

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0920
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
JOSEPH EMMANUEL MCCRAE,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2005-108364-001 DT

The Honorable Edward O. Burke, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Katia Mehu, Assistant Attorney General
Attorneys for Appellee

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Attorneys for Appellant

N O R R I S, Judge

¶1 Joseph Emmanuel McCrae appeals his sentences for aggravated robbery and aggravated assault. After two appeals and a remand for resentencing, the superior court imposed a

presumptive sentence of 11.25 years on each offense. On appeal, McCrae argues these sentences violated his constitutional due process rights because they were the result of judicial and prosecutorial vindictiveness. For the following reasons, we disagree and affirm McCrae's sentences.

FACTS AND PROCEDURAL BACKGROUND

¶12 The facts of this case are described in this court's memorandum decision, *State v. McCrae*, 1 CA-CR 07-0340, 2008 WL 2583515 (Ariz. App. June 24, 2008) (mem. decision). A jury found McCrae guilty of aggravated robbery and aggravated assault, and pursuant to a stipulation reached by the State and defense counsel, the superior court sentenced him to two concurrent supermitigated 7.5 year sentences ("first sentence"). McCrae appealed, and this court reversed his convictions and sentences and remanded for a new trial because he faced a maximum sentence of over 30 years, but was tried before only eight jurors. See *State v. McCrae*, 1 CA-CR 05-1141 (Ariz. App. Oct. 17, 2006) (mem. decision).

¶13 On remand, a properly constituted jury found McCrae guilty on both counts. The State did not reoffer the stipulation and instead asked the court to impose the presumptive 11.25 year sentence on each count. At the sentencing hearing, the superior court judge (who had also presided over the first trial and imposed the first sentence)

agreed with the State and sentenced McCrae to two concurrent 11.25 year sentences ("second sentence"). McCrae again appealed, and this court affirmed his convictions but remanded for resentencing because the second sentence was greater than the first sentence and the State had failed to overcome the presumption of prosecutorial vindictiveness with "affirmative reasons." See *McCrae*, 1 CA-CR 07-0340, at *3, ¶ 17.

¶4 On October 24, 2008, the same superior court judge again sentenced McCrae to two concurrent 11.25 year terms ("third sentence"). At the sentencing hearing, the State provided reasons for the increased sentence and the court found the State had "sufficiently rebutted the presumption of vindictiveness." The court also explained its reasons for imposing the presumptive sentence on each count.

¶5 McCrae timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), and 13-4031 and -4033 (2010).

DISCUSSION

¶6 Judicial vindictiveness is presumed "whenever a judge imposes a more severe sentence upon a defendant after a new trial," and the reasons for the enhancement do not "affirmatively appear." *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S. Ct. 2072, 2081, 23 L. Ed. 2d 656 (1969); see also

Wasman v. United States, 468 U.S. 559, 572, 104 S. Ct. 3217, 3225, 82 L. Ed. 2d 424 (1984); *State v. Thomas*, 142 Ariz. 201, 203, 688 P.2d 1093, 1095 (App. 1984). The Supreme Court limited the *Pearce* presumption in *Alabama v. Smith*, explaining the presumption is appropriate only in circumstances "in which there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." 490 U.S. 794, 799-800, 109 S. Ct. 2201, 2205, 104 L. Ed. 2d 865 (1989) (internal citations omitted).

¶17 Once the presumption arises, it is rebuttable with "objective information concerning identifiable conduct on the part of the defendant." *Pearce*, 395 U.S. at 726, 89 S. Ct. at 2081. Since *Pearce*, the Supreme Court has clarified this objective information is not limited to the defendant's conduct "occurring after the time of the original sentencing proceeding," *id.*, but can also include any "objective information . . . justifying the increased sentence." *Texas v. McCullough*, 475 U.S. 134, 142, 106 S. Ct. 976, 981, 89 L. Ed. 2d 104 (1986) (quoting *United States v. Goodwin*, 457 U.S. 368, 374, 102 S. Ct. 2485, 2489, 73 L. Ed. 2d 74 (1982)); see also *Nulph v. Cook*, 333 F.3d 1052, 1059 n.3 (9th Cir. 2003). The Arizona Supreme Court codified the *Pearce* presumption as limited by

Alabama v. Smith in Arizona Rule of Criminal Procedure 26.14(1) and (3).¹

¶18 Prosecutorial vindictiveness is similar to judicial vindictiveness: the rebuttable presumption in *Pearce* also applies when the prosecutor argues for a harsher sentence on remand.² See *Blackledge v. Perry*, 417 U.S. 21, 27-28, 94 S. Ct. 2098, 2102-03, 40 L. Ed. 2d 628 (1974); *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. 1997). We review a superior court's disposition of a claim of prosecutorial vindictiveness for an abuse of discretion, *id.*, and we review the decision of a superior court to impose a harsher sentence after remand for sufficiency of the evidence. See *State v. Smith*, 162 Ariz. 123, 126, 781 P.2d 601, 604 (App. 1989).

¶19 Here, the State advanced "objective information" concerning McCrae's criminal record and the circumstances of his

¹When a sentence has been set aside on appeal, "the court may not impose a sentence for the same offense . . . which is more severe than the prior sentence unless (1) it concludes, on the basis of evidence concerning conduct by the defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate . . . or (3) other circumstances exist under which there is no reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge." Ariz. R. Crim. P. 26.14.

²On appeal, the State argues the presumption of prosecutorial vindictiveness "is restricted to charging decisions after remand." We disagree, and note the State cites no case stating the presumption is inapplicable to a prosecutor's argument for a greater sentence on remand. Further, this argument contradicts the *Pearce* line of cases.

criminal act that warranted the presumptive term. At McCrae's first sentencing, the State stipulated to a supermitigated sentence because the victim "did not want to see [McCrae] go to prison" for "11 years or possibly more." At the third sentencing, the State argued the first sentence was inappropriate because "[t]here [were] aggravating factors," in addition to McCrae's two prior felony convictions that "support the presumptive term," such as "an additional prior felony," the "age of the victim," the presence of an accomplice, and "the offense was done for a pecuniary gain." Based on this explanation, the court found the State had "sufficiently rebutted the presumption of vindictiveness." We agree. Contrary to McCrae's assertion and as discussed above, the objective information concerning identifiable conduct on the part of the defendant needed to rebut the presumption of vindictiveness is not limited to conduct after the original sentencing proceeding. See Ariz. R. Crim. P. 26.14(3).

¶10 For similar reasons, the court did not impose a harsher sentence out of vindictiveness. It stated it "was not upset by either of Mr. McCrae's appeals," and at the first sentencing, it "fully intended to . . . follow the presentence report and impose the presumptive sentence because of . . . the severity of the acts and the disregard for [the victim's] life

and/or well-being." Regarding the first sentencing, the court stated,

I was astonished when defense counsel and the prosecutor told me they reached a deal for the supermitigated sentence. At that time I didn't realize that I didn't have to accept that deal. . . . So it wasn't that I approved that sentence. I was kind of dragged into that sentence against my will and I very reluctantly, but without comment, applied the sentence that had been stipulated to.³

¶11 The court then explained, "the presumptive sentence is more than warranted in this case" because of the severity of the crime, McCrae's previous violation of probation, his previous felony convictions, including an assault and property crime, and the presentence report assessment he was "a risk to the community's safety and the likelihood that [he] would reoffend is high."

¶12 Although the information the court relied on in imposing the third sentence was available at the first sentencing, the superior court judge did not rely on this "objective information" in imposing the first sentence because he believed -- incorrectly -- he was bound by the sentencing stipulation. At the third sentencing, however, the court

³The court expressed skepticism at the first sentencing when the State described the stipulation, asking the prosecutor, "Tell me why the state was agreeing to that if the victim was hurt so badly, Mr. Rhude, and you went through all the trouble to have the trial in this case?"

concluded the circumstances surrounding McCrae's criminal act and his criminal record made him a danger to society and justified the presumptive term. Under these unique circumstances, the presumptions of both prosecutorial and judicial vindictiveness were rebutted because the explanations by the State and the superior court judge reflected objective reasons justifying McCrae's increased sentences.

CONCLUSION

¶13 For the foregoing reasons, we affirm McCrae's sentences.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge