IN THE COURT OF APPEALS OF IOWA

No. 0-422 / 09-1125
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVIE DEWAYNE HARRINGTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

The defendant appeals following resentencing for two counts of possession of a controlled substance, two counts of failure to affix a drug tax stamp, and one count of unauthorized possession of an offensive weapon. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

VOGEL, P.J.

Stevie Harrington appeals the sentence imposed upon resentencing for two counts of possession of a controlled substance with intent to deliver, two counts of failure to affix a drug tax stamp, and one count of unauthorized possession of an offensive weapon. He raises a vindictiveness-in-sentencing claim. We affirm.

I. Background Proceedings.

On March 18, 2007, the State charged Harrington with (Count I) possession of a controlled substance (cocaine base) with the intent to deliver while in possession of a firearm and/or offensive weapon within 1000 feet of a public school, a class C felony, in violation of Iowa Code sections 124.401(1)(c), (e), and (f), and 124.401A (2007); (Count II) failure to affix a drug tax stamp, a Class D felony, in violation of Iowa Code section 453B.12; (Count III) unauthorized possession of an offensive weapon, a class D felony, in violation of Iowa Code sections 724.1 and 724.3; (Count V) possession of a controlled substance (cocaine base) with the intent to deliver within 1000 feet of a public park, a class C felony, in violation of Iowa Code sections 124.401(1)(c) and 124.401A; and (Count VI) failure to affix a drug tax stamp, a class D felony, in violation of Iowa Code section 453B.12. Counts I, II, and III were based on events that occurred on January 20, 2007, and Counts V and VI were based on events that occurred on March 18, 2007. In October 2007, a jury found Harrington guilty of Counts I, II, and III and Harrington pleaded guilty to Counts V and VI.

On November 15, 2007, a sentencing hearing was held. The State requested that the district court impose the section 124.401A "school/park" enhancement on Counts I and V and noted that the district court was required to impose the offensive weapon enhancement on Count I. Therefore, the State requested that Harrington be sentenced to a forty-five year term of incarceration on Count I and a fifteen-year term on Count V, to be served consecutively for a total of a sixty-year prison term. Harrington acknowledged that the district court was required to impose the offensive weapon enhancement on Count I. As a result, Harrington requested that he be sentenced to a thirty-year term on Count I and that all other terms be served concurrently for a total of thirty years. The district court sentenced Harrington to thirty years on Count I; five years on each of Counts II, III, and VI; and ten years on Count V.[1] The district court ordered the sentences on Counts I, II, and III to be served concurrent to each other; the sentences on Counts V and VI to be served concurrent to each other; but the sentences on Counts I and V to be served consecutive to each other for a total term of incarceration of forty years.

Harrington appealed the convictions and sentence. We affirmed Harrington's convictions in part, vacated in part, and remanded for resentencing. *State v. Harrington*, No. 07-2066 (Iowa Ct. App. May 06, 2009). As to Count I, our court determined that there was not sufficient evidence to support the

[1] Counts I and V were both class C felonies. Iowa Code § 124.401(1)(f). Iowa Code section 902.9(4) provides that the punishment for a class C felony is no more than a ten-year term of incarceration. However, because both Count I and V occurred within 1000 feet of a school and public park, the district court had discretion to add five years to each sentence, but did not impose this enhancement. *Id*. § 124.401A. Because the jury found Harrington was in immediate possession of an offensive weapon for Count I, the district court was required to triple the sentence for Count I. *Id*. § 124.401(1)(f); *State v. Rodgers*, 560 N.W.2d 585, 586 (Iowa 1997).

sentencing enhancement of immediate possession or control of a firearm while possessing crack cocaine and therefore, resentencing on this count was required. *Id*. Additionally, our court determined that the district court erroneously stated that weapons were involved in both Counts I and V in imposing consecutive sentences and therefore, these sentences were vacated and resentencing was required. *Id*.

On July 10, 2009, a resentencing hearing was held before the same judge who previously sentenced Harrington. The district court sentenced Harrington for a period not to exceed fifteen years on Count I; for a period not to exceed five years on each of Counts II, III, and VI; and for a period not to exceed fifteen years on Count V.[2] As before, the district court ordered the sentences on Counts I, II, and III to be served concurrent to each other; the sentences on Counts V and VI to be served concurrent to each other; but the sentences on Counts I and V to be served consecutive to each other for a total sentence of thirty years. As for the imposition of the sentences for Counts I and V, including the imposition of consecutive sentences, the district court discussed that Counts I, II, and III involved a significant amount of drugs and occurred within 1000 feet of two schools. Shortly after committing the offenses in Counts I, II, and III, Harrington committed the offenses in Counts V and VI, which also involved a significant amount of drugs and occurred within 1000 feet of a park. The district court stated that these were two separate and distinct crimes and therefore, it imposed consecutive sentences. As for the sentence as a whole, the district court

[2] As discussed above, the sentence for Counts I and V is a ten-year term. The district court imposed the section 124.401A school/park enhanced penalty for both Counts I and V.

discussed that it "gave significant weight to the nature of the offense, the harm to the community, and the danger to the community," as well as the fact that "some period of incarceration provided [Harrington] with the greatest opportunity for rehabilitation while at the same time ensuring that the public is protected by ongoing criminal behavior [by Harrington]."

II. Standard of Review.

Harrington appeals and asserts his sentence is unconstitutional under *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). "A claim of vindictiveness in sentencing implicates constitutional guarantees of due process. . . ." *State v. Mitchell*, 670 N.W.2d 416, 418 (Iowa 2003). Although we generally review a district court's sentencing decision for the correction of errors at law, our review is de novo where constitutional rights are implicated. *State v. Bower*, 725 N.W.2d 435, 441 (Iowa 2006); *State v. Bolsinger*, 738 N.W.2d 643, 647 (Iowa Ct. App. 2007).

III. Analysis.

Harrington was originally sentenced to a thirty-year term of incarceration on Count I and a ten-year term on Count V, to run consecutively for a total of forty years. The district court was required to impose the offensive weapon enhancement on Count I, but declined to impose the section 124.401A school/park enhancement on Counts I and V. Subsequently, Harrington was resentenced to a fifteen-year term of incarceration on Count I and a fifteen-year term on Count V, to run consecutively for a total of thirty years. The offensive weapon enhancement on Count I was no longer applicable and the district court

imposed the section 124.401A enhancement on Counts I and V. Harrington argues that because a section 124.401A enhancement was not imposed when he was first sentenced, but was imposed during resentencing, the sentence should be presumed to be the product of vindictiveness and hence unconstitutional.

Under *North Carolina v. Pearce*, 395 U.S. 711, 725-26, 89 S. Ct. 2072, 2080-81, 23 L. Ed. 2d 656, 669-70 (1969), a defendant who successfully attacks his original conviction on appeal, may not after reconviction receive a harsher sentence as punishment for exercising his appeal rights. *Bolsinger*, 738 N.W.2d at 645-46. In order to avoid the fear of judicial vindictiveness as well as actual judicial vindictiveness, the Supreme Court created a prophylactic rule—after a defendant is retried and resentenced, a more severe sentence may only be imposed if the record contains reasons for the harsher sentence. *Wasman v. United States*, 468 U.S. 559, 564-655, 104 S. Ct. 3217, 3221, 82 L. Ed. 2d 424, 430 (1984). "This rule has been read to '[apply] a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence.'" *Wasman*, 468 U.S. at 565, 104 S. Ct. at 3217, 82 L. Ed. 2d at 430 (quoting *United States v. Goodwin*, 457 U.S. 368, 374, 102 S. Ct. 2485, 2489, 73 L. Ed. 2d 74, 81 (1982)).

The *Pearce* presumption does not apply in every case where a convicted defendant receives a higher sentence following retrial. *Texas v. McCullough*, 475 U.S. 134, 138, 106 S. Ct. 976, 978, 89 L. Ed. 2d 104, 110 (1986). "[D]ue process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having

exercised guaranteed rights." *Wasman*, 468 U.S. at 568, 104 S. Ct. at 3223, 82 L. Ed. 2d at 433.

> Because the *Pearce* presumption may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct, we have limited its application, like that of other judicially created means of effectuating the rights secured by the Constitution, to circumstances where its objectives are thought most efficaciously served. Such circumstances are those in which there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority.

Smith, 490 U.S. at 795, 799, 109 S. Ct. at 2203, 2205, 104 L. Ed. 2d at 870, 872-73 (citations and internal quotations omitted) ("We hold that no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial."); *see also McCullough*, 475 U.S. at 138-40, 106 S. Ct. at 979-80, 89 L. Ed 2d at 110-12 (explaining circumstances where the *Pearce* presumption does not apply, including where a new trial occurs due to the trial judge granting the defendant's motion for a new trial or where there are "different sentencers"). Therefore, where there is a reasonable likelihood of actual vindictiveness, the presumption applies and the sentencing judge must rebut the presumption that an increased sentence resulted from vindictiveness. *Smith*, 490 U.S. at 799, 109 S. Ct. at 2205, 104 L. Ed. 2d at 873; *McCullough*, 475 U.S. at 138-39, 106 S. Ct. at 979, 89 L. Ed. 2d at 110. Where the presumption does not apply, the defendant must affirmatively prove actual vindictiveness. *Smith*, 490 U.S. at 799-800, 109 S. Ct. at 2205, 104 L. Ed. 2d at 873; *McCullough*, 475 U.S. at 138, 106 S. Ct. at 979, 89 L. Ed. 2d at 111.

Harrington claims that the *Pearce* presumption applies and does not raise a claim of actual vindictiveness. Although *Pearce* is applicable to the factual

scenario where a defendant is resentenced on remand, the facts of this case do not support a presumption of vindictiveness. *See Bolsinger*, 738 N.W.2d at 646; *see also United States v. Campbell*, 103 F.3d 64, 67 (5th Cir. 1997) ("Although *Pearce* was addressing the situation where a harsher sentence was imposed on retrial, we have said that *Pearce* should not be so narrowly read to preclude its application to a resentence on remand."). "It is clear that imposition of a harsher sentence upon resentencing is the key to a *Pearce* vindictiveness claim." *Bolsinger*, 738 N.W.2d at 646 (citing *Pearce*, 395 U.S. at 723-24, 89 S. Ct. at 2080, 23 L. Ed. 2d at 668-69); *see also Mitchell*, 670 N.W.2d at 423 ("[A]n increase in sentence length between a first and second trial is a red flag for possible judicial vindictiveness in sentencing."). In determining whether a harsher sentence has been imposed, our court has utilized the "aggregate package" approach. *Bolsinger*, 738 N.W.2d at 646. "'Under this approach, courts compare the total original sentence to the total sentence after resentencing. If the new sentence is greater than the original sentence, the new sentence is considered more severe.'" *Id*. (quoting *Campbell*, 106 F.3d at 68). Under the aggregate package approach, Harrington's sentence is not more severe—he was first sentenced to an indeterminate term of incarceration not to exceed forty years and after resentencing, he was sentenced to an indeterminate term of incarceration not to exceed thirty years.[3]

However, Harrington further requests that we overrule *Bolsinger* to the extent that it adopted the aggregate approach. Harrington does not advocate for

[3] Harrington conceded that "his total sentence decreased upon remand."

the "count-by-count" or "remainder aggregate" approach.[4] Rather, he relies on the fact that a section 124.401A school/park enhancement was not imposed when he was originally sentenced, but was imposed when he was resentenced.[5] We decline to overrule *Bolsinger*. In *Bolsinger* we explained the rationale behind the aggregate approach, as this approach

> best reflects the realities faced by district court judges who sentence a defendant on related counts of an indictment. Sentencing is a fact-sensitive exercise that requires district court judges to consider a wide array of factors when putting together a "sentencing package." When an appellate court subsequently reverses a conviction (or convictions) that was part of the original sentence, the district court's job on remand is to reconsider the entirety of the (now-changed) circumstances and fashion a sentence that fits the crime and the criminal. The aggregate approach's inherent flexibility best comports with this important goal.

738 N.W.2d at 646 (citations omitted).

The present case exemplifies the argument for the aggregate package approach. Harrington was sentenced on convictions for five counts, which

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[4]Under the "count-by-count" or "remainder aggregate" approach,

> appellate courts compare the district court's aggregate sentence on the nonreversed counts after appeal with the original sentence imposed on those same counts before appeal. If the new sentence on the remaining counts exceeds the original sentence on those counts, the *Pearce* presumption attaches.

Bolsinger, 738 N.W.2d at 646 (quoting *Campbell*, 103 F.3d at 68). As the district court originally sentenced Harrington to thirty years on count I and ten years on count VI, and subsequently sentenced Harrington to fifteen years on count I and fifteen years on count VI, even under the remainder aggregate approach, the only count that had a greater sentence is count VI.

[5] Harrington requests we "adopt the common sense standard used in New York." *See People v. Young*, 723 N.E.2d 58, 63 (N.Y. 1999). The New York Supreme Court "decline[d] to adopt either the 'aggregate' or the 'count-by-count' approach as an intractable rule." *Young*, 723 N.E.2d at 63. The court discussed that where a defendant receives an overall equal or lesser sentence, but a greater sentence on an individual count, it would "examine the record to determine whether there is a reasonable likelihood that the enhanced sentence on the individual count was the result of vindictiveness." Even under this type of analysis, we would find the record established no reasonable likelihood of vindictiveness.

involved criminal activity committed on two separate occasions. In the initial sentencing, the district court had a variety of sentencing options available to it, including an offensive weapons enhancement, section 124.401A enhancements, and a combination of concurrent and consecutive sentences. The district court also had available the ability to suspend certain portions of the sentence, which it did by suspending the fines imposed. In sentencing Harrington the first time, the district court was required to impose the offensive weapon enhancement, which resulted in a thirty-year sentence for Count I. In light of this, the district court fashioned the remainder of the sentence, declining to impose the section 124.401A enhancement on two counts and ordering two counts to be served consecutively. On remand, the district court considered the now-changed circumstances and sentencing options and fashioned a sentence that imposed the section 124.401A enhancements and consecutive sentences.

We find that because a harsher sentence was not imposed upon remand, the *Pearce* vindictiveness presumption does not apply. Harrington does not assert a claim of actual vindictiveness. Nevertheless, we note that the district court provided adequate reasons for the sentences imposed and the record does not indicate any actual vindictiveness on the part of the district court. *See Mitchell*, 670 N.W.2d at 425 ("Although we reserve the right to check the sentencing power of our district courts, we refuse to undermine that power in a case of this type absent the presentation of evidence that actual vindictiveness has already done so."). We accordingly affirm the district court's sentencing decision.

AFFIRMED.