COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1217-CR **Cir. Ct. No. 2001CF3**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNIE B. ROSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Johnnie B. Rose was sentenced on three separate occasions for an offense committed in 2000: in August 2001 as the result of a plea, in February 2003 as the result of resentencing ordered in lieu of his request to withdraw his plea, and in March 2006 after a jury trial following Rose's successful

plea withdrawal. The same judge sentenced Rose on the second and third occasions, sentencing him more harshly after the jury trial. The question is whether the March 2006 sentencing bore the presumption of vindictiveness identified in ***North Carolina v. Pearce***, 395 U.S. 711 (1969), for Rose having exercised his appeal rights. On these facts, and under ***State v. Naydihor***, 2004 WI 43, 270 Wis. 2d 585, 678 N.W.2d 220, we conclude it does not. We affirm.

¶2 In December 2000, Rose snatched a woman's purse from the seat of her car as she filled the vehicle's gas tank, and hit her over the head when she challenged him. Rose pled no contest to strong-armed robbery and aggravated battery, both as a repeater. Since Rose recently had had a contested parole revocation hearing, the trial court, Judge Walter J. Swietlik presiding, ordered a short-form presentence investigation report (PSI). The PSI listed the names and dates but no details of Rose's prior offenses. In August 2001, Judge Swietlik sentenced Rose to sixteen years' initial confinement plus five years' extended supervision on count one, and eight years' initial confinement plus three years' extended supervision on count two. The sentences were ordered consecutive to each other, but concurrent to the sentence Rose currently was serving for his parole having been revoked for this offense.

¶3 Acting pro se, Rose moved to withdraw his plea on grounds that, due to various mental health issues, he did not fully understand the proceeding and felt pressured by his attorney to enter the pleas. Shortly thereafter, a public defender appointed on Rose's behalf filed a motion for postconviction relief which reiterated the request for plea withdrawal but asserted a breach of the plea

agreement—a ***Santobello***[1] violation—and that Rose's defense counsel rendered prejudicially deficient representation by failing to object to the breach.

¶4 Instead of allowing Rose to withdraw his plea, the trial court ordered the preferred and less-extreme remedy of resentencing. *See* ***State v. Matson***, 2003 WI App 253, ¶33, 268 Wis. 2d 725, 674 N.W.2d 51. Judge Paul V. Malloy, who presided over the February 2003 resentencing, imposed a sentence of sixteen years' initial confinement plus five years' extended supervision on count one, to run consecutive to his current sentence, and withheld sentence and ordered eleven years' probation on count two.

¶5 Rose persisted in his efforts to withdraw his plea and eventually succeeded. After a four-day trial, a jury found him guilty of both strong-armed robbery and substantial battery, both as a repeater. In March 2006, the same Department of Corrections agent completed a second PSI, this one detailing Rose's prior offenses and recommending lengthier sentences. Judge Malloy again sentenced Rose. The sentence on count one remained unchanged. On count two, however, instead of a withheld sentence and probation, Rose received two years' initial confinement to be followed by three years' extended supervision, the sentence to run consecutive to that on count one.

¶6 Rose moved postconviction to reinstate the February 2003 sentence on grounds that the more severe March 2006 sentence should be presumed vindictive. Judge Malloy denied the motion.[2] Rose appeals.

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[1] ***Santobello v. New York***, 404 U.S. 257, 263 (1971).

[2] Judge Malloy granted the part of the motion which sought to amend the judgment of conviction to reflect an adjustment to Rose's sentence credit.

¶7 Rose contends on appeal that the increased sentence after his successful challenge to a prior sentencing is presumptively vindictive and therefore violates his right to due process. Our review of this issue presents a question of law that we review de novo. *See* ***State v. Church***, 2003 WI 74, ¶17, 262 Wis. 2d 678, 665 N.W.2d 141.

¶8 Due process prohibits a defendant from being given a harsher sentence at resentencing because of vindictiveness for having successfully attacked his first conviction. ***Pearce***, 395 U.S. at 725. Later Supreme Court cases have interpreted ***Pearce*** as applying "a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." ***United States v. Goodwin***, 457 U.S. 368, 374 (1982). The Wisconsin Supreme Court, too, expressly adopted the approach of ***Pearce*** and its progeny. ***Church***, 262 Wis. 2d 678, ¶52.

¶9 Rose compares Judge Malloy's sentencing comments at each of the two proceedings. At the February 2003 sentencing, the court heard each side's recommendations, Rose's allocution and a brief comment by the victim. Then, noting that he felt he knew Rose well because he had read the file several times and each of the many letters Rose had written to the court, Judge Malloy examined each of the primary sentencing factors, Rose's mental health issues and Rose's history of offenses. He then sentenced Rose as described above.

¶10 The same DOC agent prepared a new, lengthier PSI for the March 2006 sentencing. The new PSI described each of Rose's prior offenses, which included purse-snatchings in 1988 and 1992, sexual assault and a gas station hold-up, and noted that each event was violent and included at least threats of harm to the victims. The report stated that Rose had accumulated dozens of conduct

reports while in prison and had a "negative adjustment to parole supervision," committing the instant offense only two months into supervision. The PSI also observed that according to Department of Corrections records, two psychologists who interviewed Rose thought he may have fabricated various psychiatric symptoms in order to be transferred from prison to a mental health treatment center "which suited his personal preference."

¶11 After the prosecutor and defense counsel made their recommendations, Judge Malloy spoke:

> I think the Court needs to look at the total picture here. What is Mr. Rose's character, what is the gravity of this offense, and then the need to protect the public. You need to look at his age, you need to look at his background. You need to look at his mental health issues. You need to draw a composite picture of the situation that Mr. Rose presents to this Court, and go from there. And I'm going to take this one at a time.

Reviewing the offenses described in the PSI, the court noted Rose's "history of violent purse snatching [and] violent robberies … directed at women." Judge Malloy continued:

> I think paramount here is the need to protect the public. And I'm very cognizant of not punishing the defendant for exercising his constitutional right. He had every right to do that. This Court has tried to accommodate every request that the defendant has made, give[n] him time to consider his alternatives, and—But I find that there were things in this presentence investigation that I don't know why I was unaware of when I resentenced Mr. Rose.
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> I don't recall the prior purse snatching[s] …. I'm not sure if it was because I relied on the transcript from Judge Swietlik's hearings or other material in what's really quite a voluminous file, but I am really stunned … by the pattern here. And I haven't seen anything about Mr. Rose that would indicate that if I put him on the street today, that he wouldn't be involved in criminal activity within a short period of time, violent activity.

Focusing on the obligation to protect the public and Rose's apparent lack of insight and remorse, Judge Malloy imposed the sentence Rose claims is presumptively vindictive.

¶12 Rose's argument fails. When the first sentence follows a plea and the second follows a full trial, the ***Pearce*** presumption does not apply. ***Naydihor***, 270 Wis. 2d 585, ¶45. The presumption was designed to guard against vindictiveness in the resentencing process, not to prevent imposing an increased sentence where there exists a valid reason associated with the need for flexibility and discretion in the sentencing process. ***Id.*** That is because the judge who sentences after a full trial usually has available considerably more relevant sentencing information and is aware of more facts bearing on the nature and extent of the charges. ***Id.*** Therefore, it cannot be said to be more likely than not that a judge who imposes a heavier sentence after a trial is motivated by vindictiveness. ***Id.***, ¶46.

¶13 We disagree with Rose that ***Church*** governs his case. There, a jury convicted Church of five offenses, among them one count of sexual assault and two counts of child enticement. ***Church***, 262 Wis. 2d 678, ¶2. The trial court had denied Church's motion to dismiss as multiplicitous one of the two child-enticement counts and, as is relevant here, imposed a thirteen-year prison sentence on the sexual assault charge. ***Id.*** Church renewed the multiplicity argument on appeal. ***Id.*** The court of appeals agreed with Church, reversed one child-enticement count, vacated all the sentences and remanded for resentencing on the four remaining counts. ***Id.***, ¶3. The same trial court resentenced Church, increasing the sexual assault prison term to seventeen years. ***Id.*** The court of appeals affirmed. ***Id.*** On petition for review, the supreme court concluded that the increased sentence was presumptively vindictive, and that the presumption was

not overcome by objective new factors adequate to justify the increase. ***Id.***, ¶4. The supreme court reasoned that since the same court resentenced Church after successful postconviction proceedings, the appeal posed a direct challenge to the trial court's decision: its decision on multiplicity was reversed, the entire case was remanded, and the court was made to "'do over what it thought it had already done correctly.'" ***Id.***, ¶54 (citation omitted). The ***Church*** court concluded that inherent in such a situation was the "reasonable likelihood of vindictiveness" against which the ***Pearce*** presumption is meant to safeguard. ***Id.*** (citation omitted).

¶14 Here, although Judge Malloy imposed both sentences, the court was not being forced to revisit a duty it thought it previously had done properly. The court here was not proceeding according to the same sentencing considerations after the trial as after the plea. Rather, in 2006 the court had before it more detailed information relevant to an informed sentencing decision.

¶15 Judge Malloy affirmatively stated on the record his reasons for imposing a more severe sentence, and confirmed at the postconviction motion hearing that he was persuaded by the greater detail the second PSI provided:

> I was struck by the virtual[ly] identical M.O. on [the 1988 purse-snatching] case versus this case, and I felt that there's a greater need for deterrence. And at the time of sentencing, I didn't identify where the different information came up, and I don't believe—I think I said I don't—I had not been aware of the nature of that robbery. I'm sure I knew there was a robbery, but I don't think that I knew the specific factual allegations involved in that, and I felt that there was a greater need for deterrence.
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> ….
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> What did enter into my decision was the need for a greater deterrence on the part of Mr. Rose and the need to protect the public from similar … offenses; and that's how I arrived at the number I did. And therefore, I don't think that I was being vindictive. I think there was information

> that was provided to me post that first sentencing I did, post trial in the form of that presentence investigation. That's how I arrived at that number.

¶16 We thus conclude that the ***Pearce*** presumption does not apply. Even assuming, *arguendo*, that it did, the presumption was rebutted by the second PSI, which we conclude constitutes objective evidence providing a nonvindictive justification for the new sentence. *See* ***Naydihor***, 270 Wis. 2d 585, ¶77 and n.14.

¶17 Where the ***Pearce*** presumption does not apply, the defendant must show actual vindictiveness. ***Naydihor***, 270 Wis. 2d 585, ¶33. To establish actual vindictiveness, there must be objective evidence that the court acted so as to punish Rose for standing on his legal rights. *See* ***State v. Williams***, 2004 WI App 56, ¶43, 270 Wis. 2d 761, 677 N.W.2d 691. Rose nowhere claims that the increased sentence sprang from actual vindictiveness, however. Our review of the record reveals no objective evidence that the court acted in that manner.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.