IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63127-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
WILLIAM F. JENSEN,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: November 9, 2009
	)	
	)	

Cox, J. – A defendant's due process rights are violated if judicial vindictiveness plays a role in resentencing after a successful appeal.[1] A rebuttable presumption of vindictiveness arises in those circumstances in which there is a "'reasonable likelihood'" that an increased sentence is the product of actual vindictiveness on the part of the sentencing authority.[2] Here, because a different trial judge sentenced William Jensen following his successful appeal and that judge articulated logical and non-vindictive reasons for the sentence, we hold that there was no violation of William Jensen's right to due process. We affirm.

The State charged William Jensen with four counts of solicitation to

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[1] State v. Parmelee, 121 Wn. App. 707, 708, 90 P.3d 1092 (2004).

[2] Alabama v. Smith, 490 U.S. 794, 799, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989) (quoting United States v. Goodwin, 457 U.S. 368, 373, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982)).

commit murder in the first degree after he tried to hire hit men to kill his wife, his daughter, his son, and his sister-in-law. The State charged one count for each targeted victim. A jury convicted Jensen as charged.

Jensen's standard range sentence on each count was 180-240 months. The Sentencing Reform Act of 1981, chapter 9.94A RCW, required Jensen's sentences on each count to run consecutively.[3] The sentencing court imposed four consecutive bottom-range sentences of 180 months, for a total of 720 months.

Jensen appealed. The Washington State Supreme Court held that the correct unit of prosecution for solicitation to commit murder was each separate solicitation, not each targeted victim.[4] Under the facts of the case, the court found Jensen criminally liable for two solicitations.[5] The court remanded for resentencing on two counts of solicitation to commit murder.[6]

At resentencing, Jensen again faced a standard range sentence of 180-240 months for each count. The State requested two consecutive 240-month sentences for a total of 480 months. Jensen asked the court to impose two 180-month sentences for a total of 360 months. Following a hearing in which

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[3] RCW 9.94A.030(45)(a)(i), (ix) (solicitation to commit murder in the first degree is a "serious violent offense"); RCW 9.94A.589(1)(b) (a person convicted of two or more serious violent offenses must serve sentences for those offenses consecutively to each other).

[4] State v. Jensen, 164 Wn.2d 943, 946, 958-59, 195 P.3d 512 (2008).

[5] Id. at 946-47, 959.

[6] Id. at 947, 959.

testimony of the victims was heard, the court followed the State's recommendation and imposed a 480-month sentence.

Jensen appeals.

RESENTENCING AFTER APPEAL

Jensen argues that the trial court imposed an increased penalty against him after a successful appeal, thereby raising the presumption of vindictiveness. He argues that the record is not sufficient to rebut this presumption. We disagree on both points.

Where there is a "reasonable likelihood" that the sentencing authority increased a sentence based on actual vindictiveness, an increased sentence following a new trial or successful appeal presumptively violates due process.[7] In North Carolina v. Pearce,[8] the United States Supreme Court held that a rebuttable presumption of vindictiveness arises under some circumstances when a court imposes a more severe sentence after a successful appeal.[9] The Court stated, "In order to assure the absence of such a [vindictive] motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively

[7] Smith, 490 U.S. at 799; Parmelee, 121 Wn. App. at 710 (citing North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Smith, 490 U.S. 794).

[8] 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Smith, 490 U.S. 794.

[9] Pearce, 395 U.S. at 726; Parmelee, 121 Wn. App. at 709-10.

appear."[1]

Subsequent cases have limited the scope of the presumption. For example, in State v. Parmelee,[11] this court, relying on Texas v. McCullough[12] and related authority, concluded that there is "not a reasonable likelihood that actual vindictiveness plays a role in sentencing when a different judge imposes the more severe sentence."[13] The court also noted that even if the presumption arises, it may be rebutted if the second sentencing judge provides nonvindictive reasons for the sentence.

Here, a different judge conducted the second sentencing hearing. Under Parmelee, the Pearce presumption does not apply. Additionally, even if the presumption arose, the resentencing court cited nonvindictive reasons sufficient to rebut the presumption. In McCullough, the United States Supreme Court concluded that the second sentencing judge provided "an on-the-record, wholly logical, nonvindictive reason for the sentence. We read Pearce to require no more particularly since trial judges must be accorded broad discretion in sentencing."[14]

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[1] Pearce, 395 U.S. at 726.

[11] 121 Wn. App. 707, 90 P.3d 1092 (2004).

[12] 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986).

[13] Parmelee, 121 Wn. App. at 712; see also McCullough, 475 U.S. at 140 (presumption of vindictiveness inapplicable because different sentencers assessed the varying sentences).

[14] McCullough, 475 U.S. at 140.

Here, in its oral ruling, the trial court provided an on-the-record, wholly logical, nonvindictive reason for the sentence. The court characterized Jensen's crime – solicitation to commit murder in the first degree – as "shocking" and "incredible," particularly because Jensen's wife and children were targets of his acts. The court then stated, "the Court is struck by the fear that they [Jensen's family members] have to live under, the fear in worrying about you getting out and doing this again[,] and struck by what it must be like for a mother to operate under that concern and wonder if one day she might not be around and wondering what that would mean for her children."[15] This is sufficient to rebut any presumption of vindictiveness that could have arisen in this case.

Without this presumption, Jensen must prove actual vindictiveness.[16] Jensen does not point to any facts that would indicate vindictiveness on the part of the sentencing court.

Because there is no presumption of vindictiveness that arises in this case and because any theoretical presumption has been rebutted, we need not address the other issues that the parties argue.

We affirm the judgment and sentence.

Cox, J.

[15] Report of Proceedings (February 13, 2009) at 18.

[16] Smith, 490 U.S. at 799-800 (where there is no reasonable likelihood of actual vindictiveness on the part of the sentencing authority, "the burden remains upon the defendant to prove actual vindictiveness.").

WE CONCUR: