

2012 IL App (1st) 101550-U

SECOND DIVISION
August 7, 2012

No. 1-10-1550

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 04 CR 5567
)	
RONALD ROBINSON,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly resentenced defendant to same prison terms as original sentence. Where court had erroneously applied 10-year enhancement statute in imposing 16-year original sentences and this court remanded for resentencing, trial court did not violate statute prohibiting increased sentences upon resentencing because an invalid sentence does not trigger the statute. Court did not abuse its discretion by allegedly applying the enhancement on remand: there was ample proper basis for 16-year sentences on remand, and no evidence that the resentencing court was engaging in vindictiveness for defendant's appeal.

¶ 2 This case comes before us following a remand for resentencing and concerns the statutory limits on resentencing. Following a jury trial, defendant Ronald Robinson was convicted of two

counts of aggravated criminal sexual assault and sentenced to consecutive 16-year prison terms. Each term included a 10-year enhancement for displaying a dangerous weapon. On appeal, we found that the enhancement did not apply to defendant's offenses and remanded for resentencing. *People v. Robinson*, No. 1-06-2537 (2008)(unpublished order under Supreme Court Rule 23). On remand, the court imposed the same sentence of two consecutive 16-year prison terms. On appeal, defendant contends that his new sentence violates the statute generally prohibiting an increase of sentence on remand for resentencing. 730 ILCS 5/5-5-4(a) (West 2010). He also contends that the court abused its discretion by considering the inapplicable enhancement in resentencing him.

¶ 3 The jury convicted defendant of two distinct separately-charged sexual assaults against the same victim. The aggravation charged and found by the jury was that defendant threatened the victim with an object that he led the victim to reasonably believe was a dangerous weapon. At sentencing, following evidence and arguments in aggravation and mitigation, the court sentenced defendant to "the minimum time allowed under the law," that is, "16 years in the Illinois Department of Corrections on each count *** each to run consecutive to the other." The court noted that "the add-on is included in the sentence. I don't have to say six years plus ten years." The mittimus similarly stated two counts of aggravated criminal sexual assault, each with a sentence of 16 years.

¶ 4 On appeal, we affirmed the convictions against an insufficient-evidence claim. However, we found that the dangerous weapon enhancement (720 ILCS 5/12-14(d)(1)(West 2010)) had not taken effect until January 1, 2003, and thus did not apply to defendant's offenses of September 19, 2002. We remanded "for a new sentencing hearing" to "provide the trial court an opportunity to reevaluate the situation and resentence defendant to a proper term within the statutory guidelines." *Robinson*, No. 1-06-2537, at 8.

¶ 5 On remand, the court ordered a new pre-sentencing investigation report. At the sentencing hearing, the court heard evidence regarding another sexual assault by defendant, committed after the instant offenses but before his conviction thereon. Defendant argued that this evidence was irrelevant because a sentence cannot be increased upon resentencing except for defendant's conduct occurring after the original sentencing. *See* 730 ILCS 5/5-5-4(a) (West 2010). Defendant also called character witnesses. Following arguments in aggravation and mitigation, the court sentenced defendant to "16 years in the Illinois Department of Corrections" for each of the two counts, to be served consecutively. The mittimus similarly stated two counts of aggravated criminal sexual assault, each with a sentence of 16 years to be served consecutively. Defendant filed an unsuccessful motion to reconsider his sentence, and this appeal timely followed.

¶ 6 On appeal, defendant primarily contends that his 16-year prison sentences upon resentencing violate the statutory prohibition on increasing sentences upon remand for resentencing except for conduct following the original sentencing. In essence, defendant contends that he received two sentences – six years, followed by the improper 10-year enhancement – for each offense so that the trial court was required by the statute at issue to not increase the sentences for his two offenses beyond six years each.

¶ 7 Section 5-5-4(a) of the Code of Corrections (Code) provides:

"Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the more severe sentence is based upon conduct on the part of the

defendant occurring after the original sentencing." 730 ILCS 5/5-5-4(a) (West 2010).

¶ 8 The "purpose of section 5-5-4 of the Code is to ensure the due process rights set forth in *Pearce* by preventing vindictiveness in resentencing a defendant for having exercised his appeal rights or his right to file a post-judgment motion." *People v. Woolsey*, 278 Ill. App. 3d 708, 710 (1996), citing *North Carolina v. Pearce*, 395 U.S. 711 (1969). Where a defendant is resentenced because his original sentence was illegal, there is no basis for attributing the new sentence to vindictiveness for the appeal and thus "*Pearce* and section 5-5-4 of the Code are not implicated." *Woolsey*, 278 Ill. App. 3d at 710. Therefore, "section 5-5-4 of the Code only applies to an original sentence within statutory limits imposed upon an erroneously obtained conviction or to an original sentence within statutory limits later held to have been obtained or aggravated in error" and conversely "does not apply to the correction of an illegal sentence." *Id.* at 710.

¶ 9 This court has previously addressed and rejected a claim substantially identical to the one before us. *People v. Barnes*, 364 Ill. App. 3d 888 (2006). We note that *Barnes* concerned section 5-4.5-50(d) of the Code – at the time, section 5-8-1(c) of the Code – which provides regarding post-sentencing motions in the trial court that a "court may not increase a sentence once it is imposed." 730 ILCS 5/5-4.5-50(d) (West 2010). We also note that section 5-5-4(a) and former section 5-8-1(c) have been read *in pari materia* as they share the common purpose of implementing the *Pearce* anti-vindictiveness doctrine. See *People v. Moore*, 177 Ill. 2d 421, 431-33 (1997).

¶ 10 In *Barnes*, a defendant was originally sentenced to 25 years' imprisonment for attempted first degree murder, or 10 years for the underlying offense with a 15-year firearm enhancement but, upon the grant of a post-sentencing motion noting correctly that the particular enhancement had been held unconstitutional, was resentenced to 17 years' imprisonment. The *Barnes*

defendant contended that the new 17-year sentence violated former section 5-8-1(c). We noted that, as in the instant case, this contention "necessarily presumes that the trial court's recognition of the invalidity of the enhancement statute left a valid 10-year sentence which could not then be increased. We do not agree with this presumption." *Id.* at 897. The *Barnes* court noted that, while the trial court had referred to the original sentence in terms of its component parts of 10 years and a 15-year enhancement, nothing in the actual pronouncement of that sentence suggested "that the penalty imposed for attempted murder consisted of distinct, independent prison terms rather than a single 25-year sentence." *Id.* at 897. Lastly, the *Barnes* court had erred in passing the original sentence, erroneously believing that a 15-year sentence enhancement was mandated by statute, and this "mistake of law *** rendered the sentence entered on the charge voidable." *Id.* at 898. Because "only valid sentences may serve as the baseline for assessment of compliance with prohibitions against increase," *Id.* at 898, citing *People v. Garcia*, 179 Ill. 2d 55 (1997), there was no violation of the statutory ban on increasing a sentence.

¶ 11 Defendant argues that we should not follow *Barnes* because it relies upon *People v. Ridley*, 345 Ill. App. 3d 1091 (2004), which was subsequently vacated by our supreme court in a supervisory order that also directed this court to reconsider in light of *People v. Sharpe*, 216 Ill. 2d 481 (2005). *People v. Ridley*, No. 97877 (December 1, 2005). The *Barnes* court cites *Ridley* to refute *Barnes*' argument that *People v. Baker*, 341 Ill. App. 3d 1083 (2003), stood for the proposition that when an enhancement is found to be invalid, the enhanced portion must be vacated and the remainder of the sentence must stand. *Barnes*, 364 Ill. App. 3d at 897. The court in *Barnes*, citing to *Ridley*, found that *Baker* did not hold that such a remedy was mandated, stating: "This court did not hold, as defendant contends, the defendant's sentence in *Baker* had to

be set at 5 years as a result of subtracting the 15-year enhancement from the 40 years imposed initially by the trial court." *Ridley*, 345 Ill. App. 3d at 1093.

¶ 12 In *Ridley*, the trial court found the defendant guilty of armed robbery and sentenced him to 6 years in prison, plus an additional 15-year enhancement. In November 2002, the defendant appealed, arguing that the 15-year sentence enhancement must be vacated in light of the supreme court's holding in *People v. Walden*, 199 Ill. 2d 392 (2002), which found that the enhancement statute used to sentence the defendant was unconstitutional. This court, in light of *Walden*, vacated defendant's enhancement and remanded for a new sentencing hearing. The defendant filed a memorandum of law arguing that the trial court was required to sentence defendant to six years in prison, but the trial court sentenced defendant to 15 years. The defendant then appealed. *Ridley*, 345 Ill. App. 3d at 1092.

¶ 13 On appeal, defendant argued that *Baker* mandated that an enhancement be subtracted from the original sentence. We disagreed and affirmed the decision of the trial court, finding that the *Baker* court made no such mandate. *Ridley*, 345 Ill. App. 3d at 1093.

¶ 14 Subsequently in 2005, our supreme court issued its opinion in *People v. Sharpe*, 216 Ill. 2d 481 (2005), which overruled *Walden*, finding that the sentencing enhancement at issue in *Walden* (and *Ridley*) was in fact constitutional. *Ridley* was then vacated by our supreme court in a supervisory order that directed the court to reconsider its decision in light of *Sharpe*. Accordingly, *Ridley* was vacated based on the constitutionality of the sentencing enhancement at issue in that case, not the remedy analysis, and the remedy analysis is the portion of the opinion that the *Barnes* court cites.

¶ 15 Moreover, while *Barnes* indeed cites *Ridley*, the *Barnes* court engaged in its own analysis and stands independently of *Ridley*, so that we are not relying on *Ridley* in following *Barnes*. In particular, *Barnes* noted that the original sentencing judge acted under an erroneous belief that

the 15-year enhancement was mandatory, so that the resulting sentence was voidable, and only a valid sentence can serve as the basis for the statutory prohibitions on increased sentences.

Similarly, while defendant puts considerable weight on the instant trial court's original sentencing pronouncement that it was imposing the minimum sentence required by law in sentencing defendant to 16 years' imprisonment for each count, the indisputable mistake of law in that statement places this case solidly under *Barnes*. Following *Barnes*, we conclude that the resentencing here did not violate section 5-5-4(a).

¶ 16 Defendant correctly points out that, in determining whether a sentence was improperly increased, we consider the individual sentences rather than the aggregate of the sentences imposed. *People v. Harris*, 366 Ill. App. 3d 1161, 1165-66 (2006), citing *People v. Carney*, 196 Ill. 2d 518 (2001). However, this rule arose in cases addressing consecutive and concurrent sentencing; that is, where the individual sentences from resentencing were longer than the individual original sentences, section 5-5-4(a) was violated even though the sum or aggregate of the sentences was not greater following remand than originally. (The converse is also true: section 5-5-4(a) is not violated where the individual sentences following remand have not increased even if the aggregate sentence has increased. *Harris*, 366 Ill. App. 3d at 1165-66.) That holding is based on the related rules that consecutive sentences do not constitute a single sentence but instead each conviction has a discrete sentence that must be treated individually, and that consecutive sentencing is not an enhancement of a defendant's sentence but merely a method by which the individual sentences are served. *Carney*, 196 Ill. 2d at 530-38. More to the point, it does not necessarily follow that the sentence for a single count of conviction that includes a statutory enhancement is thereby an aggregate sentence with each component treated as a separate sentence for purposes of section 5-5-4(a).

¶ 17 Defendant cites one case – *People v. Blanck*, 286 Ill. App. 3d 583 (1997) – to support the proposition that the applicability of section 5-5-4(a) to individual rather than aggregate sentences extends beyond consecutive and concurrent sentencing to sentencing enhancement or extension of a single offense. The *Blanck* defendant was convicted of aggravated criminal sexual assault and aggravated kidnapping and was sentenced to a 60-year extended prison term for the former and 13-year unextended term for the latter, to be served consecutively. On appeal, we reversed the aggravated criminal sexual assault conviction and remanded for resentencing on the aggravated kidnapping, directing the trial court to determine whether that offense could now receive an extended-term sentence since there was no longer a superseding greater offense. On remand, the court resentenced defendant to an extended 30-year term for aggravated kidnapping. Upon the *Blanck* defendant's appeal from the resentencing, we held that a sentence in excess of the original 13 years violated section 5-5-4(a). However, nowhere in *Blanck* did this court state or refer to defendant's proposition that an enhanced sentence for one offense is actually two separate sentences that legally rise or fall separately. In other words, *Blanck*'s holding that an extended term could not be added on resentencing does not support defendant's very different proposition: that where an enhancement was erroneously imposed at original sentencing, the resentencing court is limited to the unenhanced portion of the original sentence.

¶ 18 Lastly, defendant argues that "the equities" support his position, because the trial court stated at the original sentencing that it "intended to sentence[] [defendant] to the minimum available term" and because his "age, sentences from other offenses, and mandatory consecutive sentencing" render "any sentence much longer than the minimum *** a *de facto* natural life term." However, the court made this statement in the belief that any sentence it imposed would be increased by 10 years. The court's comments do not indicate its intent – much less binding intent – to give any particular sentence had it been aware of the actual sentencing range.

Moreover, if the error of applying the statutory enhancement *ex post facto* had not occurred in the original trial proceedings, defendant would have been subject to a sentencing range of 6 to 30 years' imprisonment for each of his two Class X offenses. 720 ILCS 5/12-14(d)(1); 730 ILCS 5/5-4.5-25(a) (West 2010). We see no inequity in the fact that he was subject to the same range on resentencing, as the purpose of appeals and remands is to place a defendant as close as possible to his rightful position, not something more than his rightful position.

¶ 19 For the reasons stated above, we conclude that section 5-5-4(a) was inapplicable here, where we remanded for resentencing due to an illegal original sentence, and thus the trial court on resentencing was limited only by the general sentencing range for defendant's offenses.

¶ 20 Defendant alternatively contends that the trial court abused its discretion by considering the improper 10-year enhancement in imposing sentence upon remand. However, as just stated, the court's discretion on remand encompassed a sentence for each offense within the generally-applicable Class X range of 6 to 30 years. The court had considerable support for a sentence of 16 years, including the instant offenses and defendant's other sexual assault offense shown at the resentencing hearing. Notably, the language of section 5-5-4(a) does not prohibit consideration during resentencing of actions prior to the original sentencing hearing but merely provides that a resentence longer than the original must be based on actions subsequent to the original sentencing hearing. Since the court here did not impose an increased sentence, it did not violate that proviso even if it were applicable. We conclude that the trial court, far from being vindictive because defendant appealed, acted upon ample grounds with admirable abundance of caution in sentencing defendant on remand.

¶ 21 Accordingly, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.