Supreme Court of Ohio Clerk of Court - Filed June 06, 2016 - Case No. 2015-1892

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Appellee,	:	Case No. 2015-1892
	:	
v.	:	
	:	On Appeal from the Hamilton
MALIK RAHAB,	:	County Court of Appeals,
	:	First Appellate District
Appellant.	:	

MERIT BRIEF OF APPELLANT MALIK RAHAB

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I. Preliminary Statement

A sentence is contrary to law when it is based on punishing a defendant for exercising his right to a trial.

II. Statement of Facts

Malik Rahab was charged with burglary for opening a window to a home, reaching inside, and taking a purse off a table. T.d. 1, 11. He pled not guilty and requested a jury trial. T.d. 7. Before trial, the State and Mr. Rahab tried to negotiate a plea. T.p. 2:12-15. The state offered to recommend an agreed sentence of 3 years in exchange for a guilty plea. T.p. 218-25—3:1-9. Mr. Rahab did not accept the offer. T.p. 3:10-16. The court explained the plea offer to Mr. Rahab and told him that if he were found guilty, the court would decide the sentence. T.p. 3:17-25—4:1. The court further explained: "And the Court does not look highly on cases where people don't take responsibility and accept that they did something wrong if they're found guilty. You understand that? Meaning it would probably be more. I'm not going to fool you. You understand that?" T.p. 3:23-23—4:1-8. Despite the warning, Mr. Rahab chose to exercise his right to a jury trial and was found guilty. T.p. 445:1-7.

After the trial, the court requested a PSI and set the case for sentencing. T.p. 448:1-18. Mr. Rahab admitted to the probation officer that he had taken the purse. T.p. 451:23-25—452:1-4. During the sentencing, Mr. Rahab told the court he had taken the purse. T.p. 453:12-18. Admittedly, the court was "perplexed" that he went to trial instead of taking the plea and asked him:

> Okay. So I don't understand why you wouldn't admit to that and plead to that, and you had to have a trial, or why you wouldn't take the three years because I can sentence you to eight. Makes no sense to me. So I don't know what you talked about with your attorney, but – too late. You went to trial. You gambled, you lost.

> You had no defense. And you even admit that you did it, and yet you put this woman through this trial again. You traumatized her by breaking into her house. And then you had to traumatize her again to relive it and go to trial. I don't get it. T.p. 453:19-25—454:1-10.

When asked again, Mr. Rahab explained that he thought three years in prison for taking the purse was excessive. T.p. 455:12-22.

After Mr. Rahab apologized for what he did, the court replied "I sure wish I would have heard that before the trial." T.p. 456:5-10. When Mr. Rahab again tried to take responsibility for the offense, the court retorted: "Own up now. Okay. Little late." T.p. 464:24-25—465:1-5.

Mr. Rahab's older brother Deshawn Harris spoke on his brother's behalf. T.p. 456:22-25—457:1. He asked the court not to impose the maximum sentence and explained that their mother had abandoned them when Mr. Rahab was 16-years-old. T.p. 457:3-25—458:1-20. At the time of the offense, Mr. Rahab was enrolled in school, working two jobs, and in a program. T.p. 458:1-2. Addressing Mr. Harris, the court retorted:

> Did he admit it at trial? He did not. The State offered him three, and he didn't take it. He went to trial with a prove-it defense. He had absolutely no defense. They had his fingerprints. He gambled. He lost. I'm sorry, you know right from wrong, but it just does not – it's like yeah, now that it's all over, oh, I'm sorry I got caught, I'm sorry I got – I went to trial and I lost. Too late. Too late. To me, too late. * * * But he knows right from wrong, and I'm one of the judges, you break into somebody's house, you're going to prison. You don't do that. He has not – he went to trial. He lost, he gambled. T.p. 460:1-22.

Before imposing sentence, the court mentioned Mr. Rahab's juvenile record, his refusal to take responsibility, and its displeasure that Mr. Rahab went to trial rather than plea. The court admonished:

> I don't think this warrants eight years, but you're getting more than the three. * * * I looked at you and said, do you want the three or

> not; you're looking at eight. And you told me, I don't want three. That's what you told your attorney. Well, guess what, you lost your gambling. You did this. You had no defense, and you wouldn't take responsibility. You wanted to go to trial. All right, big winner you are. Six years Ohio Department of Corrections. T.p. 469:14-15—470:1-6.

III. Argument

Proposition of Law:

When the sentencing court creates an inference that a sentence is based on the decision to go to trial, the sentence is unconstitutional unless the court makes an unequivocal statement the sentence was not based on the refusal to plead guilty.

An accused is guaranteed the right to a jury trial and "should never be punished for exercising that right or for refusing to plead guilty." *State v. O'Dell*, 45 Ohio St.3d 140, 543 N.E.2d 1220 (1989), paragraph two of the syllabus. Any increase in the sentence based upon the defendant's decision to stand on his right to put the government to its proof rather than plead guilty is improper and violates the right to due process. *State v. Scalf*, 126 Ohio App.3d 614, 621, 710 N.E.2d 1206 (8th Dist.1998). *See also Columbus v. Bee*, 67 Ohio App.2d 65, 77, 425 N.E.2d 409 (10th Dist.1979). The prohibition on increased punishment applies "no matter how overwhelming the evidence of [defendant's] guilt." *Scalf* at 621, quoting *United States v. Derrick*, 519 F.2d 1, 3 (6th Cir.1975). A sentence based on a defendant's refusal to accept a plea bargain, even if only in part, infringes upon the defendant's right to trial. *United States v. Stockwell*, 472 F.2d 1186, 1187-1188 (9th Cir.1973).

A trial court violates due process when it imposes an enhanced sentence motivated by vindictive retaliation for exercising a constitutional right. *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Vindictiveness on the part of a sentencing court is not presumed merely because the sentence imposed is harsher than one offered in plea

negotiations. *State v. Mitchell*, 117 Ohio App.3d 703, 706, 691 N.E.2d 354 (8th Dist.1997). To determine whether the court acted with vindictiveness, a reviewing court looks to see whether the record shows retaliation as a result of the rejected plea agreement. *State v. Warren*, 125 Ohio App.3d 298, 307, 708 N.E.2d 288 (8th Dist.1998). Additionally, "the record must show that no improper weight was given to the failure to plead guilty * * * [and] must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." *Columbus v. Bee*, 67 Ohio App.2d 65, 75, 425 N.E.2d 409 (10th Dist.1979), quoting *United States v. Stockwell*, 472 F.2d 1186, 1187-1188 (9th Cir.1973).

When the statements of the sentencing court create an inference that the defendant received an enhanced sentence motivated by vindictive retaliation for exercising his right to a trial, an appellate court must determine whether the record also contains an unequivocal statement that the sentence was not based on the decision to go to trial. *Scalf* at 621. *See also United States v. Hutchins*, 757 F.2d 11, 14 (2d Cir.1985); *Stockwell* at 1187. Absent an unequivocal statement, the sentence must be vacated, and the matter remanded for resentencing. *Scalf* at 621.

Here, the trial court addressed Mr. Rahab at a pretrial hearing to discuss the agreement offered by the State. The court warned Mr. Rahab that it "does not look highly on cases where people don't take responsibility and accept that they did something wrong if they're found guilty. You understand that? Meaning [the sentence] would probably be more." After Mr. Rahab was found guilty, the court repeatedly questioned his decision to go to trial and expressed its displeasure that Mr. Rahab chose a trial over the plea agreement.

The court admonished Mr. Rahab numerous times because he refused to accept the plea agreement and instead went to trial with no defense. The court further admonished him for traumatizing the victim for a second time by going to trial. When Mr. Rahab apologized for the offense, the court retorted twice that the apology should have come before the trial. Throughout the sentencing, he court repeatedly referred to his exercise of his right to trial as a "gamble" that Mr. Rahab "lost."

The record affirmatively demonstrated the sentencing court vindictively punished Mr. Rahab for exercising his right to a trial and refusing to plead guilty. Moreover, the record shows the court gave improper weight to his decision go to trial when imposing sentence. In announcing the sentence, the court stated: "Well, guess what, you lost your gambling. You did this. You had no defense, and you wouldn't take responsibility. You wanted to go to trial. All right, big winner you are. Six years Ohio Department of Corrections." After demonstrating the sentence was based on the refusal to accept a plea, the trial court failed to make an unequivocal statement that the sentence was not based on the decision to go to trial.

Although, the trial court's statements affirmatively demonstrated Mr. Rahab was excessively punished for going to trial, the First District Court of Appeals erroneously concluded "the record" supported the sentence. *State v. Rahab*, First District Hamilton No. C–150186, p.3 (October 7, 2015). But the First District failed to determine whether the trial court made an unequivocal statement the sentence was not based on Mr. Rahab's decision to go to trial. *Scalf* at 621. Once the *Rahab* Court acknowledged the statements were "inappropriate" and "could have been deemed to have crossed the line from impermissible commentary to a punishment for exercising the constitutional right to a jury trial," *Rahab* at p.3, it was required to review the record for an unequivocal statement that the sentence was not based on the decision to go to trial.

Id. And here, the record contains no unequivocal statement to overcome the overwhelming evidence that the court imposed a vindictive sentence in retaliation for Mr. Rahab's decision to exercise his constitutional right to a trial. *Id.*

IV. Conclusion

Because the record affirmatively demonstrates the trial court punished Mr. Rahab for exercising his right to trial, this Court should reverse the First District Court of Appeals and remand the case for resentencing.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of Appellant's Merit Brief was served via email on Scott Heenan, Assistant Prosecuting Attorney, on June 5, 2016.

Marguerite Slagle

Appendix

Supreme Court of Ohio Clerk of Court - Filed November 23, 2015 - Case No. 2015-1892

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Appellee,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
v.	:	
MALIK RAHAB,	:	Court of Appeals Case No. C-1500186
Appellant.	:	

NOTICE OF APPEAL OF APPELLANT MALIK RAHAB

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Notice of Appeal of Appellant Madison Griffin

Appellant Malik Rahab hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-1500186 on October 7, 2015.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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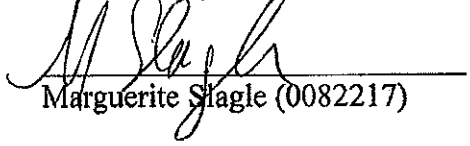
CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was served by email to Scott Heenan, Hamilton County Prosecutor, at scott.heenan@hcpros.org on November 23, 2015.



Marguerite Slagle (0082217)

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

D112201952

STATE OF OHIO,	:	APPEAL NO. C-150186 TRIAL NO. B-1404871
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
MALIK RAHAB,	:	
Defendant-Appellant.	:	

ENTERED
OCT 07 2015

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Malik Rahab was indicted for burglary, a felony of the second-degree. After rejecting an offer from the state to recommend an agreed sentence of three years' imprisonment in exchange for a guilty plea, Rahab elected to have his case tried before a jury. Rahab was found guilty as charged, and the trial court imposed a sentence of six years' imprisonment.

Rahab has appealed, arguing in his sole assignment of error that the sentence imposed was contrary to law because the trial court had punished him for exercising his constitutional right to a jury trial. A defendant should never be punished for rejecting an offered plea and exercising his or her right to a jury trial. *See State v. Stafford*, 158 Ohio App.3d 509, 2004-Ohio-3893, 817 N.E.2d 411, ¶ 14 (1st Dist.),

citing *State v. O'Dell*, 45 Ohio St.3d 140, 543 N.E.2d 1220 (1989). When the record demonstrates that "(1) the trial court engaged in plea or sentence bargaining, (2) a tentative sentence was discussed, and (3) a harsher sentence followed a breakdown in negotiations," a presumption exists that the trial court imposed a harsher sentence because the defendant failed to plead guilty. *Id.* at ¶ 15. To overcome this presumption, the record must establish that the trial court imposed the sentence solely based on the facts of the case at hand and the defendant's history, rather than as a punishment for exercising the right to a jury trial. *Id.*

Here, the trial court did not directly engage in plea negotiations. But after Rahab rejected the offered plea, the trial court did inform him that

> The charge that you're facing now, sir, carries a potential sentence of two to eight. There's the presumption that you go to prison, okay? And if you didn't take the agreed sentence and you were found guilty, it would be up to the Court to sentence you. And the Court does not look highly on cases where people don't take responsibility and accept that they did something wrong if they're found guilty. You understand that? Meaning it would probably be more.

After Rahab was found guilty, the trial court made the following statements: "So I don't understand why you wouldn't admit to that and plead to that, and you had to have a trial * * *"; "You went to trial. You gambled, you lost. You had no defense"; "He went to the trial with a prove-it defense. He had absolutely no defense. They had his fingerprints. He gambled, he lost"; and "You did this. You had no defense, and you wouldn't take responsibility. You wanted to go to trial. All right, big winner you are. Six years Ohio Department of Corrections."

ENTERED
OCT 07 2015

These comments were not necessary, were inappropriate, and, absent the following circumstances, could have been deemed to have crossed the line from permissible commentary to a punishment for exercising the constitutional right to a jury trial. But the record indicates that Rahab had an extensive juvenile record, including adjudications for receiving stolen property and robbery. His juvenile record additionally contained ten adjudications for violations of court orders, demonstrating an unwillingness to comply with directives from the court. Further, while Rahab did apologize for his actions at the sentencing hearing, he additionally attempted to blame his attorney for forcing him to take his case to trial. The trial court could plausibly have found that Rahab's offered apology was disingenuous. Last, Rahab was found guilty of a felony of the second degree, which the trial court correctly noted carried a presumption of incarceration.

The record establishes that the trial court based Rahab's sentence on his personal history and the facts of the case, including the trauma suffered by the victim of Rahab's offense, rather than as a punishment for exercising his right to a jury trial.

Rahab's assignment of error is overruled, and the judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., FISCHER and MOCK, JJ.

To the clerk:

Enter upon the journal of the court on _____

per order of the court _____.
Presiding Judge

ENTERED
OCT 07 2015