

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 :
 :
 Plaintiff-Appellant, : Case No. 2008-488
 :
 :
 v. : On appeal from the Champaign County
 : Court of Appeals, Second Appellate
 Kevin Bradley, : District, Case No. 06CA31
 :
 :
 Defendant-Appellee. :

Merit Brief of Appellee Kevin Bradley

Nick A. Selvaggio, 0055607
Champaign County Prosecutor

Scott Schockling, 0062949
Assistant Prosecuting Attorney
(Counsel of Record)

Champaign County Courthouse
200 N. Main Street
Urbana, Ohio 43078
(937) 484-1900
(937) 484-1901 - Fax

Counsel for Plaintiff-Appellant,
State of Ohio

Office of the Ohio Public Defender

By: Stephen P. Hardwick, 0062932
Assistant Public Defender
(Counsel of Record)

8 East Long Street - 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
stephen.hardwick@opd.ohio.gov

Counsel for Defendant-Appellee,
Kevin Bradley

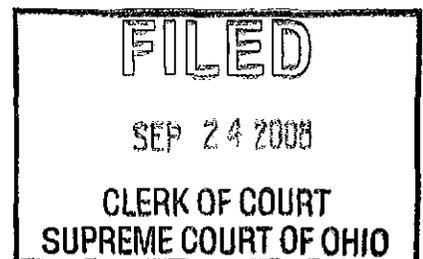


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Statement of the Case and the Facts

In 2004, Mr. Bradley was tried in jail garb before a jury on sixteen counts related to drug possession and related actions. At trial, the State also introduced into evidence calls that Mr. Bradley had made to his son in which Mr. Bradley told his son testify as to Mr. Bradley's alibi. The State asserts that the alibi was false. He was sentenced to a total of twenty-seven years and six months in prison. Specifically, the trial court imposed six months for Count 4, vandalism (F4); seven years for drug possession (F2), Count 6; and four years for the illegal assembly or possession of chemicals for the manufacture of drugs (F3), Count 15. Sentencing Entry, June 22, 2004, State's Brief at A-88. The vandalism sentence was concurrent to all other sentences, but the other two sentences were consecutive with each other and to Count 4. Sentencing Entry, Sept. 15, 2006, State's Brief at A-83.

The court of appeals reversed all of Mr. Bradley's convictions because he was tried in jail garb. State v. Bradley, Champaign App. No. 2004-CA-15, 2005-Ohio-6533. After the court of appeals reversed, the State indicted Mr. Bradley for six counts of witness tampering and soliciting perjury for the phone calls introduced into evidence two years earlier. Mr. Bradley objected that the charges were vindictive. The State and Mr. Bradley negotiated a plea agreement in which Mr. Bradley would plead guilty to three charges related to the original indictment, and to one count of soliciting perjury. The State did require that Mr. Bradley agree to any given sentence, and he did not. T.p. (Aug. 25, 2006) 1-170.

The trial court praised Mr. Bradley's intelligence. The court also found that Mr. Bradley had accepted responsibility for the calls to his sons, and that Mr. Bradley was genuinely remorseful:

[T]he Court has been impressed throughout this current case proceeding about defendant's view of his conduct in making the phone call to his son. The Court chooses to believe that the defendant is sincerely remorseful for the affect that it's had on his son. The Court accepts the concept that every time the defendant committed that offense that he was thinking more of himself, and that he's regretted it ever since then.

T.p. (resentencing) 19-20. But the trial judge also held that it had to impose the sentence in light of the previous convictions. It found:

That the sentence in the previous case was imposed in view of all the convictions. The Court has the same responsibility now to decide what sentence to impose when considering matters before the Court.

Id. at 18-19. Finally, the Court noted its own stake in the decision before it imposed sentence:

[E]ach side gave up something in the negotiation process to reach the position that was reached.

The Court also is giving up something authorizing the plea to be accepted because the Court believed in the sentence that it imposed originally or the Court wouldn't have imposed it then, so it required the Court to look freshly at what the result is. After considering all of that information [the court imposes sentence].

Id. at 20-21.

The trial court imposed a sentence of twelve months on Counts 4, 5 and 1 (new case) plus five years on Count 15, to be run consecutively. Sentencing Entry, Sept. 15, 2006. The following table summarizes the relevant sentences:

Count	Level	First Sentence	Level	Second Sentence
4. Vandalism	F5	6 months, concurrent	F5	12 months, consecutive
6. Drug possession	F2	7 years, consecutive	F5	12 months, consecutive
15. Illegal Ass. of Chemicals for Drugs	F3	4 years, consecutive	F3	5 years, consecutive
1. Solicit. Perjury (new count)	F3	n.a.	F4	12 months, consecutive

Mr. Bradley appealed. He argued that the State violated due process by prosecuting the soliciting charge because he won an appeal. He also argued that the increased sentences on counts four and 15 were vindictive. Initially, the court of appeals rejected both claims, State v. Bradley, Champaign App. No. 06CA31, 2007-Ohio-6853, and this Court declined to hear Mr. Bradley's appeal. State v. Bradley, 117 Ohio St.3d 1498, 2008-Ohio-2028. But on reconsideration, the court of appeals ruled that the additional sentences were vindictive, and remanded the case for resentencing. State v. Bradley, Champaign App. No. 06CA31, 2008-Ohio-720. This Court accepted the State's appeal of that decision. State v. Bradley, 118 Ohio St.3d 1432, 2008-Ohio-2595.

Argument

Proposition of Law No. I:

The presumption of vindictiveness applies when a trial court increases a sentence for two counts of a multi-count case.

Proposition of Law No. II:

The “sentencing package” doctrine has no applicability to Ohio sentencing laws. A sentencing court may not employ the doctrine when sentencing a defendant, even after dismissal of some charges. (State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 10, applied.)

I. Introduction

Like several other states, Ohio has chosen to examine sentences count-by-count, instead of as a package, at both the trial and appellate levels. As a result, when looking at whether a sentence is vindictive, reviewing courts look at whether the trial court improperly increased each sentence.

The State’s argument reverses the logical order of discussion. For simplicity’s sake, Appellee maintains the order of the propositions of law. For clarity’s sake, Appellee reverses the order of discussion. The order of discussion must be reversed because in order to decide whether the trial court vindictively increased a sentence, this Court must first decide what a “sentence” is. Is it the package of sanctions imposed to punish all of a defendant’s wrongdoing? Or is it the specific set of sanctions imposed for each count for which the defendant was actually convicted?

This Court has clearly answered the question. “Ohio’s felony-sentencing scheme is clearly designed to focus the judge’s attention on one offense at a time.” State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶8. As a

result, this trial courts cannot increase the sentence for an individual count as a result of a defendant successfully exercising his right to appeal.

II. Discussion

A. The trial court improperly followed the sentencing package doctrine when it increased the sentence on some counts to make up for the sentence on counts the State dismissed after a successful appeal.

In Saxon, this Court clearly, unequivocally, and repeatedly instructed trial and appellate courts to view criminal sentences on a count-by-count basis. “Ohio’s felony-sentencing scheme is clearly designed to focus the judge’s attention on one offense at a time.” Saxon at ¶8. This Court expressly rejected “the ‘sentencing package’ doctrine, a federal doctrine that requires the court to consider the sanctions imposed on multiple offenses as the components of a single, comprehensive sentencing plan.” *Id.* at ¶5. This Court also expressly required trial courts to look at sentences on a count-by-count basis: “Instead of considering multiple offenses as a whole and imposing one, overarching sentence to encompass the entirety of the offenses as in the federal sentencing regime, a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense.” *Id.* at ¶9.

Finally, this Court specifically prohibited both trial and appellate courts from considering sentences as a package:

This court has never adopted the sentencing-package doctrine, and we decline to do so now. The “sentencing package” doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant, and appellate

courts may not utilize the doctrine when reviewing a sentence or sentences.

Saxon at ¶10.

In State v. Evans, 113 Ohio St.3d 100, 2007-Ohio-861, this Court reiterated that trial and appellate courts must look at sentences count-by-count:

First, the “sentencing package” doctrine ignores the sentencing scheme set forth by the Revised Code, which provides a particular, independent sanction or range of sanctions for each offense and does not authorize a trial court at sentencing to consider multiple offenses together.

Evans, at ¶12 (citations to Saxon omitted).

Nothing in the language of Saxon or Evans allows the use of the sentencing package doctrine after a successful appeal of a conviction. To the contrary, the language of the cases is broad. “The ‘sentencing package’ doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant[.]” Saxon at ¶10. “[A] judge sentencing a defendant pursuant to Ohio law must consider each offense individually. . . .” Id. at ¶9. Perhaps more importantly, as Mr. Bradley shows next, states that repudiate the sentencing package doctrine also look at allegedly vindictive sentences on a count-by-count basis.

B. A trial court’s sentence is presumptively vindictive under North Carolina v. Pearce (1931), 282 U.S. 304, when it vindictively increases a sentence for two counts of a multi-count case.

On page 8 of its merit brief, the State asks a question that deserves an answer:

In the present case, the trial court's knowledge of Bradley's criminal activity was not diminished as a result of the reversal of his convictions in State v. Bradley, Champaign App. No. 2004-CA-15, 2005-Ohio-6533. Why should that knowledge not remain part of the sentencing calculus following the post-remand plea agreement?

In Saxon, this Court answered that question: Because "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time." Saxon at ¶8.

The State's reliance on State v. Nelloms (2nd Dist. 2001), 144 Ohio App.3d 1, is telling because Nelloms expressly relied on the same sentencing package doctrine line-of-cases that this Court expressly repudiated in Saxon. In Nelloms, the Second District relied on the sentencing package doctrine to hold that in "multi-count situations, the judge imposes a sentence as a package, taking into consideration a myriad of factors." Nelloms at 5. As the First District correctly recognized, Nelloms is inconsistent with Saxon. State v. Johnson, 174 Ohio App.3d 130, 2007-Ohio-6512, at ¶14.¹ Further, the

¹ The First District reasoned that:

The state argues in this case that Pear[ce] does not apply because the total sentence did not increase. In fact, some courts have held that "when one or more counts of a multi-count conviction are vacated and remanded, a court does not violate the principles of Pearce as long as the aggregate length of the new sentence does not exceed the total length of the original sentence." [See State v. Nelloms (2001), 144 Ohio App.3d 1, 7, appeal not allowed (2001), 93 Ohio St.3d 1428.] But that line of cases is based on the "sentence packaging" doctrine that has subsequently been rejected by the Ohio Supreme Court. [State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245; State v. Evans, 113 Ohio St.3d 100, 2007-Ohio-861.]

State v. Johnson, 174 Ohio App.3d 130, 2007-Ohio-6512, at ¶14.

Second District's decision in this case in effect (but not expressly) repudiates the District's prior holding in Nelloms.

The State's reliance on cases from jurisdictions that use the sentencing package doctrine is equally telling. Like Ohio, some states and federal circuits look at sentences on a count-by-count basis. Other states and federal circuits employ the sentencing package doctrine. It is not surprising that courts look at sentence packages in jurisdictions that employ the sentencing package doctrine.

But the State also cites a Georgia case that is no longer good law . It is true that in 2001, the Georgia Court of Appeals ruled that Pearce does not apply as long as the aggregate sentence remains the same. But four years later, that court of appeals came to a different conclusion. Blake v. Georgia (2005), 272 Ga. App. 402, 406, 612 S.E.2d 589. In Blake, the court of appeals followed the holding of its state supreme court, which had repudiated the sentencing package doctrine. Anthony v. Hopper (1975), 235 Ga. 336, 219 S.E.2d 413. Further, the court of appeals held that the trial court triggered Pearce when it increased a sentence on one count, even though the aggregate sentence went from ten years in prison to five:

In Anthony, the Supreme Court of Georgia determined that the defendant's new sentence was more severe than his initial sentence - and thus that the presumption of vindictiveness should apply under [Pearce] -by comparing the new sentence and initial sentence on a count-by-count basis, rather than in the aggregate. Anthony, 235 Ga. at 337. Here, the presumption of vindictiveness applies under Anthony because Blake's sentence increased as to Count 1, the serious injury by vehicle count, even though Blake's sentence as a whole was reduced by the trial judge on remand.

Blake, 272 Ga. App. at 407 (Bernes, J., concurring). See also, New Hampshire v. Abram (2008), 941 A.2d 576, 581-2 (rejecting sentencing package doctrine and holding that Pearce applied to individual counts even though aggregate sentence stayed the same).

If the State wanted to avoid the Pearce presumption, it should have required Mr. Bradley to waive his Saxon rights or to enter into an agreed sentence. The State also could have insisted on a guilty plea that included more severe counts. If Mr. Bradley balked at what the State wanted, the State could have taken the case to trial. The State was an equal partner (if not a significantly stronger partner) in the plea negotiating process. And the State chose to agree to a plea to charges for which the trial court imposed less than maximum consecutive sentences. The State is now asking this Court to give it the benefit of a plea agreement it declined to make in the trial court.

Increasing Mr. Bradley's sentence would violate his right to Due Process and his right to be free from Double Jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution. The trial court said that it was imposing the additional sanctions to partially make up for the dismissed counts. The trial court praised Mr. Bradley's intelligence. The court also found that Mr. Bradley had accepted responsibility for the calls to his sons, and that Mr. Bradley was genuinely remorseful:

[T]he Court has been impressed throughout this current case proceeding about defendant's view of his conduct in making the phone call to his son. The Court chooses to believe that the defendant is sincerely remorseful for the affect that it's had on his son. The Court accepts the concept that every time the defendant

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Id. at 20-21.

Further, Mr. Bradley is presumed innocent of the charges the State dismissed, and a sentence for fifteen counts that includes an assault on a police officer should be dramatically higher than a sentence for four counts, none of which involve violence against a person. The State was initially able to obtain a conviction only by illegally trying Mr. Bradley in jail garb in front of the jury. If the State wished to continue to maintain that Mr. Bradley committed additional offenses, it should not have dismissed the charges with prejudice. In essence, the State wants Mr. Bradley to be punished for alleged offenses without having to go through the trouble of winning at trial or obtaining a guilty plea.

To the extent that the trial court is allowed to consider the other alleged offenses, Wasman v. United States (1984), 468 U.S. 559, Mr. Bradley's sentence should go down, not up. At Mr. Bradley's first sentencing hearing, he stood convicted of fifteen drug-related counts. The trial court also heard unmitigated evidence that Mr. Bradley attempted to coerce his son into not testifying against him. But at his second sentencing hearing, he stood guilty of only three drug-related counts, and the trial court expressly found that Mr. Bradley had accepted responsibility and was genuinely remorseful for the pressure he had placed on his son. T.p. (resentencing) 19-20. Other than the successful appeal and successful plea bargain (that resulted in the dismissal of many charges), the trial court gave no reason to justify increased sentences. The fact that the trial court's vindictive sentence only partially made up for the dismissed counts mitigates the damage, but it does not eliminate the harm.

At his second sentencing, Mr. Bradley faced dramatically fewer charges than at his first sentencing hearing. At the second sentencing, the trial court also found that Mr. Bradley was genuinely remorseful for the conduct that led to the additional soliciting perjury charge, conduct that the court was aware of when it initially sentenced Mr. Bradley. Given the lack of justification for the higher sentences, the sentences are presumptively vindictive, and the court of appeals correctly reversed.

Conclusion

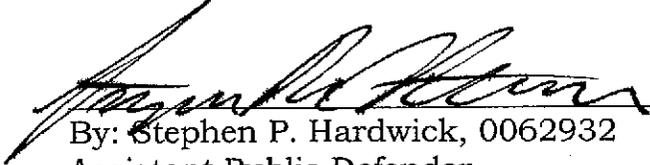
Mr. Bradley is presumed innocent on the dismissed counts. It is now patently unreasonable (and a violation of Due Process) to punish him more severely for two counts simply because the State agreed to dismiss other charges instead of taking them to trial.

The trial court found that Mr. Bradley had accepted responsibility for his actions. It is time for the State to take responsibility for the deal it struck.

This Court should affirm the decision of the court of appeals.

Respectfully submitted,

Office of the Ohio Public Defender



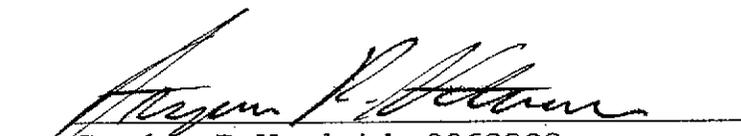
By: Stephen P. Hardwick, 0062932
Assistant Public Defender

8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)

Counsel for Kevin Bradley

Certificate of Service

I certify a copy of the foregoing **Merit Brief of Appellee Kevin Bradley** has been sent by regular U.S. Mail, postage prepaid to Scott Schockling, Assistant Champaign County Prosecuting Attorney, Champaign County Courthouse, 200 N. Main Street, Urbana, Ohio 43078 this 24th day of September, 2008.


Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Kevin Bradley

#283444

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**Appendix to
Merit Brief of Appellee Kevin Bradley**

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.