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Bowser v. State of Nevada, 135 Nev. Adv. Op. 15 (May 16, 2019)

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APPELLATE LAW: SENTENCING IN A NEW TRIAL

Summary

The Court overruled precedent which held that a presumption of vindictiveness applies when a judge imposes a longer sentence after a new trial.

Background

Following his first trial, Appellant Terrance Bowser was convicted on six counts: first degree murder with use of a deadly weapon (count 2), discharging a firearm out of a window (count 4), discharging a firearm into a structure or vehicle (count 6), and three additional conspiracy charges. The district court sentenced him to two consecutive terms of life with the possibility of parole after 20 years on the murder charge, 24-60 months on count 4, and 12-60 months on count 6, all to run concurrent.

Bowser appealed the conviction. The conviction was reversed and remanded for a new trial. On remand, Bowser was tried for the same 6 counts but with a different judge presiding. Bowser was convicted of voluntary manslaughter, instead of first-degree murder, and was convicted on counts 4 and 6. He was acquitted of the three conspiracy charges. The district court conducting the retrial sentenced Bowser to 2 consecutive terms of 48-120 months on count 2, 48-120 months on count 4 to run consecutive with count 2, and 28-72 months on count 6 to run consecutive with count 4. Bowser then appealed the new conviction because of the harsher sentences on counts 4 and 6.

Discussion

Majority Decision

A presumption of vindictiveness applies when a judge of a new trial imposes a harsher sentence than the sentence given by the original district court judge.² The presumption may be overcome if the more severe sentence is based on objective indicators which appear on the record.³

In calculating whether Bowser's new sentence was more severe than that of the original trial, the Supreme Court analyzed the new sentence count-by-count. Under the count-by-count method, Bowser received longer sentences for count 4 and 6. Furthermore, the new sentence on count 4 was to run consecutive whereas originally it would be concurrent. Therefore, the majority held that the new sentence was more severe than the original sentence.

The presumption of vindictiveness only applies when "there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority."⁴ Here, the Court concluded that the presumption does not

¹ By Andrew Brown.

² *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969).

³ *Id.* at 726.

⁴ *Alabama v. Smith*, 490 U.S. 794, 799 (1989).

apply where a different judge imposes a harsher sentence after retrial than the original judge. In such circumstances, the likelihood of vindictiveness from the second judge is minimal. Judges have broad discretion in sentencing, and any difference in the two sentences reflects this discretion.

Stiglich, J., concurring in part and dissenting in part

Judge Stiglich concurs with the majority's decision to use the count-by-count approach to determine the length of the sentence. He also concurs that Bowser's second sentence was harsher than the first. However, Stiglich disagrees with the majority's bright line rule that a presumption of vindictiveness does not occur if a second judge imposes a longer sentence after retrial than the first judge imposed originally. Instead, Stiglich writes that the presumption should not apply only when the second judge articulates objective, nonvindictive rationale for the longer sentence.⁵

Conclusion

Applying the majority's rule here, the second district court judge's longer sentence did not violate Bowser's due process rights. Therefore, the judgment of conviction from the second trial is affirmed.

⁵ Holbrook v. State, 90 Nev. 95, 98, 518 P.2d 1242, 1244 (1974).