[Cite as *State v. Mitchell*, 2012-Ohio-1992.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-11-039

Appellee — Trial Court No. 2006-CR-380

v.

Chad Mitchell — **DECISION AND JUDGMENT**

Appellant — Decided: May 4, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

John F. Kirwan, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, Chad Mitchell, appeals his resentencing by the Erie County Court of Common Pleas on seven counts of complicity relating to various offenses.

{¶ 2} This case was previously before us in *State v. Mitchell*, 6th Dist. No. E-09-064, 2011-Ohio-973. There, among other assigned errors, Mitchell challenged his original sentence on the complicity convictions. These convictions related to felonious

{¶ 3} assault, a second degree felony, in violation of R.C. 2903.11(A)(2) and R.C. 2923.03(A)(2) (Counts 1, 3 and 4); improperly discharging a firearm at or into a habitation, a second degree felony, in violation of R.C. 2923.161(A)(1) and 2923.03(A)(2) (Count 2); improperly handling firearms in a motor vehicle, a fourth degree felony, in violation of R.C. 2923.16(A) and 2923.03(A)(2) (Count 5); having a weapon while under disability, a third degree felony, in violation of R.C. 2923.13(A)(3) and R.C. 2923.03(A)(2) (Count 6); and carrying a concealed weapon, a fourth degree felony, in violation 2923.12(A)(2) and R.C. 2923.03(A)(2) (Count 7).

{¶ 4} Mitchell was sentenced to an aggregate prison term of 21 years and then appealed. On review, we affirmed in part, reversed in part, and remanded for resentencing. Applying *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, we determined that the convictions on Counts 2 and 5 should have been merged with those on Counts 1, 3 and 4. *Id*. at ¶ 45. [1] On April 18, 2011, a resentencing hearing was held and the trial court imposed an aggregate prison term of 20 years.

{¶ 5} From this sentence Mitchell presently appeals, assigning one error for review:

{¶ 6} The trial court erred by enhancing defendant's original sentence in violation of *North Carolina vs. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

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[1] We also found partially well-taken Mitchell's third assigned error pertaining to his concealed-weapons conviction on Count 7. We held that his "conviction on complicity to carrying a concealed weapon [must] be reduced from a fourth degree felony to a first degree misdemeanor." *Id.* at ¶47.

{¶ 7} In *Pearce*, the United States Supreme Court held that a defendant's due-process rights are violated when a provably vindictive judge imposes a harsher sentence as punishment for a successful appeal. *Id*. at 725-726. In this appeal Mitchell argues that despite the appearance of a shorter aggregate sentence of 20 years, the resentencing here still violated *Pearce's* vindictiveness principle. He points to the fact that the trial court increased by one year the prison time on Counts 1, 3 and 4 (from six to seven years on each count). He also suggests that the merger we ordered on Counts 2 and 5, and the reduction of Count 7 from a felony to a misdemeanor, should have resulted in a sentence of substantially less than 20 years. These contentions are wholly without merit.

{¶ 8} In *State v. Boyd*, 6th Dist. L-07-1095, 2009-Ohio-3803, we reviewed a *Pearce* challenge to a resentencing that doubled the aggregate prison term of the defendant's original sentence. For his various convictions, Boyd had initially received a total sentence of 20 years. *Id*. at ¶ 1. He appealed and we vacated that sentence under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Following remand, a different judge was assigned to the case and at the resentencing hearing Boyd received an aggregate prison term of 40 years. In appealing that sentence, he argued that the doubled prison time *automatically* violated his due-process rights under *Pearce* because vindictiveness is presumed when the second sentence results in greater time for the same convictions. We rejected this argument on two grounds, first noting that *Pearce* does not apply to *Foster* remands, *Boyd* at ¶ 16, nor to cases where the defendant is resentenced by a different judge. *Id*. at ¶ 18-19. Secondly, we observed that later rulings have since restricted *Pearce*'s vindictiveness doctrine:

> [T]he United States Supreme Court eventually narrowed * * * *Pearce* by holding that in the absence of a "reasonable likelihood" that the enlarged sentence was the product of vindictiveness, the burden was on the defendant to show "actual vindictiveness." *Alabama v. Smith* (1989), 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865.
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> "Actual vindictiveness" implies an animus against a defendant because he or she exercised his or her right of appeal which resulted in the reversal of the prior conviction based upon an error made by the sentencing judge. *Boyd* at ¶ 14-15.

{¶ 9} After *Alabama v. Smith*, a presumption of vindictiveness arises only in circumstances in which an *unexplained* increase makes it reasonably likely that the second sentence resulted from "actual vindictiveness" on the part of the sentencing judge. *Smith* at 799-802. "While sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment, [*Pearce*] recognized it must not be exercised with the purpose of punishing a successful appeal." *Id.* at 798. "*Pearce* requires no more than that 'the second sentencer provide an on-the-record, wholly logical, nonvindictive reason for the sentence.'"(Citations omitted.) *Gauntlett v. Kelley*, 849 F.2d 213, 217 (6th Cir.1988). [2]

{¶ 10} We have thoroughly reviewed the transcript of the April 18th resentencing hearing and the sentencing entry arising from it. Notwithstanding that less aggregate time

[2] In *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973), the Supreme Court upheld the "constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they may have on the right to appeal." *Id*. at 29.

was imposed, we see nothing in this sentencing record that suggests there was a "reasonable likelihood" the court acted with a vindictive mindset or attitude. Counts 2 and 5 were merged with Counts 1, 3 and 4, consistent with our previous ruling. The firearms specifications in Counts 1, 3, 4 and 6 were all merged. While the court did increase the individual prison terms on Counts 1, 3, and 4 by one year, all were made concurrent.

{¶ 11} Responding to defense counsel's objection to the increases, the court stated:

> The Court will note your objection on the record. The Court, for the record, when it ran counts one, two, three, four and five concurrent at the time, * * * it had known at that original sentencing that there was the eight year sentence that had been imposed on Count two and had added up the years and knew it was 21 years. So although there's been an increase in Counts one, three, and four of a year, *the overall sentence has been reduced by a year to the defendant's benefit*. Had the Court known that Count[s] two and five, that they should have merged, and of course, if you read the mandate, the law on merger has, from the Supreme Court, has been decided numerous times since then and the test has been modified many times, that it does throw the trial courts into a little bit of confusion as to what does and [doesn't] merge. Had the Court known it would have merged at that time, it would have given this sentence or even maybe an appropriate higher sentence of the 21 years. *So this resentencing has worked out to the*

benefit of the defendant. Albeit those three counts have increased by a year, the overall sentence has decreased by a year.

{¶ 12} Beyond this, Mitchell has identified nothing to support an inference that the one-year increases were somehow in retaliation for his first appeal. The sentencing judge expressed no umbrage, frustration or animosity relating to the previous appeal or its outcome. The court provided an "on-the-record, wholly logical, nonvindictive" explanation for the aggregate difference - one from which Mitchell unarguably benefited. Moreover, the premise underlying Mitchell's claim is simply incorrect: increased prison time in a new sentence, standing alone, is not evidence of vindictive intent. Nothing in *Pearce* created a per se bar to a greater sentence following a successful appeal.[3] *See id*. at 719-723. It is not the increase, but the *retaliatory motive* that violates due process. *Id*. at 725. As we noted in *Boyd*, "the focus of *Pearce* was the sentencer's *personal motivation*." (Emphasis added.) *Id*. at ¶ 15.

[3] Indeed, *Pearce* anticipated that after a successful appeal a re-sentenced defendant could, for valid reasons, draw a greater *or* lesser net prison term than was imposed in the original sentence:

> [N]either the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, *whether greater or less than the original sentence*, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." * * * Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle * * * that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." (Emphasis added; internal citations omitted.) *Id*. at 723.

{¶ 13} Finally, Mitchell has not argued that the court did not adhere to the statutory purposes of felony sentencing in R.C. 2929.11 or follow the criteria set forth in R.C. 2929.12. Nor, on this record, could he successfully do so. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

{¶ 14} Accordingly, the sole assigned error is not well-taken.

{¶ 15} On consideration whereof, the judgment of the Erie County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE