IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO.: 2013-AP-06-A-O
Lower Court Case No.: 2012-MM-10707-A-O

SHAWN JERMAINE MARTINEZ,

Appellant,
vs.

STATE OF FLORIDA,

Appellee.
_____/

Appeal from the County Court
for Orange County, Florida,
Deborah B. Ansbro, County Court Judge

Robert Wesley, Public Defender, and
Jessica Saltz, Assistant Public Defender,
for Appellant

Jeffery Ashton, State Attorney and
Jennie Zilner, Assistant State Attorney,
for Appellee

Before POWELL, MIHOK, and LUBET, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART TRIAL COURT

Appellant, Shawn Martinez, appeals his judgment and sentence rendered on January 22, 2013. This court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1).

Appellant was convicted of Battery in violation of section 784.03(1)(A)(1), Florida Statues and sentenced to 365 days in jail with credit for 16 days time served. Appellant has raised two issues on appeal: (1) whether the trial court erred when defense counsel was restricted from voir dire questioning regarding permissible touching, and (2) whether there was

judicial vindictiveness when Appellant declined the trial court's plea deal of 57 days time served and the trial court subsequently imposed 365 days after a jury found him guilty.

Regarding the first issue, a trial court's rulings regarding the scope of voir dire examination are to be reviewed under an abuse of discretion standard. *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997). In making rulings regarding voir dire examination, a trial judge has "considerable discretion in determining the extent of counsel's examination of prospective jurors." *Mendez v. State*, 898 So. 2d 1141, 1143 (Fla. 5th DCA 2005) (quoting *Williams v. State*, 424 So. 2d 148, 149 (Fla. 5th DCA 1982)).

In the case at bar, defense counsel asked if anyone could think of a situation where it was okay to touch someone. The trial court sustained the State's objection. The trial court indicated that the line of questioning was inappropriate, and that it would confuse the panel. The trial court's ruling was proper. Therefore, we find that the trial court did not abuse its discretion.

We have analyzed the next issue, judicial vindictiveness, under the guidelines set forth in *Wilson v. State*, 845 So. 2d 142, 156 (Fla. 2003) and *State v. Warner*, 762 So. 2d 507 (Fla. 2000). In *Warner*, the Court did not prohibit judicial participation in plea negotiations but imposed restrictions. The Court determined that 1) the judge could not initiate the plea dialogue but may participate in discussion upon request of a party, actively discuss potential sentences, and comment on proposed plea agreements and 2) the judge must not state nor imply alternative sentence possibilities which hinge upon future procedural choices. *Warner*, 762 So. 2d at 513-514.

"If the judge participates in plea discussions beyond what is contemplated in *Warner*, and by his or her comments appears to have departed from the role of neutral arbiter, these actions alone may give rise to a presumption of judicial vindictiveness that would shift the burden to the State to produce affirmative evidence on the record to dispel the presumption."

Wilson, 762 So. 2d at 156. The *Wilson* Court went on to identify four factors to also consider: "(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." *Id.*

In the instant case, prior to trial, the State offered 365 days in the Orange County Jail. The trial court stated, ". . . well if he insists on going to trial, which hopefully he won't once he gets up here, but if he does we could do a bench trial, no jail, no adjudication, and 57 days time served." After a jury returned a guilty verdict, the defendant was sentenced to 365 days, 16 days credit for time served, plus a fine.

An analysis of the four factors in *Wilson* as applied to the instant case follows. First, whether the trial court initiated plea negotiations. Appellant argues that the trial court initiated the plea discussions. However, transcripts from the status hearing on January 14, 2013 indicate that the State first brought its plea offer to the trial court's attention. Subsequently, at the request of the State, the trial court made its plea offer. Since the trial court did not initiate plea discussions, the first factor is not met. Second, whether the trial court departed from its role as an impartial arbiter. Appellant argues that the judge's comments indicate that she did. The most incriminating statement was, ". . . well if he insists on going to trial, which hopefully he won't . . .." This could be interpreted as an effort to coerce the defense into accepting the plea deal. Therefore, the second factor is met. Third, whether there is a disparity between the plea offer

and the ultimate sentence imposed. Here, the trial court's plea offer was for "a bench trial, no jail, no adjudication, and 57 days time served." After a jury convicted the Appellant, the trial court imposed 365 days, 16 days credit for time served, and a fine. Clearly, there is disparity between the two. Thus, the third factor is met. Finally, whether there was a lack of any facts on the record that explain the reason for the increased sentence. The State contends that the increased sentence was warranted due to the Appellant's criminal history and the permanent injuries suffered by the victim. Based on the record, it appears that the judge had some knowledge of the Appellant's criminal history during the plea negotiation at the status hearing. However, the judge did not put on the record the reasons for the harsher sentence. As a result, the fourth factor is met.

When considering all four factors in light of the totality of circumstances, we find that there is indication of judicial vindictiveness. *Wilson*, 845 So. 2d at 156. Where the court imposes an increased sentence after failed plea negotiations and there is an unrebutted presumption of judicial vindictiveness, the appropriate remedy is remand for resentencing before a different judge. *Id.* at 158. Accordingly, we remand this case for resentencing before a new judge.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Appellant's judgment is **AFFIRMED**. Appellant's sentence is **VACATED,** and the case is **REMANDED** for resentencing before a new judge.

DONE AND ORDERED on this 21st day of April 2014.

/S/
ROM W. POWELL
Presiding Circuit Judge

MIHOK and LUBET, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Jessica Saltz, Assistant Public Defender**, 2000 E. Michigan Street, Orlando, Florida 32801; **Jennie Zilner, Assistant State Attorney,** 415 N. Orange Avenue, Orlando, Florida 32801, this 22nd day of April, 2014.

/S/
Judicial Assistant