

Fifth Circuit Court of Appeal
State of Louisiana

No. 25-KA-463

STATE OF LOUISIANA

versus

LOK C. AU

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 17-6147, DIVISION "I"
HONORABLE NANCY A. MILLER, JUDGE PRESIDING

April 29, 2026

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Stephen J. Windhorst

AFFIRMED

SJW
SMC
FHW

TRUE COPY



JALISA WALKER
DEPUTY CLERK

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA

Honorable Paul D. Connick, Jr.
Juliet L. Clark
Thomas J. Butler

COUNSEL FOR DEFENDANT/APPELLANT,
LOK C. AU

Douglas D. Brown

WINDHORST, J.

Defendant, Lok C. Au, appeals his sentence for indecent behavior with a juvenile. For the following reasons, defendant's sentence is affirmed.

FACTS and PROCEDURAL HISTORY

On July 24, 2018, the Jefferson Parish District Attorney's Office filed a bill of information charging defendant, Lok C. Au, with sexual battery upon a known juvenile (DOB 6/2/2008) wherein the child was under the age of thirteen in violation of La. R.S. 14:43.1 (count one).¹ State v. Au, 23-90 (La. App. 5 Cir. 12/20/23), 378 So.3d 265, 268.² Defendant pled not guilty. Id. On September 25, 2019, a superseding bill of information was filed, adding count three, which charged defendant with indecent behavior with a juvenile (DOB 6/2/2008) in violation of La. R.S. 14:81. Id.

On October 3, 2019, a second superseding bill of information was filed, charging defendant with sexual battery of a known juvenile (DOB 6/2/2008) under the age of thirteen in violation of La. R.S. 14:43.1 (count one), and indecent behavior with a juvenile (DOB 6/2/2008) under the age of thirteen in violation of La. R.S. 14:81 (count three). Id. Defendant pled not guilty. Id. The alleged victim was M.G. Id.

On February 12, 2020, the defendant was found guilty on both counts by a jury verdict of ten to two. Id. Defendant was then sentenced to thirty-five years imprisonment on count one, and to fifteen years of imprisonment on count three. Id. Defendant appealed. Id.

On August 14, 2020, this court granted defendant's motion to remand his case to the trial court to reconsider his motion for new trial due to the recent decision of Ramos v. Louisiana, 590 U.S.83, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020). Id. On remand, the trial court granted defendant's motion for new trial. Id. Because defendant's convictions and sentences were vacated and the matter was set for a new

¹ In the same bill, K.P. was charged in count two with cruelty to a juvenile (DOB 6/2/2008) in violation of La. R.S. 14:93.

² See State v. Au, 23-90 (La. App. 5 Cir. 12/20/23), 378 So.3d 265, 269-275 for the trial evidence and facts.

trial pursuant to the holding in Ramos, this court found that it no longer had appellate jurisdiction and dismissed defendant's appeal by order dated February 23, 2021. A second trial began on March 14, 2022, but a mistrial was declared on March 15, 2022, due to the illness of co-counsel for the defendant. Id. at 269.

Defendant's third trial was held from August 15-17, 2022. Id. On August 17, 2022, the trial court declared a mistrial as to count one when the jury was unable to reach a verdict. Id. As to count three, the jury unanimously found defendant guilty as charged of indecent behavior with a juvenile under the age of thirteen. Id. Defendant filed a motion for new trial. Id.

On September 12, 2022, the trial court denied defendant's motion for new trial. Id. Defendant was sentenced to twenty years imprisonment at hard labor as to count three.³ Id. Defendant filed a motion to reconsider sentence, which was denied. Id. Defendant appealed. Id.

On appeal, this court found that, in part, the trial court failed to restrict benefits for any portion of the sentence. Id. at 280. This court explained that because the portion of the sentence to be served without benefits is left to the discretion of the trial court, the trial court's failure to impose the statutory restrictions was not cured by La. R.S. 15:301.1. Id. Consequently, this court affirmed defendant's conviction on count three, pretermitted defendant's assignments of error regarding sentencing, vacated the sentence on count three, and remanded the matter for resentencing. Id.

On January 29, 2024, the trial court resentenced defendant to twenty years imprisonment at hard labor with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence. State v. Au, 24-249

³ At the time of the offense, La. R.S. 14:81(H)(2) held that whoever commits the crime of indecent behavior with juveniles on a victim under the age of thirteen when the offender is seventeen years of age or older shall be punished by imprisonment at hard labor for not less than two nor more than twenty-five years. It further stated that at least two years of the sentence imposed shall be served without the benefit of parole, probation, or suspension of sentence. While the statute has since been revised, the amendments did not affect the sentencing provision in this particular subsection. See State v. Sugasti, 01-3407 (La. 6/21/02), 820 So.2d 518, 520

(La. App. 5 Cir. 3/12/25), 411 So.3d 42, 44. The trial court denied defendant's motion to reconsider sentence and granted defendant's motion for appeal. Id.

On appeal, this court found on error patent review that defendant's appearance via Zoom at his resentencing was not in compliance with La. C.Cr.P. art. 562, and therefore, defendant must be resentenced.⁴ Id. at 45. The sentence was vacated and the matter remanded. Id. Consequently, this court pretermitted addressing defendant's assignments of error regarding sentencing. Id.

On April 3, 2025, the trial court resentenced defendant to twenty years imprisonment at hard labor with the first two years to be served without benefit of parole, probation, or suspension of sentence. The trial court denied defendant's motion to reconsider sentence as untimely and granted defendant's application for post-conviction relief, seeking reinstatement of his right to appeal. This appeal followed.

LEGAL ANALYSIS⁵

In his sole assignment of error, defendant argues that the post-Ramos increase in his sentence from fifteen years to twenty years was vindictive. Defendant contends that with respect to the sentence imposed, the same trial judge erred by increasing his sentence following his successful appeal, from fifteen to twenty years. He asserts that the increase in his sentence is presumptively vindictive because there is no objective information in the record to justify the increased sentence following his successful attack of his convictions on appeal. Defendant points out that this court remanded the matter for resentencing because the trial judge failed to restrict benefits and that when he was resentenced, the trial judge did not provide reasons for imposing the increased sentence again. Defendant concludes that his sentence

⁴ Judge Schlegel dissented, explaining that although he agreed with the majority's finding that defendant's appearance via Zoom at his resentencing was not in compliance with La. C.Cr.P. art. 562, he did not believe it necessary to vacate defendant's sentence and remand in this instance. Id. at 46.

⁵ The underlying facts of defendant's conviction are omitted because they are not at issue in this appeal. They may be found in defendant's prior appeal. Au., 378 So.3d at 269-275.

should be vacated and remanded for resentencing, or alternatively, this court should vacate his sentence and impose the original fifteen year sentence.

The State argues that the presumption of vindictiveness does not apply because the trial court itself granted the new trial that resulted in the dismissal of the first appeal as moot. The State contends that at the sentencing hearing on September 12, 2022, the trial court heard new victim impact testimony, recounted some of the procedural history of this case, and gave reasons for the sentence imposed. The State also points out the considerations by the trial court at the January 29, 2024 resentencing hearing and that the court adopted its prior reasoning when imposing the April 3, 2025 sentence. Thus, the State asserts that defendant has not met his burden of proving actual vindictiveness.

Generally, if a defendant is successful in having his conviction overturned on appeal and is subsequently retried and convicted, the trial judge may not then impose a more severe sentence. State v. Dazart, 07-15 (La. App. 5 Cir. 5/15/07), 960 So.2d 1079, 1086, *citing* North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969),⁶ *overruled in part by* Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). If a judge imposes a more severe sentence on a defendant when he is convicted following a successful appeal, the trial judge's reasons for the increased sentence must affirmatively appear in the record. State v. Morgan, 08-1299 (La. App. 5 Cir. 5/26/09), 15 So.3d 1026, 1028. If not, there is a presumption of vindictiveness. Id. The purpose behind this rule is to prevent defendants from being penalized for having exercised their constitutional rights. Id.

⁶ The United States Supreme Court, in Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), held that the Due Process Clause of the 14th Amendment prevented an increase in sentence following a retrial *if the increase in the sentence was motivated by vindictiveness* against the defendant because the fear of such retaliation would have a chilling effect on the defendant's exercise of his appellate rights. Id. at 725-726. The Pearce court held that a judge who had originally sentenced a defendant could not impose a more severe punishment upon resentencing unless certain conditions were present (1) the new sentence must be based upon objective information concerning the defendant's identifiable conduct occurring after the time of the original sentencing proceeding, and (2) the factual basis establishing such conduct must be included in the record. Id. at 726. The Louisiana Supreme Court adopted the Pearce rule in State v. Rutledge, 259 La. 543, 250 So.2d 734 (1971). [Emphasis added.]

The general principles set forth in Pearce also apply to circumstances in which the original sentence is successfully attacked. See State v. Brown, 22-483 (La. App. 3 Cir. 11/16/22), 353 So.3d 919, 928, writ denied, 22-1791 (La. 5/2/23), 359 So.3d 1279. However, when different judges have imposed the differing sentences, the presumption of vindictiveness is inapplicable because under those circumstances, a sentence “increase” cannot truly be said to have taken place. Dauzart, 960 So.2d at 1086, *citing* Texas v. McCullough, 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104. Where the presumption does not apply, the defendant may still be entitled to relief, but he must affirmatively prove actual vindictiveness. Dauzart, 960 So.2d at 1086, *citing* Wasman v. U.S., 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984), and State v. Rodriguez, 550 So.2d 837 (La. App. 2 Cir. 1989).

In the instant matter, although the same trial judge sentenced defendant after both trials, the record shows that defendant was not retried as a result of a successful appeal. After his first appeal was lodged, defendant filed a motion to remand the case to the trial court to reconsider his motion for new trial due to the decision in Ramos. This court granted the motion and remanded the case to the trial court. Because *the trial court* granted defendant’s motion for new trial, vacated his convictions and sentences, and set the case for a new trial, this court found that it no longer had appellate jurisdiction and dismissed defendant’s appeal. Based on these specific facts, we find the Pearce presumption does not apply.⁷

Where the presumption of vindictiveness does not apply, as in the instant case, a defendant may still be entitled to relief, but he must affirmatively prove actual vindictiveness. Defendant asserts that there were no events or changes to justify the

⁷ Nevertheless, even if the Pearce presumption applied, we find that the record shows that defendant’s increased sentence was based upon objective information concerning the defendant’s identifiable conduct occurring *after* the time of the original sentencing proceeding, which was included in the record (*i.e.*, M.G.’s impact statement, which was absent from the original sentencing). The trial judge discussed the victim’s impact statement and stated that she also considered all of the mitigating and aggravated circumstances set for in La. C.Cr.P. art. 894.1 in determining the appropriate sentence, detailing the same.

increase in his sentence and the trial court gave no reasons for the increase. We find defendant's argument is without merit.

Here, defendant was subsequently retried, a mistrial was declared as to count one, and defendant was unanimously convicted on count three. On September 12, 2022, prior to the imposition of defendant's sentence, the trial court heard victim impact testimony from the victim, M.G.,⁸ who was 14 years old at the time of defendant's retrial, and her adoptive father, T.F. Notably, the record shows that M.G. did not give an impact statement prior to the imposition of defendant's original sentence following the first trial. In her statement, M.G. told defendant that he hurt her at a young age. She spoke about the difficulty of facing defendant, who hurt her physically and mentally, expounding that it was difficult, heartbreaking, and embarrassing. M.G. explained that this situation has caused her stress and she has difficulty trusting people. Nevertheless, she expressed that "with the help of God and all my family and friends, I realized I have so much love in my past," noting that she was stronger than what happened to her. She articulated that she had "grown up to be strong, smart and kind and a forgiving person." M.G. stated that even though defendant "took a lot away from [her] and [she] experienced things that [she] should not have had to experience, [she] moved on[,]” declaring that she would not let her past dictate her future.

Next, the court heard from T.F., M.G.'s adoptive father, who stated that because of defendant's "exploitation of pregnant K.P. and [M.G.] we're here in [c]ourt." He mentioned that M.G. gave her statement, stating how she feels, and also M.G.'s younger sister's situation due to defendant's conduct. T.F. then asked the court "for a maximum sentence."

⁸ M.G.'s last name was legally changed to her adoptive parents. To avoid confusion, this court's opinion will use M.G.'s birth initials, which were used in our prior opinions.

Afterwards, the trial court noted that this was the second trial in this case. The trial court mentioned that in the first trial defendant was convicted on both counts, but the convictions were reversed due to non-unanimous verdicts. The trial court remarked that in this trial, the jury unanimously convicted defendant on count three, indecent behavior with a juvenile under the age of thirteen, while a mistrial was declared as to count one, sexual battery on a juvenile under the age of thirteen, which was still pending before the court. The trial court also received several letters from defendant's family and friends. The trial court explained that it considered all of the mitigating and aggravating circumstances pursuant to La. C.Cr.P. art. 894.1 in determining an appropriate sentence for the case. Further, the trial court stated:

The fact that the victim in this case, [M.G.], has moved along is not a tribute to [defendant]. It is a tribute to the family that has sat beside her every step of the way in this case. The fact that [M.G.] has moved on is a tribute to [M.G.]. And over the course of the last seven to eight years she's been able to make something out of her life instead of following the path given by her mother; that's a tribute to M.G., and that should never be forgotten. And it's a tribute to her parents who should never be forgotten. The fact that [M.G.] has moved on does not diminish the harm that was done to her. While I believe that all the people who know [defendant] believed him to be a good person and they believed him to be a good person, they were not present when the crimes were committed against this child. While [defendant] says he did not believe that [M.G.] was awake during the playing of pornography on the TV, in the hotel room where a child was present and having sexual intercourse with her mother while the child three feet away in the bed next to her, I don't see how that brings mitigation to this case. By the mere fact he thought she was asleep and participated in these acts with a child not housed in a separate bedroom, but with a child who was in the same room, when this child wasn't, to me that is not any mitigation.

The trial court then sentenced defendant to twenty years imprisonment at hard labor. Defendant appealed. As previously stated, although defendant's conviction on count three was affirmed, on errors patent review, this court found that the trial court failed to restrict benefits for any portion of the sentence. Because the portion of the sentence to be served without benefits is left to the discretion of the trial court, we concluded that the trial court's failure to impose the statutory restrictions was not

cured by La. R.S. 15:301.1. Au, 378 So.3d at 280. Consequently, this court pretermitted defendant's assignments of error regarding sentencing, vacated the sentence on count three, and remanded the matter for resentencing.

On January 29, 2024, prior to resentencing pursuant to this court's decision in Au, 378 So.3d at 280, defense counsel requested that the trial court resentence defendant to the original fifteen year sentence that he received after his first trial. The State contended that the matter was remanded to the trial court for imposition of the restriction of benefits. In resentencing defendant to twenty years imprisonment without benefit of parole, probation, or suspension of sentence pursuant to the statute, the trial court explained:

In fashioning his sentence, the [c]ourt has carefully considered Code of Criminal Procedure article 894.1, considering all aggravating and mitigating circumstances.

The [c]ourt has taken into consideration his lack of criminal history, his supportive family and his ties to his community.

An aggravating fashion, the [c]ourt has also considered the circumstances of the case before us. [Defendant] befriended a self-admitted prostitute who was a self-admitted drug abuser. And it was under those circumstances that he took sexual advantage of a child under the age of thirteen, that having been her daughter.

Having sat through this trial twice and hearing testimony of the child on two separate occasions, the [c]ourt is of the opinion that the sentence given in this matter is indeed just and deserved.

On appeal, on errors patent review, this court again pretermitted defendant's assignments of error regarding sentencing, vacated defendant's sentence, and remanded for resentencing upon finding that defendant's appearance via Zoom at his resentencing was not in compliance with La. C.Cr.P. art. 562. Au, 411 So.3d at 45.

On April 3, 2025, the trial court resented defendant to twenty years imprisonment at hard labor with the first two years to be served without benefit of parole, probation, or suspension of sentence.

Under the facts of this case and considering the trial court's reasons for imposition of the twenty-year sentence, and on concluding that the presumption of

vindictiveness does not apply, we find that defendant did not prove, and the record does not support, a finding of actual vindictiveness by the trial court. Moreover, because the Pearce presumption did not apply, the trial court was only required to comply with La. C.Cr.P. art. 894.1, which we find the trial court complied. See State v. Neville, 572 So.2d 1161, 1166 (La. App. 1 Cir. 1991). Accordingly, we find defendant's assignment of error is without merit.

ERRORS PATENT

The record was reviewed for errors patent according to the mandates of La. C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); and State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). Our review shows that there are no errors patent requiring corrective action.

DECREE

Accordingly, for the reasons stated, defendant's sentence is affirmed.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
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STEPHEN J. WINDHORST
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **APRIL 29, 2026** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

25-KA-463

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE NANCY A. MILLER (DISTRICT JUDGE)

HONORABLE PAUL D. CONNICK, JR.
(APPELLEE)

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