IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-758

Filed: 6 March 2018

Mecklenburg County, No. 15 CRS 241826-28; 16 CRS 9095

STATE OF NORTH CAROLINA

v.

SCOTT ALTON HILL, Defendant.

Appeal by Defendant from judgment entered 19 January 2017 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ann W. Matthews for the State.

Mark Montgomery, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Scott Alton Hill ("Defendant") appeals from a 19 January 2017 judgment entered after a jury convicted him of three counts of common law robbery, four counts of trafficking oxycodone, and two counts of trafficking hydrocodone. Defendant then pled guilty and obtained the status of an habitual offender.

On appeal, Defendant contends his exercise of the right to trial by jury and his rejection of a plea offer triggered the State to file superseding and additional charges resulting in prosecutorial vindictiveness. Defendant argues the trial court erred in denying his motions to dismiss fourteen indictments obtained after plea negotiations failed. We find no error.

I. Factual and Procedural Background

On 7 December 2015, a Mecklenburg County Grand Jury indicted Defendant on three counts of robbery with a dangerous weapon ("RWDW") in violation of N.C. Gen. Stat. § 14-87. On 22 March 2016, Defendant received a plea offer from Assistant District Attorney Kevin Minton ("Minton"). The offer required Defendant to plead guilty to all three counts of RWDW and obtaining habitual felon status in return for the State dismissing six counts of drug trafficking and a promise by the State not to seek violent habitual felon status. The offer provided Defendant with a consolidated sentence under the highest offense class of 117 to 153 months' imprisonment. On 23 March 2016, Defendant rejected the plea offer.

On 28 March 2016, the district attorney sought and the Mecklenburg County Grand Jury issued three superseding indictments charging Defendant with three counts of RWDW and added six counts of trafficking drugs. On the same date, a grand jury, for the first time, found Defendant obtained the status of violent habitual felon pursuant to N.C. Gen. Stat. § 14-7.7 and habitual felon status pursuant to N.C.

Gen. Stat. § 14-7.1. On 6 June 2016, the grand jury issued three additional indictments charging Defendant with possession of a firearm by a felon for offenses occurring 22 October 2015, 7 November 2015, and 18 November 2015.

On 10 January 2017 the case came on for trial. Defendant moved to dismiss asserting "the State of North Carolina and the District Attorney's Office acted vindictively in prosecuting the Defendant . . . with additional charges after he had been originally charged with three counts of robbery with a dangerous weapon." Counsel for Defendant contended:

> [A]fter the State's plea was rejected and the Defendant expressed through counsel on the record that he was, in fact, not guilty and wanted to go to trial, at that time as a result the State produced additional indictments totaling eleven . . . [a]nd there was a strong inference created that that was the only reason for the new charges, would be punitive or vindictive. . . . [T]o punish the Defendant because he has plainly done what the law allows him to do -- which was obtain a bond, plead not guilty, and insist on going to trial -- there's a due process violation.

The trial court denied the motion and stated:

> The Court finds that the Defendant has not been prejudiced, and that the State -- the State's actions in this case were not directed at the Defendant for purposes of punishment or being vindictive. . . . The Court finds that the Defendant's constitutional rights were not violated, and the Court denies the Defendant's motion to dismiss.

At trial, the State's witnesses offered substantially the same testimony. The State called: Tiffany Crabtree ("Crabtree"), a Walgreens pharmacist; Suzanna

Rountree ("Rountree"), a Harris Teeter pharmacist; and Kim Nguyen ("Nguyen"), a CVS pharmacist. The State's evidence tended to show the following narrative. On 22 October 2015, 7 November 2015, and 18 November 2015, Defendant entered Walgreens, Harris Teeter, and CVS, respectively, and unlawfully took and carried away Oxycodone in the form of Roxicodone[1], and Norco.

Each of the witnesses identified Defendant as the individual who robbed her respective pharmacy. First, the State called Crabtree, who testified Defendant "made the demand for Roxicodone to be put in a bag . . . or he would shoot [her]." Defendant carried away $5,410 of Oxycodone from Walgreens. Next, the State called Rountree, who stated Defendant told her he needed oxycodone and "lifted his shirt to show . . . his gun." Defendant carried away $36 of Roxicodone from Harris Teeter. Lastly, the State called Nguyen, who testified a man approached the counter, asked for Roxicodone, and "pulled up his shirt, where he had a gun strapped to his waist." Defendant carried away $1,800 of Norco from CVS.

After the State rested, Defendant called Dr. Morris McEwen ("McEwen"), a psychiatrist who is board certified in substance abuse and addiction. McEwen treated Defendant between 15 November 2013 and 31 July 2015. Defendant "look[ed] for [McEwen] to prescribe him medication called Suboxone.[2]" McEwen prescribed

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[1] Roxicodone is the "brand name" of oxycodone, and is classified as an opioid painkiller.

[2] Suboxone is a narcotic opiate blocker which "block[s] the effect of opiates being taken currently so that it has little or no psychological or chemical effect on the addict" and reduces an addict's craving for narcotics.

Defendant 8 milligrams of Suboxone after each visit. Regarding Defendant, McEwan testified:

> His condition was opiate addiction or dependence, ADHD, that would be the hyperactivity disorder, and in addition to it I put down that I felt - - and, again, from having seen him, that he was antisocial, that is, that his feelings about the system, obtaining drugs, getting drugs, using drugs, was distorted, that his feeling was that he deserved to have them.

Defendant took the stand. Defendant's first exposure to drugs was at age 5, when his mother gave him paregoric,[3] "to deal with [his] obnoxious behavior." Defendant used alcohol, prescription drugs, and narcotics, and "drugs became an integral part of [his] lifestyle." Defendant had no active recollection of robbing the pharmacies:

> If I could describe - - it's like when I left the house that morning - - each morning of the robbery, I remember leaving the house. My intent was not to rob anybody or go to any pharmacy. It's like that's where I went and that's what I did and I didn't think about it. I wasn't afraid. I wasn't - - it was like I didn't care. I didn't - - it's like there was no consciousness of it. It's hard to explain, because I've never been - - I've never been in that mental state before. I've been in some mental states, but I've never been in that mental state before.

[3] Paregoric contains 44 percent ethyl alcohol by volume, and .04 grams of anhydrous morphine.

At the close of Defendant's evidence, Defendant renewed his motion to dismiss. The State argued its evidence was sufficient "to go forward with the case." The trial court denied Defendant's motion.

On 18 January 2017, the jury returned a verdict finding Defendant guilty of three counts of common law robbery and six counts of trafficking drugs. Following the verdict, Defendant pled guilty and obtained habitual offender status. The trial court calculated twenty-one prior record points, and placed Defendant at a level VI. The trial court entered judgment on 19 January 2017.

The trial court consolidated counts II and III of Case No. 15 CRS 241826[4] and sentenced Defendant to 225 to 282 months' imprisonment and imposed a $500,000 fine for two counts of trafficking oxycodone. The trial court then consolidated counts II and III of case no. 15 CRS 241827[5] and counts II and III of case no. 15 CRS 241828,[6] and sentenced defendant to 117 to 153 months' imprisonment to run concurrently with Defendant's sentence for counts II and III of case no. 15 CRS 241826. Lastly, the trial court consolidated the three counts of common law robbery and sentenced

[4] Case No. 15 CRS 241826 refers to the 22 October 2015 offenses. Count I: common law robbery at Walgreens; count II: trafficking oxycodone by possession more than 28 grams; and count III: trafficking oxycodone by transportation more than 28 grams.

[5] Case No. 15 CRS 241827 refers to the 7 November 2015 offenses. Count I: common law robbery at Harris Teeter; count II: trafficking oxycodone by possession 4 grams or more but less than 14 grams; and count III: trafficking oxycodone by transportation 4 grams or more but less than 14 grams.

[6] Case No. 15 CRS 241828 refers to the 18 November 2015 offenses. Count I: common law robbery at CVS; count II: trafficking hydrocodone by possession of 14 grams or more; and count III: trafficking hydrocodone by transportation of 14 grams or more.

Defendant to 87 to 117 months' imprisonment. The trial court ordered Defendant's common law robbery sentence to run consecutively with Defendant's sentence for trafficking drugs. The trial court gave Defendant credit for 427 days spent in confinement prior to the date of his judgment. Defendant timely appealed.

II. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). *See also United States v. Wilson*, 262 F.3d 305, 316 (4th Cir. 2001).

III. Analysis

Defendant appeals the trial court's denial of his motion to dismiss on the grounds of prosecutorial vindictiveness. Prosecutorial discretion receives broad deference in the criminal justice system. Prosecutorial discretion enjoys a "presumption of regularity." *State v. Wagner*, 148 N.C. App. 658, 663, 560 S.E.2d 174, 177, *rev'd in part on other grounds*, 356 N.C. 599, 572 S.E.2d 777 (2002). *See generally Bordenkircher v. Hayes*, 434 U.S. 357, 364, 54 L. Ed. 2d 604, 611 (1978). The decision to charge a defendant and to prosecute rests entirely with the prosecutor, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute." *United States v. Armstrong*, 517 U.S. 456, 464, 134 L. Ed. 2d 687, 698 (1996). When charges are altered after an original indictment, a defendant's claim of prosecutorial vindictiveness "must be weighed against the State's discretion

to re-evaluate the evidence . . . and to make a decision on what charges to pursue." *Wagner* at 664, 560 S.E.2d at 177-78.

The United States Supreme Court first addressed the doctrine of presumed vindictiveness in *North Carolina v. Pearce,* 395 U.S. 711, 23 L. Ed. 2d 656 (1969), *overruled by Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989). There, the defendant was sentenced to a term of 12 to 15 years for assault with intent to rape. *Id.* at 713, 23 L. Ed. 2d at 662. Several years later, defendant initiated a post-conviction proceeding which resulted in a reversal of his conviction. *Id.* at 713, 23 L. Ed. 2d at 662. Defendant was retried, convicted, and sentenced by the trial court to an 8-year prison term, which, when added to the time defendant already spent in prison, amounted to a longer sentence than originally imposed. *Id.* at 713, 23 L. Ed. 2d at 662. The United States Supreme Court held whenever a judge imposes a more severe sentence upon a defendant after a new trial, the judge's reasons for doing so must be apparent. *Id.* at 726, 23 L. Ed. 2d at 670. If the record fails to contain such objective reasons, a reviewing court may presume vindictiveness. *Id.* at 726, 23 L. Ed. 2d at 670.

In *Blackledge v. Perry*, 417 U.S. 21, 40 L. Ed. 2d 628 (1974), the United States Supreme Court addressed a presumption of vindictiveness. In *Blackledge* the defendant, while imprisoned, had an altercation with another inmate. The State charged defendant with misdemeanor assault with a deadly weapon. *Id.* at 22, 40 L.

Ed. 2d at 631. The defendant was tried and convicted in district court, where he was sentenced to six-months' imprisonment to begin after the completion of his current prison term. *Id.* at 22, 40 L. Ed. 2d at 631. The defendant then filed a notice of appeal and requested a trial *de novo* in superior court. *Id.* at 22, 40 L. Ed. 2d at 631. After the defendant filed his notice of appeal, but before his trial, the State obtained a grand jury indictment charging the defendant with felony assault with a deadly weapon with intent to kill and inflict serious bodily injury. *Id.* at 23, 40 L. Ed. 2d at 631. This indictment for the greater charge covered the same occurrence of which defendant was tried and convicted of in district court. *Id.* at 23, 40 L. Ed. 2d at 631. The defendant pled guilty, and the trial court sentenced him to a term of five to seven years imprisonment, to be served concurrently with his current prison term.[7] *Id.* at 23, 40 L. Ed. 2d at 631-32. The Supreme Court concluded a defendant is entitled to pursue his statutory right to a trial *de novo* on appeal, without apprehension the State will retaliate by substituting a more serious charge for the original one. *Id.* at 28-29, 40 L. Ed. 2d at 634. In reaching its conclusion, the Court applied the same consideration as it did in *Pearce*, which is "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally

[7] Defendant premised his guilty plea on the expectation of any sentence he received in superior court would run concurrently with his current prison sentence. This is in contrast to the consecutive sentence defendant received in district court. However, by the time defendant's assault sentence commenced, defendant had already served most of his original sentence. The effect of the five to seven year sentence for felony assault increased defendant's confinement by 17 months, as opposed to the 6 month increase defendant received in district court.

attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the [State]." *Pearce* at 725, 23 L. Ed. 2d at 669.

The United States Supreme Court addressed whether the presumption of vindictiveness applied in a pretrial setting in *United States v. Goodwin*, 457 U.S. 368, 73 L. Ed. 2d 74 (1982). The defendant in that case requested a jury trial on alleged misdemeanors following unsuccessful plea negotiations with the State. *Id.* at 370, 73 L. Ed. 2d at 79. The State later indicted and convicted defendant on a felony charge, and the defendant alleged vindictive prosecution. *Id.* at 371, 73 L. Ed. 2d at 79. The Supreme Court concluded a presumption of vindictiveness did not apply in that pretrial setting. *Id*. at 384, 73 L. Ed. 2d at 87.

In an analysis of these three decisions, this Court stated:

> After considering the timing of the defendant's action, the *Goodwin* court analyzed the nature of the rights asserted–the not guilty plea and request for a jury trial– and concluded that these did not force the duplicative expenditure of prosecutorial resources as did the asserted rights in *Pearce* and *Blackledge*. In those cases, it was feared that the institutional bias against the retrial of decided issues and the possibility that a formerly convicted defendant might go free might motivate a retaliatory or vindictive reaction. The same considerations were not implicated by the pretrial plea of not guilty and request for a jury trial.

State v. Rogers, 68 N.C. App. 358, 381, 315 S.E.2d 492, 509 (1984).

This Court turned to *Goodwin* when considering possible vindictiveness in a

pretrial setting. This Court noted, "[t]o presume that every case is complete at the time an initial charge is filed, however, is to presume that every prosecutor is infallible–an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources." *Rogers* at 383, 315 S.E.2d at 509 (quoting *Goodwin* at 382 n.14, 73 L. Ed. 2d at 86). Additionally, "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." *Rogers* at 383, 315 S.E.2d at 509 (quoting *Goodwin* at 384, 73 S.E.2d at 87). This Court concluded, "[t]he presumption applies only where the *realistic* likelihood of actual vindictiveness is clearly demonstrated by circumstances such as existed in *Pearce* and *Blackledge*." *Rogers* at 383, 315 S.E.2d at 510.

The North Carolina Court of Appeals adopted the "pre-trial standard" articulated in *Goodwin* when confronted with alleged prosecutorial vindictiveness. In establishing prosecutorial vindictiveness, this Court held:

> [A] defendant is constitutionally entitled to relief from judgment if he can show through objective evidence that either: (1) his prosecution was *actually* motivated by a desire to punish him for doing what the law clearly permits him to do, or (2) the circumstances surrounding his prosecution are such that a vindictive motive may be presumed and the State has failed to provide affirmative evidence to overcome the presumption.

Wagner at 661, 560 S.E.2d at 176. Given the "prophylactic nature of th[is] presumption," this Court held the presumption applies only where the defendant

shows the circumstances "pose a realistic likelihood of vindictiveness." *Wagner* at 661-62, 560 S.E.2d at 176 (quoting *Blackledge* at 27, 40 L. Ed. 2d at 634).

In the instant case, Defendant admits he cannot show the State "intentionally caused injury or that injury was caused to the Defendant." Instead, Defendant contends the evidence raises a presumption of prosecutorial vindictiveness. We disagree.

At the time of his plea offer, the State obtained three indictments for robbery with a dangerous weapon. Defendant contends the State could have brought the accompanying drug trafficking charges at that time. However, Defendant contends the State waited for the outcome of plea negotiations in an effort to penalize Defendant. To support his argument, Defendant relies upon a decision from the Sixth Circuit Court of Appeals, which concluded "[g]enerally, a potentially vindictive superseding indictment must add additional charges or substitute more severe charges based on the same conduct charged less heavily in the first indictment." *United States v. Suarez*, 263 F.3d 468, 480 (6th Cir. 2001). While informative, this Circuit decision is not binding precedent.

In other cases our Court found no retaliatory motive where the State brought subsequent charges containing allegations known at the time of the first indictment. For example, in *State v. Wagner*, the defendant was arrested for attempted possession of cocaine and possession of drug paraphernalia. *Id.* at 660, 560 S.E.2d at 175.

Defendant plead guilty to attempted possession of cocaine while having a status as an habitual felon. *Id.* at 660, 560 S.E.2d at 175. Defendant received a mitigated sentence of 101 to 131 months. *Id.* at 660, 560 S.E.2d at 175. One year later, defendant filed a Motion for Appropriate Relief ("MAR") alleging an error in the calculation of his sentence. *Id.* at 660, 560 S.E.2d at 175. The trial court granted defendant's MAR and vacated defendant's guilty plea and set his sentence aside. *Id.* at 660, 560 S.E.2d at 175. Defendant's case was then assigned to a new prosecutor who obtained indictments charging defendant with attempted possession of cocaine, felonious possession of drug paraphernalia, and being an habitual felon. *Id.* at 660, 560 S.E.2d at 175. The prosecutor then offered defendant a second plea agreement which would result in a sentence identical to defendant's original sentence. *Id.* at 660, 560 S.E.2d at 175. Defendant rejected this offer and moved to dismiss the indictment for felonious possession of drug paraphernalia. *Id.* at 660, 560 S.E.2d at 175. The trial court denied defendant's motion. *Id.* at 660, 560 S.E.2d at 175. Defendant was convicted of both charges, and received consecutive sentences of 135 to 171 months. *Id.* at 660, 560 S.E.2d at 175.

The defendant in *Wagner* conceded he had "no direct evidence of actual vindictiveness on the part of the prosecutor[,]" but urged this Court to "presume a vindictive motive from the circumstances leading up to his felonious possession of drug paraphernalia indictment." *Id.* at 661, 560 S.E.2d at 176. This Court declined

to find the circumstances in *Wagner* presented a realistic likelihood of vindictiveness. *Id*. at 662, 560 S.E.2d at 177. This Court reasoned:

> Although the State could have originally sought an indictment for [the felony offense] after [defendant's] arrest, it did so only after he successfully challenged his guilty plea. This timing, by itself, does not necessarily lead to a conclusion that the indictment was likely to have been brought for a retaliatory purpose.

Id. at 662, 560 S.E.2d at 177. This Court then concluded:

> These actions on the part of the State cannot be said to have likely been the product of a vindictive motive but rather the result of an evaluation of the evidence and how defendant's case should proceed to trial. This is especially true in light of our criminal justice system's respect for the exercise of prosecutorial discretion which itself enjoys a "background presumption" of regularity.

Id. at 663, 560 S.E.2d at 177.

In this case, like *Wagner*¸ Defendant concedes he has no direct evidence of the State's vindictiveness. Rather, Defendant contends this Court should presume the State acted with vindictiveness since "there [was] no evidence that the State intended to [pursue additional charges] until after [Defendant] rejected the plea offer." This contention is without merit. Our review of the record reveals the State listed the pending drug charges at the bottom of the plea offer. Therefore, Defendant was aware of other possible charges. On 22 March 2016, Defendant received a plea offer which required Defendant to plead guilty to all three counts of RWDW and obtaining

habitual felon status in return for the State dismissing six counts of drug trafficking and the promise not to seek violent habitual felon status. We are therefore not persuaded by Defendant's claim he was unaware of the existence of other possible charges against him.

The prosecutor in *State v. Knox*, as here, obtained additional indictments following the defendant's rejection of a plea offer. In both *Knox* and here, those additional indictments were based on facts known at the time of the original indictment. *Knox*, 95 N.C. App. 699, 702, 383 S.E.2d 698, 700 (1989). In refusing to apply the presumption, this Court held:

> Absent any actual vindictiveness, "[t]he possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is certainly not warranted."

Id. at 703, 383 S.E.2d at 701 (quoting *Goodwin* at 384, 73 L. Ed. 2d at 87) (emphasis in original).

Defendant contends "there is no plausible explanation for the bringing of additional charges, other than to punish [Defendant] for going to trial." However, this case is indistinguishable from our prior decisions where we declined to find a presumption of vindictiveness. *See Wagner* at 663, 560 S.E.2d at 177; *Knox* at 703, 383 S.E.2d at 701; *Rogers* at 383, 315 S.E.2d at 510. We conclude it was entirely proper for the prosecutor in this case to seek additional charges against Defendant

once Defendant refused the State's plea agreement. Additionally, the United States Supreme Court cautioned nothing else appearing, "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." *Goodwin* at 384, 73 L. Ed. 2d at 87. The presumption of vindictiveness applies only where the *realistic* likelihood of actual vindictiveness is "clearly demonstrated by circumstances such as existed in *Pearce* and *Blackledge*." *Rogers* at 383, 315 S.E.2d at 510. Defendant in this case fails to demonstrate a realistic likelihood of vindictiveness, and a presumption of vindictiveness is wholly unwarranted under these circumstances. The Defendant has not shown he was denied due process here.

Defendant also contends the State failed to rebut the presumption of vindictiveness. However, the State need not rebut the presumption since we conclude the presumption of vindictive prosecution does not apply here. The State's plea offer was pre-trial, and we recognize the State's broad discretion in charging decisions and plea negotiations. Therefore, we conclude the State acted legitimately within its discretion after Defendant rejected the State's original plea offer and decline to find a presumption of prosecutorial vindictiveness.

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).