NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
RICHARD BALSAVAGE,	:	
Appellant	:	No. 691 MDA 2014

Appeal from the Judgment of Sentence entered on January 23, 2014
in the Court of Common Pleas of Berks County,
Criminal Division, No. CP-06-CR-0001210-2005

BEFORE: BOWES, WECHT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 18, 2014**

Richard Balsavage ("Balsavage") appeals from the judgment of sentence imposed on seven counts of sexual abuse of children,[1] following the revocation of his probation. We affirm.

The trial court set forth the relevant factual and procedural history in its Opinion, which we adopt herein for purposes of this appeal. ***See*** Trial Court Opinion, 7/23/14, at 2-6.

On appeal, Balsavage raises the following issues for our review:

1. Did the trial court err by increasing [Balsavage's] sentence and not overcoming or correcting the judicial vindictiveness that the trial court (by way of a different judge) earlier exhibited in the case?

2. Did the trial court's increasing of [Balsavage's] sentence punish [Balsavage] for previously exercising his right to

[1] ***See*** 18 Pa.C.S.A. § 6312(d) (child pornography).

> allocution, which violates the standards set forth in the Pennsylvania Rules of Criminal Procedure and decisional law?
>
> 3. Did the trial court's increasing of [Balsavage's] sentence, without citing any new objective evidence of record, violate [Balsavage's] [d]ue [p]rocess rights under the United States Constitution?

Brief for Appellant at 9 (citations omitted).

Balsavage challenges the discretionary aspects of his sentence. "Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right." ***Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010); ***see also Commonwealth v. Yanoff***, 690 A.2d 260, 267 (Pa. Super. 1997) (stating that, when an appellant challenges the discretionary aspects of his sentence, we must consider his brief on this issue as a petition for permission to appeal). Prior to reaching the merits of a discretionary sentencing issue,

> [this Court conducts] a four part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, [***see***] Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, [***see***] 42 Pa.C.S.A. § 9781(b).

Moury, 992 A.2d at 170 (citation omitted).

In the instant case, Balsavage filed a timely Notice of Appeal, preserved his claims in a timely post-sentence Motion, and included in his

appellate brief a separate Rule 2119(f) statement.[2] As such, he is in technical compliance with the requirements to challenge the discretionary aspects of a sentence. ***Commonwealth v. Rhoades***, 8 A.3d 912, 916 (Pa. Super. 2010). Thus, we will proceed to determine whether Balsavage has presented a substantial question for our review.

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***See Commonwealth v. Paul***, 925 A.2d 825, 828 (Pa. Super. 2007). "A substantial question exits only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. Griffin***, 65 A.3d 932, 936 (Pa. Super. 2013) (internal quotation marks and citations omitted).

Challenges to the length of the sentence following resentencing, citing judicial vindictiveness, implicate a discretionary aspect of the sentencing process. ***See Commonwealth v. Tapp***, 997 A.2d 1201, 1202-03 (Pa. Super. 2010). Accordingly, we grant review of Balsavage's claims and will address the merits of his argument.

As Balsavage's issues are related, we will address them together. Balsavage asserts that, because the sentences imposed by Judge Stephen

[2] In his Rule 2119(f) Statement, Balsavage disputes that his claims involve a challenge to the discretionary aspects of his sentence. ***See*** Brief for Appellant at 26.

Lieberman ("Judge Lieberman") in 2007 ("the 2007 sentence")[3] and 2009 ("the 2009 sentence")[4] were reversed, we must look to the 2007 sentence as the basis from which to evaluate the sentence at issue, which was imposed by Judge Paul Yatron ("Judge Yatron") following the January 23, 2014 resentencing hearing ("the 2014 sentence").[5] ***Id***. at 28-29. Balsavage contends that because no new evidence was presented at the January 23, 2014 resentencing hearing, there was no basis for Judge Yatron to increase Balsavage's sentence beyond the 2007 sentence. ***Id***. at 29. Balsavage claims that Judge Yatron failed to acknowledge that the purpose of the January 23, 2014 resentencing hearing was for Balsavage to exercise his right of allocution, which had been denied by Judge Lieberman at the 2007

[3] Following Balsavage's admission to a probation violation of his original sentence, which was imposed in 2005, Judge Lieberman conducted a hearing pursuant to ***Gagnon v. Scarpelli***, 411 U.S. 778, (1973) ("***Gagnon II*** hearing") before imposing the 2007 sentence, which consisted of a prison term of 3½ to 7 years, followed by 42 years of probation.

[4] Following Balsavage's successful appeal of the 2007 sentence, Judge Lieberman conducted a second ***Gagnon II*** hearing before imposing the 2009 sentence, which consisted of a prison term of 24½ to 49 years, followed by 7 years of probation.

[5] Following Balsavage's successful Petition for a writ of *habeas corpus* regarding the 2009 sentence, Judge Yatron conducted a third ***Gagnon II*** hearing before imposing the 2014 sentence, which consists of a prison term of 4½ years to 24 years in prison, followed by 7 years of probation.

sentencing hearing.[6] ***Id***. Balsavage asserts that Judge Yatron erred by regarding the January 23, 2014 resentencing hearing as a complete "do-over," and thereby failed to overcome the judicial vindictiveness exhibited by Judge Lieberman.[7] ***Id***.

Balsavage further claims that a presumption of judicial vindictiveness applies to the 2014 sentence based on Judge Yatron's imposition of a sentence greater than the 2007 sentence. ***Id***. at 30. Balsavage asserts that Judge Yatron violated his rights by effectively punishing him for successfully appealing his 2009 sentence, just as Judge Lieberman violated his rights when Balsavage appealed his 2007 sentence. ***Id***. at 31. Balsavage also claims that Judge Yatron erred by conducting his resentencing on a *de novo* basis.[8] ***Id***. at 34. Balsavage contends that Judge Yatron's justification for increasing his sentence, based on the fact that Balsavage took the subject

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[6] In contrast to the position taken in Balsavage's appellate brief, his counsel asserted at the January 23, 2014 resentencing hearing that Balsavage did not wish to exercise his right of allocution, and that Judge Yatron should instead take into consideration the apology made by Balsavage at the 2009 resentencing hearing when imposing his sentence. ***See*** N.T., 1/23/14, at 8, 12-13.

[7] In contrast to the position taken in Balsavage's appellate brief, his counsel asserted at the January 23, 2014 resentencing hearing that Judge Yatron's role was, in fact, to conduct a "do-over" of the 2009 resentencing hearing. ***See*** N.T., 1/23/14, at 8.

[8] In contrast to the position taken in Balsavage's appellate brief, his counsel agreed with Judge Yatron at the January 23, 2014 resentencing hearing that Judge Yatron's evaluation of the case should be "*de novo*." ***See*** N.T., 1/23/14, at 4-5.

pornographic photos himself as opposed to obtaining them from the Internet,[9] does not constitute new objective evidence that would justify an increased sentence. ***Id***. Balsavage asserts that, by failing to cite any new objective evidence as the basis for an increased sentence, Judge Yatron violated his due process rights under the United States Constitution. ***Id***. at 35.[10]

In ***North Carolina v. Pearce***, 395 U.S. 711 (1969), the United States Supreme Court recognized the possibility that a trial court's imposition of an enhanced sentence after retrial may be motivated by reasons personal to the judge, including vindictiveness toward the defendant for having secured relief from the original sentence on appeal. ***See id***. at 725. Finding such motivation inimical to due process, the Court ruled that

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[9] Balsavage admitted to taking the subject pornographic photographs, which depicted his ex-girlfriend's two-year-old son in a nude or semi-nude state with his genitals exposed, and in positions which suggested that he had been posed, for the purpose of using them to masturbate. ***See*** N.T., 6/16/05, at 3-4.

[10] Although Balsavage fails to specify which of his rights were violated by Judge Yatron when he imposed the 2014 sentence, Balsavage relies on a rescinded rule of criminal procedure, and corresponding case law, addressing a defendant's right of allocution at sentencing in support this argument. ***See*** Brief for Appellant at 31. However, our review of the January 23, 2014 resentencing hearing reveals that Judge Yatron twice afforded Balsavage his right of allocution, which Balsavage declined to exercise. ***See*** N.T., 1/23/14, at 8, 12-13. Moreover, Balsavage concedes that he elected not to exercise his right of allocution at the January 23, 2014 resentencing hearing. ***See*** Brief for Appellant at 29. Thus, to the extent that Balsavage claims that Judge Yatron denied him his right of allocution, such claim is without support in the record.

> [i]n order to assure the absence of such a motivation, . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

Id. at 726. Clarifying this holding in subsequent decisions, the Court recognized that ***Pearce*** applied a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence. ***See Alabama v. Smith***, 490 U.S. 794, 798-99 (1989).

However, the ***Pearce*** requirements do not apply in every case where a convicted defendant receives a greater sentence upon resentencing. ***See Texas v. McCullough***, 475 U.S. 134, 138 (1986). Relevantly, the presumption of judicial vindictiveness does not apply where the enhanced sentence imposed upon resentencing was imposed by a sentencing authority *different* from the one that imposed the earlier sentence. ***See id***. at 138-39 (stating that, where the sentencer is not the same in the two proceedings, the sentencer imposing the second sentence has no personal stake in the prior conviction and no motivation to engage in self-vindication, rendering the threat of vindictiveness far more speculative than real).

Additionally, when different sentencers have assessed the varying sentences that a defendant has received, "a sentence 'increase' cannot truly be said to have taken place." ***McCullough***, 475 U.S. at 140; ***see also id***. (explaining that "[it] may often be that the [second sentencer] will impose a

punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty." (quoting ***Colten v. Kentucky***, 407 U.S. 104, 117 (1972)).

In Pennsylvania, no presumption of vindictiveness arises when sentences have been imposed by two different judges. ***See Tapp***, 997 A.2d at 1205. In the absence of a presumption of vindictiveness, the defendant must affirmatively prove actual vindictiveness. ***Id***. When a defendant makes no attempt to prove vindictiveness by affirmative evidence, his right to due process has not been infringed, and he is not entitled to be resentenced. ***See id***.

Here, because Balsavage was resentenced in 2014 by a *different* judge than the judge who sentenced him in 2007, the presumption of judicial vindictiveness does not apply.[11] ***See id***. Additionally, because Balsavage's

[11] In support of his claim that judicial vindictiveness applies to the 2014 sentence, Balsavage relies on the Opinion entered by the federal district court in ***Balsavage v. Wetzel***, 936 F. Supp. 2d 505 (E.D. Pa. 2013), affirmed in part, vacated in part, remanded, 545 Fed. Appx. 151 (3d Cir. 2013). ***See*** Brief for Appellant at 32-34. However, the issue before the district court was whether the presumption of judicial vindictiveness applied to the 2009 sentence, which involved an increased sentence imposed by the *same* judge (*i.e.*, Judge Lieberman) who had imposed the 2007 sentence. Thus, because the *same* judge imposed both of those sentences, the district court determined that the presumption of judicial vindictiveness applied to the 2009 sentence, requiring the identification of objective information in the record to justify the increased sentence. Because no presumption of judicial vindictiveness applies to Balsavage's 2014 sentence, the ***Pearce*** requirement that new objective evidence be presented to justify the increased sentence does not apply.

sentences were imposed by different judges, there has been no "increase" in his sentence. ***See McCullough***, 475 U.S. at 140 (stating that where a different judge imposes the second sentence, no sentence "increase" has occurred). Indeed, it no more follows that the 2014 sentence imposed by Judge Yatron is a vindictive penalty for Balsavage's pursuit of a writ of *habeas corpus* than that the 2007 sentence imposed by Judge Lieberman was too a lenient penalty. ***See id***.; ***see also Tapp***, 997 A.2d at 1205.

Although a defendant may seek to establish judicial vindictiveness by affirmative evidence, Balsavage has presented no evidence of actual vindictiveness, and nothing in the record suggests that Judge Yatron was motivated by vindictiveness. Accordingly, Balsavage's claim of judicial vindictiveness, resulting in a due process violation, must fail under both federal and Pennsylvania state law.

The standard of review applicable to resentencing following the revocation of probation applies to the 2014 sentence:

> In general, the imposition of sentence following the revocation of probation is vested within the sound discretion of the trial court, which, absent an abuse of that discretion, will not be disturbed on appeal. Our standard of review is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing alternatives that it had at the time of the initial sentencing. Once probation has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist: (1) the defendant has been convicted of another crime; or (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or, (3) such a sentence is essential to vindicate the authority of court.

Commonwealth v. Edwards, 71 A.3d 323, 327 (Pa. Super. 2013) (citations omitted); ***see also*** 42 Pa.C.S.A. § 9771.

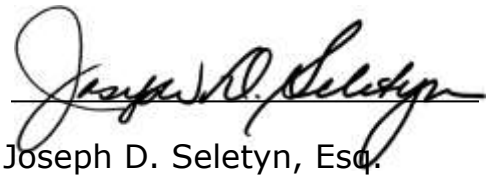
Here, the record reflects that Judge Yatron reviewed ample testimony and numerous documents, which led him to conclude that the 2014 sentence he imposed was justifiable and necessary in this case. Specifically, Judge Yatron had the benefit of extensive evidence of Balsavage's likelihood to reoffend, including the testimony of Balsavage's probation officer, cellmate, two sex offender therapists, and a sex offender treatment specialist who prepared a Treatment Summary of Balsavage's treatment while he was on probation. ***See*** Trial Court Opinion, 7/23/14, at 2. Judge Yatron also had the benefit of evidence regarding Balsavage's (1) admission that he had victimized twelve additional minor victims; (2) struggles with pedophilia fantasies, to which he sometimes masturbates, and a sexual interest in urophilia and coprophilia; (3) addiction to marijuana and alcohol; and (4) fantasies about doing something like the Amish schoolhouse murders. ***See id***.

Additionally, Judge Yatron had available to him the same sentencing alternatives that were available to Judge Lieberman at the 2007 resentencing hearing. ***See Edwards***, 71 A.3d at 327. Notably, Balsavage does not challenge the legality of the individual sentences which comprise the 2014 sentence, or the fact that those sentences were imposed consecutively. Having reviewed the record, we find no error and discern no

abuse of discretion regarding the 2014 sentence. Accordingly, we affirm Balsavage's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2014