

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 19, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

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**Appeal No. 2005AP2578-CR**

**Cir. Ct. No. 2000CF359**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICKY A. MYHRE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 ANDERSON, J. Ricky A. Myhre argues that the sentencing court acted vindictively in imposing his sentence, violating his due process rights. Myhre contends that he is entitled to a presumption of vindictiveness. Myhre had first been convicted and sentenced on a negotiated no contest plea that was later

reversed on appeal and after the subsequent trial the court imposed an increased sentence. Based on our supreme court's decision in *State v. Church*, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141, we hold that an increased sentence imposed after trial where the defendant had first been convicted and sentenced on a negotiated no contest plea does not give rise to a presumption of vindictiveness. We further conclude that Myhre has failed to carry his burden of demonstrating actual vindictiveness. We affirm.

¶2 Myhre entered a negotiated no contest plea to one count of first-degree sexual assault in 2001. The court imposed a twenty-year sentence of seven years' initial confinement followed by thirteen years' extended supervision. In handing down this sentence, the court looked at several factors. It considered Myhre's history of blaming others when things go wrong. Specifically, the court noted that Myhre refused to admit guilt of the offense and blamed the victim by suggesting that she, as well as two other nieces, made advances towards him. Myhre also had severe problems with drug and alcohol abuse. These problems had been a contributing factor in this incident as well as his past criminal behavior and previous attempts to treat these problems had failed. Additionally, the court considered the fact that Myhre's past criminal record was relatively serious. There was also new evidence presented at sentencing suggesting that Myhre had previously sexually assaulted others and that the sexual assault he had pled to was not even an insulated incident with respect to this particular victim.

¶3 Myhre later filed a motion to vacate his no contest plea, which was granted. A jury trial was held, and Myhre was found guilty of one count of first-degree sexual assault.

¶4 The court sentenced Myhre to a twenty-five-year sentence consisting of ten years' initial confinement followed by fifteen years' extended supervision. In imposing the greater sentence, the court stated:

[T]his court is well aware and is sensitive to the fact that where upon a resentencing a greater sentence is imposed than was the first time around there must be new factors present that were not present at the time of the original sentencing that justify the imposition of a greater sentence [because] [y]ou cannot be given a greater sentence simply because you availed yourself of a trial.

¶5 The court identified four factors that it felt justified the increase. First, the court noted that Myhre refused to participate in substance abuse and sex offender treatment offered to him during his initial incarceration. Second, the court commented that while Myhre admitted at his initial sentencing that he had problems with alcohol, which was seen as a contributing factor in his criminal behavior, he has since repudiated that admission, making it unlikely that any treatment would be effective. Third, the court observed that Myhre is at an increased risk of reoffending than was recognized at the time of the first sentencing based on his continued denial of this offense and the need for treatment and his newfound denial of the need to treat his long-standing drug and alcohol problem. Finally, the court noted that this offense has had a more profound and continuing impact on the victim than originally thought. At the time of the first presentence investigation, the victim was not interviewed because she was relatively young. By the time of the second presentence investigation, she was older and able to talk about the incident. The presentence investigator was able to include in the presentence investigation report the victim's own statements concerning the effect the incident had upon her. The court also noted in regard to this final point that, notwithstanding the passage of years, Myhre had not ceased

making accusations against the victim and blaming the incident upon her and her family.

¶6 Myhre then filed a motion to vacate that sentence on the grounds that the trial court was vindictive in handing down a sentence higher than the one imposed under his earlier plea to the same charge, violating his due process rights. The circuit court denied that motion on the basis that a presumption of vindictiveness did not apply, that Myhre failed to present evidence suggesting the increased sentence was the result of actual vindictiveness, and that the factors articulated by the sentencing court were soundly rooted in the objective and identifiable facts of record.

¶7 On appeal, Myhre argues that his sentence should be deemed presumptively vindictive under *Church* and that this presumption was not overcome by “any new identifiable conduct on the part of Myhre occurring after the original sentence.” Myhre further asserts that even assuming that there is no presumption of vindictiveness, he has demonstrated actual vindictiveness.

¶8 “Whether an increased sentence imposed upon a defendant after a successful appeal violates a defendant’s right to due process under the federal and state constitutions is a question of law that we review de novo.” *Id.*, ¶17.

¶9 Our supreme court has recently clarified when a presumption of vindictiveness applies. In *Church*, the defendant was initially found guilty on one count of second-degree sexual assault, one count of sexual exploitation of a child, one count of delivery of a controlled substance to a minor, and two counts of child enticement. *Id.*, ¶¶5-6, 8. The court sentenced the defendant to thirteen years in prison on the second-degree sexual assault count. *Id.*, ¶9. The court withheld sentencing on the other four counts in favor of probation. *Id.* However, the

defendant successfully appealed, and the court reversed one of the two counts of child enticement. *Id.*, ¶10. The court concluded that it was necessary to vacate all of the defendant's sentences and resentence the defendant on the remaining four counts. *Id.* On remand, the sentencing court increased the prison sentence on the second-degree sexual assault count by four years to seventeen years and preserved the same probationary terms as originally imposed on the three remaining counts. *Id.*, ¶15. The defendant appealed the sentence increase, and our supreme court reversed. *Id.*, ¶16.

¶10 Our supreme court reversed on the basis that the increased sentence was vindictive. *Id.*, ¶60. The court taught us that ordinarily when “a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for ... doing so must affirmatively appear.” *Id.*, ¶31 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969)). This has been characterized as “a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence.” *Church*, 262 Wis. 2d 678, ¶34 (quoting *United States v. Goodwin*, 457 U.S. 368, 374 (1982)). However, the court applies the presumption “only in cases in which a reasonable likelihood of vindictiveness exists.” *Church*, 262 Wis. 2d 678, ¶37 (quoting *Goodwin*, 457 U.S. at 373). Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness. *Church*, 262 Wis. 2d 678, ¶39 (quoting *Alabama v. Smith*, 490 U.S. 794, 799 (1989)). The *Church* court determined that there was a reasonable likelihood of vindictiveness in that case because the defendant was given an increased sentence after the sentence originally imposed was vacated. *Church*, 262 Wis. 2d 678, ¶53.

¶11 Unlike the defendant in *Church*, Myhre's increased sentence after a trial followed a vacated original sentence premised on a negotiated no contest

plea. See *id.* *Church* instructs that the presumption does not apply “to a longer sentence imposed after a trial where the defendant had first been convicted and sentenced on a negotiated guilty plea that was later reversed on appeal.” *Id.*, ¶38 (citing *Smith*, 490 U.S. at 799). In such cases, the reasonable likelihood of vindictiveness is absent because “the relevant sentencing information available to the judge after a guilty plea will usually be considerably less than that available after trial.” *Church*, 262 Wis. 2d 678, ¶39 (quoting *Smith*, 490 U.S. at 801). In *Smith*, a case in which the first sentence was based upon a guilty plea later vacated and the second, higher sentence followed a trial, the United States Supreme Court elaborated on this point:

[I]n the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant’s conduct during trial may give the judge insights into his [or her] moral character and suitability for rehabilitation. Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present. Here, too, although the same judge who sentenced following the guilty plea also imposes sentence following trial, in conducting the trial the court is not simply “do[ing] over what it thought it had already done correctly.” Each of these factors distinguishes the present case, and others like it, from cases like *Pearce*. There, the 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. In cases like the present one, however, we think there are enough justifications for a heavier second sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by vindictiveness.

*Smith*, 490 U.S. at 801 (citations omitted). In discussing *State v. Stubbendick*, 110 Wis. 2d 693, 694-97, 698, 329 N.W.2d 399 (1983) (addressing whether a circuit court may constitutionally impose an increased sentence after the defendant withdraws his no contest plea and goes to trial), the *Church* court implied that the

*Smith* standard applies to cases where the first sentence was based on a no contest plea.<sup>1</sup> *Church*, 262 Wis. 2d 678, ¶43. We therefore hold that Myhre is not entitled to a presumption of vindictiveness and, consequently, has the burden of proving actual vindictiveness on the part of the sentencing court. *See id.*, ¶39.

¶12 Myhre asserts that even assuming that there is no presumption of vindictiveness, he has demonstrated actual vindictiveness. Myhre fails to point to any direct evidence of actual vindictiveness. *See United States v. Jackson*, 181 F.3d 740, 745 n.4 (6th Cir. 1999) (demonstrating actual vindictiveness requires a showing of direct evidence). Indeed, when imposing the increased sentence, the trial court specifically recognized its duty not to punish Myhre for exercising his constitutional right to trial.

¶13 Furthermore, the sentencing court's comments evidence its acute awareness of the issues that might arise in giving Myhre an increased sentence. Therefore, the court carefully cited several factors that justified the sentence increase, including Myhre's refusal to participate in sex offender and substance abuse treatment and the more profound impact of the crime on the victim.

¶14 Myhre maintains that his refusal to participate in treatment should not have played a role in the resentencing decision. Myhre suggests that because

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<sup>1</sup> *Alabama v. Smith*, 490 U.S. 794, 799 (1989), on which *State v. Church*, 2003 WI 74, ¶38, 262 Wis. 2d 678, 655 N.W.2d 141, relied, differs from the case at hand because in *Smith* the defendant entered a negotiated guilty plea, while Myhre entered a negotiated no contest plea. However, this distinction does not alter our holding in this case. The rationale of *Smith* applies under both circumstances. Regardless of whether a defendant enters a guilty plea or no contest plea in the first instance, the court will have considerably more information available to it for sentencing purposes following a trial.

it did play a role, the court offended his right to maintain his innocence until the final appeal has been exhausted. We are not persuaded.

¶15 The resentencing court explicitly stated that it was not holding the fact that Myhre maintained his innocence against him. The court noted the association between Myhre's past and present criminal behavior and his substance abuse problems. The court also commented on the increased danger to public safety presented by Myhre's refusal to participate in the substance abuse and sex offender treatment offered to him in the intervening years. While a defendant cannot be subject to greater penalties for having exercised his or her constitutional rights, this does not prevent the court from considering factors, such as a defendant's refusal to participate in treatment, relevant to a defendant's need for rehabilitation and the extent to which the public might be endangered by his or her being at large in the community. See *State v. Baldwin*, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981) (consideration of the defendant's failure to admit guilt as one of many factors in determining a defendant's sentence is neither improper nor an abuse of discretion, as the court is obligated to consider factors such as the defendant's demeanor, his or her rehabilitation needs and the safety of the public).

¶16 This is not a case where the court premised the increased sentence *solely* on the grounds that the defendant, claiming his or her innocence, *continued* to refuse treatment. See *Church*, 262 Wis. 2d 678, ¶¶15, 57 (“To premise an increased sentence after a successful appeal on a defendant's continued denial of responsibility, *without more*, comes far too close to punishing the defendant for exercising his [or her] right to appeal.” (Emphasis added.)). As noted at the outset, Myhre's refusal to participate in treatment was not the sole justification the court offered for the sentence increase. Also, Myhre's refusal to participate in treatment was not simply a continuation of the situation that existed at the time of



the original sentencing. At the original sentencing hearing, even while maintaining his innocence, Myhre indicated a willingness to participate in substance abuse treatment. During the time between the original sentencing hearing and the resentencing hearing, Myhre had the option of participating in both substance abuse and sex offender treatment, but refused. Given these circumstances, we conclude that the court, in resentencing Myhre, properly considered Myhre's refusal to participate in substance abuse and sex offender treatment.

¶17 Myhre next asserts that the trial court should not have used its more complete understanding of the impact of the offense on the victim to justify the sentence increase. The court was entitled to consider information about events and circumstances that the court was unaware of at the initial sentencing or that occurred after the initial sentencing, including new information regarding the severity of the impact of the offense on the victim. *See State v. Carter*, 208 Wis. 2d 142, 158, 560 N.W.2d 256 (1997); *State v. Naydihor*, 2004 WI 43, ¶32, 270 Wis. 2d 585, 678 N.W.2d 220 (listing the gravity and nature of the offense, including the impact on the victim, as a primary sentencing factor and holding that an increased sentence is justified when a victim testifies at resentencing that his or her condition has deteriorated as a result of the defendant's criminal act); *United States v. Johnson*, 144 F.3d 1149, 1151 (8th Cir. 1998) (the court increased the defendant's sentence based on new information regarding the severity of the impact of the offense on the victim).

¶18 The court obtained more information concerning the nature of the crime and its impact on the victim both during and after trial. Specifically, the victim's participation in the presentence investigation following the trial provided

the court with new information about the depth of the crime's impact from the victim's own perspective. The court properly considered the new information.<sup>2</sup>

¶19 In sum, we conclude that Myhre is not entitled to a presumption of vindictiveness. We further hold that Myhre has not met his burden of demonstrating actual vindictiveness. We affirm.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

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<sup>2</sup> Myhre also points out that the State commented during its argument at sentencing that Myhre put the State through a trial, forcing the victim to testify about the incident. The circuit court was clear that it was not considering that Myhre had put the victim through a trial as it was his constitutional right to go to trial.

