

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER WAYNE ANGELO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44388

FILED

JAN 12 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from an amended judgment of conviction, pursuant to a guilty plea, of two counts of lewdness with a child under the age of 14. Third Judicial District Court, Lyon County; David A. Huff, Judge.

Angelo was originally sentenced on December 10, 2001, to serve a prison term of life with the possibility of parole for each count and the terms were imposed to run concurrent. Following a direct appeal from the sentence, and stipulation from both parties that Angelo had been sentenced under an incorrect penalty statute, this Court remanded to the district court for a new sentencing proceeding.¹ At the new sentencing proceeding, Angelo was sentenced to a term of 10 years on each count, to be served consecutively. Angelo then filed a post-conviction habeas corpus petition and supplement to the petition. During the evidentiary hearing, the parties stipulated to a third sentencing hearing in front of a new judge. That judge ordered a sentence of 10 years on each count ordered to

¹Angelo v. State, Docket No. 39047 (Order of Remand, October 23, 2002).

run consecutive. Angelo now appeals that sentence as a violation of the Double Jeopardy and Due Process Clauses of the Constitution.

"Once a defendant begins to serve a lawful sentence, he may not be sentenced to an increased term; to do so violates the constitutional proscription against double jeopardy."² "If the initial sentence is unlawful, however, there is no double jeopardy problem in vacating or modifying the whole sentence."³ The initial sentence ordered Angelo to serve a term of life with the possibility of parole for each count. The district court recognized on remand that the crime was punishable by a minimum term of 2 years and a maximum term of not more than 10 years. As a result, the initial sentence was unlawful as it was based on an incorrect version of the penalty statute, and double jeopardy does not apply.

"Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."⁴ The fact that sentences are different, as they are in this case, is itself sufficient grounds to make the presumption of vindictiveness inapplicable.⁵ "The fact that concurrent sentences are changed to consecutive terms does not by itself indicate an actual increase in penalty."⁶ The Lopez court ruled that the

²Dolby v. State, 106 Nev. 63, 65, 787 P.2d 388, 389 (1990).

³Id. (quoting Bozza v. United States, 330 U.S. 160 (1947)).

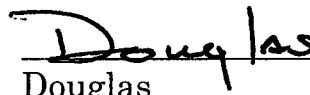
⁴North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (overruled on other grounds Alabama v. Smith, 490 U.S. 794 (1989)).

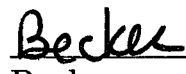
⁵Texas v. McCullough, 475 U.S. 134, 143 (1986).

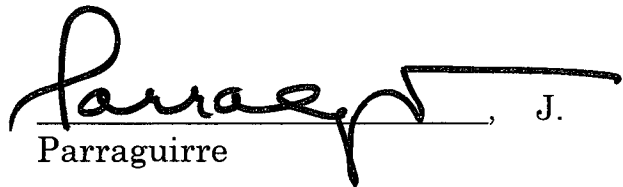
⁶State v. Lopez, 661 P.2d 890, 891 (N.M. 1983).

concept of presumed vindictiveness in Pearce was not applicable "where the total term of imprisonment subsequently ordered is less than the original which had been imposed." The maximum term on Angelo's original sentence was life imprisonment. The maximum on the subsequent sentences is 20 years. As a result, the subsequent sentence is less severe than the original, and the presumptions of vindictiveness in Pearce do not apply. Accordingly, we

ORDER the amended judgment of conviction AFFIRMED.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

cc: Hon. David A. Huff, District Judge
Law Offices of Robert Witek
Attorney General George Chanos/Carson City
Lyon County District Attorney
Lyon County Clerk