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Due Process

court of appeals has determined that the New York standard encourages heightened "prosecutorial care"[243] in responding to discovery requests and establishes a clear standard.

People v. Van Pelt[244]
(decided June 5, 1990)

A criminal defendant contended that his due process rights under the federal[245] and state[246] constitutions were violated when he, upon retrial before a new trial judge, received a harsher sentence than originally imposed by the first trial judge.[247] The court held that the defendant's procedural due process rights were violated.[248]

A jury convicted defendant of first and second degree armed robbery, and the trial judge sentenced defendant to concurrent terms of five to ten years and four to eight years. The appellate division reversed and remanded for a new trial because the trial judge failed to instruct the jury that the prosecution had to disprove the defendant's alibi beyond a reasonable doubt.[249] Upon retrial, before a new trial judge, defendant was again convicted of first and second degree armed robbery. However, this judge imposed increased concurrent terms of seven and one half to fifteen years and six to twelve years. The trial judge imposed a harsher sentence because he believed that the defendant coerced his sister and brother-in-law into establishing an unbelievable alibi, and because a complaining witness was forced to come back to court to testify, thereby reliving the trauma of the incident.[250]

In a unanimous decision, the court of appeals held that the imposition of a harsher sentence by a trial judge creates a presump-

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243. *Id.*

244. 76 N.Y.2d 156, 556 N.E.2d 423, 556 N.Y.S.2d 984 (1990).

245. U.S. CONST. amends. V, XIV, § 1.

246. N.Y. CONST. art. I, § 6.

247. *Van Pelt,* 76 N.Y.2d at 161, 556 N.E.2d at 425, 556 N.Y.S.2d at 986.

248. *Id.* at 158, 556 N.E.2d at 424, 556 N.Y.S.2d at 985.

249. *Id.* at 158-59, 556 N.E.2d at 424, 556 N.Y.S.2d at 985.

250. *Id.* at 159, 556 N.E.2d at 424, 556 N.Y.S.2d at 985.

tion of institutional vindictiveness.[251] This presumption can only be overcome if the trial judge, upon resentencing, justifies the harsher sentence with evidence that became known or available only after the first sentence was imposed. Here, the court ruled that the defendant's due process rights were violated because the trial judge failed to offer ample justification for imposing the harsher sentence.[252]

The court began its analysis by stating that under certain circumstances the United States Constitution's due process clause shields a criminal defendant from receiving a harsher sentence imposed upon retrial if it is determined that the second trial judge's reasons were vindictive or punitive. In *North Carolina v. Pearce*,[253] the United States Supreme Court held that a criminal defendant's due process rights under the Federal Constitution are violated when a trial judge, the same judge who sentenced the defendant in the first trial, imposes a more severe sentence after a second trial without identifying the reasons for imposing the harsher sentence. According to the Supreme Court, this rule, the so-called "*Pearce* presumption," is designed to reduce judicial vindictiveness or the perception thereof, thereby eliminating any apprehension by the defendant that his choice to appeal will result in a more severe sentence.[254]

The *Pearce* Court left open the issue of whether the *Pearce* presumption is applicable to instances where the criminal defendant is given an increased sentence by someone other than the original sentencer. That issue was subsequently decided in *Texas v. McCullough*,[255] where the Supreme Court rendered *Pearce* inapplicable to cases where the sentencers in each case are different. In that case, the Court concluded that there was no federal due process violation when the second sentencer, a trial judge, imposed a harsher sentence than that imposed by the original sentencer, a jury.[256]

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251. *Id.* at 161, 556 N.E.2d at 425, 556 N.Y.S.2d at 986.
252. *Id.* at 161-62, 556 N.E.2d at 425-26, 556 N.Y.S.2d at 986-87.
253. 395 U.S. 711 (1969).
254. *Id.* at 725.
255. 475 U.S. 134 (1986).
256. *Id.* at 141.

In *Van Pelt*, the court of appeals chose not to follow *McCullough* and decided the issue under the state constitution.[257] Stating that "our State due process provision confers a more protective benefit than the Federal counterpart,"[258] the court held that in New York the existence of two different sentencers does not eradicate the *Pearce* presumption.[259] The existence of two sentencers is only a factor in overcoming the presumption. The court explained that the due process clause found in article one, section six of the state constitution requires the presumption "as a procedural safeguard against punitively toughened sentences . . . ."[260] To overcome the presumption, there must be some articulation on the record by the trial judge indicating an event subsequent to the first conviction upon which the harsher sentence ought to be justified.

The court offered several reasons for providing the criminal defendant increased protection under the state constitution. First, appeals under the *Pearce* presumption will be few in number thus not overburdening the appellate courts. Second, the potential for denial of the defendant's due process rights significantly overrides any burden placed upon the sentencing process. Third, the

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257. *Van Pelt*, 76 N.Y.2d at 161, 556 N.E.2d at 425, 556 N.Y.S.2d at 986.

258. *Id.* at 162, 556 N.E.2d at 426, 556 N.Y.S.2d at 987.

259. *Id.* In People v. Miller, 65 N.Y.2d 502, 482 N.E.2d 892, 493 N.Y.S.2d 96, *cert. denied*, 474 U.S. 951 (1985), the court of appeals held that the *Pearce* presumption did not apply even though a criminal defendant received a harsher sentence upon retrial for making a victim, who was raped by the defendant, testify in court. That case is distinguishable, however, because the original sentence was a result of a plea bargain struck in exchange for sparing the victim from having to testify in court. On appeal of the plea bargain, the defendant breached the agreement by forcing the victim to testify. This breach, according to the *Miller* court, justified the imposition of a harsher sentence.

The court of appeals in *Van Pelt* distinguished *Miller* on the basis that the defendant made no plea bargain agreement to receive a reduced sentence for sparing the complaining witness from having to testify. The court stated that having a witness testify twice does not constitute a rebuttal of the *Pearce* presumption.

260. *Van Pelt*, 76 N.Y.2d at 161, 556 N.E.2d at 425, 556 N.Y.S.2d at 986.

presumption is easily rebutted if the trial judge documents a justifiable reason for the increased sentence. Fourth, the presumption will not interfere with the state's interest in providing the trial judge full discretion and flexibility in sentencing the defendant. Lastly, the court, following the rationale in *Pearce*, believed that the threat of a harsher sentence upon reconviction might deter the defendant in exercising his or her right to appeal.[261]

People v. Harris[262]
(decided July 5, 1990)

Defendant claimed that his right to be present at a material stage of his trial was violated when the trial judge communicated with the jury outside his presence,[263] thus violating his state[264] and federal[265] right to due process of law. The court of appeals held that the defendant's presence was not constitutionally mandated when the trial judge, accompanied by the prosecutor and the defense attorney, asked the jury to clarify its request for testimony readback, characterizing the communication as ministerial in nature.[266] Therefore, the defendant's procedural due process rights were not violated.[267]

At defendant's trial, on charges of sodomy and other offenses, the jury sent a note to the judge requesting a readback of certain trial testimony. Accompanied by the prosecutor and defendant's attorney, the judge proceeded to the jury room for a clarification of the readback request. Specifically, the judge asked whether the jurors wanted to hear testimony about the victim, or by the

261. *Id.* at 162-63, 556 N.E.2d at 426-27, 556 N.Y.S.2d at 987-88.

262. 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990).

263. *Id.* at 811-12, 559 N.E.2d at 661, 559 N.Y.S.2d at 967.

264. N.Y. CONST. art. I, § 6.

265. U.S. CONST. amend. XIV, § 1.

266. *Harris*, 76 N.Y.2d at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968. No mention is made in the majority opinion of whether the defendant brought his case under the United States or New York Constitution or both. The dissent refers to defendant's rights under both constitutions. *Id.* at 813, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.

267. *Id.* at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.