

65366-1

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No. 65366-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW WILLIAMS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court imposed a vindictive sentence in violation of the Fourteenth Amendment's due process protections.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Fourteenth Amendment forbids a court from punishing a defendant for exercising his constitutional or statutory rights. When the court imposes a higher sentence after a defendant's successful challenge to his conviction or sentence, the new sentence is presumed to be vindictive unless the court identifies a reason based upon objective information about the defendant's conduct obtained after the initial sentencing hearing. The sentencing court originally gave Mr. Williams a sentence at the low end of the standard sentence range, but the court imposed a mid-range sentence after Mr. Williams' successful personal restraint petition resulted in re-sentencing based upon the corrected offender score. Where the court's proportionately higher sentence was not based upon any new information, must the sentence be vacated as vindictive?

C. STATEMENT OF THE CASE

After the court found him competent to stand trial in 2003, Matthew Williams pled guilty to three counts of first degree robbery,

each with a firearm enhancement. CP 19-43; SuppCP __ (Findings of Fact and Conclusions of Law Regarding Defendant's Competency, sub. no. 35, 8/14/03). Defense counsel filed a presentence report that included psychological evaluations of Mr. Williams prepared by Ken Muscatel and by R.M. Hart of Western State Hospital. SuppCP ____ (Presentence Report, sub. no. 82, 6/8/04) (hereafter Presentence Report).

Mr. Williams is mildly mentally retarded, and Dr. Muscatel diagnosed a severe learning disorder, chronic post-traumatic stress disorder due to childhood trauma, and polysubstance dependence, which was in remission due to his incarceration. Presentence Report at 20-21, 22, 24. Dr. Muscatel noted that Mr. Williams is "a very limited individual" who was incapable of planning the robberies. Presentence Report at 24. Defense counsel also presented letters to the court from Mr. Williams' family members and someone who worked with Mr. Williams at the jail. Presentence Report at 29-32; SuppCP __ (Presentence Letter for Reference by CPS, Kintner, sub. no. 83C, 6/11/04).

Based upon an offender score of 9, the court determined Mr. Williams' standard range for each robbery was 129 to 171 months plus consecutive 60-month terms for each of the three firearm

enhancements. CP 20, 45, 47. The Honorable Greg Canova imposed a low-end standard range sentence of 129 months for each count, resulting in a total sentence of 309 months. CP 47.

Mr. Williams subsequently filed a successful personal restraint petition challenging the determination of his criminal history and offender score.¹ CP 53-54; RP 1; Personal Restraint of Matthew Williams, No. 83266-8. At the resentencing hearing, the prosecutor agreed that one of the juvenile felonies used to determine Mr. Williams' offender score had been reversed and dismissed, his offender score was reduced by two points. CP 81; RP 1. Based upon the correct offender score of 7, Mr. Williams' standard sentence range for each count was 87-116 months, again with an addition 60 months per count for the firearm enhancements. CP 2.

Mr. Williams' attorney asked Judge Canova to again impose a sentence at the bottom of the standard range, relying upon the sentencing material presented at the first sentencing hearing. RP

¹ Although the Supreme Court's order does not explain why the personal restraint petition was granted, a review of the briefs shows the King County Prosecutor's Office agreed the petition should be granted because the Judgment and Sentence was invalid on its face; the judgment listed only one prior conviction and thus did not support the offender score. In his petition, Mr. Williams provided proof that a juvenile conviction for second degree assault, No. 99-8-03520-0, that was included in the prosecutor's computation of his criminal history had been reversed and dismissed on appeal, No. 45376-9-I. Personal Restraint of Matthew Williams, No. 83266-8; CP 45, 50.

4-6. Mr. Williams told the court that he had stayed out of trouble in prison and was trying to educate himself. RP 6.

The court, however, gave Mr. Williams a mid-range sentence, explaining he did not “feel that the lower end of the sentencing range is an accurate reflection of the crimes of which Mr. Williams was convicted.” RP 6. The court ordered Mr. Williams to serve 100 months for each of the robbery counts. CP 2, 4; RP 7. With the consecutive firearm enhancements, Mr. Williams’ total sentence was 280 months. CP 4; RP 7. Mr. Williams appeals. CP 66.

D. ARGUMENT

MR. WILLIAMS’ CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE TRIAL COURT IMPOSED A SENTENCE AT THE MIDDLE OF THE STANDARD SENTENCE RANGE UPON RESENTENCING AFTER A SUCCESSFUL PERSONAL RESTRAINT PETITION IN THE ABSENCE OF A FACTUAL BASIS TO JUSTIFY WHY A LOW-END SENTENCE WAS NO LONGER APPROPRIATE

1. The Fourteenth Amendment protects defendants from vindictive sentencing after the reversal of a conviction or sentence.

The Fourteenth Amendment’s due process clause prohibits the court or prosecutor from penalizing a defendant for exercising his

constitutional or statutory rights.² U.S. Const. amend. XIV; North Carolina v. Pearce, 395 U.S. 711, 723-24, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled in part, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); Thigpen v. Roberts, 468 U.S. 27, 30, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984). Thus, the court may not impose a higher sentence after a defendant's successful attack on his first conviction if the higher sentence is motivated by vindictiveness. Pearce, 395 U.S. at 723-25.

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. . . . Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.

Id. at 724-25.

The Pearce Court noted that even the fear of vindictiveness would chill a defendant's exercise of his constitutional or statutory rights. Pearce, 395 U.S. at 725. The Court therefore held that when the judge who presided over the defendant's first sentencing imposes a more severe sentence after a new trial, the court must

² The Fourteenth Amendment states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

expressly state objective reasons for the higher sentence. Id. at 726.

In order to assure the absence of such a [retaliatory] 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. The same principle applies when a defendant faces resentencing after successfully attacking his original sentence as did Mr. Williams. United States v. Resendez-Mendez, 251 F.3d 514, 517 n.6 (5th Cir. 2001) (vacating sentence based upon judicial vindictiveness when first sentence reversed on appeal because judge did not permit defendant to speak in mitigation of his sentence).

2. The imposition of a mid-standard-range sentence after Mr. Williams' successful personal restraint petition was vindictive where the court initially gave Mr. Williams a sentence at the low end of the standard range and there were no new facts to justify the change. In sentencing a defendant for felony offenses, the court must comply with the Sentencing Reform Act of 1985 (SRA).³ RCW 9.94A.505(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). The SRA creates a grid of standard sentencing ranges based upon the offender's "offender score" and the "seriousness level" of the current offense. RCW 9.94A.505(1); RCW 9.94A.530(1); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The court normally imposes a sentence within the standard sentence range, which constitutes the Legislature's determination of an appropriate sentence for the crime given the defendant's criminal history, absent substantial and compelling mitigating or aggravating circumstances. RCW 9.94A.505(2)(a)(1); RCW 9.94A.535.

At Mr. Williams' first sentencing hearing, the court set his punishment at the low end of the standard range. CP 45, 47. The

³ The sentencing court must comply with the sentencing statutes in effect at the time the defendant committed the offense. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

standard sentence range, however, was incorrect, and Mr. Williams successfully challenged the sentence in a personal restraint petition. CP 77-82; RP 1. Upon resentencing, the same judge imposed a sentence within the middle, not the low end, of the correct standard range, thus giving Mr. Williams a proportionately higher sentence.

In Ameline, this Court reversed the defendant's exceptional sentence after a third trial because the sentencing court did not identify any new facts of which it was not aware of when it imposed standard range sentences after the defendant's first and second trials. State v. Ameline, 118 Wn.App. 128, 133, 75 P.3d 589 (2003). The sentencing court did not base the higher sentence upon any new information as required by Pearce, and the sentence was therefore presumed to be vindictive. Id. at 133; Pearce, 395 U.S. at 726; Smith, 490 U.S. at 802 ("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"); see Wasan v. United States, 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984) (presumption of vindictiveness rebutted because

sentencing court increased sentence due to defendant's intervening criminal conviction).

The only reason given by the sentencing court for not again imposing a sentence at the low end of the standard sentence range was that the court did "not feel" the low end of the standard range was reflective of Mr. Williams' crimes. RP 6. In that case, however, the court should not have sentenced him at the low end of the standard range at the first sentencing hearing. The court did not mention any objective fact that caused it to impose a disproportionately higher sentence. 1RP 6-7. Nor were any additional facts – other than the correct offender score – presented by the State. 1RP 2-3; CP 67-84.

The lack of an objective reason for sentencing Mr. Williams at the middle of the standard sentence range instead of the low end creates a rebuttable presumption of vindictiveness. Nothing in the record rebuts this presumption, and his sentence must be vacated. Pearce, 395 U.S. at 713-15, 726; Ameline, 118 Wn.App. at 133-34.

3. Mr. Williams may challenge his sentence on appeal.

Washington courts have traditionally addressed challenges to sentences even if the challenge was not raised in the trial court.

Ford, 137 Wn.2d at 477-78 (illegal or erroneous sentence may be

challenged for first time on appeal); State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (defendant may challenge procedure by which standard range sentence imposed for first time on appeal), cert. denied, 479 U.S. 930 (1986).

RAP 2.5(a) also gives this Court the discretion to address constitutional issues even if they were not raised in the trial court. Appellate courts have therefore addressed due process challenges argued for the first time on appeal. Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (procedural due process); State v. Santos, 104 Wn.2d 142, 145-46, 701 P.2d 1179 (1985) (whether statute violated due process right of child to be heard in paternity action); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983) (jury instruction that shifted burden of proof to defendant); In re J.R., 156 Wn.App. 9, 18, 230 P.3d 1087 (substantive due process challenge to statute), rev. denied, 170 Wn.2d 1006 (2010).

In determining whether to review a constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492

(1988). Put another way, an error is manifest if it has “practical and identifiable consequences” in the case.” State v. Schaler, 169 Wn.2d 274, 282, 236 P.2d 858 (2010).

Vindictive sentencing is a constitutional issue under the Fourteenth Amendment. The error is manifest in this case, as it resulted in a higher sentence than would otherwise be imposed. Mr. Williams may therefore raise this issue.

4. Mr. Williams’ sentence must be vacated. The sentencing court imposed a sentence at the low end of the incorrect standard range and, after Mr. Williams’ personal restraint petition was granted by the Supreme Court, the sentencing court imposed a sentence at the middle of the correct standard range. The new sentence was not based upon any “identifiable conduct on the part of the defendant occurring after the time of the original sentencing hearing.” Pearce, 395 U.S. at 726. Thus, the proportionately higher sentence is presumed to be vindictive. Because no evidence in the record supports the courts decision, Mr. Williams’ sentence must be vacated and remanded to impose a sentence at the low end of the correct standard range. Ameline, 118 Wn.App. at 133-34; Resendez-Mendez, 251 F.3d at 519.

E. CONCLUSION

Mr. Williams received a mid-range sentence after his successful personal restraint petition which was proportionately higher than the low-end sentence imposed at the first sentencing hearing. Because the court did not identify any new information to justify the mid-range sentence, the sentence is presumptively vindictive, and must be vacated.

DATED this 29th day of July, 2011.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2011.

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