

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

LEONARD LLOYD REINKE,
Defendant-Appellant.

Multnomah County Circuit Court
090130185; A157528

Kelly Skye, Judge.

Argued and submitted April 26, 2016.

Kyle Krohn, Deputy Public Defender, argued the cause for appellant. With him on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Doug M. Petrina, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Affirmed.

ARMSTRONG, P. J.

Defendant appeals a judgment of conviction for, among other things, second-degree kidnapping, ORS 163.225, challenging the sentence that he received on remand after a successful appeal.¹ In the proceeding that led to the initial appeal, the court had convicted defendant of various crimes and, with regard to the kidnapping conviction, had found defendant to be a dangerous offender. In the initial appeal, *State v. Reinke*, 245 Or App 33, 260 P3d 820 (2011) (*Reinke I*), *aff'd*, 354 Or 98, 309 P3d 1059, *adh'd to as modified on recons*, 354 Or 570, 316 P3d 286 (2013) (*Reinke II*), we concluded that defendant's dangerous-offender sentence of 280 months on the kidnapping charge was erroneous and reversed and remanded for resentencing.² Defendant was resentenced on remand by a different judge from the judge who had imposed the initial sentence. However, the resentencing court relied on the initial sentencing court's finding under ORS 161.725 to 161.737 that defendant is a dangerous offender and, based on that finding, sentenced defendant to a 30-year indeterminate sentence with a 120-month minimum determinate sentence on the kidnapping conviction.

Defendant challenges his new dangerous-offender sentence on two grounds. First, he contends that the resentencing court erred under the principles established in *State v. Partain*, 349 Or 10, 239 P3d 232 (2010), by increasing his sentence on remand without articulating adequate grounds to justify the increase. The state responds, and we agree, that the record is sufficient to support the decision by the resentencing court to impose the sentence that it did. Second, defendant contends that the resentencing court could not rely on the dangerous-offender finding made by the initial sentencing court because, although defendant had waived his right to a jury trial in the initial proceeding, the jury

¹ Defendant was convicted of various other crimes. Except for the waiver of some financial obligations, the sentences imposed for those crimes were not modified on remand, and defendant does not assign error to those sentences. Accordingly, we address only the sentence imposed on the kidnapping conviction.

² In *Reinke I*, defendant contended that his dangerous-offender sentence was erroneous in two respects. We agreed with one of his challenges but rejected the other. See *Reinke I*, 245 Or App at 34. The Supreme Court granted defendant's petition for review and ultimately affirmed our decision and remanded the case to the trial court for resentencing. See *Reinke II*, 354 Or at 571.

waiver and concomitant finding by the initial sentencing court that defendant was a dangerous offender could not be applied on resentencing. We disagree. The scope of the remand for resentencing did not require the resentencing court to empanel a jury to determine whether defendant is a dangerous offender for the court to sentence defendant as a dangerous offender. Accordingly, we affirm.

The facts relevant to this appeal are procedural and undisputed. After waiving his right to a jury trial, defendant was convicted by the trial court of, among other things, second-degree kidnapping. The court thereafter found, for purposes of sentencing defendant on his kidnapping conviction, that he is a dangerous offender. The state argued at sentencing that the maximum dangerous-offender sentence that the court could impose was capped by the “400 percent rule” at four times the presumptive sentence on the kidnapping conviction.³ Because the state understood the presumptive sentence on the kidnapping conviction to be 70 months,⁴ the state asked the court to sentence defendant to 280 months’ imprisonment on that conviction, which is the sentence that the court imposed from the bench and ultimately included in an amended judgment.⁵

Defendant appealed the trial court’s amended judgment, contending, among other things, that a dangerous-offender sentence required the court to impose both a

³ The state’s assertion that the 400 percent rule applied was erroneous. *See* 289 Or App at 16-17.

⁴ Defendant’s kidnapping conviction came within gridblock 9-A of the sentencing guidelines, so his presumptive sentence for that conviction was 66 to 72 months.

⁵ Before entering the amended judgment, the court entered a temporary sentencing order that imposed a 280-month sentence, including a minimum sentence of 70 months under ORS 137.717. ORS 137.717 does not apply to the crimes for which defendant was convicted. The parties agree that the reference to ORS 137.717 was likely a typographical error and that the trial court presumably intended to refer to ORS 137.700.

The court entered an original judgment of conviction the day after it sentenced defendant, but that judgment could not subsequently be found. The court entered a supplemental judgment a few weeks later, followed by an amended judgment. The amended judgment imposed a 280-month sentence on defendant’s kidnapping conviction, did not include a 70-month minimum term, and increased defendant’s term of post-prison supervision to 280 months, minus time served. The amended judgment is the judgment on which defendant based his initial appeal.

determinate and an indeterminate term of incarceration, and, because the court had imposed only a single incarceration term of 280 months' imprisonment on the kidnapping conviction, the court had imposed an unlawful sentence.⁶ See *State v. Isom*, 201 Or App 687, 690, 120 P3d 912 (2005) (“[A] correct sentence for a dangerous offender contains both a determinate mandatory minimum term of incarceration and an indeterminate maximum term, not to exceed 30 years.”). We agreed with defendant that the court had erred by entering a dangerous-offender sentence that did not include both a determinate and an indeterminate term of incarceration, and we remanded for resentencing. *Reinke I*, 245 Or App at 34.

As noted, a different judge from the initial sentencing judge presided over the resentencing proceeding. In that proceeding, the court resented defendant on his kidnapping conviction to a 30-year indeterminate sentence and a determinate minimum sentence of 120 months, together with various Measure 11 provisions required by ORS 137.700. The resentencing court concluded that the initial sentencing court had erred in three respects in imposing a dangerous-offender sentence on the kidnapping conviction: (1) by applying the 400 percent rule, (2) by not imposing both a determinate and an indeterminate term of imprisonment, and (3) by not including sentencing provisions required by Measure 11. In correcting those errors, the court imposed a sentence that increased the incarceration term of defendant's sentence from that which had been originally imposed.

On appeal, defendant does not challenge the resentencing court's conclusions regarding the errors that the initial sentencing court had made in sentencing defendant as a dangerous offender. He contends, however, that a decision by the resentencing court to correct those errors provides an insufficient basis to justify the imposition of a more severe sentence on remand, because *Partain* permits a more severe sentence only to address newly discovered facts and not to

⁶ The parties disagree about whether the 280-month sentence was a determinate or an indeterminate sentence. We need not resolve that issue, because it does not affect our analysis.

correct legal error.⁷ Additionally, he contends that the resentencing court had to empanel a jury to find the facts that had to be found to sentence him as a dangerous offender because he had withdrawn his jury waiver at resentencing and the resentencing court could not rely on the dangerous-offender finding made by the initial sentencing court.

We first address the application of *Partain* to the sentence imposed on remand. The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a criminal defendant's right to appeal, such that he may not receive a vindictive sentence on remand for successfully pursuing an appeal. *See Partain*, 349 Or at 24-25. The Oregon Supreme Court recently explained in *State v. Sierra*, 361 Or 723, 734-44, 399 P3d 987 (2017), the two-step inquiry to be used by an appellate court to determine whether a judge who was not the original sentencing judge has imposed a sentence on remand that triggers a presumption of vindictiveness, which, if triggered, makes the sentence unlawful.⁸ The first step requires the appellate court to determine whether the resentencing court has imposed a

⁷ To the extent that defendant contends that the resentencing court was required to re-impose the 70-month determinate sentence that the initial sentencing court had included in its temporary sentencing order (absent articulation of a reason to increase that portion of the sentence), *see* 289 Or App at 13 n 5, we reject that argument without extended discussion. Defendant's argument is based on his contention that the initial sentencing court lacked authority to enter the supplemental and amended judgments, and, thus, the sentence to be used under *Partain* to determine whether the sentence imposed on remand is more severe than the original sentence is the one imposed by the temporary sentencing order, which included a 70-month minimum determinate sentence. Defendant did not challenge the validity of the supplemental and amended judgments in his initial appeal, and it is too late to do that now. We reversed and remanded for resentencing in *Reinke I* because defendant's dangerous-offender sentence did *not* include both a determinate and an indeterminate sentence, which is the error that defendant had identified in his initial appeal of the amended judgment. Defendant cannot claim, as he does now, that his dangerous-offender sentence *did* include both of those components. *See, e.g., Washer v. Clatsop Care and Rehab. District*, 98 Or App 232, 235, 778 P2d 987 (1989) (The plaintiff "could have contended on [his first] appeal that the [trial court's] ruling *** was error. Because he did not do so, the ruling became the law of the case."); *State v. Scott*, 68 Or App 386, 390, 681 P2d 1188, *rev den*, 297 Or 547 (1984) ("There is no reason why law of the case should be applied differently in criminal cases than it is in civil cases.").

⁸ The court in *Sierra* noted that the phrase "presumption of vindictiveness" is confusing. Unlike traditional presumptions in the law that are susceptible to being rebutted, once a "presumption of vindictiveness" is established, it is not rebuttable. 361 Or at 741 n 8.

sentence that is more severe than was originally imposed, which turns on whether “the total length of the second sentence exceeds that of the first.” *Id.* at 744 (quoting *State v. Febuary*, 361 Or 544, 563, 396 P3d 894 (2017)). The second step requires the court to determine whether the resentencing court has articulated “a wholly logical, nonvindictive reason for the more severe sentence.” *Id.* If the resentencing court has done that, then the second sentence is not presumed to be vindictive, and, thus, the defendant’s due process rights have not been violated by the imposition of a more severe sentence on remand.

Applying that test here, we conclude that the sentence imposed by the resentencing court does not violate defendant’s due process rights. We first address whether defendant’s sentence on remand is more severe than the sentence that he initially received. The state contends that, because the sentence imposed by the initial sentencing court was legally erroneous, the initial sentence cannot serve as the benchmark to determine whether the sentence imposed on remand is more severe. We disagree. Legal error in an initial sentence does not foreclose a determination that a subsequent sentence can trigger a presumption of vindictiveness. *See, e.g., Partain*, 349 Or at 12-13 (defendant’s original sentence was legally erroneous, but Supreme Court analyzed whether subsequent sentence violated defendant’s due process rights). The appropriate inquiry requires a comparison of the severity of the sentences that a defendant has received. Here, defendant’s initial sentence was a 280-month sentence. On resentencing, he received a maximum sentence of 30 years, *viz.*, 360 months. The total length of his sentence on remand is longer than the length of his initial sentence, and, thus, the new sentence satisfies the first element of the *Sierra* test.

Turning to the second element of the test, we conclude that the resentencing court articulated wholly logical, nonvindictive reasons for imposing the sentence that it did. The resentencing court correctly noted that the initial sentencing court had improperly relied on the 400 percent rule in imposing defendant’s initial dangerous-offender sentence. That rule, by its terms, did not apply to defendant’s sentence because the rule governs the imposition of consecutive

departure sentences, which defendant did not receive. See OAR 213-008-0007(3) (400 percent rule applies “[w]hen a departure sentence is imposed for any individual offense sentenced consecutively”); *State v. Skelton*, 153 Or App 580, 590, 957 P2d 585, *rev den*, 327 Or 448 (1998) (“According to the 400 percent rule, the maximum incarceration term that may be imposed for all the *consecutive sentences* together by departure cannot exceed four times the maximum presumptive incarceration term of the primary offense.” (Internal quotation marks omitted; emphasis added.)). The initial sentence was legally erroneous for the further reason that it did not impose both a determinate and an indeterminate sentence. See *Reinke I*, 245 Or App at 34. Finally, the resentencing court included in its sentence the additional terms that Measure 11 required it to impose on defendant’s kidnapping conviction. Because the resentencing court recognized that defendant’s initial sentence was legally erroneous and that the court was required to impose a lawful sentence on remand, which it sought to do in imposing the sentence that it did, we conclude that the resentencing court articulated “wholly logical, nonvindictive reasons” for the longer sentence that it imposed on remand. Thus, the sentence did not violate defendant’s due process rights.

Defendant next contends that the trial court erred in sentencing him as a dangerous offender by relying on the dangerous-offender finding that had been made by the initial sentencing court. As noted earlier, defendant waived his right to a jury trial and tried the case to the court. After finding defendant guilty, the initial sentencing court made the findings that were necessary to sentence defendant as a dangerous offender.

On resentencing, defendant contended that the dangerous-offender statutes require that the findings necessary to support a dangerous-offender sentence be made contemporaneously with the imposition of that sentence, and, because he was withdrawing his original jury waiver, the facts that had to be found to sentence him as a dangerous offender had to be found by a jury. The resentencing court disagreed and concluded that it could rely on the initial sentencing court’s finding that defendant was a dangerous offender, which our decision in *Reinke I* had not affected,

thereby allowing the court to resentence defendant as a dangerous offender, as it did.

On appeal, defendant's argument focuses on the resentencing court's conclusion that our decision in *Reinke I* had not affected the validity of the initial sentencing court's dangerous-offender finding. Defendant contends that a jury waiver is not valid on remand when a retrial is ordered and, hence, that it is not valid on remand when facts must be found to impose a sentence on remand. He thus concludes that the resentencing court had to empanel a jury to make a new dangerous-offender finding on remand.⁹ We disagree.

Defendant had the opportunity to assign error in his first appeal to the initial sentencing court's finding that he was a dangerous offender. Because he did not challenge that finding in his first appeal, the finding is binding on remand under the doctrine of law of the case. *See, e.g., Washer v. Clatsop Care and Rehab. District*, 98 Or App 232, 235, 778 P2d 987 (1989) (explaining doctrine); *cf. Kennedy v. Wheeler*, 356 Or 518, 524-31, 341 P3d 728 (2014) (clarifying distinction between preservation and law-of-the-case principles). Our reversal of defendant's dangerous-offender sentence and concomitant remand for resentencing did not reverse the trial court's finding under ORS 161.725 to 161.737 that defendant is a dangerous offender. *See State v. Zolotoff*, 275 Or App 384, 395-96, 365 P3d 131 (2015) (clarifying that resentencing court may rely on findings properly made in original sentencing hearing). Hence, the resentencing court did not err by relying on the finding made by the initial sentencing court that defendant is a dangerous offender and by sentencing him accordingly.

Affirmed.

⁹ Defendant does not advance on appeal the argument that he made below that the dangerous-offender statutes require that the findings necessary to impose a dangerous-offender sentence must be made contemporaneously with the imposition of such a sentence. Accordingly, we do not address the merits of that argument.