

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

MALIK RAHAB,

Appellant.

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Case No. 2015-1892

On Appeal from the Hamilton  
County Court of Appeals,  
First Appellate District

REPLY BRIEF OF APPELLANT MALIK RAHAB

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**I. The record does not support the State's claim that Mr. Rahab's sentence was based on his personal history and the facts of the case.**

The State's argument the sentence was based on Mr. Rahab's personal history and the facts of the case is without merit. (Merit Brief of Appellee-Plaintiff, p. 9). Specifically, the State argues: (1) new information gleaned from the trial justified the sentence; (2) Mr. Rahab's remorse was not genuine; and (3) his personal history and trauma suffered by the victim justified the sentence. Even if the trial court gave other valid reasons for the sentence, it does not dispel the inference that the court based its sentence upon the refusal to accept the plea and the decision to go to trial. *See State v. Fritz*, 178 Ohio App.3d 65, 2008-Ohio-4389, 896 N.E.2d 778, ¶ 30 (2d Dist.) (finding any other sentencing factors discussed did not dispel the glaring inference in the court's comments that refusal to plead was a factor involved in fashioning the sentence). A review of the record reveals the sentence was based on Mr. Rahab's decision to exercise his right to trial.

**A. No new information gleaned from the trial justified a more severe sentence because the facts at trial showed Mr. Rahab's conduct was less serious than the State initially thought.**

Before the trial started, the court asked Mr. Rahab's counsel to explain the defense theory for trial after Mr. Rahab refused to accept the plea. T.p. 4. Counsel explained Mr. Rahab's defense was that he did not enter the house. T.p. 4. Upon further questioning, counsel further confirmed to the court the theory was that Mr. Rahab did not enter the home. T.p. 4-5.

The State's theory was that Mr. Rahab was guilty of a home invasion. T.p. 109. The State believed Mr. Rahab climbed into the house through a window, and while in the house, awakened one of the homeowners, Ms. Hewitt. T.p. 206-207. At trial, however, Ms. Hewitt testified she did not hear a noise; she just woke up because she had enough sleep. T.p. 218, 222.

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By the end of trial, the State realized there was no evidence Mr. Rahab had completely entered the home. T.p. 398-399.

The State requested a jury instruction that “[e]ntry of any body part, however slight, into or onto the premises of another is sufficient to prove an entrance has occurred.” T.p. 364-365. Mr. Rahab objected to the instruction, and the court overruled the objection because “your defense is he didn’t enter in at all, he was never there, it wasn’t him.” T.p. 367. Then, Mr. Rahab’s counsel acknowledged the defense theory had changed from Mr. Rahab did not enter the house to Mr. Rahab was not there. T.p. 367.

During the closing, the State described Mr. Rahab as “[s]omeone who otherwise might be a good person, but when an opportunity was right there, they made a bad decision.” T.p. 409. The State explained to the jurors that Mr. Rahab saw the purse, opened the window, climbed on a bucket, reached in, and took the purse. T.p. 411-412. The State’s evidence did not support its initial theory that Mr. Rahab entered the home and woke up Ms. Hewitt. The facts at trial confirmed Mr. Rahab’s conduct was less serious than conduct normally constituting burglary and less serious than the State initially believed. Therefore, the facts gleaned at trial supported a less severe sentence.

**B. The trial court improperly equated Mr. Rahab’s decision to go to trial with a lack of remorse.**

When a trial court equates a lack of remorse with the decision to go to trial, “the inference that appellant’s sentence was augmented because he chose to stand trial is unavoidable.” *State v. Ambriez*, 6th Dist. Lucas No. L-03-1051, 2004-Ohio-5230, ¶ 24. *See also State v. Turner*, 9th Dist. Summit No. 27210, 2014-Ohio-4460, ¶ 24-25 (concluding the judge’s statements that by going to trial, Turner did not accept responsibility, and Turner’s remorse was

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insincere because he claimed to accept responsibility only after being convicted, created an inference Turner's sentence was based on his decision to go to trial).

Here the trial court equated the decision to go to trial with a lack of remorse. After the State summarized the plea offer on the record, the court warned Mr. Rahab he would probably be sentenced more severely for going to trial because "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." T.p. 4.

At the sentencing hearing, the court improperly focused on Mr. Rahab's decision to go to trial "with a prove-it defense." Mr. Rahab admitted his guilt to probation and to the court. T.p. 451-452. Instead of determining whether his remorse was sincere, the court wanted to know why Mr. Rahab went to trial in the first place, and why he "didn't [ ] take the three years that was offered?" T.p. 452. Mr. Rahab explained that he thought three years was excessive based on his actual conduct. T.p. 453, 455. When the State offered its plea, the plea was based on its belief Mr. Rahab was guilty of a home invasion that awakened the homeowner, and not Mr. Rahab's actual conduct.

The court continued to question his decision to go to trial. The court was "perplexed" that Mr. Rahab thought three years was unfair and could not understand why he insisted on a trial instead of accepting the plea. T.p. 453. Mr. Rahab tried to explain that he did not want to go to trial, but did so because he felt the plea deal was unfair. T.p. 454-456. Again, the court asked him to explain why he refused the three years when the court asked him if he wanted to accept the plea before trial. T.p. 454-456.

Even when Mr. Rahab expressed remorse the court replied "I sure wish I would have heard that before trial." T.p. 456. The court reiterated its belief that once a defendant exercises

the right to trial, it is too late to express remorse: "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." T.p. 460.

Before imposing sentence, the court improperly questioned defense counsel about the decision to go to trial. The court told counsel "he threw you under the bus. Is there anything you want to say? He said he didn't want to go to trial; he only went to trial because you told him to." T.p. 467. Defense counsel confirmed that Mr. Rahab "didn't want to go to trial but he didn't want to plead to three years," but those were his only two options. T.p. 468. The court retorted: "Yeah, they pretty had them. I mean, it really was a prove-it defense. They had him. Okay." T.p. 468. The court equated his "bad attitude" to his decision to go to trial, and its belief Mr. Rahab threw his attorney under the bus. T.p. 469.

The trial court equated the alleged lack of remorse with Mr. Rahab's decision to go to trial, and "the inference that appellant's sentence was augmented because he chose to stand trial is unavoidable." *Ambriez*, at ¶ 24.

**C. Mr. Rahab's personal history and the trauma suffered by the victim did not justify the sentence.**

Although the trial court noted Mr. Rahab's "horrible" juvenile record, Mr. Rahab was never sent to DYS, and many of his contacts were probation violations. T.p. 469, 467. The brief reference to the juvenile history did not dispel the glaring inference the sentence was based on the decision to go to trial. *Fritz* at ¶ 30.

Even the court's statements regarding the victim's trauma focused on the decision to go to trial. The court admonished Mr. Rahab for admitting he had taken the purse, "yet you put this

woman through this trial again. You traumatized her by breaking into the house. And you had to traumatize her again to relive it and go to trial. I don't get it." T.p. 454. Again the court improperly emphasized Mr. Rahab's decision to go to trial when considering the harm to the victim. Although the trial court may have given valid reasons for the sentence, the court's numerous statements regarding Mr. Rahab's refusal to accept the plea did not overcome the inference the sentence was vindictive. *See Fritz* at ¶ 30.

**II. An inference of vindictiveness arises when the record shows a reasonable likelihood that an increase in sentence over that offered in a plea agreement is the product of actual vindictiveness on the part of the sentencing judge.**

The State claims the "only time a presumption of judicial vindictiveness exists is when a defendant receives a harsher punishment after a successful appeal." (Merit Brief of Plaintiff-Appellee, p. 10). To the extent that a presumption is the equivalent of an inference, the State is wrong. Numerous appellate courts in Ohio have found a sentence must be vacated if the court creates an inference a defendant was punished for going to trial unless the sentencing court clearly states the decision to go to trial was not considered in imposing sentence. See e.g. *Ambriez*, at ¶ 25; *Fritz* at ¶ 3; *Turner* at ¶ 22; *State v. Mayles*, 7th Dist. No. 04CA808, 2005-Ohio-1346, ¶ 45; *State v. Scalf*, 126 Ohio App.3d 614, 620, 710 N.E.2d 1206 (1998); *State v. Noble*, 12th Dist. Warren, No. CA2014-06-080, 2015-Ohio-652, ¶ 12.

The inference is limited to those situations in which there is a reasonable likelihood that the increase in sentence is the product of vindictiveness on the part of the sentencing court. See *Alabama v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). When there is no such reasonable likelihood, the burden of proof remains on the defendant to establish actual vindictiveness. *Id.*, citing *Wasman v. United States*, 468 U.S. 559, 569, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). Impropriety will not be presumed solely because the sentence was greater

than the negotiated plea. *Mayles* at ¶ 46. However, if the statements of the sentencing court give rise to the inference an enhanced sentence was imposed in retaliation for the exercise of the right to a trial, the record must affirmatively show the sentence was not based on the decision to go to trial. *Columbus v. Bee*, 67 Ohio App.2d 65, 67, 425 N.E.2d 409 (10th Dist.1979) quoting *United States v. Stockwell*, 472 F.2d 1186, 1187-1188 (9th Cir. 1973).

**A. The inference applies whether or not the trial court was involved in plea negotiations.**

The State claims “the trial court needs to be actively involved in the plea negotiations for there to be even a suggestion of vindictiveness.” (Merit Brief of Plaintiff-Appellee, p. 11). The State is wrong. Although participation in the plea negotiations is a factor in some cases, the critical issue is whether the court’s statements gave rise to the inference the sentence was based on the defendant’s refusal to plead. *State v. Mayles*, 7th Dist. No. 04CA808, 2005-Ohio-1346, ¶ 45, citing *State v. Scalf*, 126 Ohio App.3d 614, 620, 710 N.E.2d 1206 (1998).

Whether or not the court actively participates in the plea negotiations, the court must refrain from creating the appearance that the failure to plead will result in a more severe sanction. *State v. Turner*, 9th Dist. Summit No. 27210, 2014-Ohio-4460, ¶ 22, citing *State v. Jackson*, 9th Dist. Lorain No. 12CA010155, 2012-Ohio-4872, ¶ 10. In *Turner*, the prosecutor summarized the plea offer on the record. When Turner rejected the plea, the sentencing court warned him:

When someone refuses to accept responsibility and if the jury convicts them, I take that into account, so I indicated to your attorney that, if you were to plead guilty and accept responsibility, then I will probably give you [c]ommunity [c]ontrol and maybe some house arrest, but that, after a trial, if you are convicted, in light of your record, that would not be the case. You know, it would be more likely you would be going to prison, so that’s the way it is.

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*Id.* at ¶ 23. At the sentencing hearing, the court discussed Turner's refusal to take responsibility by going to trial, his lack of remorse for not accepting responsibility until after the conviction, and the additional stress on the victim and witnesses. *Id.* at ¶ 24. The *Turner* Court vacated the sentence finding the judge's remarks before trial and at the hearing "created the appearance that she sentenced Turner to prison, rather than community control, because he chose to proceed to trial rather than accept a plea offer." *Id.* at ¶ 25.

Here, as in *Turner*, the court did more than simply put the plea offer on the record. The court participated in the plea discussions. After the prosecutor put the plea on the record, and defense counsel confirmed Mr. Rahab did not wish to accept the offer, the court directly addressed Mr. Rahab. The court warned him the sentence would be more if he did not accept the plea, take responsibility, and accept that he did something wrong. After warning him, the court asked him "[a]nd so you don't want to accept the three that they're offering?" T.p. 4. When he declined, the court immediately questioned defense counsel regarding the theory of defense.

The court became involved in the plea offer when it hinted Mr. Rahab's sentence would be greater if he refused the plea and then attempted to get him to accept the plea. The court's pretrial remarks improperly implied any future sentence hinged on his decision to exercise his right to trial and created the appearance that the failure to plead would result in a more severe sanction. *Id.* at ¶ 22; *Jackson* at ¶ 10.

**B. Where there is no reasonable likelihood the sentence resulted from judicial vindictiveness, then the burden of proof remains on the defendant to prove actual vindictiveness by clear and convincing evidence.**

The State asks this Court to reject the inference of vindictiveness standard, and instead require a defendant to prove actual vindictiveness by clear and convincing evidence. (Merit

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Brief of Appellee-Plaintiff, p. 8). The State further argues that even if the record shows vindictiveness, the sentence should not be vacated unless the record does not support the sentence. (Merit Brief of Appellee-Plaintiff, p. 16).

The State's approach ignores the fact that the presumption is designed to prevent the "vindictiveness of the sentencing judge." *See Alabama v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). The presumption was premised on the need to guard against sentences based on a vindictive purpose and to secure defendants' constitutional rights. *See id.* The application is limited to cases where there is a reasonable likelihood the sentence is based on vindictiveness by the sentencing court. *See id.* Absent a reasonable likelihood of vindictiveness, the burden is on the defendant to prove the vindictiveness. *See id.*

When the court's statements show a reasonable likelihood of vindictiveness, as they do here, the inference applies. *See id.* A review of the record here leaves the inference un rebutted, and the record does not affirmatively show the sentence was not based on the decision to go to trial. *Bee* at 67. When the record fails to contain an unequivocal statement the sentence was not based on vindictiveness, the sentence must be reversed. *Scalf* at 621. *See also State v. Morris*, 159 Ohio App.3d 775, 825 N.E.2d 637, 2005-Ohio-962, ¶ 13 (4th Dist.); *Mayles*, at ¶ 45.

**C. The State is correct that that a remand to the sentencing court is not an effective remedy for judicial vindictiveness.**

The State points out that remanding the case to the sentencing court to allow the court to "append, I am not punishing you for taking the matter to trial," would "bless such a constitutional violation." (Merit Brief of Appellee-Plaintiff, p. 12). However, the sentence must be supported by the record. Therefore, Mr. Rahab would ask this Court to vacate the unconstitutional sentence and order the sentence reduced under R.C. 2953.08(G)(2). In the

alternative, Mr. Rahab requests this Court to vacate the sentence and remand for a resentencing before a different judge. See *Wilson v. State*, 845 So.2d 142, 159, 28Fla.L.Weekly S311 (2003) (holding “in cases where an un rebutted presumption of judicial vindictiveness arises, we conclude that the appropriate remedy is resentencing before a different judge”). See also *Fritz* at ¶ 31 (concluding “that a different judge must resentence because the trial court’s statement suggesting only the innocent have the right to trial evidences a bias and fundamental misconception of appellant’s constitutional right to a jury trial.”)

### III. 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 either reduce the sentence or remand the case for resentencing before a different judge.

Respectfully submitted,

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### Certificate of Service

I hereby certify that a copy of Appellant’s Reply Brief was served via email on Scott Heenan, Assistant Prosecuting Attorney and Counsel for Amici, Eric E. Murphy and Christopher Pagan on August 15, 2016.

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