[Cite as *State v. Hitchcock*, 2020-Ohio-6751.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 19-CA-56
	:	
JEFFERY HITCHCOCK	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Case No. CR2016-00275
JUDGMENT:	REVERSED, SENTENCE VACATED, AND SENTENCE IMPOSED
DATE OF JUDGMENT ENTRY:	December 15, 2020

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
R. KYLE WITT FAIRFIELD CO. PROSECUTOR AVERY T. YOUNG 239 West Main St., Ste. 101 Lancaster, OH 43130	DARREN L. MEADE 2602 Oakstone Dr. Columbus, OH 43231

Delaney, J.

{¶1} Appellant Jeffery Hitchcock appeals from the November 20, 2019 Judgment Entry of Sentence of the Fairfield County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal convictions is not necessary to our resolution of this appeal. A more thorough statement of the facts may be found in our opinion at *State v. Hitchcock*, 5th Dist. Fairfield No. 16-CA-41, 2017-Ohio-8255 [*Hitchcock I*], reversed and remanded, 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164.

{¶3} Appellant was charged by indictment with four counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and (B)(3), all felonies of the third degree [Counts I through IV], and endangering children in violation of R.C. 2919.22(A), a misdemeanor of the first degree [Count V]. The case ultimately resolved with a change-of-plea hearing as described below.

The first sentencing hearing: September 20, 2016

{¶4} On September 20, 2016, the parties appeared before the trial court for what the prosecutor described as a "contested sentencing:"

> [PROSECUTOR]: * * * *.
>
> The parties have reached an agreement where the Defendant—it is anticipated the Defendant will enter pleas of guilty to Counts One, Two and Three, those all being unlawful sexual conduct with a minor, felonies of the third degree.

> In exchange for those guilty pleas, the State would then move to dismiss Counts Four and Five.
>
> It is anticipated that there will be a contested sentencing where the State will recommend imposition of the maximum consecutive prison terms on Counts One and Two, followed by suspended maximum terms on Count Three; for each count to run consecutive to any other conviction. The Defendant will waive all potential evidentiary issues, including a potential motion to suppress. The State agrees to not pursue additional charges arising out of similar conduct pertaining to this incident. Essentially, that we would not file any further unlawful sexual conduct charges with this victim and this Defendant.
>
> The State would recommend sex offender treatment, to follow all recommendations thereof. No contact with the victim [ ] or any other minor children without supervision. Jail credits are calculated at 75 days. The State does anticipate two victim impact statements and a restitution request; for the Defendant to pay costs. And the State takes no position on the imposition of potential fines.
>
> * * * *.
>
> T. Plea/Sentencing September 20, 2016, 4-5.

{¶5} The trial court then engaged in a colloquy with appellant, describing the rights appellant waived upon entering his pleas of guilty and appellant acknowledged his understanding of those rights. Appellee noted the underlying facts of the case, including

that appellant began a sexual relationship with the minor victim when the victim was age 13, resulting ultimately in the birth of a stillborn child when the victim was age 15. A D.N.A. test of the stillborn child established appellant was the father of the child. Appellee alleged a 26-year age difference between appellant and the victim. Appellee requested three separate terms of incarceration:

> [PROSECUTOR]: * * * *.
>
> As to Counts One and Two, the State is requesting the maximum of 60 months on each count to be imposed consecutively to one another. And as to Count Three, the State is requesting community control, but for a five-year sentence to remain reserved, and to place him on five years of community control on that count.
>
> * * * *.
>
> T. 16-17.

{¶6} Appellee then presented victim impact statements from the minor victim and her mother, and appellant presented information through defense trial counsel. Appellant acknowledged his prior criminal history and made his own statement.

{¶7} The trial court then stated the following:

> THE COURT: * * * *.
>
> First of all, the court makes the determination that these offenses, Counts One, Two, and Three, do not merge for purposes of sentencing; that these offenses are not allied offenses of similar import pursuant to the State of Ohio case of State versus Ruff, Ohio Supreme Court.

The Court finds that as to each of these offenses, that the underlying conduct which occurred caused several different consequences to the victim of the offense, each of the offenses; that there was separate conduct that was engaged in by Mr. Hitchcock on each of these offenses; and that it was done with a separate intent. The Court finds that these offenses were not, obviously, conducted—did not occur all at the same time, but on different dates.

As to sentencing, Mr. Hitchcock, the Court has considered everything that's been stated here today, the record of these proceedings, pre-sentence investigation, application for community control, and the purposes and principles of sentencing, including the Court's purpose to hold you accountable for your crimes, to deter you and others from committing crimes in the future, to protect the public welfare and safety, and to not unnecessarily burden state and local resources.

This Court has presided over many situations such as this, may [*sic*] cases involving adults who take advantage of minor children for their own sexual gratification.

This situation is aggravated by the fact that not only, Mr. Hitchcock, did you engage in sexual conduct with a minor female child [Jane Doe], but you did so in a way that resulted in her pregnancy. And I recognize—and I don't lay at your feet the fact that the child was stillborn.

Obviously, you had nothing to do with that, did not control that outcome. But nonetheless, those consequences are consequences which will be longstanding and more significant and aggravated than the consequences which usually befall an individual who has been taken advantage of at a young age by an older individual who persuaded, at the very least, them to engage in sexual conduct with them.

The Court also takes into account that this was not a single isolated act on your part. This was not a situation where you lost your self-control on one particular occasion and engaged impulsively in sexual conduct with [Jane Doe]. You engaged in sexual conduct with her on multiple occasions over a significant length of time.

If this were a situation where it was a one-time, single, isolated event, and if the evidence showed that after having done so, you stopped on your own, or as a result of seeking out counseling or advice or help of any nature, that would show a significant amount of remorse and a turn of a different direction on your part than what is reflected in your conduct here.

Your conduct here was intentional, it was planned, and it was calculated, and it was all done for the purposes of your own sexual gratification. You took advantage of this situation because you could, and there was no one to stop you, and you thought your way through

this thing as to how it could be done under situations, under circumstances where you would not be apprehended or discovered.

Your previous criminal history does not show that you have been convicted of any prior sex offenses. And for the record, the Court does not give any weight in any way to the material or to the information that was in the sentencing report or the criminal history report as to the items that [defense trial counsel], your counsel, has pointed out with regard to the three matters that he pointed out to the Court. The Court places no weight whatsoever on those matters.

But the Court does place great weight and significance on that fact that you have previously served time in a state penal institution; you've been convicted multiple times for felony offenses; you've served time in local jails on multiple occasions.

Equally important is the fact that you have previously been on community control supervision, both the misdemeanor level and the felony level, and significantly, your community control was revoked. This is significant in the Court's mind because it shows there have been efforts in the past to work with you to address whatever type of personal problems that you may have been encountering; giving you an opportunity for probationary supervision, which likely included the opportunities for counseling.

And it is difficult for the Court to understand with regard to the matter of counseling, why it was that after you saw yourself—put

yourself deep into this situation, that you didn't stop yourself, even after multiple times, and again, seek out help from any source.

It is a matter of common knowledge that sex offenses wherein there's a minor person who is victimized, even though that minor person may have arguably consented to it, there's a reason that the State of Ohio and every other state in this country has laws against sexual conduct, sex acts with minors, and that is because they are not of the age—proper age to make those kinds of consensual decisions, if, in fact, it was consensual.

In the Court's judgment, what is necessary here in order to impress upon you, Mr. Hitchcock, the severity of your actions, to deter you personally and specifically, and also to send a message to those who might follow in your own footsteps, is for you to spend a significant amount of time in prison both for that purpose and also for the purpose to allow you the opportunity at the discretion of the Ohio Department of Rehabilitations and Corrections to engage in a residential sex offender treatment program while you are incarcerated in a state prison.

I don't have a crystal ball, Mr. Hitchcock, and ladies and gentlemen, obviously. I don't know what the future will hold here for any of us. And I don't know what is going to be necessary, Mr. Hitchcock, in terms of a length of time that's going to be necessary

for you to serve before the Court feels satisfied that it can trust you back out in the community around other minors.

That is a decision which will in some respects be perhaps left for a later determination, because the Court is going to hold open the possibility of a judicial release at some date far into the future. And I say hold open the possibility, which is certainly no guarantee and certainly no indication that the Court would even consider or grant your motion for judicial release at a later point.

But my experience has shown one of the most important things that the Court can do, first off, is hold a person accountable for their crimes, protect the victim, and also important, not to put an individual in a corner to the point where they feel that they have nothing to work towards, to better themselves; to not put an individual in a position where they simply throw themselves away and don't make any efforts toward rehabilitation, because that is a significant goal as well. So the Court's sentence will also reflect those considerations.

As to Count One, the Court orders you to serve a term of 60 months in a state penal institution. No fine is imposed.

As to Count Two, the Court orders you to serve a term of incarceration of 60 months in a state penal institution. No fine is imposed.

As to Count Three, the Court orders you as its sentence that you be placed on community control for a period of five years under the standard terms and conditions and the conditions of community control which the Court will detail here in a few moments.

However, if you violate any one or more of the terms and conditions of community control, the Court reserves the authority at that time to order you to prison to serve out a consecutive 60-month term of imprisonment in a state penal institution.

Again, the Court orders that all sentences, those actually imposed and reserved, are ordered to be served consecutively. The Court does so after considering the record, and finds that consecutive sentences are necessary to protect the public from future crime on your part, to punish you, and that consecutive sentences are not disproportionate to the seriousness of your conduct and to the danger and risk you pose to the public.

The Court finds that you committed these multiple offenses as part of several different courses of conduct, and that the harm caused by these multiple offenses was so significant that no single prison term for any one of the offenses would adequately reflect the seriousness of your conduct, and your history of criminal conduct demonstrates consecutive sentences are necessary to protect the public from future crime on your part.

> As to the terms and conditions of community control, after completing all or a portion of the ten-year term of imprisonment, the Court orders that you be assessed for potential admission into a community-based correctional facility program for purposes of sex offender counseling; that you engage in outpatient counseling for mental health and substance abuse counseling assessments; pay restitution in the amount of $4,298.47for medical and/or counseling expenses. * * * *.
>
> T. Plea/Sentencing September 20, 2016, 40-49.

Ensuing appeals and reversal of sentence

{¶8} Appellant appealed the judgment of conviction and sentence to this Court, arguing in part that the trial court erred in sentencing him to a term of community control consecutive to an imposed term of prison. *Hitchcock I*, 2017-Ohio-8255, ¶ 7. We disagreed and affirmed appellant's convictions and sentences.

{¶9} The Ohio Supreme Court accepted jurisdiction of appellant's appeal from our decision and reversed *Hitchcock I*, holding the trial court had no authority to order, as part of a community-control sentence, that appellant be placed in a CBCF after completing a separate prison term. *State v. Hitchcock*, 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164, ¶ 13, citing *State v. Paige*, 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.3d 800. *Hitchcock I* was thereby reversed and the matter was remanded to the trial court for resentencing. *Id.* at ¶ 25.

Resentencing hearing on November 29, 2019

{¶10} A resentencing hearing was held on November 19, 2019.

{¶11} The resentencing hearing opened with appellee's argument the parties were present for resentencing upon Count Three only because the decision of the Ohio Supreme Court did not affect the sentences upon Counts One and Two. Appellee noted at the original sentencing the state's request was a total 10-year prison term followed by a term of community service and asked that the sentences upon Counts One and Two remain undisturbed. The trial court inquired as to appellee's position on allied offenses of similar import, and appellee responded that appellant pled to three separate, non-allied offenses and consecutive terms were contemplated. Appellee dismissed Counts Four and Five on the basis of those plea negotiations.

{¶12} Appellant argued the entire sentence was reversed and the sentences upon Counts One and Two should not remain undisturbed. Appellant stated the original sentence arose from a contested sentencing, not an agreed-upon negotiated sentence, and argued for a reduced total aggregate prison term of 5 years. T. Resentencing, Nov. 7, 2019, 12.

{¶13} Appellant was then sworn for purposes of questioning about his conduct while incarcerated and described programming he has participated in. Defense trial counsel acknowledged appellant had received one "ticket" at the correctional facility, but the ticket was overturned upon review. T. Resentencing, Nov. 7, 2019, 13.

{¶14} At the conclusion of appellant's testimony, the parties briefly argued their positions. The trial court ruled that the Ohio Supreme Court's remand permitted the court to solely resentence upon Count Three. The trial court then found Count Three does not

merge with Counts One and Two and imposed a prison term of 36 months to be served consecutively to that which appellant was already serving. Appellant's resulting aggregate sentence is therefore 13 years.

{¶15} Appellant now appeals from the trial court's Judgment Entry of Sentence of November 20, 2019.

{¶16} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶17} "THE TRIAL COURT ENGAGED IN IMPERMISSIBLE VINDICTIVE SENTENCING BY INCREASING APPELLANT'S ORIGINALLY IMPOSED 10 YEAR PRISON SENTENCE TO 13 YEARS WHERE NO OTHER BASIS OF WRONGDOING OR AGGRAVATING CIRCUMSTANCES EXISTED TO WARRANT SUCH INCREASE."

ANALYSIS

{¶18} In his sole assignment of error, appellant argues the sentence imposed by the trial court at resentencing is an impermissible vindictive sentence. We agree to the extent that the sentence imposed after remand raises a presumption of vindictiveness which is not rebutted in the record before us. We thus sustain appellant's sole assignment of error.

{¶19} Appellant's original sentence consisted of two consecutive 5-year terms upon Counts One and Two, followed by a 5-year term of community control upon Count Three, for a total aggregate prison term of 10 years. The Ohio Supreme Court reversed the community-control portion of the sentence upon Count Three because appellant was required to be assessed for participation in a community-based corrections facility (CBCF). After remand, appellant was resentenced to a prison term of three years upon

Count Three to be served consecutively with the terms upon Counts One and Two, for a total aggregate prison term of 13 years. Appellant thus objectively received a harsher sentence after remand.

{¶20} Appellant argues the harsher sentence is a result of vindictive sentencing by the trial court. We addressed an allegation of vindictive sentencing in *State v. Moore*, 5th Dist. Knox No. 07-CA-19, 2007-Ohio-6826, in which we reviewed *North Carolina v. Pearce* , 395 U.S. 711, 89 S.Ct. 2072 (1969) and its progeny. In *Pearce*, the U.S. Supreme Court set aside the sentence of a state prisoner who had successfully appealed his conviction but upon remand was given a harsher sentence. The Court stated that a defendant's due process rights were violated when, after a successful appeal, a harsher sentence was imposed because of vindictiveness. The Court went on to hold that, if a more severe sentence is imposed following appeal, the reasons for the harsher sentence must appear on the record and 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.

{¶21} Subsequent to the decision in *Pearce*, the Supreme Court decided *Wasman v. United States*, 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). In *Wasman*, the Court clarified its Pearce holding by making it clear that enhanced sentences on remand were not prohibited unless the enhancement was motivated by actual vindictiveness against the defendant as punishment for having exercised his constitutionally guaranteed rights. 468 U.S. at 568. The Supreme Court further clarified the *Pearce* doctrine in *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201 (1989) explaining that, unless there was

a "reasonable likelihood" that the increased sentence was the product of actual vindictiveness, the burden was on the defendant to show actual vindictiveness. *Id*. at 799.

{¶22} *Pearce* permits a court to impose a higher sentence on remand, but simultaneously requires that court to give reasons based upon objective information concerning identifiable conduct on the part of the defendant, 395 U.S. at 726. "Relevant conduct or events" sufficient to overcome the presumption of vindictiveness are those that throw "new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id.* at 570-71 [quoting *Williams v. New York*, 337 U.S. 241, 245, 69 S.Ct. 1079 (1949)]. In the end, a court imposing a higher sentence on remand must "detail the reasons for an increased sentence or charge" so that appellate courts may "ensure that a non-vindictive rationale supports the increase." *Id.* at 572.

{¶23} In *Pearce,* supra, the prosecution offered no evidence to justify the increased sentence of the defendant and made no effort to explain or justify the increased sentence. "[T]he record must show more than that the judge simply articulated some reason for imposing a more severe sentence. The reason must have at least something to do with conduct or an event, other than the appeal, attributable in some way to the defendant." *United States v. Rapal*, 146 F.3d 661, 664 (9th Cir.1998).

{¶24} In the instant case, the resentencing was performed by the same judge as the original sentencing. Appellant received an objectively harsher sentence because his prison term was lengthened by 3 years. The issue before us is whether the presumption of vindictiveness arising from the harsher sentence is rebutted by the record.

{¶25} Our review of the record of the resentencing hearing indicates the trial court's expressed rationale for the sentence was almost identical to the first sentencing

hearing. The trial court noted the offenses were committed at separate times, with separate intent, and therefore do not merge. T. Resentencing, Nov. 7, 2019, 28. The trial court noted its sentence was based upon the resentencing hearing, the record of the original sentencing hearing, the original P.S.I., and the statutory principles and purposes of sentencing. T. Resentencing, Nov. 7, 2019, 29. The trial court noted this case is more aggravated than many in which an adult takes advantage of a child for the adult's own sexual gratification because the crimes resulted in pregnancy. T. Resentencing, Nov. 7, 2019, 29. The trial court acknowledged appellant was not responsible for the stillbirth, but the fact of the pregnancy and its aftermath makes the consequences of appellant's crimes more consequential and more aggravated. T. Resentencing, Nov. 7, 2019, 30. Moreover, appellant engaged in sexual conduct with the victim on multiple occasions over a significant length of time. T. Resentencing, Nov. 7, 2019, 30. Also, appellant's prior criminal history was significant to the trial court's decision. T. Resentencing, Nov. 7, 2019, 31. We note the victim's mother was given an opportunity to speak at the resentencing and chose not to do so. T. Resentencing, Nov. 7, 2019, 6.[1]

{¶26} The missing factor at the resentencing hearing is any specific reason attributable to the defendant in support of the longer sentence. *Pearce,* supra, provides that a sentencing judge cannot impose a greater sentence on remand without providing reasons "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Pearce,* 395 U.S. at 726. The U.S. Supreme Court itself has cautioned, though, that this passage

[1] We note that the victim's representative chose not to speak at the resentencing only to indicate there was no updated victim-impact statement that may have provided a basis for the trial court's decision to impose a 3-year term upon Count III.

from *Pearce* "was never intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified." *Texas v. McCullough*, 475 U.S. 134, 141, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986); see, also, *Wasman v. United States*, 468 U.S. 559, 572, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). The Court reasoned that the defendant's increased sentence did not need to be supported by anything more than a logical, non-vindictive reason for the heightened punishment. *Texas v. McCullough*, 475 U.S. 134, 140, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986). A presumption of vindictiveness may be overcome with any objective information that justifies an increased sentence. *Id.* at 142. This includes a trial court's discovery of "new, probative evidence supporting a longer sentence[.]" *Id.* at 143.

{¶27} In the instant case, therefore, we have exhaustively reviewed the record of the resentencing hearing for a logical, non-vindictive reason for the heightened punishment and are unable to find any. The trial court cited the same rationale, in many of the same terms, as at the original sentencing. This time appellant received a 3-year prison term instead of community control.

{¶28} We hasten to add that nor did we find any overt evidence of vindictiveness. However, to overcome the presumption of vindictiveness, the trial court must make affirmative findings on the record regarding conduct or events that occurred or were discovered after the original sentencing. *State v. Thrasher*, 178 Ohio App.3d 587, 2008-Ohio-5182, 899 N.E.2d 193, ¶ 17 (2nd Dist.), citing *Pearce* and *Wasman.* In the instant case, as in *Thrasher*, "the matters which the court cited are not conduct or events that throw any new light on defendant's conduct, life, or propensities." *Id.* The only new

information to arise at the resentencing hearing was appellant's self-serving testimony about programming he attended while incarcerated.

{¶29} We are unable to discern any evidence supporting a logical reason for the heightened sentence. Instead, we have a near-repeat of the original sentencing hearing. Information regarding identifiable conduct on defendant's part that was known by the court at the original sentencing proceeding does not rebut the presumption of vindictiveness that arises from the imposition of a harsher sentence following defendant's successful appeal of his sentence. *State v. Paynter,* Muskingum App. No. CT2006–0034, 2006-Ohio-5542, 2006 WL3020319, ¶ 19. Because due process compelled the trial court to affirmatively explain the increase in its sentence in order to overcome the *Pearce* presumption of vindictiveness, we find that the reasons given by the trial court fail to ensure that a non-vindictive rationale led to the second, higher sentence. *Id.*, citing *United States v. Jackson,* 181 F.3d 740, 746 (6th Cir.1999). Accordingly, the presumption of vindictiveness arises, and is not overcome by any trial court findings affirmatively appearing in the record. *Id.* Since the record is barren of justifiable reasons to rebut the *Pearce* presumption, the assignment of error is sustained.

{¶30} We find the presumption of a vindictive sentence upon Count Three is not rebutted by the record before us. Therefore, appellant's sole assignment of error is sustained, and the judgment of the re-sentencing court is reversed.

CONCLUSION

{¶31} Appellant's sole assignment of error is sustained and the judgment of the Fairfield County Court of Common Pleas is reversed. Appellant's sentence upon Count Three is vacated. Appellant's sentence is modified to an aggregate term of 10 years

pursuant to the authority set forth in Section 3(B)(2), Article IV of the Ohio Constitution and R.C. 2953.08(G)(2). Specifically, the 3-year prison term imposed by the trial court upon Count Three is hereby ordered to be served concurrently with the terms upon Counts One and Two. *Paynter*, supra, 2006-Ohio-5542, 2006 WL3020319, ¶ 19; see also, *Thrasher,* supra, 2008-Ohio-5182 at ¶ 30; *State v. Garrett*, 2nd Dist. Clark No. 2007 CA 23, 2008-Ohio-1752, ¶ 34, appeal not allowed, 119 Ohio St.3d 1446, 2008-Ohio-4487, 893 N.E.2d 517.

By: Delaney, J.,

Hoffman, P.J. and

Gwin, J., concur.