

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	ID No. 0408022175
)	
PAUL WEBER,)	
)	
Defendant.)	

Submitted: June 4, 2009
Decided: July 9, 2009

On State's Motion to Vacate and Re-Sentence - DENIED
On Defendant's Motion to Reset Bail - GRANTED

MEMORANDUM OPINION

Stephen M. Walther, Esquire, Department of Justice, 820 North French Street, Wilmington, Delaware 19801. Counsel for State of Delaware.

Leo Ramunno, Esquire, 2961 Centerville Road, Suite 302, Wilmington, DE 19808. Counsel for Paul Weber.

CARPENTER, J.

INTRODUCTION

On September 20, 2004, the defendant was indicted for Attempted Robbery First Degree and Attempted Carjacking First Degree relating to his interaction with a customer at the Shell gas station on the corner of Duncan Road and Kirkwood Highway in Wilmington, Delaware. As a result of a jury trial, the defendant was found guilty of both charges on March 22, 2005. After the verdict but before sentencing, the trial judge determined that a conflict, unrelated to the case, had developed with counsel for the defendant, and the case was reassigned to this judge for sentencing purposes. The sentencing was delayed due to multiple requests for continuances by the defense, as well as the filing of numerous motions made by the defendant himself. Sentencing did occur on January 11, 2008, and the State moved to sentence the defendant as an habitual offender on the Attempted Robbery First Degree charge.¹ The Court granted the motion and sentenced the defendant to 25 years of incarceration on the Attempted Robbery charge and 2 years of incarceration followed by 6 months of home confinement on the Attempted Carjacking offense.

On April 22, 2009, the Delaware Supreme Court reversed the defendant's conviction on the Attempted Robbery offense and remanded that matter back to the

¹ The State originally moved to sentence the defendant as an habitual offender on both charges but withdrew that request on the day of sentencing.

Superior Court for a new trial. The Attempted Carjacking offense and the sentencing related to it were unaffected by the Supreme Court's opinion.

As a result of the Supreme Court's opinion, the defendant moved to have his bail reset on the Attempted Robbery offense, arguing that he had been incarcerated since March 21, 2005 - the date of his conviction - and as such had been incarcerated for a period of time greater than the sentence imposed on the Attempted Carjacking offense. He argues the time he has been in custody should be applied to his Attempted Carjacking conviction, and that he is entitled to bail on the Attempted Robbery offense for which the new trial has been ordered. The State objected to the motion arguing that any time served related to the mandatory time being served as a result of the habitual offender petition on the Attempted Robbery offense and as such the defendant had not completed the sentence ordered on January 11, 2008. The State is requesting the Court vacate its sentence order and re-sentence the defendant on the Attempted Carjacking offense, presumably so they can file a new petition seeking habitual offender status as to that offense. Since the Attempted Carjacking First Degree offense involved a 74-year-old victim, it is a class B violent offense and the defendant would face a minimum of 25 years of incarceration pursuant to 11 *Del. C.* § 4212(e). For the reasons set forth below, the Court will grant the defendant's Motion and deny the State's Motion.

The defendant's conviction and the sentence imposed for Attempted Carjacking were unaffected by the Supreme Court's decision of April 22, 2009. It was not remanded for re-sentencing, and there is no dispute that the defendant has been in custody longer than the Level 5 sentence imposed for that offense.² At the time of sentencing, the State made a proper and logical choice as to the particular offense for which it would seek habitual offender status. Unfortunately, by no fault of the State, that decision has been dramatically affected by the Supreme Court's opinion. Since the habitual offender petition would be applicable to either conviction, the State now seeks re-sentencing, in an effort to keep an individual they believe should be jailed for a significant portion of his adult life in custody. In support of its position, the State argues that the present case is procedurally similar to *White v. State*.³ There, the Supreme Court approved the redistribution of time a defendant originally received to other counts of the indictment when one of the original charges was vacated and returned to this Court for re-sentencing. However, the Court finds the State has taken the "no legitimate expectation of finality" language used by the Supreme Court in that

² The Court also notes that not only has defendant served his Level 5 sentence for attempted carjacking, but if he had been convicted of offensive touching, the lesser included offense of attempted robbery as argued by the defense, he would also have served the maximum sentence for that offense.

³ 576 A.2d 1322 (Del. 1990).

case out of context.⁴ First, in *White* it appears that the case was remanded for re-sentencing as a result of the Supreme Court’s vacating the conviction on a weapons offense. That did not occur here, and there is no indication in the Supreme Court’s opinion which would lead this Court to believe they are suggesting that re-sentencing in this matter is appropriate. Secondly, unlike *White*, the robbery offense here was not vacated and removed from further consideration, but was simply reversed. Therefore, as to that count, the State is free to retry the matter, and if convicted, the defendant is still subject to habitual offender treatment. The Court believes that these differences are significant and do not mandate or even suggest the course of action requested by the State.

The Court finds that it is bound by the sentence it imposed on January 11, 2008, and while the defendant may be getting an unexpected (and perhaps unjustified) benefit from how this case has proceeded procedurally, the Court is not willing to manipulate the sentencing process to undo the State’s earlier decision. The Court recognizes that a potentially unfortunate consequence of this decision is that

⁴ In *White*, the Court held “[t]he constitutional prohibition against double jeopardy is not implicated when a defendant charged with multiple crimes successfully appeals a conviction on double jeopardy grounds and the trial court resents the defendant within the combined duration of the original sentences imposed. Under these circumstances White had no legitimate expectation of finality in his original sentence. Similarly, because the new sentence did not exceed the original sentence imposed, there is no presumption of vindictiveness and no due process violation.” *Id.* at 1329.

future defendants may be adversely affected as it is likely that the State will prevent this situation from re-occurring in future sentencings by requesting that the habitual offender statute apply to more than a single convicted count of the indictment. The Court would hope that in spite of this temptation, the State will act with reason and common sense to avoid not only unreasonably long sentences, but also the associated costs related to such action.

Having decided to grant the defendant's request for bail, the remaining issue is the appropriate amount to ensure not only that the defendant will appear in court but also the safety of the community. In making this determination the Court must recognize that in spite of the Supreme Court's decision, the jury's conviction of the defendant is reflective of the strength of the State's case. There is no dispute that he is eligible for sentencing as an habitual offender, and if found guilty, will serve at least 25 years in custody for the attempted robbery offense. If this were to occur, the defendant would be nearly 70 years old when he is released from custody. The defendant has a long history of probation violations reflecting his difficulty dealing with community supervision. Additionally, the defendant has a drug and mental health history that is of significant concern to the Court as it relates to the safety of the community, as well as the defendant's own well-being. As a result of all of the above, the Court believes bail in the amount of \$250,000 secured is appropriate and that if the defendant is released, he should be monitored by pretrial services.

CONCLUSION

As such, the defendant's Motion to Reset Bail is GRANTED consistent with the above opinion. The State's Motion to Vacate and Re-Sentence is DENIED.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.