

[CAPTION]

I. MOTION TO DISMISS (VINDICTIVE RE-CHARGING)

The Defendant, by counsel, respectfully requests this Court, pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Indiana Constitution, to dismiss the information in this cause. In support of this Motion, the Defendant states the following:

1. On [insert date], the Defendant was tried for [insert charged offense(s)] in the [insert court] in [insert cause number].

2. [CHOOSE ONE: The prosecution resulted in a mistrial on [insert date] OR The prosecution resulted in a conviction for the above specified offense(s) which was set aside by the appellate court for the reason that: [specify grounds for setting aside or reversal]].

3. On [insert date], an [indictment/information] was filed in this cause charging the Defendant with [insert newly charged offense(s)]. The new charges are [more numerous/more severe] than the charges in the original [information/indictment].

4. The factual basis for the crime charged in this cause was the same alleged for the crimes in [inset cause number], which were [set aside/reversed].

5. [CHOOSE ONE: “[I]t is clear that when the prosecution has occasion to file more numerous or more severe charges for the same basic criminal conduct against an accused after the accused has successfully exercised his statutory or constitutional rights to an appeal, the prosecution bears a heavy burden of proving that the increase in the number or severity of the charges was not motivated by a vindictive purpose.” Cherry v. State, 414 N.E.2d 301, 305 (Ind. 1981) **OR**

“[U]nless there is new evidence or information discovered to warrant additional charges, the potential for prosecutorial vindictiveness is too great for courts to allow the State to bring additional charges against a defendant who successfully moves for a mistrial.” Owen v. State, 822 N.E.2d 1075, 1077 (Ind.Ct.App. 2005).]

6. The State has presented no factual basis or justification for the increase in the offense charged as required by the Due Process Clause of the Fourteenth Amendment. Blackridge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); U.S. v. Jamison, 505 F.2d 407(D.C. Cir. 1974).

7. This Court may dismiss an indictment or information upon “any other ground that is a basis for dismissal as a matter of law.” Ind. Code 35-34-1-4(a)(11).

8. Pursuant to Criminal Rule 3, a memorandum stating specifically the grounds for dismissal is filed herewith and incorporated by reference as Exhibit A.

WHEREFORE, the Defendant requests this Court to set this matter for hearing if the State alleges there is a factual basis and justification for increasing the charge against the Defendant. If the State makes no such allegations, the Defendant requests this Court to dismiss the [indictment/information], and for all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK B.10.1

Ind. Code 35-34-1-8 (motion to dismiss by defendant; requisites; affidavits; documentary evidence; hearing; disposition; procedures)

U.S. Constitution, 14th Amendment (due process clause)

Article I, Section 12 of the Indiana Constitution

Indiana Rules of Criminal Procedure, Rule 3 (memorandum to be filed with motion to dismiss)

NOTE

There is a claim of prosecutorial vindictiveness whenever the charges a Defendant faces increase in severity or number after the Defendant exercises any procedural or constitutional right, such as his right to bail or right to a jury trial, and not just the right to appeal. State v. Selva, 444 N.E.2d 329 (Ind.Ct.App. 1983); Cherry v. State, 414 N.E.2d 301 (Ind. 1981).

CASE LAW

Texas v. McCullough, 475 U.S. 134, 104 S.Ct. 976, 89 L.Ed.2d 104 (1986) (imposition of a sentence on retrial ordered by the judge, greater than had been imposed by a jury at the first trial, does not raise a presumption of vindictiveness under North Carolina v. Pearce, 395 U.S. 711 (1969) and does not violate due process; here, the trial judge ordered the new trial rather than an appellate court; even if vindictiveness were presumed, the reasons given by the judge for the increased sentence would overcome the presumption even though not based on events or conduct occurring after the first trial). But cf. Alabama v. Smith, 490 U.S. 794, 802, 109 S.Ct. 2201, 2206-07 (1989) (Pearce presumption of vindictiveness does not apply when a sentence imposed after trial is greater than that previously imposed after a guilty plea).

Thigpen v. Roberts, 468 U.S. 27, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984) (prosecution for manslaughter after appeal of conviction of misdemeanor traffic offenses raised a presumption of vindictiveness which the State did not rebut, even though there were different prosecutors).

Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) (felony charge after appeal to de novo trial from misdemeanor charge violated due process clause by penalizing right of appeal), overruled on other grounds, Bordenkircher v. Hayes, 434 U.S. 357 (1978). See also Warner v. State, 773 N.E.2d 239, 243 n.2 (Ind. 2002).

State v. Selva, 444 N.E.2d 329 (Ind.Ct.App. 1983) (vindictiveness where prosecutor filed additional counts after prosecutor's motion to revoke bail and to consolidate charges was denied). See also Murphy v. State, 453 N.E.2d 219 (Ind. 1983) (where, upon Defendant's successful motion for mistrial, State added habitual offender charge, fundamental fairness precluded requirement that Defendant show vindictive motivation or that the State be permitted to show its absence and, thus, trial court reversibly erred in denying Defendant's motion to dismiss).

Cherry v. State, 414 N.E.2d 301 (Ind. 1981) (the State's re-filing of charges which it previously dismissed after the court granted the Defendant's motion to correct errors was prosecutorial vindictiveness).

Szymanski v. State, 636 N.E.2d 196 (Ind.Ct.App. 1994) (it was error to allow the State to file an additional charge against the Defendant after statement about polygraph by the State's witness caused a

mistrial; because the Defendant was then subjected to additional charge related to the same conduct, after prosecutorial persistence if not vindictiveness, the Defendant was improperly penalized for his exercise of his right to a fair trial).

Bowers v. State, 500 N.E.2d 203 (Ind. 1986) (where deputy prosecutor entered into oral agreement with the Defendant for information in exchange for no charges, the prosecutor is bound by the agreement; denial of motion to dismiss reversed).

Reynolds v. State, 625 N.E.2d 1319 (Ind.Ct.App. 1993) (it was not vindictive prosecution for State to dismiss two D felony theft charges and file charges of class C felony forgery after the Defendant was acquitted of theft and received lenient sentence for cocaine possession; filing of charges after breakdown in negotiations wasn't retaliation for exercising right to trial).

Warner v. State, 773 N.E.2d 239 (Ind. 2002) (where the new evidence on which the State is justifying an additional charge is not even used at trial, the new evidence cannot overcome the presumption of vindictiveness).

Murphy v. State, 453 N.E.2d 219 (Ind. 1983) (the State's assertion that it did not file the habitual offender status at the first trial because the State was unprepared or unable to prove the status did not justify the prosecutor's filing of the habitual offender status on re-trial).

Owens v. State, 822 N.E.2d 1075, 1077 (Ind.Ct.App. 2005) (the trial court erred in allowing State to file an additional charge following the Defendant's first successful appeal; protecting a Defendant's right to a fair trial, which justifies presumption of prosecutorial vindictiveness, is even more compelling in case of a successful appeal than in the case of a successful motion for mistrial).

Schiro v. State, 888 N.E.2d 828 (Ind.Ct.App. 2008) (twenty-five year delay in bringing rape charges against Defendant did not violate Defendant's Fifth Amendment due process right and did not constitute prosecutorial vindictiveness; Defendant had been convicted of murder and sentenced to death; after death sentence was set aside, prosecutor further investigated case against Defendant on charge wholly unrelated to murder conviction and death penalty sentence).

Johnson v. State, 959 N.E.2d 334 (Ind.Ct.App. 2011) (a refiled indictment is a pre-trial action, and the State's pre-trial action is presumptively valid for purposes of prosecutorial vindictiveness claims; thus, a Defendant claiming prosecutorial vindictiveness with regard to a refiled indictment must show actual vindictiveness).

Sisson v. State, 985 N.E.2d 1 (Ind.Ct.App. 2012) (no fundamental error by allowing refile of habitual offender and SVF charges after mistrial due to hung jury where trial court sua sponte declared mistrial after jury reported that it was deadlocked; the refile of charges did not result from Defendant successfully exercising any statutory or constitutional right, thus there is no presumption of vindictiveness).

U.S. v. Ribota, 792 F.3d 837 (7th Cir. 2015) (fact that prosecutor filed contempt charges on same day that he agreed to motion to suppress evidence that led to dismissal of Defendant's indictments for drug and firearm offenses was not evidence of actual prosecutorial vindictiveness; prosecutor did not oppose suppression, had no personal stake in the matter since he did not bring initial charges, and timing of contempt charges was based on Defendant's impending release and decision to abscond for nine years after prior criminal charges were filed).