

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4931

DON N. CARTER,

Petitioner-Appellant,

v.

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CV-532)

(February 8, 1994)

Before JONES and DeMOSS, Circuit Judges and COBB*, District Judge**

PER CURIAM:

In this appeal from the district court's denial of habeas corpus relief, the petitioner-appellant asserts that his resentencing violated the terms of his plea bargain and was vindictive under North Carolina v. Pearce, 395 U.S. 711 (1969). Finding no entitlement to relief, we AFFIRM.

* District judge of the Eastern District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Pursuant to a plea bargain, Don Carter pled guilty to three counts of armed robbery in violation of La. Rev. Stat. Ann. §14:64 (West 1986), each of which carries a maximum penalty of ninety-nine years in prison. The trial judge sentenced Carter to 30 years on each count to run *consecutively*. Concluding that the *consecutive* sentences were inconsistent with the terms of the plea bargain, the Louisiana Supreme Court vacated the trial judge's sentences and ordered him to impose sentences in accordance with the terms of the plea bargain or allow Carter to withdraw his guilty plea. Carter was then resentenced by the trial judge to serve 70 years on each count to run *concurrently*.

Carter first argues that the resentencing violates the terms of his plea bargain. As an initial matter, we note that state trial courts are accorded wide discretion in their sentencing decisions such that claims arising out of such decisions are not generally constitutionally cognizable and therefore not reviewable by the federal habeas court. See Haynes v. Butler, 825 F.2d 921, 923 (5th Cir. 1987), cert. denied, 484 U.S. 1014 (1988). However, relief may be required "where the petitioner is able to show that the sentence imposed exceeds or is outside the statutory limits, or is wholly unauthorized by law." Id. at 923-924. If a sentence is within the statutory limits, as it is here, then "the petitioner must show that the sentencing decision was wholly devoid of discretion or amounted to an 'arbitrary or capricious abuse of discretion,' or that an error of law resulted in the improper

exercise of the sentencer's discretion."¹ Id. at 924 (citations omitted).

Carter is simply unable to meet his burden under Haynes. On the day he pleaded guilty, Carter signed a petition to enter his plea which specifically set forth that the only representation by the government he relied upon was that pleading guilty to all three counts would allow him to serve the sentences *concurrently*. On the same day, the district attorney signed a certificate of counsel which set forth the exact same understanding of the plea bargain. In short, the plea bargain as understood by the parties at the time in no way implicated the length of the sentences, but only the way they would be served -- namely *concurrently*. The trial judge certainly operated within the terms of the plea bargain upon resentencing Carter, and thus cannot be said to have abused his discretion in a manner contemplated by Haynes.

Carter's other contention is that the trial judge's imposition of three 70 year sentences to run *concurrently*, when compared to the initial three 30 year sentences to run *consecutively*, amounts to vindictiveness on the part of the judge and violates due process under Pearce. Petitioner's claim is meritless. Without a showing that his second sentence is harsher than his first, petitioner can maintain no claim at all of vindictiveness upon resentencing. See United States v. Vontsteen,

¹ The sentence is within the statutory limits since each count of armed robbery carries with it the possibility of a maximum ninety-nine year sentence. See La. Rev. Stat. Ann. §14:64 (West 1986).

950 F.2d 1086, 1088 (5th Cir. 1992) (en banc). Quite clearly, Carter's overall sentence decreased 20 years and thus he has no vindictiveness claim.²

For the foregoing reasons, we **AFFIRM** the district court's denial of petitioner's application for a writ of habeas corpus.

² This result would obtain under either the "aggregate package" approach which compares the total original sentence to the total sentence after resentencing or the "modified aggregate package" approach which compares the aggregate sentence on the *non-reversed* counts after appeal with the original sentence imposed on those same counts before appeal. See Vonsteen, 950 F.2d at 1092-93. Thus, we need not resolve today the conflict in methodologies employed in some of our cases. See id. at 1093.