

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2014-03-081 |
| | : | |
| - vs - | : | <u>OPINION</u> |
| | : | 3/23/2015 |
| | : | |
| ROBERT M. SEYMOUR a.k.a. ROBERT | : | |
| M. SEYMORE, | : | |
| | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-03-0432

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Neal D. Schuett, 121 West High Street, Oxford, Ohio 45056, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Robert M. Seymour a.k.a Robert M. Seymore, appeals from his sentence in the Butler County Court of Common Pleas for aggravated burglary. For the reasons set forth below, we affirm.

{¶ 2} In July 2011, appellant pled guilty to one count of domestic violence, one count of aggravated burglary, two counts of assault, one count of grand theft, one count of failure to

comply with an order or signal of a police officer, and one count of violating a protection order. Appellant was sentenced to a total prison term of 13 years and six months. Appellant's aggravated burglary conviction accounted for six years of that prison term. Appellant appealed his conviction and sentence, and on July 9, 2012, this court remanded the matter back to the trial court after concluding that the offenses of domestic violence, aggravated burglary, and violating a protection order were allied offenses of similar import that should have been merged pursuant to R.C. 2941.25. *State v. Seymore*, 12th Dist. Butler Nos. CA2011-07-131 and CA2011-07-143, 2012-Ohio-3125.

{¶ 3} At appellant's resentencing hearing, the state elected to pursue the aggravated burglary charge, and the charges of violating a protection order and domestic violence were merged. The trial court sentenced appellant to a seven-year prison term for the aggravated burglary offense, which was a greater sentence than the six-year prison term originally imposed. Appellant appealed his sentence. On January 13, 2014, this court found that the increased aggravated burglary sentence was constitutionally defective as there was a presumption of vindictiveness because the trial court failed to provide an explanation for the increased sentence on the record. *State v. Seymour*, 12th Dist. Butler No. CA2013-03-038, 2014-Ohio-72, ¶ 18-20 (*Seymore II*).¹ Appellant's sentence was reversed and the matter remanded for resentencing. In remanding the case to the trial court, we stated the following:

If the trial court decides to impose a harsher sentence than the sentence imposed originally, then the trial court must affirmatively state upon the record the reasons for imposing the harsher sentence. Those reasons may come to the judge's attention from a variety of ways including "from a new presentence investigation, from the defendant's prison record, or possibly from other sources." [*State v.*] *Collins*, [8th Dist. Cuyahoga Nos. 98575, 98595], 2013-Ohio-938, ¶ 12, citing *Wasaman v. United States*, 468 U.S. 559, 104 S.Ct. 3217 (1984).

1. Inconsistencies in the spelling of appellant's last name resulted in two different case captions for appellant's respective appeals in 2012 and 2014. For ease of discussion, we refer to appellant's 2014 appeal as *Seymore II*.

Seymore II at ¶ 20.

{¶ 1} On February 5, 2014, appellant was resentenced a second time on the aggravated burglary offense to seven years in prison. In imposing a seven-year prison term, the trial court noted that it was considering appellant's "old presentence investigation" report, as well as "new information" contained in appellant's prison incident reports and his institutional summary report.

{¶ 2} Appellant timely appealed his sentence, raising the following assignment of error:

{¶ 3} THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT RESENTENCED APPELLANT TO AN INCREASED TERM OF INCARCERATION UPON REMAND IN VIOLATION OF APPELLANT'S SUBSTANTIVE DUE PROCESS RIGHTS.

{¶ 4} In his sole assignment of error, appellant contends that the presumption of vindictiveness recognized in *Seymore II* remains, as the trial court failed to make "relevant findings" justifying the increased sentence on his aggravated burglary conviction. Appellant argues that the trial court's reference to his behavior while incarcerated did not shed new light upon his "life, health, habits, conduct, and mental and moral propensities" as the behavior described in the prison incident reports and institutional summary report was "not inconsistent with the charges to which he pled guilty or his extensive criminal history."

{¶ 5} Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction or sentence must not play a part in the sentence a defendant receives after a new trial or upon remand for resentencing. *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S.Ct. 2072 (1969); *State v. Andrews*, 12th Dist. Butler No. CA2006-06-142, 2007-Ohio-223, ¶ 20. To ensure the absence of such motivation, a judge that imposes a more severe sanction must affirmatively provide the reasons for the harsher

sentence. *Pearce* at 726. "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.* The information must shed new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities" and may come to the judge's attention "from a new presentence investigation, from the defendant's prison record, or possibly from other sources." *Id.* at 723, quoting *Williams v. New York*, 337 U.S. 241, 245, 69 S.Ct. 1079 (1949). See also *Seymore II*, 2014-Ohio-72 at ¶ 8, 20.

{¶ 6} At appellant's February 5, 2014 resentencing hearing, the trial court affirmatively set forth the basis for the more severe, seven-year prison term. The trial court reviewed appellant's institutional summary report and 29 prison incident reports—all of which constituted new information that had not been before the court when appellant was originally sentenced. These records indicated that since appellant's initial incarceration, he had been transferred from an institution in Chillicothe, Ohio to an institution in Mansfield, Ohio because his security risk had risen to a "very high" level due to a "plethora of incidents." These incidents included appellant starting prison fights, refusing to go to work on numerous occasions, stealing from the prison commissary, consuming "hooch alcohol," threatening prison staff members, and confessing to having a "serious anger management problem" and feeling "homicidal."

{¶ 7} We find that the information set forth in appellant's institutional summary report and prison incident reports constituted new, objective information concerning identifiable conduct on the part of appellant occurring after the time of the original sentencing proceeding. As the trial court affirmatively stated on the record that it was relying on this objective information as its basis for the increased sentence for aggravated burglary, we find that the presumption of vindictiveness recognized in *Seymore II* was thoroughly rebutted. We therefore conclude that appellant's due process rights were not violated by the trial

court's imposition of a seven-year prison term on the aggravated burglary conviction.

{¶ 8} Appellant's sole assignment of error is overruled.

{¶ 9} Judgment affirmed.

S. POWELL, P.J., and RINGLAND, J., concur.