the second sentencing. Furthermore, the original sentence was *not* final after it had been reversed.

1. Because The Presumptive Sentence Had Changed, The Exceptional Sentence Imposed On Remand Did Not Involve The Same Exercise Of Judicial Discretion As At The Original Sentencing.

To satisfy the first requirement for collateral estoppel, the party must establish that an identical issue was decided in the prior adjudication. Harrison, 148 Wn.2d at 561. The State’s Court of Appeals brief discussed whether the issues at the two sentencing were the same. Brief of Respondent at 14-18. As that brief pointed out, a decision to impose an exceptional sentence involves two steps: (1) Determining whether facts exist to support an exceptional sentence. (2) If the requisite facts exist, determining whether an exceptional sentence is warranted. The first step is a factual determination; the second is an exercise of judicial discretion. State

v. Rowland, 160 Wn. App. 316, 330 ¶ 22, 249 P.3d 635 (2011),
aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012).

In the present case, the first step was decided at the initial sentencing *against* the defendant. The court found that there were valid legal grounds for imposing an exceptional sentence. 3/12/13 RP 21. As to that question, there is no decision favorable to the defendant that could be the basis for applying estoppel against the State.

With regard to the second step, the court decided at the first sentencing not to impose an exceptional sentence as a matter of judicial discretion. At that time, the question was whether a 638-month sentence was, as a matter of judicial discretion, adequate punishment for the defendant's crimes. By the time of the second sentencing, however, the standard range had reduced. The question then was whether a 351-month sentence was adequate punishment. Obviously those questions are not the same.

The defendant essentially wants to treat "whether to impose an exceptional sentence" as an "issue" to which collateral estoppel should be applied. This court rejected such an analysis in State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003). There, the trial court initially declined to impose an exceptional sentence. On appeal, this

court determined that the trial court had incorrectly computed the standard range. On remand, the trial court declared an exceptional sentence and re-imposed the original sentence as an exceptional sentence. This court held that because the presumptive sentence range had changed, the trial court faced a different “issue” at re-sentencing than it had at the original sentencing. As a result, the new sentence was not barred by collateral estoppel. Id. at 365.

The defendant puts heavy reliance on the lead opinion in State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992). As this court has already recognized, the relevant portion of that opinion was disavowed by a majority of the court. Harrison, 148 Wn.2d at 560. As such, that portion of the opinion never stated the law at all. It makes no difference that this court has never “overruled” it. Concurring opinions do not need to be overruled.

In any event, the issue addressed in Collicott is significantly different from the one now before the court. In that case, the sentencing court initially rejected a claim that the crime involved deliberately cruelty. On re-sentencing, it imposed an exceptional sentence on that basis. The lead opinion believed that an exceptional sentence on that ground was barred by collateral estoppel. Collicott, 118 Wn.2d at 661. Whether “deliberate cruelty”

existed was a factual issue. On remand, the facts underlying that decision had not changed.

In the present case, in contrast, the decision on remand was premised on a discretionary decision, not a factual one. As discussed above, the circumstances surrounding the court's exercise of discretion had changed. Because the issue on remand was not the same, collateral estoppel did not apply.

2. Because The Original Sentence Had Been Reversed, It Was No Longer A "Final Judgment" For Purposes Of Collateral Estoppel.

Collateral estoppel is also inapplicable for a second reason: the original judgment is no longer "final." The court addressed this point in Harrison. That case represented the flip-side of the present case. At the original sentencing there, the State violated a plea agreement by basing its recommendation on an excessive offender score. The court imposed an exceptional sentence. At a remand for re-sentencing, the court declined to impose an exceptional sentence. On a second appeal, the State claimed that this decision violated collateral estoppel. This court rejected that claim:

[T]he act of an appeal does not suspend or negate collateral estoppel aspects of a judgment entered after trial in the superior courts, but collateral estoppel can be defeated by later rulings on appeal. On [the defendant's] first appeal, the court reversed [his]

sentences and remanded for resentencing with the State's recommendation of an offender score of 7. His entire sentence was reversed, or vacated, since "reverse" and "vacate" have the same definition and effect in this context — the finality of the judgment is destroyed. Accordingly, [the defendant's] prior sentence ceased to be a final judgment on the merits, and collateral estoppel does not apply.

Harrison, 148 Wn.2d at 561–62 (citations omitted).

The situation in the present case is substantially the same. On the original appeal, the Court of Appeals reversed some of the convictions and remanded for "resentencing." 1 CP 88. Since the sentence was reversed, it was no longer a final judgment. As a result, collateral estoppel does not apply to sentencing decisions.

This point was not raised in either Collicott or Tili. In Collicott, the lead opinion did not mention the "final judgment" requirement. Collicott, 118 Wn.2d at 270. Tili mentioned that requirement but did not discuss it. Tili, 148 Wn.2d at 361. When a court does not address or consider an issue, its ruling is not dispositive as to that issue. In re Stockwell, 179 Wn.2d 588, 600 ¶ 22, 316 P.3d 1007 (2014). Since Tili did not address or consider whether the original sentence was a final judgment, the decision has no precedential value on that point. The same is true of the lead opinion in Collicott (to the extent that the opinion has any precedential value at all).

Neither can be viewed as diminishing the later holding in Harrison — that a sentence which was overturned on appeal is no longer a “final judgment.” For that reason as well, the original sentence in the present case does not bar later imposition of an exceptional sentence.

B. REDUCING A SENTENCE AFTER APPEAL DOES NOT GIVE RISE TO A PRESUMPTION OF VINDICTIVENESS.

The defendant next argues that the sentence imposed on remand was “presumptively vindictive” under the rule set out in North Carolina v. Pearce, 359 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The court there held that it would be a “flagrant violation” of a defendant’s constitutional rights to impose “a penalty for having successfully pursued a statutory right of appeal.” Id. at 724. Due process requires that “vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence that he receives after a new trial.” It also requires that “a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.” Id. at 725.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively

appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726. As later cases have clarified, this requirement only applies under circumstances that give rise to “a reasonable likelihood that the increase in sentence is the product of actual vindictiveness.” Alabama v. Smith, 490 U.S. 794, 799, 104 L.Ed.2d 865, 109 S.Ct. 2201 (1989).

In the present case, the precondition for applying the Pearce rule is simply not present. The trial judge did not “impose[] a more severe sentence” on the defendant. Instead, he drastically reduced the sentence, from a total of 638 months’ confinement to a total of 399 months — a reduction of 19½ years. Compare 1 CP 93 with 1 CP 11. It cannot reasonably be claimed that the judge retaliated against the defendant by reducing his sentence. Nor can it be claimed that defendants would be chilled from appealing by the prospect of obtaining “only” a 19½-year reduction. Since there was no increase in the defendant’s sentence, there is no basis for requiring the trial judge to explain the non-existent increase.

The Court of Appeals has applied Pearce in exactly this manner. It has held that the Pearce presumption is inapplicable when the aggregate sentence is not increased. State v. Larson, 56 Wn. App. 323, 328, 783 P.2d 1093 (1989). An overwhelming majority of Federal courts follow the same rule. See, e.g., United States v. Pimienta-Redondo, 874 F.2d 9, 13 (1st Cir. 1989) (en banc); United States v. Nerius, 824 F.2d 29 (3rd Cir. 2016); United States v. Gray, 852 F.2d 136 (4th Cir. 1988); United States v. Cataldo, 832 F.2d 869 (5th Cir. 1987); United States v. Rivera, 327 F.3d 612, 615 (7th Cir. 2003); United States v. Horob, 735 F.3d 866 (9th Cir. 2013); United States v. Sullivan, 967 F.2d 370, 374 (10th Cir. 1992).

The defendant cites two cases to the contrary: United States v. Monaco, 702 F.2d 860 (11th Cir. 1983) and United States v. Markus, 603 F.2d 409 (2nd Cir. 1979). Both of these cases precede the U.S. Supreme Court's 1989 clarification of the Pearce rule in Smith. Monaco has been largely repudiated by the 11th Circuit Court of Appeals. That court has held that the "modified aggregate approach" is inapplicable to sentences imposed under the federal sentencing guidelines. United States v. Fowler, 749 F.3d 100, 1020 (11th Cir. 2014).

The 2nd Circuit Court of Appeals has, on the surface, adhered to the “modified aggregate approach.” As applied by that court, however, the different approach is of minimal significance. The court has recognized that re-imposition of the sentence originally imposed does not give rise to any presumption of vindictiveness. “Where one or more of several related counts have been vacated, and the district court on resentencing has increased the sentence on the remaining, related counts to maintain the same aggregate sentence as before, no presumption of vindictiveness applies.” United States v. Weingarten, 713 F.3d 704, 714 (2d Cir. 2013).

There is thus no Federal circuit that could apply a “presumption of vindictiveness” under facts similar to those of the present case. Nor is there any reason to do so. “The fact that a defendant’s sentence remains the same ... does not create a chilling effect.” Horob, 735 F.3d at 871. The sentence imposed on re-sentencing was proper.

C. WHEN IMPOSING A SENTENCE DOES NOT GIVE RISE TO ANY PRESUMPTION OF VINDICTIVENESS, RECOMMENDING THAT SENTENCE LIKEWISE DOES NOT GIVE RISE TO ANY SUCH PRESUMPTION.

Finally, the defendant argues that the sentence on remand was the product of prosecutorial vindictiveness. He relies on Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed.2d 628 (1974). There, a prosecutor filed increased charges after a defendant exercised his statutory right to a trial de novo. The Supreme Court applied the Pearce “presumption of vindictiveness” to that decision. As in Pearce, the presumption is limited to circumstances that “pose a realistic likelihood of ‘vindictiveness.’” Id. at 26-27.

The defendant’s attempt to apply Blackledge runs up against a fundamental problem — there was no increase in the charges after the remand. When a defendant’s high offender score results in current offenses being unpunished, the court is empowered to impose an exceptional sentence without the filing of any charge. RCW 9.94A.535(2)(c); State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (2008).

At the original sentencing, the State asks the court to impose a sentence totaling 638 months. 2 CP 118-119. At re-sentencing,

the State asks the court to re-impose the same sentence. 1 CP 36. As discussed above, re-imposition of an identical sentence is not vindictive. If the court can lawfully impose a particular sentence, there is no reason why a prosecutor should be forbidden to recommend that sentence (absent any agreement to the contrary). The ultimate sentence was up to the court, not the prosecutor.

IV. CONCLUSION

The decision of the Court of Appeals should be affirmed. As that court directed, the case should be remanded to strike certain sentencing conditions. In all other respects, the sentence should be affirmed.

Respectfully submitted on August 30, 2018.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
SETH A FINE, WSBA #10937
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Petitioner,

No. 95734-7

RONALD RICHARD BROWN,

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Respondent.

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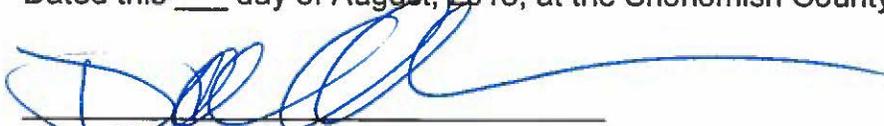
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I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney for the respondent; Maureen M. Cyr, Washington Appellate Project; wapofficemail@washapp.org; maureen@washapp.org; and Mick Woynarowski, King County Department of Public Defense; mick.woynarowski@kingcounty.gov

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of August, 2018, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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