

IN THE COURT OF APPEALS OF MARYLAND

No. 116

September Term, 1994

ARNOLD JEROME JENNINGS, JR.

v.

STATE OF MARYLAND

Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker
McAuliffe, John F. (Retired,
specially assigned),

JJ.

Dissenting Opinion by Raker, J., in
which Eldridge, J., joins

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Filed: September 14, 1995

Raker, J., dissenting:

I believe that in this case the sentencing court imposed a penalty on the petitioner because he refused to state that he was guilty, a right constitutionally protected by the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights. Because the imposition of a more severe sentence imposed by the trial court infringed upon the fundamental rights of the petitioner, I would reverse the judgment and remand for a new sentencing.

A sentence that does not exceed the maximum penalty permitted by statute is ordinarily not subject to appellate review. We have recognized, however, that there exist limited circumstances where a sentence may be reviewed and vacated because the trial court has abused its discretion. See *State v. Dopkowski*, 325 Md. 671, 680, 602 A.2d 1185, 1189 (1992). The majority recognizes that if the trial judge used an impermissible consideration in imposing the sentence, the sentence must be vacated and the case remanded for resentencing. Majority Op. at 9.

In my view, the trial judge abused his discretion in this case and imposed a sentence based upon improper factors. Considering the court's comments in their entirety, I conclude that the sentence was based on the refusal of Jennings to confess his guilt, and that, had he done so, he would have received a lesser sentence. This is improper under the Fifth Amendment and caused Jennings to pay "a judicially imposed penalty for exercising his

constitutionally guaranteed rights.'" *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286, 293 (1974) (quoting *Thomas v. United States*, 368 F.2d 941, 946 (5th Cir. 1966)).

In *Thomas*, the Court of Appeals for the Fifth Circuit reviewed the sentence of a defendant convicted by a jury for bank robbery. The two co-defendants pleaded guilty. At sentencing, the judge told Thomas:

If you will come clean and make a clean breast of this thing for once and for all, the Court will take that into account in the length of sentence to be imposed. If you persist, however, in your denial, as you did a moment ago, that you participated in this robbery, the Court also must take that into account.

368 F.2d at 944. The Court held that "[w]hen Thomas received a harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights." *Id.* at 946. The Fifth Circuit noted that if Thomas chose the first "if" presented to him by the trial court, to "come clean and make a clean breast of this thing," he would effectively forfeit all his post-conviction remedies, including appeal. *Id.* at 945; see also *Christian v. State*, 513 P.2d 664, 670 n.6 (Alaska 1973) (noting that "it may be unreasonable to expect an offender to admit guilt when his case is on appeal").

In *Johnson v. State*, 274 Md. 536, 336 A.2d 113 (1975), this Court made clear that a sentencing judge may not take into account

the failure of a defendant to plead guilty. Following *Johnson*, the Court of Special Appeals held in *Herbert v. State*, 31 Md. App. 48, 354 A.2d 449 (1976), that "protestations of innocence throughout the trial must not influence sentencing `in any way.'" *Id.* at 56, 354 A.2d at 453 (quoting *Johnson*, 274 Md. at 543, 336 A.2d at 117).

A sentencing judge may legitimately consider the remorse of a defendant as a mitigating factor in imposing a sentence. A refusal to admit guilt, to abandon one's claim of innocence, or to waive the right to a trial, however, cannot become the basis for a more severe sentence.

To be sure, it can be difficult to draw this distinction. Nonetheless, a defendant may not be penalized for asserting his or her legal rights to a trial and appeal, and it is not beyond the competence of a reviewing court to identify improper influences in the sentencing process. "In determining whether sentencing was improperly influenced by a defendant's failure to admit his guilt following a conviction, the court's focus [is] upon whether the sentencing court indicated, whether expressly or impliedly, that there would be better treatment on sentencing if the defendant abandoned his claim of innocence." *People v. Byrd*, 139 Ill. App. 3d 859, 487 N.E.2d 1275, 1280 (1986).

Here, after a reference to the petitioner's statement in the presentence investigation report that the jury had found the wrong person guilty, the court specifically told petitioner that "until

you can face up to your problem of your implication in this little event, you haven't learned a thing." The court then told Jennings that no portion of the sentence would be suspended because he "does not have any remorse, none whatsoever." The court speculated, "I guarantee you, [I'll] get a letter thirty days from now: 'Oh, I'm sorry. I did all that.' But there is absolutely no remorse." The court concluded by telling the petitioner, "All I wanted to hear from you is, you know, what implication you had this, in this, because you're an innocent. In your mind you're an innocent man."

I conclude that these remarks reflect the improper influence on the sentence of the petitioner's continued denial of guilt, and not, as the majority speculates, "the sense that the trial judge was searching for the proper sentence." Majority Op. at 14. Because Jennings received a greater sentence for continuing to protest his innocence, he is entitled to a new sentencing hearing.

Judge Eldridge has authorized me to state that he joins in the views expressed herein.