

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

ASTLEY GERHARDT PENSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appellate Division (Criminal)

Case No.: 502008AP900004AXXXMB

Co. Court Case No.: 502007MM017410AXXXMB

Opinion filed: September 25, 2008

Appeal from Judge Paul Damico,
County Court in and for Palm Beach County.

For Appellant, Tom Odom, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401

For Appellee, Michelle Zieba, Esq., Assistant State Attorney, 401 North Dixie Hwy., West Palm Beach, FL 33401

MARX, J.

Astley Penson appeals his sentence of four years in the Palm Beach County Jail entered by the trial court after a jury found him guilty of Giving False Name Upon Being Arrested or Detained, Resisting Officer without Violence, and two counts of Battery. Penson argues that trial court Judge Paul Damico was vindictive in the sentence given and that Penson's case should be remanded to the trial court before a different judge for resentencing. We disagree and affirm the trial court's sentence.

On July 25, 2007, Penson was involved in a physical altercation involving a tire iron with his girlfriend and her roommate. Police were called to the scene and after twice using their taser on Penson, he was arrested. While in custody of the officers, Penson provided false

identification to the police arresting officers.

Prior to trial, Judge Damico joined in plea negotiations and offered Penson a sentence of six months in jail which he declined. At calendar call, Judge Damico changed his offer to one year in jail. Penson declined the offer and the case was brought to trial.

Penson argues that the trial court violated his due process rights by being vindictive in sentencing Penson to a longer sentence than that which was offered by the trial court prior to trial. "The law is clear that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional." United States v. Jackson, 390 U.S. 570 (1968). Therefore, although a guilty plea may justify leniency, an "accused may not be subjected to more severe punishment for exercising ... [the] constitutional right to stand trial." Mitchell v. State, 521 So. 2d 185, 187 (Fla. 4th DCA 1988).

"When there is judicial participation in plea negotiations, followed by a harsher sentence, the [Florida] supreme court has adopted a totality of the circumstances approach in determining whether a presumption of vindictiveness arises." Mounds v. State, 849 So. 2d 1170, 1171 (Fla. 4th DCA 2003). If the totality of the circumstances gives rise to a presumption of vindictiveness, the burden shifts to the State "to produce affirmative evidence on the record to dispel the presumption." Wilson v. State, 951 So. 2d 1039 (Fla. 3d DCA 2007). The State may overcome the presumption by presenting facts on the record which would explain the increased sentence, other than that the defendant chose to exercise his rights. Correa v. State, 892 So. 2d 1067 (Fla. 2d DCA 2004).

Judicial participation in plea negotiations followed by a harsher sentence is one of the circumstances that, along with other factors, should be considered in determining whether there

is a "reasonable likelihood" that the harsher sentence was vindictive and imposed in retaliation for the defendant not pleading guilty and instead exercising his or her right to proceed to trial. Wilson v. State, 845 So. 2d at 156. Along with judicial participation in plea discussion, other factors that should be considered include but are not limited to:

(1) whether the trial judge initiated the plea discussions with the defendant in violation of *Warner*; (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing.

Wilson v. State, 845 So. 2d at 156. (footnotes omitted).

Here, Judge Damico participated in the plea discussion between Penson and the State. At a pre-trial hearing to discuss a possible settlement, Penson asked to be sentenced to 73 days time served in jail. The State countered with an offer of one year in jail. In response, Judge Damico characterized the case as "bad facts...just a fine line between that and circuit homicide cases." He offered "a hundred and eighty days in the Palm Beach County Jail today if you wanted to resolve all cases with what I know now." Penson refused the offer from Judge Damico and the case was set for calendar call.

More plea discussions were held during the calendar call hearing. Penson proposed a sentence of time served with credit for 101 days in jail. The State offered a sentence of two years in jail. Penson then asked Judge Damico if the previous offer of 180 days was "still on the table." Judge Damico retracted the offer of 180 days in jail because he became aware for the first time of Penson's prior domestic battery conviction. He replaced the 180 day offer with an offer of 364 days in jail. Appellant declined the court's offer and the case was brought to trial.

Penson contends that Judge Damico's sentence was vindictive due to Penson's decision to take his case to trial and forego a plea bargain offered by the court. Participation by the trial judge in plea discussions, however, is not enough by itself to satisfy a presumption of vindictiveness. Wilson v. State, 845 So. 2d at 148. There is no evidence that Judge Damico initiated plea discussions or left his role as a neutral arbiter, and Penson admits that the trial court did not act with any degree of malice, nor did it display any personal hostility. Penson hinges his argument on the lack of facts brought up at trial to justify the increase in the length of his sentence. Prior to trial, however, Judge Damico was only aware of a general description of events that took place on the night of Penson's arrest. New facts and evidence came out during trial to warrant the increase. Judge Damico referred to this evidence as "aggravating" and "egregious." Included in this evidence were photos of the injuries to the victims, which included a sink full of blood, a swollen face, scratch marks, dried blood, and red marks. For the first time, Judge Damico also heard an audio tape of a portion of the event in which Penson resisted arrest. Additionally, detailed first-person testimony from witnesses involved was heard for the first time.

Penson's prior convictions also played a major role in his ultimate sentence. During the sentencing phase, Judge Damico was informed that Penson had been previously convicted on four different charges. During the pre-trial plea negotiations, Judge Damico was only aware of two convictions.

Judges are generally given deference to increase a sentence that was not accepted by a defendant prior to trial. Jamerson v. State, 888 So. 2d 49 (Fla. 5th DCA 2004) (life in prison sentence not vindictive where defendant declined 30-year offer and where court did not initiate plea discussion, never implied that harsher sentence would result, was not coercive, and life

sentence was within discretion of trial court.); Hornbuckle v. State, 864 So. 2d 1203 (Fla. 5th DCA 2004) (three-year sentence imposed for driving with cancelled, suspended, or revoked license was not vindictive after defendant rejected 180 day offer); Bell v. State, 847 So. 2d 558 (Fla. 3d DCA 2003) (twenty-year sentence imposed on defendant for attempted kidnapping was not vindictive even though plea offer had been for 364 days in jail.) Graff v. State, 843 So. 2d 1012 (Fla. 5th DCA 2003) (increased sentence justified and not vindictive after listening to testimony of victim and the severe impact it had on the victim's life.)

In Jamerson v. State, the court held that the fact "that the sentence was greater than that offered by the State does not, without more, equate to vindictiveness." 888 So. 2d at 50. Each charge in the instant case is a first degree misdemeanor which carries a maximum sentence of one year in jail. Although Judge Damico increased the sentence, he did not initiate plea negotiations, leave his role as a neutral arbiter, or fail to demonstrate evidence which appeared at trial to justify the increase. The introduction of testimony by the victims and police officers as well as the uncovering of the full criminal record of Penson is enough to nullify a presumption of vindictiveness on Judge Damico's part, and demonstrates the reasoning behind the increase.

Based on the foregoing, we hold that the totality of the circumstances do not give rise to a presumption that Judge Damico was vindictive in his sentencing. Therefore, the judgment of the trial court is affirmed.

(J. Miller, Wennet, concur.)