

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

VICTORIA MICHELLE WILLIAMS,

Appellant,

v.

Case No. 5D12-2460

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed February 22, 2013

Appeal from the Circuit Court
for Marion County,
Hale R. Stancil, Judge.

James S. Purdy, Public Defender, and
Colby Nicole Ferris and Shannon
Timmann, Assistant Public Defenders,
Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Douglas T. Squire,
Assistant Attorney General, Daytona
Beach, for Appellee.

HARRIS, C.M., Senior Judge.

The trial judge, after considering the defendant's numerous petit theft convictions, sentenced her to eighteen months in prison. When defendant's counsel later suggested that defendant might have mental problems, the judge set aside the

sentence and ordered a mental evaluation. After defendant was determined to be competent, she was rescheduled for sentencing.

Although no new facts were presented to the court, the judge increased defendant's sentence to 30 months in prison. The judge reasoned that although defendant filed a motion for determination of competency, she was indeed competent and knew what she was doing at the time of the offense. Because the court had not considered defendant's competency at the time of the original sentencing and because the court mentioned defendant's long record at the original sentencing, there was nothing new presented which would warrant the increased sentence. See *Longley v. State*, 902 So. 2d 925 (Fla. 5th DCA 2005).

Although defense counsel did not specifically argue "vindictive sentence," she did point out to the court that nothing had changed since the first sentence to justify a greater sentence. This was adequate to preserve the issue. See *Walcot v. State*, 460 So. 2d 915 (Fla. 5th DCA 1984).

REVERSED and REMANDED.

BERGER, J., concurs.

LAWSON, J., concurs and concurs specially with opinion.

LAWSON, J., concurring and concurring specially.

I agree with the majority opinion, and write to further explain a few points.

Defendant was being sentenced for violating her probation. The affidavit explained that Defendant violated her probation with a new offense (petit theft), which Defendant admitted. At the second sentencing hearing, after the trial court announced a longer sentence than announced at the first hearing, Defendant's counsel repeatedly attempted to explain to the court that because nothing had changed that could reasonably affect the length of the sentence imposed, the sentence should not exceed the 18-months originally announced. As explained by the majority, this was sufficient to preserve the issue for review.

In response to counsel's objections, the trial court initially indicated that the sentence was being increased because Defendant committed the new offense after the first sentencing hearing. This was not true. The offense was the basis for the violation to which Defendant originally pled. After Defendant's counsel corrected this misimpression, the trial judge then explained that he was increasing the sentence because of facts relating to the new offense that had not been presented previously.

When Defendant's counsel persisted by arguing that the same facts were before the court at the original sentencing hearing, the trial court then explained that it was "appropriate to give her a stiffer sentence because . . . there's not any mental issues about her competency." There are two problems with this explanation. As addressed by the majority opinion, the trial judge certainly understood Defendant to be competent when he announced the first sentence, meaning that there were no changed

circumstances relating to Defendant's competency at the second hearing. Additionally, however, it should be clear that the fact of a defendant's competence is an inappropriate sentencing consideration in any event. A defendant must be competent in order to proceed to sentencing, and thus, it makes no sense to suggest that a person can be punished for being competent, or for delaying proceedings for a competency determination.