Supreme Court of Ohio Clerk of Court - Filed July 26, 2016 - Case No. 2015-1892

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2015-1892
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
MALIK RAHAB	:	Court of Appeals Case Number C-150186
Defendant-Appellant	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE

Joseph T. Deters (0012084P)
Prosecuting Attorney

Scott M. Heenan (0075734P)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3227
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

MARGUERITE SLAGLE
Attorney at Law
Hamilton County Public Defender's Office
230 E. 9th St., 2nd Floor
Cincinnati, Ohio 45202
(513) 946-3838

COUNSEL FOR DEFENDANT-APPELLANT, MALIK RAHAB

Table of Contents

Page

Table of Authorities ii

Introduction 1

Statement of the Case and Facts 2

Argument in Support of State's Proposition of Law 7

State's Proposition of Law: There is no presumption of judicial vindictiveness when a defendant receives a higher sentence after trial than was offered during plea negotiations. Absent clear and convincing evidence 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 that the trial court took part in, a trial court is presumed to have properly sentenced a defendant. 7

Should such proof exist, then an appellate court may only vacate or modify the sentence if it finds by clear and convincing evidence that the record does not support the sentence. 7

Conclusion 16

Proof of Service 17

Appendix A-1

Table of Authorities

Page

Cases from the Supreme Court of the United States

Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) 8-9
Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) 8. 11, 14
Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) 8
Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) 11
Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) 8
North Carolina v. Pearce, 395 U.S. 711, 89, S.Ct. 2072, 23 L.Ed.2d 656 (1969) 8-11
Wasman v. United States, 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984) 8

Cases from the Supreme Court of Ohio

State v. Marcum, ___ Ohio St. 3d ___, 2016-Ohio-1002, ___ N.E.3d ___ 10
State v. O'Dell, 45 Ohio St. 3d 140, 543 N.E.2d 1220 7

Cases from the Ohio Appellate Courts

State v. Ambriez, 6th Dist. Lucas No. L-03-1051, 2004-Ohio-5230 14
State v. Holmes, 6th Dist. Lucas No. L-08-1034, 2009-Ohio-6255 14
State v. Petrik, 3rd Dist. Crawford No. 3-10-06, 2010-Ohio-3671 13
State v. Richmond, 2nd Dist. Greene No. 2011-CA-17, 2011-Ohio-6807 13
State v. Scalf, 126 Ohio App. 3d 614, 710 N.E.2d 1206 (8th Dist. 1998) 12
State v. Stafford, 158 Ohio App. 3d 509, 2004-Ohio-3893, 817 N.E.2d 411 ..... 7, 10
State v. Warren, 125 Ohio App. 3d 298, 708 N.E.2d 288 (8th Dist. 1998) 14
State v. Zeune, 10th Dist. Franklin No. 10AP-1102, 2011-Ohio-5170 13

Other Federal Cases

United States v. Cruz, 977 F.2d 732, 733 (C.A.2, 1992) 14
United States v. Stockwell, 472 F.2d 1186, 1187 (C.A. 9 1973) 14

Ohio Revised Code

R.C. 2929.12(D)(5) 9
R.C. 2929.12(E)(5) 9

Introduction

In this case, this court will address how Ohio courts will review allegations that a defendant was improperly punished by exercising their right to a trial. Malik Rahab wants this court to rule that, in some circumstances, such an unconstitutional and vindictive judicial act must be presumed. The state, however, suggests that such a serious allegation against a court cannot stand without clear and convincing proof to back it up.

This case also presents the question of what a reviewing court should do if a defendant does present clear and convincing evidence suggesting that a trial court may have improperly punished a defendant for exercising their constitutional rights. Rahab suggests that a trial court must make a statement on the record that this was not a reason behind the defendant's sentence. The state, however, suggests that a reviewing court must look at the entire record.

As this court will see, the trial court in this matter did not involve itself with plea or sentencing negotiations. It will also see that the trial court based Rahab's sentence off of the purposes and principles of Ohio sentencing law.

Because the trial court was not involved in plea and sentencing negotiations, Rahab is unable to present clear and convincing proof that the trial court impermissibly punished him for rejecting the state's plea offer. And even if that were not the case, Rahab cannot overcome the fact that the record shows the trial court's sentence was based upon permissible sentencing factors, such as his criminal history and lack of remorse.

This court should, therefore, adopt the state's proposition of law and affirm the First District's finding that the trial court properly sentenced Rahab.

Statement of the Case and Facts

A. The trial court verified for the record that Rahab was offered a plea deal and chose to go to trial instead.

Before trial, the court asked "[j]ust for the record" whether "there had been any type of plea negotiations." Trial Tr. at 2. The prosecution stated that they had offered to recommend a three year sentence in exchange for a guilty plea, but Rahab had rejected the offer. *Id.* at 2-3. The court then made sure that Rahab himself, not his attorney, had made this decision:

> THE COURT: Okay, Sir, you understand that the State is offering to do an agreed sentence of three years in prison. The charge that you're facing now, sir, carries a potential sentence of 2 to 8. . . . 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 probably would be more. I'm not going to fool you. You understand that?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And so you don't want to accept the three that they're offering?
>
> THE DEFENDANT: No, ma'am.

Id. at 3-4. The case then went to trial before a jury.

B. An Ohio jury convicted Rahab of burglary after he broke into the victim's residence at night and stole property.

At night on July 14, 2014, Malik Rahab entered the home of Christine Hewitt by opening a window from the outside, reaching in, and stealing her purse from an inside table. Trial Tr. at 393-95. Fingerprints left on the window connected Rahab to the crime scene. *Id.* at 401-02. The defense presented no witnesses and no case. *Id.* at 390-91. Rahab offered no alibi. *Id.* In closing argument, Rahab's counsel argued only that the fingerprints were smudged, and the prosecution's expert may have made a mistake, but presented no reason to believe that a mistake had been made. *Id.* at 403-408. The jury convicted Rahab of burglary.

C. At sentencing, Rahab said he wanted to plead guilty but was prevented by his attorney; he soon admitted that the decision had in fact been his own.

The trial court's decision to verify that Rahab had in fact voluntarily refused the plea deal proved prescient. At sentencing Rahab asserted that he had actually wanted to plead guilty all along, but that his attorney had made him go to trial.

> THE DEFENDANT: I never wanted to take it to trial, but I listened to my attorney. . . .
>
> THE COURT: . . . Is that true? It's your life, it's your case, you get to decide if you want to go to trial or not. In fact, I think the State offered you something didn't they?

Id. at 452.

The court proceeded to carefully question the defendant about whether he or his lawyer had made the decision to go to trial. It began by asking why Rahab had not taken the plea deal. He explained:

> THE DEFENDANT: Because ain't – I didn't think it was worth what I did, three years.
>
> THE COURT: Do you know what you're looking at now? Do you know what you're looking at now?
>
> THE DEFENDANT: No, ma'am.
>
> THE COURT: Eight years. I told you that when they offered you three. So, you know, I'm a little perplexed that you're saying you didn't think three was fair and you're telling me that your attorney made you go to trial. And now you're telling me that you did it. You did it, didn't you, right?
>
> THE DEFENDANT: (Nodding.)

Id. at 453. This answer was inconsistent with his prior statement that he had wanted to take the plea deal. The court pointed out the inconsistency:

> THE COURT: 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.

Id. at 453-54. Rahab then returned to his earlier claim that he did not want to go to trial:

THE DEFENDANT: I never wanted to.

THE COURT: You never -- but – the trial was about you. You're the one charged. What do you mean you never wanted to. So why did you? Why did you?

THE DEFENDANT: Because I never been through this before and I was listening to people. I told her – I told her from the beginning I didn't want to take it trial.

THE COURT: Who told you?

THE DEFENDANT: Her. She said, well, you can fire me. And I didn't want to go through all that.

THE COURT: Fire her for what?

THE DEFENDANT: Pleading out.

THE COURT: Because she didn't want to enter a plea for you?

THE DEFENDANT: (Shaking head.)

THE COURT: She wanted to go to trial?

THE DEFENDANT: Yeah.

THE COURT: She wanted to go to trial, not you?

THE DEFENDANT: No, I didn't want to go to trial.

THE COURT: Then why when we asked you, when I asked you if you wanted three years on the record -- I asked you, not her, because she's your attorney – this is really all about you; she doesn't do the time, you do -- *why, when I asked you if you wanted to take three years from the State, she didn't say no, you did? So can you explain that?*

THE DEFENDANT: (Shaking head.) I ain't think it was fair.

THE COURT: Okay, that's fine. *So you chose not to take the three, not her, you, right?*

THE DEFENDANT: Yeah.

Id. at 454-456 (emphasis added).

D. The Court sentenced Rahab to six years after not crediting his statement of remorse, noting the impact on the victim, and accounting for his extensive juvenile history.

The court was unimpressed with Rahab's decision to blame his lawyer. Only after admitting that he, not his lawyer, did not want to go to trial, did the defendant express remorse:

> THE DEFENDANT: I know what I did was wrong and I learned from it. And I want better than this. This ain't what I want. And I'm sorry for what I did.
>
> THE COURT: I sure wish I would have heard that before the trial.

Id. at 456. The court pointed to defendant's earlier statements blaming his lawyer as evidence that Rahab's apology was not genuine:

> THE COURT: He went to the 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.

Id. at 460. Blaming his attorney and attempting to deceive the court suggested Rahab was only sorry he got caught, not that he committed the crime.

The court also looked at the impact on the victim. She had just moved into the home when she was robbed and had to move out as a result of it: "This woman is – it's destroyed her. She had to move. I mean, she's working two jobs, going to school, trying to make a life for herself. She just moved in and he did this." *Id.* at 459.

The court also looked at Rahab's "extensive juvenile record with 22 adjudications and 34 delinquency contacts." *Id.* at 465. After getting into trouble as a minor, Rahab was assigned to a residential program. *Id.* at 462. His case manager in that program, though, would not ask for a reduced sentence:

> CASE MANAGER: So it was -- you know, it's been difficult working with him, and, like I said, he was noncompliant in a lot of different areas. So, you know, we're supportive of whatever decision you make at this time. . . .

Id. at 464. The court concluded that Rahab's "juvenile record" was "horrible." *Id.*

Weighing these factors, the court rejected Rahab's argument blaming counsel and sentenced Rahab to six years, explaining:

> THE COURT: The thing I don't like is your attitude. You're throwing your attorney under the bus. This is all about you; it's your decision. 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.

Id. at 469-470. Rahab's lack of genuine remorse, the impact on the victim, and Rahab's extensive record led to a within-guidelines sentence in the mid- to upper-range.

Rahab appealed, arguing that the "the trial court had punished him for exercising his constitutional right to a jury trial." Op. at 1. The First District disagreed. It refused to apply a presumption of vindictiveness and noted that the trial court "did not directly engage in plea negotiations." *Id.* at 2. The appeals court found that some of the trial court's statements were "not necessary" and "inappropriate" but did not rise to actual vindictiveness. *Id.* at 3. The record showed "Rahab had an extensive juvenile record" and "an unwillingness to comply with directives from the court." *Id.* Based on Rahab's attempt to blame his attorney, it was "plausibl[e]" to find Rahab's apology "disingenuous." *Id.* In sum, "[t]he 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." *Id.* Rahab then filed this appeal.

Argument in Support of State's Proposition of Law

State's Proposition of Law: There is no presumption of judicial vindictiveness when a defendant receives a higher sentence after trial than was offered during plea negotiations. Absent clear and convincing evidence 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 that the trial court took part in, a trial court is presumed to have properly sentenced a defendant.

Should such proof exist, then an appellate court may only vacate or modify the sentence if it finds by clear and convincing evidence that the record does not support the sentence.

There is no question that trial courts cannot impose a "trial tax" by punishing defendants who exercise their Constitutional right to have the state prove their guilt. *State v. O'Dell,* 45 Ohio St. 3d 140, 543 N.E.2d 1220, paragraph two of the syllabus. The State absolutely agrees that punishing someone for exercising any of their constitutional rights is wrong.

The question here is, when a defendant alleges that he was punished for exercising his right to go to trial, how should appellate courts review that allegation?

The First District Court of Appeals reviewed Rahab's allegation and, using its *State v. Stafford* test, 158 Ohio App. 3d 509, 2004-Ohio-3893, 817 N.E.2d 411, ¶ 15, found that there was no presumption of vindictiveness in this matter. In *Stafford,* a trial court had involved itself in plea negotiations and threatened to increase Stafford's sentence if he was found guilty after a trial. After a jury found him guilty, the trial court carried through on its threat. *Stafford* found that there was "actual vindictiveness – or at least a presumption of vindictiveness that the state has not rebutted – on the trial court's part." *Id.* at ¶ 27. That was based off of the court finding that the trial court had (1) engaged in plea or sentence bargaining, (2) a tentative sentence was discussed, and (3) a harsher sentence followed a breakdown in those negotiations. *Id.* at ¶ 15.

While the *Stafford* test takes appropriate factors into consideration, this court should find that there is no presumption of vindictiveness and, instead, defendants must present clear and convincing evidence of vindictiveness.

A. There is no presumption of judicial vindictiveness when a trial leads to a higher sentence than was offered during plea negotiations.

There is but one occasion in which there is a presumption of judicial vindictiveness: when a defendant receives a harsher punishment after a successful appeal. *North Carolina v. Pearce,* 395 U.S. 711, 725, 89, S.Ct. 2072, 23 L.Ed.2d 656 (1969). That presumption, of course, can be rebutted when the record demonstrates there are reasons for the harsher sentence. *Id.* at 726. And, despite having had multiple opportunities to do so, the United States Supreme Court has repeatedly refused to extend *Pearce*. *Wasman v. United States,* 468 U.S. 559, 566, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). *See, also*, *Colten v. Kentucky*, 407 U.S. 104, 117, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), and *Alabama v. Smith,* 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Notably, in *Alabama v. Smith,* the Court ruled that "no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial." *Smith, supra,* 490 U.S. at 795. As the Court has recognized, the essence of plea bargaining is to secure a lesser sentence than would be imposed after a trial. *See Brady v. United States,* 397 U.S. 742, 752, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), and *Bordenkircher v. Hayes,* 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). So it is unsurprising that Rahab was offered less time during the plea bargaining stage of his matter. And, as the record reveals, the trial court did nothing more than make sure that Rahab knew what was being offered to him before he went to trial.

It is equally unsurprising that Rahab received a greater sentence after trial because of all the information that the trial court learned during the trial. A trial judge typically has "considerably less" information during a plea than it possesses after a trial. *Smith, supra,* 490 U.S. at 801. "[I]n the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present." *Id.* (internal citations omitted).

Even *Pearce* recognizes this by allowing a defendant to receive a harsher sentence after a successful appeal if new information in the record justifies the harsher sentence. *Pearce, supra,* 395 U.S. at 726. Here, as the First District noted, 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." Op. at 3. Rahab's trial gave the court a greater insight into who Rahab was and what he had done than it possessed at the plea stage of the proceedings..

Not only was Rahab's personal history something that the court developed knowledge of, it also gained a sense of his remorse or, in this case, his lack thereof. Ohio's sentencing guidelines direct courts to consider a defendant's remorse when sentencing a defendant. R.C. 2929.12(D)(5) & (E)(5). Ohio recognizes that a defendant's lack of remorse is a "factor[] indicating that the offender is likely to commit future crimes." R.C. 2929.12(D). Here, instead of indicating any hint of remorse, Rahab informed the trial court that he did not feel that his violation of someone's home was worth three years while also claiming that he really did not want to go to trial but was, instead, forced into doing so by his attorney.

The only time a presumption of judicial vindictiveness exists is when a defendant receives a harsher punishment after a successful appeal. *Pearce, supra.* The standard of review found in *Stafford*, therefore, improperly allows for a presumption of vindictiveness. There should be no such presumption. Instead, as this court requires for other alleged sentencing errors, a defendant should be required to prove by clear and convincing evidence that a trial court improperly punished them for exercising their right to a trial. *See State v. Marcum,* ___ Ohio St. 3d ___, 2016-Ohio-1002, ___ N.E.3d ___, ¶ 23 ("an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.")

B. The *Stafford* test does offer guidance on what a defendant needs to prove by clear and convincing evidence to support an allegation of vindictiveness.

The *Stafford* test does offer guidance on what would need to be proven to demonstrate that a trial court vindictively sentenced a defendant. If a defendant presents clear and convincing evidence that (1) the trial court engaged in plea or sentencing bargaining, (2) that a tentative sentence was discussed, and (3) a harsher sentence followed a breakdown in negotiations that the trial court took part in, then an appellate court should review the entire record to see if the sentence is supported by the record. Applying that test here shows that Rahab has failed to show that he was improperly punished for taking his case to trial.

First, the trial court did not engage in plea negotiations. The offer below was not the trial court's offer; it was the State's offer. As the record shows, the trial court only made sure that Rahab was aware of the state's plea offer. It shows that the trial court was making sure that Rahab was acting in a knowing, intelligent, and voluntary manner when he opted to reject the state's offer. It does not show the trial court taking part in the negotiations behind that offer.

Second, while a tentative sentence of three years was discussed, the trial court was only relaying what the state had offered. The trial court had no involvement in reaching the tentative sentence. That was all done by the state.

Third, while a harsher sentence was imposed after plea negotiations broke down, the trial court was not involved in those negotiations.

Looking at the three factors found in *Stafford*, one thing stands out – the trial court needs to be actively involved in the plea negotiations for there to be even a suggestion of vindictiveness. As the Court has ruled over the years, even *Pearce's* presumption does not apply when different entities impose a harsher sentence. *See, e.g., Chaffin v. Stynchcombe,* 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) (*Pearce* does not apply where a jury imposed the increased sentence on retrial); and *Bordenkircher v. Hayes, supra,* 434 U.S. 357 (due process clause is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges if the defendant does not plead guilty to the original charges).

Finally, even if he had shown all three of those things, the record shows that Rahab's sentence was fully justified. As the trial court explained, it was imposing a sentence based upon the "horrible" criminal history that, in spite of multiple people trying to help him, Rahab had built up. It was based on the facts of the case which showed that Rahab absolutely committed the underlying offense. It was based on Rahab continuing to refuse to accept responsibility for his actions at sentencing and, instead, blaming his defense attorney for forcing him to go to trial. And, working in his favor, it was based off of the mitigating evidence Rahab's brother presented to the court. The record, therefore, shows that the trial court properly sentenced Rahab.

C. Proof and the record should be the standard, not inferences and talismanic words.

The standard of review the state is suggesting requires a defendant to present proof of his allegation that a trial court was vindictive, while also requiring consideration of the entire record to see if the trial court's sentence was properly imposed. Rahab, on the other hand, argues that when there are statements from a trial court that create a possible inference that a defendant received an enhanced sentence based off of taking a matter to trial, then the sentence should be reversed unless the trial court makes an unequivocal statement that the sentence was not based on the decision to go to trial. Appellant's Merit Brief at p. 4, citing *State v. Scalf,* 126 Ohio App. 3d 614, 710 N.E.2d 1206 (1998).

In other words, while the state is asking this court to establish a standard of review based upon proof and the record, Rahab wants inferences and magic words.

Adopting Rahab's proposition of law would do nothing more than cause this matter to be remanded so the trial court could append, "I am not punishing you for taking the matter to trial," to its previous sentencing statements. When the record taken as a whole shows that a defendant was not punished for exercising their rights, then there should be no reason for a trial court to state what the record already shows. (Likewise, when the record taken as a whole shows that a defendant was punished for exercising their rights, then a simple statement at sentencing should not be allowed to bless such a constitutional violation.)

Even courts that have relied on *Scalf* have looked at the record as a whole to see if the trial court improperly engaged in plea negotiations before considering whether an improper trial tax had been imposed.

In *State v. Richmond,* the Second District looked to see if the trial court had involved itself in plea negotiations. It noted that the trial court had indicated that it would have accepted a

plea bargain that would have avoided a jail sentence, but then imposed 180 days in jail after a trial. But it also noted the facts of the case and Richmond's criminal history when it ruled that the trial court properly sentenced Richmond. *State v. Richmond,* 2nd Dist. Greene No. 2011-CA-17, 2011-Ohio-6807.

In *State v. Petrik*, the Third District looked to see if the trial court had been involved in plea negotiations before moving on to see if facts of the case justified the trial court's sentence. *State v. Petrik*, 3rd Dist. Crawford No. 3-10-06, 2010-Ohio-3671, ¶ 30-31.

Notably, even when trial courts have made an unequivocal statement on the record, reviewing courts still have reviewed the record to make sure that the imposed sentence is proper under the facts and circumstances of the case. *State v. Zeune*, 10th Dist. Franklin No. 10AP-1102, 2011-Ohio-5170, ¶ 23-28.

Reviewing courts should always review the record as a whole to see if a defendant was properly sentenced, not whether a few talismanic words were uttered. Requiring an unequivocal statement in cases such as this does nothing other than elevate form over substance. This court should, therefore, adopt the State's proposition of law that requires both proof and a full review of the record.

D. The arguments of amicus, allegedly filed in support of Rahab, defy reason and reality.

As noted above, there should be no presumption of vindictiveness in this or any case simply because of earlier plea negotiations. The amicus brief, allegedly filed in support of Rahab's arguments (it refers to the case he primarily relies upon as "flimsy"), would have this presumption apply anytime there are any plea negotiations that involve less time than what is ultimately imposed by the trial court.

Instead of Rahab's "flimsy" argument, Amicus argues that this court should instead rule that anytime a trial court imposes a harsher sentence than was offered in a plea bargain, then there must be a presumption of a trial tax that can only be overcome by clear and convincing evidence that the trial court had objective evidence that justified the increase. Amicus' argument would apply to any plea offer, even if it was one the trial court was entirely ignorant of.

As anyone who has been a prosecutor knows, there are often multiple and varied reasons why the state will make plea offers to defendants. It could be to protect victims from having to testify. It could be to seek cooperation on another case. It could be that the state is concerned that one of its witnesses may not show or will present poorly on the stand. Defendants considering whether to accept such an offer also have to run through those same types of considerations. This was recognized by the United States Supreme Court in *Bordenkircker v. Hayes. Supra,* 434 U.S. 357.

Ultimately, however, a guilty plea is often a huge indicator of remorse. As multiple courts have found, there is nothing wrong with a trial court imposing a lesser sentence on defendants who are willing to admit their guilt. *See, for example, State v. Warren,* 125 Ohio App. 3d 298, 708 N.E.2d 288 (8th Dist. 1998) citing *United States v. Cruz*, 977 F.2d 732, 733 (C.A.2, 1992); and *State v. Holmes*, 6th Dist. Lucas No. L-08-1034, 2009-Ohio-6255, ¶ 30, quoting *State v. Ambriez*, 6th Dist. Lucas No. L-03-1051, 2004-Ohio-5230, ¶ 21, and *United States v. Stockwell*, 472 F.2d 1186, 1187 (C.A. 9 1973). The undersigned knows, for example, of trial judges who will never impose a maximum sentence on someone who pleads guilty on even the most heinous crimes because of the defendant being willing to admit to their guilt since it is a sign of remorse.

Plea and sentencing bargaining takes place in almost every criminal case in not just Ohio, but in the United States. In many of those cases, initial offers are rejected and harsher penalties are imposed for a plethora of valid reasons. Amicus would have something that happens in criminal cases everyday create an automatic presumption of judicial vindictiveness. No court has ever gone so far. No court ever should. Amicus' argument, therefore, should be rejected.

Conclusion

Absent clear and convincing evidence 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 that the trial court took part in, a trial court is presumed to have properly sentenced a defendant.

Should such proof exist, then an appellate court may only vacate or modify the sentence if it finds by clear and convincing evidence that the record does not support the sentence.

In this matter, the trial court was not involved in plea or sentencing bargaining. While a tentative sentence was discussed, those discussions were between the state and Rahab. While a harsher sentence followed trial, that trial revealed much that was not otherwise in consideration during the plea negotiation stage of Rahab's case. Nothing in the record shows that the trial court impermissibly punished Rahab for exercising his right to take this matter to trial.

Instead, it shows that the trial court based its sentence on Rahab's lack of responsibility, lack of remorse, and criminal history. Since Rahab has not shown clear and convincing proof of vindictiveness and since the record, taken as a whole, shows that he was properly sentenced, this court should adopt the State's proposition of law and should affirm this matter.

Respectfully,

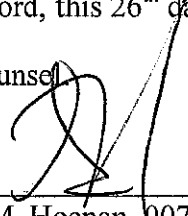
Joseph T. Deters, 0012084P
Prosecuting Attorney

Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3227
Attorneys for Plaintiff-Appellee, State of Ohio

Proof of Service

I hereby certify that I have sent a copy of the foregoing Merit Brief to Marguerite Slagle via email to MSlagle@cms.hamilton-co.org, counsel of record, this 26th day of July, 2016.

Courtesy copies have also been issued to amicus counsel.



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney

Appendix – Ohio Revised Code 2929.12

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing; was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code; was under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code; was under transitional control in connection with a prior offense; or had absconded from the offender's approved community placement resulting in the offender's removal from the transitional control program under section 2967.26 of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.