[Cite as *State v. Johnson*, 2010-Ohio-2010.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23297
Plaintiff-Appellee	:	
	:	Trial Court Case No. 05-CR-2232
v.	:	
	:	
ERIC JOHNSON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 7th day of May, 2010.

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BROGAN, J.

{¶ 1} Eric Johnson appeals from the trial court's termination entry re-sentencing him to prison following a remand from this court.

{¶ 2} Johnson advances two assignments of error on appeal. First, he contends the trial court erred by imposing a more severe sentence than originally imposed. Johnson argues that the increased sentence was the result of judicial

vindictiveness. Second, he claims the trial court erred by denying him an opportunity for allocution under Crim.R. 32(A)(1).

{¶ 3} The record reflects that Johnson was convicted in 2005 on charges of aggravated robbery (two counts), felonious assault (two counts), having a weapon while under disability (two counts), and possession of criminal tools. He also was found guilty of several firearm specifications, which were merged. The trial court imposed an aggregate nineteen-year prison sentence. We reversed and remanded for re-sentencing pursuant to *State v. Foster*, 109 Ohio St. 1, 2006-Ohio-856. See *State v. Johnson*, Montgomery App. No. 21359, 2007-Ohio-437.

{¶ 4} Following a new sentencing hearing, the trial court reimposed an aggregate nineteen-year sentence in 2007. Johnson again appealed. We reversed and remanded for reasons related to Johnson's dissatisfaction with his appointed counsel. See *State v. Johnson*, 179 Ohio App.3d 151, 2008-Ohio-5769. After another sentencing hearing, the trial court sentenced Johnson a third time in February 2009. This time a different judge imposed an aggregate twenty-six-year prison sentence. Johnson again has appealed.

{¶ 5} In his first assignment of error, Johnson contends the trial court erred in increasing his sentence from nineteen years to twenty six years on remand. Johnson maintains that this increase resulted from judicial vindictiveness. His argument implicates *North Carolina v. Pearce* (1969), 395 U.S. 711, and its progeny. In *Pearce*, the U.S. Supreme Court explained that due process precludes vindictiveness from playing any role in a defendant's sentence following a remand. Id. at 725. Under some circumstances, a presumption of vindictiveness exists when a defendant

receives a more severe sentence on remand. Cases subsequent to *Pearce* indicate that such a presumption arises only when circumstances establish a "reasonable likelihood" that an increased sentence is the product of vindictiveness. See, e.g., *Alabama v. Smith* (1989), 490 U.S. 794, 799. "Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." Id., citing *Wasman v. United States* (1984), 468 U.S. 559, 569.

{¶ 6} The circumstances in the present case do not establish a reasonable likelihood that the judge who re-sentenced Johnson to a longer prison term was motivated by vindictiveness. This court has held that no presumption of vindictiveness exists "where a different trial judge, who is not required to preside over a new trial, imposes a harsher sentence, and explains on the record the reasons for the sentence." *State v. Johnson*, Montgomery App. No. 18937, 2002-Ohio-4339, ¶2. That is the case here. The most recent sentencing was performed by Judge A.J. Wagner, who did not preside over either of the first two sentencing hearings. Judge Wagner was not required to conduct a new trial, as we had remanded only for purposes of re-sentencing. Moreover, Judge Wagner made clear on the record the reasons for the harsher sentence he imposed. His comments reveal that he was motivated in part by Johnson's misconduct in prison and failure to take advantage of prison programs. He also was motivated by his knowledge of the full extent of the harm suffered by the victim. Therefore, no presumption of vindictiveness exists.[1]

[1]Judge Wagner prefaced his sentencing remarks by acknowledging that Johnson had "every right" to appeal his prior sentences and by assuring the parties: "[T]his is not going to be about getting any kind of retribution for sentence. I mean, that's just not going to happen here." Judge Wagner's assurances are not dispositive, of course, but

{¶ 7} Where a presumption of vindictiveness does not apply, a defendant still may attempt to prove, from the record, that a harsher sentence resulted from actual judicial vindictiveness. *Johnson*, Montgomery App. No. 18937, at ¶21; see, also, *Smith*, 490 U.S. at 799-800 (noting that a defendant bears the burden to prove actual vindictiveness). In the present case, Johnson asserts actual vindictiveness based on two things: (1) the trial court's reliance on allegedly inaccurate information in an updated PSI report it considered; and (2) the trial court's allegedly improper consideration of a statement from Johnson's shooting victim about her worsening condition. Neither of these issues establishes actual vindictiveness by the trial court.

{¶ 8} The PSI report Judge Wagner obtained was an "update" from the sentencing report prepared in connection with Johnson's original sentencing in 2005. The updated report contained the following information about Johnson's conduct since his entry into the prison system:

{¶ 9} "Just a few weeks after Mr. Johnson entered SOCF, on November 22, 2005, Mr. Johnson was caught fighting with another inmate and received 10 days of Disciplinary Control (DC) which is the equivalent of being placed 'in the hole.' On September 26, 2006 Mr. Johnson threatened bodily harm and was disrespectful to staff members. He sent letters to a staff member stating 'the crew wonders how they could taste and rape that fat wet pussy' and could he 'stick his dick in her throat.' He received 15 days of DC for this incident. Additionally, Mr. Johnson has received nine conduct reports which did not result in DC that included: Creating a disturbance

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they do suggest his awareness that vindictiveness could play no role in the sentence he imposed.

(screaming at the officer to 'get the fuck out of the range'); being out of place; possession of contraband; disobedience of a direct order; disrespectful to staff; and masturbation.

{¶ 10} "Mr. Johnson is currently enrolled in Adult Basic Education classes and has completed 1 program (Success After Prison) which was conducted via television and focused on social interaction. Mr. Johnson has been recommended for 10 programs (Commitment to Change; Thinking for Change; ADAPT; ABLE Literacy; Family Reunification; Attitude; Personal/Emotional; Substance Abuse; Education and Education (sic)) and has only completed one program. Mr. Johnson was initially classed as reception status and based on his behavior and attitude, he has been increased to level 4 status. He is not eligible to reduce his status until at least December, 2009.

{¶ 11} "Mr. Johnson's Case Manager is Joanne Jepson and she reports that she does not know Mr. Johnson well due to the fact that he was gone for a while at outside court from November 21, 2008 to December 23, 2008 and she just picked up his block mid last year. Ms. Jepson indicated that other officers have informed her that Mr. Johnson is loud in the block and has a history of yelling at officers. Ms. Jepson feels that Mr. Johnson does not like authority and does not have a good rapport with staff. Due to the fact that Mr. Johnson is at a level 4 status (formerly maximum security) he may not have as many options for programming as he would at a lesser security institution."

{¶ 12} In addition to the PSI report, the trial court considered prison records indicating that Johnson had committed a number of infractions while incarcerated at

SOCF. The record reflects that Johnson committed all but one of these infractions after his initial sentencing in 2005 but before his first re-sentencing in 2007. The infractions include disobeying orders to lock up, possession of contraband (cassette player and headphones), threatening to rape prison staff, being out of place, disobeying orders to stop shouting across the yard, disobeying orders to stop shouting out of his cell, arguing with another inmate, and masturbation.

{¶ 13} The victim-impact statement the trial court considered was from Rhonda Little. She informed the trial court about various problems she had experienced since last appearing in court. She mentioned suffering a stomach and colon infection, losing a kidney, losing her job due to her poor health, and experiencing depression severe enough to require medication. Little also told the trial court that she remained fearful, that she was scheduled for another surgery, and that she would remain under a doctor's care for the rest of her life.

{¶ 14} Assuming, purely arguendo, that the trial court considered inaccurate information, as Johnson alleges, the information was contained in a PSI report that the trial court had no hand in preparing. The report was accompanied by copies of Johnson's internal prison records, which showed his substantial offense history while incarcerated. Once again, the trial court played no part in preparing these records. On their face, the PSI report and the prison records provided the trial court with objective, non-vindictive reasons for imposing a longer prison sentence. Even if the trial court's sentencing materials contained some errors, which is not apparent from the record, its reliance on traditional sentencing materials prepared by someone else

in no way suggests vindictiveness.[2]

{¶ 15} We reach the same conclusion regarding the trial court's reliance on Little's statement. A victim-impact statement is a traditional source of sentencing information, and the extent of the harm to Little as a result of being shot by Johnson was certainly a relevant sentencing consideration. Moreover, Little's statement about the ways Johnson's crime had harmed her physically, psychologically, and financially provided the trial court with another objective, non-vindictive reason for imposing a longer prison sentence.

{¶ 16} In reaching the foregoing conclusion, we recognize that much of the information in the updated PSI and prison records concerns conduct by Johnson that occurred after his original sentencing and before the first re-sentencing in 2007, where he received a nineteen-year sentence. We note too that some of the problems Little mentioned may have manifested themselves after the initial sentencing and before the first re-sentencing in 2007. Her testimony on the timing is unclear. She told the trial court at the most recent sentencing that her problems had occurred "since the last time" she had appeared in court. That was at the time of Johnson's

[2]Parenthetically, we note that if Johnson had concerns about the accuracy of the sentencing materials, he bore the burden of proof on that issue. *State v. Sims*, 184 Ohio App.3d 741, 746, 2009-Ohio-5751. When a defendant wishes to introduce evidence to refute an alleged factual inaccuracy in a PSI report, a trial court may abuse its discretion by failing to grant a requested continuance to obtain the needed information. *State v. Liming*, Greene App. No. 03CA43, 2004-Ohio-168, ¶52. In the present case, Johnson presented no evidence to refute the accuracy of his PSI report or the accompanying prison records. Nor did he seek leave to gather such evidence. Under such circumstances, a trial court does not abuse its discretion in electing to accept the information in the PSI as true. *Sims*, 184 Ohio App.3d at 746.

conviction and sentence in 2005.[3] Therefore, the various problems she mentioned manifested themselves sometime between November 2005, when Johnson initially was sentenced, and February 2009, when Little appeared before the trial court for the second re-sentencing now under review.

{¶ 17} For purposes of our vindictive-sentencing analysis, however, the key issue in not when the facts upon which the trial court relied came into being. Rather, we believe the key issue is when the trial court *became aware* of those facts. The record reflects that Judge Wagner was the only judge to sentence Johnson with knowledge of his prison misconduct and with knowledge of the full extent of harm suffered by Little.[4] Thus, Judge Wagner was entitled to rely on this increased information to lengthen Johnson's sentence because no sentencing judge had considered it before. As will be shown more fully below, the fact that Judge Wagner was armed with, and acted upon, previously unknown sentencing information negates any reasonable inference of vindictiveness.

{¶ 18} In arguing to the contrary, Johnson cites *Pearce*, supra, and insists 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 (Emphasis added). On its face, this language from *Pearce*

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[3]This court has obtained a copy of a transcript of Johnson's first re-sentencing in 2007. Little did not provide a statement or participate in that re-sentencing.

[4]As set forth above, Little did not participate in the first re-sentencing hearing in 2007. Moreover, Judge Wagner requested the updated PSI report with the internal prison records upon which he relied. This additional information was not considered by the prior judge who had re-sentenced Johnson in 2007.

would preclude Judge Wagner from considering any prison misconduct by Johnson that occurred before the first re-sentencing in 2007. It also would prevent Judge Wagner from considering Little's recent statement because all of her problems stem from Johnson's conduct at the time of his offense, namely his act of shooting her in the stomach.

{¶ 19} We note, however, that the language from *Pearce* upon which Johnson relies applies only when there is a presumption of vindictiveness to rebut. When there is no presumption of vindictiveness to overcome, the *Pearce* requirements do not apply. In such a case, we have determined, logically enough, that "'no explanation is required'" to rebut a non-existent presumption. S*tate v. Thrasher*, 178 Ohio App.3d 587, 591, 2008-Ohio-5182, ¶14, quoting *State v. Howard*, 174 Ohio App.3d 562, 2007-Ohio-4334. Moreover, courts have retreated from a strict application of *Pearce*. The U.S. Supreme Court itself has cautioned that the passage from *Pearce* relied upon by Johnson "was never intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified." *Texas v. McCullough* (1986), 475 U.S. 134, 141; see, also, *Wasman v. United States* (1984), 468 U.S. 559, 572 ("Even without a limitation on the type of factual information that may be considered, the requirement that the sentencing authority or prosecutor detail the reasons for an increased sentence or charge enables appellate courts to ensure that a nonvindictive rationale supports the increase. A contrary conclusion would result in the needless exclusion of relevant sentencing information from the very authority in whom the sentencing power is vested.").

{¶ 20} In *McCullough*, supra, the defendant was convicted of murder following

a jury trial. He elected to be sentenced by a jury and received a twenty-year prison term. The trial court subsequently granted a new trial. The defendant was retried before another jury, with the same judge presiding, and was convicted. This time, he elected to be sentenced by the judge, who imposed a fifty-year prison term. In support of the longer sentence, the judge explained "that in fixing the sentence she relied on new evidence about the murder that was not presented at the first trial and hence never made known to the sentencing jury." *McCullough*, 475 U.S. at 136.

{¶ 21} The Texas Court of Appeals reversed, finding itself constrained by *Pearce's* admonition that a longer sentence could be imposed only if it was based on conduct of the defendant occurring after the prior proceeding. Id. at 137 n.2. The Texas Court of Criminal Appeals subsequently ruled, inter alia, that a presumption of vindictiveness applied under *Pearce* even though a judge rather than a jury imposed the second sentence. Id.

{¶ 22} Upon review, the U.S. Supreme Court found no presumption of vindictiveness "because different sentencers assessed the varying sentences that McCullough received." Id. at 140. 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. The Court found such a reason in the sentencing judge's assertion that she believed "the 20-year sentence respondent received initially was unduly lenient in light of significant evidence not before the sentencing jury in the first trial." Id. Finally, even if a presumption of vindictiveness were to apply, the Court abandoned *Pearce's* limitation that any justification for a sentence increase must relate to events occurring subsequent to

the prior proceeding. Id. at 141 (noting that such a restriction "could in some circumstances lead to absurd results"). Instead, the Court opined that 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. The *McCullough* Court then found that the sentencing judge properly had imposed an increased sentence based on "obviously relevant fact[s] not before the sentencing jury in the first trial." Id. at 144.

{¶ 23} In *Alabama v. Smith*, supra, the defendant pled guilty to burglary and rape charges in exchange for dismissal of a sodomy charge. The trial court sentenced him to concurrent terms of thirty years in prison. The defendant later had his plea vacated, proceeded to trial on all three charges, and was found guilty. The same judge this time imposed two concurrent life sentences and a consecutive 150-year sentence. In support, the judge explained that he was imposing a harsher sentence because the evidence presented at trial, of which he had been unaware at the time of the first sentencing, convinced him "that the original sentence had been too lenient." *Smith*, 490 U.S. at 796-797. In particular, the judge relied on testimony that the defendant had raped the victim at least five times, forced her to engage in oral sex, and threatened her with a knife. Id. at 797.

{¶ 24} The Alabama Court of Criminal Appeals affirmed the convictions while affirming the sentences in part and reversing them in part. The Alabama Supreme Court granted further review and reversed the life sentence for burglary. Relying on *Pearce*, the Alabama high court reasoned that the sentencing judge improperly "had

increased respondent's sentence for the burglary conviction based on new information about events occurring *prior* to the imposition of the original sentence–e.g., new information about the nature of the crime and its effect on the victim[.]" Id. at 797.

{¶ 25} The U.S. Supreme Court granted certiorari in *Smith* and reversed. It reasoned, in part: "* * * [W]hen a greater penalty is imposed after trial then was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial."[5] Id. at 801.

{¶ 26} Upon review, we see no material distinction between the present case and *McCullough*. There, as here, the defendant was tried by a jury, convicted, and sentenced.

{¶ 27} There, as here, a different sentencer subsequently imposed a longer sentence.[6] There, as here, the later sentencer supported the longer sentence with

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[5]The *Smith* Court held that the existence of additional relevant sentencing information precluded a presumption of vindictiveness. It declined to address the defendant's argument that he had evidence to support a finding of actual vindictiveness, as that issue was not before the Court. *Smith*, 490 U.S. at 803.

[6]We recognize that *McCullough* involved a sentencing by a jury and then a second sentencing by a judge. The present case differs from *McCullough* in that it involves a sentencing by a judge and then a re-sentencing by another judge. In both cases, however, a different sentencer imposed the later, more lengthy sentence. Relying on *McCullough*, we have determined on at least two occasions that no presumption of vindictiveness exists where a *different judge* imposes a longer sentence on remand. See *State v. Johnson*, Montgomery App. No. 18937, 2002-Ohio-4339, ¶13 ("We conclude that the presumption of vindictiveness provided for in *North Carolina v.*

evidence in existence at the time of the prior sentencing but unknown to the earlier sentencer. Under these circumstances, the *McCullough Court* found that the later sentencer's reliance on "obviously relevant fact[s] not before" the earlier sentencer justified the increased sentence and defeated any vindictiveness argument. This conclusion is further supported by *Smith*, which similarly approved a judge's reliance on additional information available at the time of a second sentencing where this information existed, but remained unknown, at the time of the prior sentencing.[7]

{¶ 28} Based on the foregoing authority, we conclude that Judge Wagner properly relied on Johnson's prison record and Little's statement to increase his sentence from nineteen years to twenty-six years. Even though much of the information those sources provided predates Johnson's 2007 first re-sentencing, the information remained unknown to any sentencer until Judge Wagner obtained an updated PSI with the prison records and heard from Little. Because Judge Wagner was the only judge to sentence Johnson with knowledge of his prison misconduct and the full extent of harm suffered by Little, he was entitled to rely on this increased

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Pearce, supra, is not applicable in this case. We base this conclusion upon the fact that a different trial judge, not the same trial judge, imposed the harsher sentence."); *State v. Howard*, 174 Ohio App.3d at 567, ¶20 (reasoning that where two different judges sentenced the defendant, "the judge who imposed the second sentence was not required to explain his reason for a harsher sentence in order to rebut the presumption of vindictiveness that could have applied had the same sentencer acted in both instances").

[7]*Smith* is distinguishable from the present case insofar as it involved a guilty plea followed by a jury trial. But the fact that *Smith* involved a plea then a trial merely explains *why* the sentencing judge possessed additional information the second time around. Although its procedural history is different, *Smith* remains pertinent to the present case because it supports the proposition, at issue here, that a sentencing judge may rely on new evidence to impose a longer sentence when that evidence existed, but was unknown to the sentencer, at the prior sentencing.

information to lengthen Johnson's sentence. As set forth above, the presumption of vindictiveness does not apply because Judge Wagner did not impose Johnson's earlier sentences; and we see no evidence of actual vindictiveness in this case.

{¶ 29} Even if we were to apply the *Pearce* presumption of vindictiveness, our own case law establishes that Judge Wagner's explanation rebutted it. In *Thrasher*, supra, we recognized that "[t]o 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*." *Thrasher*, 178 Ohio App.3d at 591, ¶17. We made clear that facts supporting a longer sentence "must be those that were not before the court at the time of the original sentence." Id. at 592, ¶20; see, also, *United States v. Resendez-Mendez* (5th Cir. 2001), 251 F.3d 514, 519 (recognizing that when a presumption of vindictiveness applies, "the re-sentencing court must articulate specific reasons, grounded in particularized facts that arise either from newly discovered evidence or from events that occur after the original sentencing"). Because the facts the trial court cited in *Thrasher* to impose a longer sentence were known to the court at the time of the prior sentencing, we held that those facts did not rebut the presumption of vindictiveness. *Thrasher*, at ¶22. As explained above, however, Judge Wagner increased Johnson's sentence based on facts that were *unknown* to the sentencing judge at the prior sentencing. *McCullough* and *Thrasher* establish that Judge Wagner was permitted to do so, regardless of whether the presumption of vindictiveness applied.

{¶ 30} In reaching the foregoing conclusion, we find Johnson's reliance on *State v. Jackson* (1986), 30 Ohio App.3d 149, to be unpersuasive. In that case, the

Eighth District Court of Appeals cited *Pearce* for the proposition that a sentence increase must be based on conduct of the defendant occurring after the original sentencing. The *Jackson* court found that the victim's death after the original sentencing did not support an increased sentence on remand, even if the death was caused by the defendant's crime. This was so, the Eighth District reasoned, because the defendant's crime itself occurred before the original sentencing. Although this logic supports Johnson's position in the present case, it runs contrary to *McCullough* and other cases mentioned above that have retreated from *Pearce*'s restrictive language.

{¶ 31} We are equally unpersuaded by Johnson's citation to *State v. Garrett*, Clark App. No. 2007 CA 23, 2008-Ohio-1752. In *Garrett*, we found actual vindictiveness where the defendant received a fourteen-year sentence increase for no apparent reason other than a change in the sentencing judge. In reaching our conclusion, we noted the absence of any relevant facts occurring since the first sentencing. We also noted comments from the sentencing judge from which we inferred a personal animus against the defendant. Unlike *Garrett*, the trial court in the present case supported its increased sentence with objective, non-vindictive reasons. In particular, the trial court cited previously unknown information about Johnson's prison record and the impact of his crime on the victim. The trial court was entitled to rely on this information. See, e.g., *Thrasher*, supra. The trial court also made no comments from which we could infer a personal animus against Johnson. To the contrary, the trial court went out of its way to assure the parties that animosity played no part in its sentencing decision. Consequently, *Garrett* is readily distinguishable.

Having found neither a presumption of vindictiveness nor any evidence of actual vindictiveness, we overrule Johnson's first assignment of error.

{¶ 32} In his second assignment of error, Johnson claims the trial court erred by denying him an opportunity for allocution under Crim.R. 32(A)(1). Although the trial court asked him whether he had anything to say at sentencing, Johnson claims he was interrupted after nineteen seconds and barely allowed to speak.

{¶ 33} Upon review, we find Johnson's second assignment of error to be without merit. Prior to sentencing, the trial court was obligated by Crim.R. 32(A)(1) to "address the defendant personally and ask if he * * * wishe[d] to make a statement in his * * * own behalf or present any information in mitigation of punishment."

{¶ 34} After listening to Johnson's attorney speak, the trial court complied with the foregoing requirement by asking Johnson what he would like to say. Johnson responded by apologizing for his crimes and expressing hope that the victim would recover. He also told the trial court that he had "been in programs" in prison and had "been staying out of trouble." An audio-video recording of the sentencing hearing, which is part of the record, reveals that Johnson then paused and stopped speaking. At that point, the trial court commenced a discussion with him about the contents of the updated PSI report. Johnson responded to various inquiries from the trial court and provided information about his behavior in prison.

{¶ 35} Having reviewed the sentencing transcript and the audio-video recording, we disagree with Johnson's allegation that the trial court interrupted him and barely allowed him to speak. The record reflects that Johnson spoke freely and was not prevented from saying anything. Accordingly, we find no violation of Crim.R.

32(A)(1). Johnson's second assignment of error is overruled.

{¶ 36} The judgment of the Montgomery County Common Pleas Court is affirmed.

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FROELICH, J., concurs.

DONOVAN, P.J., dissenting:

{¶ 37} I disagree. As noted by the majority in a footnote, Judge Wagner stated at sentencing, "This is not going to be about any kind of retribution for sentence. I mean, that's just not going to happen here." In my view, the court "doth protest too much." This sentence, after two successful appeals, was enhanced from 19 years to 26 years by a judge who did not preside over the original or any later jury trial.

{¶ 38} Judge Luse, upon initial remand, when not constrained by pre-*Foster* sentencing restrictions, imposed the same 19-year sentence that he deemed appropriate after presiding over the trial. As the judge who heard the evidence firsthand, Judge Luse was in the best position to gain a full appreciation of the nature and extent of the crimes charged. He was also in the best position to gain insight into Johnson's moral character.

{¶ 39} Judge Wagner's imposition of a harsher sentence cannot be justified by what the majority characterizes as "knowledge of the full extent of harm" to the victim. This is not new conduct on the part of Mr. Johnson. This is certainly not analogous to new information and additional evidence adduced at a trial upon reversal of a plea. Pleas often offer only a small glimpse at the nature of a defendant's conduct.

{¶ 40} Further, the prison record cited contains reference to only one incident occurring after Judge Luse's second sentence was imposed. That incident led to a 30-day commissary restriction at the prison. Although a judge should be able to impose an appropriate prison term at re-sentencing, in light of facts and circumstances surrounding the case, a 37% increase of seven years based upon "institutional adjustment problems" effectively chills appellate rights.

{¶ 41} The bulk of prison "incidents" resulted in 30-day commissary and/or phone restrictions. Several incidents involved shouting at other inmates. The "contraband" referred to by the majority was a stereo cassette and head phones, not drugs. One incident involved being "hyper" and "excited" over watching a football game on television along with other inmates.

{¶ 42} The majority also notes Johnson only participated in one of ten offered programs, but the PSI indicates his case manager, Joanne Jepson, acknowledged "he may not have as many options for programming (at Southern Ohio Correctional Facility - maximum security) as he would at a lesser security institution." Notably, his defense attorney indicated that Johnson had participated in several programs.

{¶ 43} The meaning of *Pearce* for this case must take into consideration that the second sentencing judge in *Pearce* was a different judge than the first - a fact not mentioned in *Pearce*, but clear from the underlying state court opinion. See *Pearce* generally, including *State v. Pearce,* 268 N.C. 707 (1966).

{¶ 44} The United States Supreme Court's decisions regarding the reasonable likelihood of vindictiveness in re-sentencing "reflect a recognition by the court of the institutional bias inherent in the judicial system against the retrial of issues that have

already been decided." *United States v. Goodwin*, 457 U.S. 368 at 376 (1982). I acknowledge the existence of a retaliatory motive is difficult to prove in any given case, but I am satisfied it is established here. Perhaps counsel for Johnson said it best at sentencing:

{¶ 45} "And, when - - when I first talked to you, Your Honor, about this case you - - you advised me to tell my client that 19 years was not the maximum time that he could receive on this case that - - that Your Honor could actually come down with a harsher sentence.

{¶ 46} "And, I'm requesting that this Court refrain from issuing a harsher sentence. After receiving two sentences of the same 19-year period, it would seem that the only reason to come down with a harsher sentence at this point in time would be to punish Mr. Johnson for continuing to exercise his - - his appellate rights, his Constitutional rights.

{¶ 47} "And, I understand that the Prosecutor and - - and Your Honor may feel that Mr. Johnson's just simply, you know, wasting the Court's time. So, I wanted to at least take a little bit of time to put this in perspective and to explain why Mr. Johnson continues to fight for his rights."

{¶ 48} Finally, in an ironic twist, this court found that sentencing in the second disposition of this case merited reversal of the 19-year sentence because the trial court had a "duty" to inquire into the effectiveness of Johnson's counsel at said sentencing. *State v. Johnson,* 179 Ohio App.3d 151, 2008-Ohio-5769. It certainly seems that lawyer was more effective than originally thought!

{¶ 49} I would reverse and remand with instructions to impose a 19-year

sentence.

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