

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP201-CR

Cir. Ct. No. 2006CF2992

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL LELAND RAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Daniel Ray appeals a judgment convicting him of second-degree sexual assault of a child, and an order denying postconviction relief. Ray pled guilty to the sexual assault charge and the circuit court sentenced him to four years of initial confinement and six years of extended supervision. He

filed a postconviction motion for resentencing and, because the court failed to consider the sentencing guidelines, it ordered him resentenced before a different judge. On resentencing, a different presiding judge imposed a sentence of five years of initial confinement and seven years of extended supervision. The issue is whether the circuit court violated Ray's right to due process when it sentenced him to a longer term than first imposed. We affirm.

¶2 The Due Process Clause of the United States Constitution prohibits a defendant from receiving a harsher sentence at resentencing if the harsher sentence is the vindictive result of the defendant's successful challenge to the original conviction. *State v. Naydihor*, 2004 WI 43, ¶33, 270 Wis. 2d 585, 678 N.W.2d 220. In some circumstances the defendant is entitled to a presumption of vindictiveness, which can be overcome only by objective information in the record justifying the increased sentence. *Id.*, ¶¶33-36. However, there must be a reasonable likelihood of vindictiveness for the presumption to apply. *Id.*, ¶36. "[A] reasonable likelihood of vindictiveness exists only if there is a realistic possibility that the sentencing court, after being reversed, may engage in self-vindication and retaliate against the defendant for having successfully pursued appellate relief." *Id.*, ¶37. If the defendant cannot demonstrate a reasonable likelihood of vindictiveness, then the resentence is subject to review only as to whether the court erroneously exercised its sentencing discretion. *See State v. Fortier*, 2006 WI App 11, ¶28 n.5, 289 Wis. 2d 179, 709 N.W.2d 893. Whether a harsher sentence represents a due process violation is a question of law that we review de novo. *State v. Church*, 2003 WI 74, ¶17, 262 Wis. 2d 678, 665 N.W.2d 141.

¶3 Ray contends that he is entitled to the presumption of vindictiveness, and also contends that the court resentenced him without any significant new or

objective information to rebut that presumption. We conclude, however, that Ray is not entitled to the presumption. The error leading to resentencing was newly created by recent case law and was minor and technical in nature. The parties stipulated to it, and the sentencing court itself admitted the error and granted resentencing. The only subsequent proceeding was a brief resentencing hearing, and a different judge presided. Under these circumstances, there was no reasonable likelihood that the harsher sentence was the product of vindictiveness on the part of that different judge.

¶4 Even if vindictiveness could be presumed, it was rebutted by new, objective information. At the original sentencing the only information about the effect of the crime on the victim was the statement the victim's mother gave to the presentence investigation reporter. At the resentencing hearing the victim's mother appeared and spoke, and described the effects of the sexual assault as significantly more serious than she described them in her prior statement.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

