IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30072
Summary Calendar

FRANK J. SEPCICH,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden
Louisiana State Penitentiary
and RICHARD P. IEYOUB, Attorney
General State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court for
the Eastern District of Louisiana
(CA 93 3270 D)

(June 16, 1994)

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Frank Sepcich was convicted of armed robbery in Louisiana. The state trial court originally sentenced Sepcich to serve 50 years in prison, the first ten to be served without benefit of

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*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

parole. Sepcich appealed, and the state formally moved to correct Sepcich's sentence (before any decision from the appellate court) because the sentence was illegally lenient.[1] Sepcich's conviction was affirmed and his case was remanded for resentencing in State v. Sepcich, 473 So. 2d 380 (La. Ct. App. 1985); he was resentenced by the same sentencing judge to 50 years in prison, without benefit of probation, parole, or suspension of sentence. The Louisiana state court found on appeal that the resentencing, which mandated that Sepcich was not eligible for parole until after serving 50 years instead of after serving ten, did not violate due process because the corrected sentence was not the result of Sepcich exercising his right to appeal. State v. Sepcich, 485 So. 2d 559, 561 (La. Ct. App. 1986). The Louisiana Supreme Court denied Sepcich's petition for a writ of certiorari. State ex. rel. Sepcich v. Blackburn, 515 So.2d 1106 (La. 1987).

Sepcich filed a federal petition for habeas corpus, arguing that his corrected sentence violated the Constitution, was a product of vindictiveness by the sentencing court and was cruel and unusual punishment. The district court denied Sepcich's petition. We affirm.

DISCUSSION

We review the district court's findings of fact in habeas corpus proceedings for clear error. United States v. Woods, 870

[1] LA. REV. STAT. ANN. § 14:64 (West 1986) provides that sentences for armed robbery must be served without benefit of parole, probation, or suspension of sentence.

F.2d 285, 287 (5th Cir. 1989). We review conclusions of law *de novo*. Id. Sepcich argues that his corrected sentence violates the Constitutional guarantees set forth in North Carolina v. Pearce, 89 S. Ct. 2072 (1969). Pearce provides that the Constitution forbids a judge from imposing a harsher sentence upon remand if the purpose of the increase is to punish the defendant for having successfully appealed a prior conviction. Id. at 2080. In the present case, however, Sepcich was not given a harsher sentence in violation of Pearce for exercising his right to appeal.

Pearce seeks to protect a defendant's right to appeal his conviction without suffering a retaliatory blow at sentencing imposed by a vindictive tribunal. Id. The facts in the present case demonstrate that the defendant's right to appeal was not punished by vindictiveness. First, the state trial court moved to correct the illegal sentence prior to any decision by the appellate court Sepcich, 485 So. 2d at 561. Second, an attack on an illegal sentence can be made at any time pursuant to Louisiana law, regardless of and unrelated to a defendant's decision to appeal. See LA. CODE CRIM. PROC. ANN. art. 882. (West Supp. 1993). Finally, Louisiana law considers a corrected illegal sentence to be the first valid, legal sentence in a criminal case. State v. Husband, 593 So. 2d 1257, 1258 (La. 1992). Sepcich was resentenced more harshly because his first sentence could not be legally carried out, without regard to his

unsuccessful exercise of appeal. See Sepcich, 485 So. 2d at 561.[2]

Sepcich next complains that his resentencing was improper because the Louisiana Supreme Court now requires the resentencing judge to revisit the judge's intent who initially imposed the first sentence. See State v. Desdunes, 579 So. 2d 452 (La. 1991); Husband, 593 So. 2d at 1258.[3] We do not consider this inquiry to be of a Constitutional dimension. We are without authority on habeas corpus review to correct applications of state law unless a federal constitutional infraction mandates that we do so. See Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988); Stewart v. Estelle, 634 F.2d 998, 999 (5th Cir. 1981).

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[2] Sepcich argues that because a harsher penalty was imposed by the same judge on resentencing, he is entitled to a presumption of vindictiveness. See United States v. Moore, 997 F.2d 30, 38 (5th Cir.), cert. denied, 114 S. Ct. 647 (1993). This presumption does not apply in the present case, however, because Sepcich's first sentence was corrected only because it was illegal; nothing occurred to trigger a presumption of vindictiveness. See Kindred v. Spears, 894 F.2d 1477, 1480 (5th Cir. 1990) (absent a triggering event, the court will not presume vindictiveness).

[3] Desdunes set forth the requirement that the record on resentencing should reflect the intent of the original sentencing judge as follows: if the intent of the original sentencing judge was that the defendant's term of years be served without benefit of parole, resentencing to the same term of years without parole would be appropriate; if the intent was to allow parole eligibility, then the resentencing judge may impose a sentence of a lesser term of years without parole to reflect that intent; if the intent cannot be determined, then the resentencing judge should make an independent determination of an appropriate sentence, not to exceed the term of years originally imposed, to be served without benefit of parole. 579 So. 2d at 452.

Finally, Sepcich argues that his sentence is excessive and that it constitutes cruel and unusual punishment under the Eighth Amendment. In order to determine what constitutes an Eighth Amendment violation, we must make a threshold comparison of the gravity of the offense against the severity of the sentence. McGruder v. Puckett, 954 F.2d 313, 316 (5th Cir.), cert. denied, 113 S. Ct. 146 (1992). Unless the sentence is grossly disproportionate to the offense, we need not consider the remaining determinative factors set forth by the Supreme Court in Solem v. Helm, 103 S. Ct. 3001 (1983). Id.

Sepcich was convicted of armed robbery; he entered a drug store and pointed a shot-gun at the clerk, ordered everyone to the floor, stole money and drugs, and then brandished his weapon at a police officer in order to further an escape. In Louisiana, armed robbery is punishable by imprisonment for not less than five years and not more than ninety-nine years, without benefit of parole, probation, or suspension. LA. REV. STAT. ANN. § 14.64. Sepcich had been convicted of two armed robberies and simple rape at the time he was sentenced, and his record demonstrated an additional number of arrests for suspected armed robberies throughout his lifetime. We do not consider Sepcich's punishment of fifty years without benefit of parole to be grossly disproportionate to the armed robbery offense.

AFFIRMED.