

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REX HENRY ROBINSON,

Defendant-Appellant.

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UNPUBLISHED

May 13, 2004

No. 246976

Jackson Circuit Court

LC No. 00-002245-FC

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Following a bench trial defendant was convicted of two counts of first-degree criminal sexual conduct, in violation of MCL 750.520b(1)(a), and was sentenced as a second-offense habitual offender (MCL 769.10) to concurrent terms of 126 to 240 months' imprisonment. Defendant's sentence was vacated and the case remanded for resentencing to correct errors in the presentence investigation report.<sup>1</sup> On remand before a different judge<sup>2</sup> defendant was re-sentenced to concurrent terms of 180 to 360 months' imprisonment. Defendant appeals that sentence as of right and we affirm. We review a trial court's imposition of a particular sentence for an abuse of discretion. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

Defendant argues that his increased sentence raises the presumption of vindictiveness, even though he was resentenced before a different judge, because his resentencing occurred on remand from this Court, as opposed to following a retrial or a plea withdrawal.

In *People v Mazzie*, 429 Mich 29, 33; 413 NW2d 1 (1987), our Supreme Court explained that "sentences are based more on an assessment of the offender than the offense," and that "a natural and unavoidable result of this sentencing scheme, leaving as it does wide discretion to the trial judge, is that the length of a defendant's sentence rests in part upon the perceptions, experience, and judgment of the individual judge before whom he is tried." "When a defendant is resentenced by the same judge and the second sentence is longer than the first, there is a

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<sup>1</sup> *People v Robinson*, unpublished opinion per curiam of the Court of Appeals, issued 12/3/02 (Docket No. 231390).

<sup>2</sup> The original sentencing judge retired.

presumption of vindictiveness.” *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997). However, “that presumption may be overcome if the trial court enunciates reasons for doing so at resentencing.” *Id.* Further, “that presumption does not apply when the sentences are imposed by different judges.” *People v Colon*, 250 Mich App 59, 66-67; 644 NW2d 790 (2002), because “different judges may perceive the same information differently, and to invoke a presumption of vindictiveness because of the fortuitous circumstances of facing one judge or another would make all sentences constitutionally suspect.” *Mazzie, supra*, 33-34.

The latter holding in *Mazzie* with regard to differing perceptions is precisely what the resentencing judge articulated in this case in turning aside defense counsel’s objection to a sentence higher than the one originally imposed. The judge, who was clearly familiar with the facts of the case and the sentencing documents including the corrected presentence report, indicated that he disagreed with the length of the original sentence and stated, “I just think that my sentence would have been higher” had he been the original sentencing judge. Further, the judge explained as follows: “I have to put my name on this; this is my sentence. And if I’m uncomfortable with that sentence [the original sentence] as being lower than I feel is appropriate, I don’t want to put my name on it.”

Defendant attempts to distinguish the cases setting forth the rule that there is no presumption of vindictiveness when a different judge imposes a harsher sentence on resentencing, because in those cases resentencing occurred after a plea withdrawal and subsequent trial, or after a retrial, whereas here, the resentencing occurred after the successful appeal of a sentence. *Mazzie, supra* at 33. We find no support for a different result under these circumstances. See *Gauntlett v Kelley*, 849 F2d 213, 217 (CA 6, 1988).

In the instant case, the presumption of vindictiveness does not apply and the record belies any such motive. There is no reason to invoke the presumption of vindictiveness simply because defendant was resentenced following remand instead of following a retrial or plea withdrawal and subsequent trial. The manner in which the case comes before the resentencing judge is immaterial. The judge noted that defendant was a repeat-offender, that his previous prison sentence was clearly not a deterrent, and stated his concern that defendant would engage in similar conduct again. The resentencing judge was quite clear in his reasons for sentencing defendant to the term imposed, including that his goal in sentencing defendant was to not only punish defendant, but also to protect society. In imposing a higher sentence than that which was originally imposed, the judge based his sentence on the PSIR, the crime, and the variables involved. Nothing in the record “raises the spectre of vindictiveness,” and the sentence did not constitute an abuse of discretion.

Affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Pat M. Donofrio