COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2654-CR **Cir. Ct. No. 2005CF189**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGELIO R. RODRIGUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Rogelio R. Rodriguez successfully moved, pursuant to WIS. STAT. § 971.08(2) (2013-14)[1] and ***State v. Douangmala***, 2002

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

WI 62, 253 Wis. 2d 173, 646 N.W.2d 1, to vacate his conviction and withdraw his guilty plea on grounds that the trial court failed to personally advise him of deportation consequences as § 971.08(1)(c) requires. He asserts that his lengthier new sentence violates his right to be free of double jeopardy. We affirm.

¶2 Rodriguez, a Mexican citizen, has resided in the United States since 1996. In 2005 he pleaded guilty to operating a vehicle while under the influence of an intoxicant (OWI), fifth or greater offense. The sentence imposed by Judge John Race comprised two years' initial confinement (IC) and three years' extended supervision (ES). His sentence was stayed in favor of three years' probation. Rodriguez was discharged from probation in 2008.

¶3 In 2013, Rodriguez successfully sought vacatur and leave to withdraw his 2005 plea based on the defective plea colloquy. He then entered a new guilty plea to the 2005 OWI violation. Judge David Reddy sentenced him to eighteen months each of IC and ES. His 400 days of sentence credit included the 360 days he had served in jail as a condition of his 2005 probation.

¶4 Rodriguez appeals. He argues that Judge Reddy's harsher sentence violates the prohibition against double jeopardy because it is a second punishment for the same OWI offense.

¶5 The fifth amendment to the United States Constitution and art. I, sec. 8 of the Wisconsin Constitution protect criminal defendants from being subjected to double jeopardy. The protection germane here is the safeguard against multiple punishments for the same offense. "Whether an individual has been placed in jeopardy twice for the same offense is a question of law that this court reviews de novo." ***State v. Clark***, 2000 WI App 245, ¶4, 239 Wis. 2d 417, 620 N.W.2d 435.

¶6 The double jeopardy guarantee does not preclude resentencing if the conviction is vacated. ***State v. Martin***, 121 Wis. 2d 670, 682, 360 N.W.2d 43 (1985). A court may impose a more severe sentence on resentencing, but its reasons for doing so must "affirmatively appear" and cannot be the result of vindictiveness. ***North Carolina v. Pearce***, 395 U.S. 711, 725-26 (1969), *overruled in part on other grounds*, ***Alabama v. Smith***, 490 U.S. 794 (1989). ***Pearce*** has been interpreted as applying "a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." ***United States v. Goodwin***, 457 U.S. 368, 374 (1982). "'[T]he evil the [***Pearce***] Court sought to prevent' was not the imposition of 'enlarged sentences after a new trial' but 'vindictiveness of a sentencing judge.'" ***Smith***, 490 U.S. at 799 (second alteration in original; citation omitted).

¶7 Here there is objective information in the record justifying the increased sentence. Unlike Judge Race, Judge Reddy had the benefit of a PSI and COMPAS risk assessment tool. Also, the parties at the 2005 sentencing had stipulated to a joint recommendation, the rationale for which does not appear in the first sentencing transcript. At the 2014 hearing, however, they presented sentencing arguments that fleshed out aggravating and mitigating factors.

¶8 Judge Reddy found the most applicable sentencing objectives to be the protection of the community, punishment and rehabilitation of the defendant, and deterrence of others. He explained that probation would depreciate the severity of fifth-offense OWI, that progressive punishment dictates a prison sentence,[2] and that treatment could best be provided through confinement.

[2] Rodriguez received a 360-day jail sentence for his fourth OWI.

¶9 No reasonable likelihood of vindictiveness exists when a different judge undertakes the resentencing. *See* ***State v. Naydihor***, 2004 WI 43, ¶¶34-35, 270 Wis. 2d 585, 678 N.W.2d 220. Beyond that, nothing in Judge Reddy's actual remarks suggests that he had a motive to retaliate against Rodriguez for successfully challenging the previous sentence. *See* ***id.***, 270 Wis. 2d 585, ¶55. The ***Pearce*** presumption therefore does not apply. ***Naydihor***, 270 Wis. 2d 585, ¶¶35, 55. Even if it did, the objective information in the record justifying the increased sentence would have overcome it. *See* ***id.***, ¶33.

¶10 "[W]here the presumption does not apply, the defendant must affirmatively prove actual vindictiveness." ***Wasman v. United States***, 468 U.S. 559, 569 (1984); ***Naydihor***, 270 Wis. 2d 585, ¶33. Rodriguez does not address vindictiveness at all, however. He argues instead that the analytical framework for double jeopardy is the defendant's legitimate expectation of finality in the sentence, which may be influenced by factors such as the completion of the sentence and the passage of time. *See* ***State v. Jones***, 2002 WI App 208, ¶10, 257 Wis. 2d 163, 650 N.W.2d 844. He contends his resentencing unsettled the expectation of finality he had once he completed the sentence Judge Race imposed and almost six years passed since his discharge from probation.

¶11 The record does not bear out his expectation-of-finality claim. Upon successfully withdrawing his plea and having his conviction vacated, Rodriguez requested a jury trial. When he decided to plead guilty, the plea questionnaire and waiver of rights form informed him that the court was not bound by the parties' negotiations or recommendations but could sentence him to the maximum penalty. As he did not supply a transcript of the plea hearing, we presume it would show that the trial court confirmed his understanding on the record. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979).

¶12 Finally, Rodriguez asserts that, as the legislature enacted WIS. STAT. § 971.08(2) to be curative, it did not intend the statute to allow increased penalties when a defendant exercises the remedy provided. Besides raising the argument for the first time on appeal, he points to nothing in the language of the statute or in the legislative history demonstrating that intent. Rather, he cites ***Douangmala***, 253 Wis. 2d 173, ¶31, where the supreme court observed that the legislative history persuaded it that "the legislature intended what the statute explicitly states." The statute does not state, explicitly or implicitly, that an increased penalty is forbidden on resentencing.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.