NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

THEODORIC R. JONES

Appellant,

Appeal No. CRC 11-00030APANO
UCN 522011AP000030XXXXCR

vs.

STATE OF FLORIDA

Appellee.
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Opinion filed February 16, 2012.

Appeal from a Judgment and Sentence
entered by the Pinellas County Court
County Judge Paul A. Levine

Thomas Matthew McLaughlin, Esquire
Attorney for Appellant

Kaitlyn Bagnato, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PER CURIAM.

THIS MATTER is before the Court on Appellant, Theodoric R. Jones' appeal from the judgment and sentence of the Pinellas County Court which was imposed following the jury's guilty verdict. After reviewing the briefs and record, this Court

affirms the conviction and judgment of guilt but remands the case to the county court for resentencing.

Procedural Background

Appellant was charged by misdemeanor information with one count of Driving While License Suspended or Revoked, a second degree misdemeanor. A jury trial was conducted in the county court on June 8, 2011. The jury returned a verdict of guilty as charged that same day. The court sentenced Appellant upon return of the verdict to thirty days in the county jail and imposed $1,000.00 fines and court costs. The trial court later reduced the fine and court costs imposed upon Defense motion stating that the original amounts imposed exceeded the statutory maximum. Appellant subsequently filed this appeal challenging the judgment and sentence of the trial court.

Issues on Appeal

The Appellant raises three issues for review. Two of Appellant's claims concern the validity of Appellant's conviction and subsequent judgment of guilt while the third challenge raised goes to the legality of the sentence imposed by the trial court. The Court finds no merit as to Appellant's claims regarding the denial of his motion for judgment of acquittal or the denial of his request for a jury instruction regarding the "necessity" defense. As such, those two claims will not be addressed in this opinion. The third issue, that the trial court imposed a vindictive sentence is addressed in this opinion.

Vindictive Sentences

Vindictiveness in sentencing is "simply a term of art which expresses the legal effect of a given objective course of action, and does not imply any personal or subjective animosity between the court [...] and the defendant." *McDonald v. State*, 751 So.2d 56,

59 (Fla. 2nd DCA 1999). In sentencing, "although a guilty plea may justify leniency, ... an "accused may not be subjected to more severe punishment for exercising ... [the] constitutional right to stand trial." *Wilson v. State*, 845 So.2d 142, 150 (Fla. 2003) (internal citation omitted). On the other hand "a defendant who is convicted after rejecting a plea offer has no right to insist on being sentenced in accordance with the offer." *McDonald*, 751 So.2d at 58. "To avoid the potential for coercion, a judge must neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant's right to trial." *State v. Warner,* 762 So.2d 507, 514 (Fla. 2000).

> Judicial participation in plea negotiations followed by a harsher sentence is one of the circumstances that, along with other factors, should be considered in determining whether there is a "reasonable likelihood" that the harsher sentence was imposed in retaliation for the defendant not pleading guilty and instead exercising his or her right to proceed to trial. *See Smith,* 490 U.S. at 799, 109 S.Ct. 2201. The other factors that should be considered include but are not limited to: (1) whether the trial judge initiated the plea discussions with the defendant in violation of *Warner;* (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; [...] (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing.

Wilson, 845 So.2d at 156 (footnotes omitted). "[A] totality of the circumstances review, ... is the more appropriate analysis to employ to determine whether a defendant's constitutional right to due process of law was violated by the imposition of an increased sentence after unsuccessful plea discussions in which the trial judge participated. *Wilson,* 845 So.2d at 156. "[I]n cases where an unrebutted presumption of judicial

vindictiveness arises, [...] the appropriate remedy is resentencing before a different judge." *Wilson*, 845 So.2d at 159.

The Present Case

In the case at bar the trial court became actively involved in plea negotiations on the morning of trial. These negotiations did not result in a change of plea and the matter ultimately proceeded to jury trial. Upon receipt of the jury's verdict the trial court made several comments prior to sentencing the defendant.[1] These comments plainly demonstrate that the court's sentence was imposed due to Appellant's decision to exercise his Constitutional right to trial by jury. This sequence of events culminating in the courts comments just prior to sentencing require that sentence to be set aside.

Analyzing this case in light of the four factors discussed in *Wilson*, the record clearly demonstrates that the trial court initiated plea negotiations on the morning of trial, imposed a significantly greater sentence after trial than it offered prior to trial, and placed no factual basis on the record of aggravating circumstances that came out during the trial or sentencing hearing which supported the enhanced sentence. The presumption of vindictiveness created by these three factors has not been rebutted by the state. Finally, the trial court's comments made at the conclusion of the proceedings must be taken at face value.

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[1] **"THE COURT: $1,000 fines and court costs for going to trial today, incurring the expense of the PD, the cops, everything, everyone that came to trial today because you wanted a trial when you had absolutely no defense today to this particular charge. So, it costs money. If you ride the bus, it costs money. Play the game, it costs money; 1,000 fines and court costs and 25 to Saint Pete and 30 days in the county jail."**
Excerpt from trial transcript p. 212.