

# ARKANSAS COURT OF APPEALS

DIVISION III  
No. CACR12-484

COREY JAMES WILLIAMS  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered March 13, 2013

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT, FIRST  
DIVISION  
[NO. 60CR-10-3510]

HONORABLE LEON JOHNSON,  
JUDGE

AFFIRMED

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**ROBIN F. WYNNE, Judge**

Appellant Corey James Williams was found guilty of aggravated robbery (Class Y felony) and theft of property (Class A misdemeanor), and his sentence was enhanced by seven years pursuant to Arkansas Code Annotated section 16-90-120 for employing a firearm in the commission of a felony. On appeal, he challenges the firearm enhancement on the following grounds: (1) the circuit court erred in denying his motion to quash the State’s amendment of the information to add the firearm enhancement charge because the State failed to rebut the presumption of prosecutorial vindictiveness; and (2) the firearm-enhancement is an illegal sentence because it is contrary to the criminal code’s provision that “[n]o defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter.” We affirm.



In October 2010, the State filed a felony information charging appellant with aggravated robbery, felony theft of property, and possession of a firearm by certain persons.<sup>1</sup> Appellant's jury trial on the charges of aggravated robbery and theft of property was held on September 27, 2011. After the jury was unable to reach a verdict, the circuit court granted appellant's motion for mistrial without objection by the State. Two days later, on September 29, 2011, the State filed an amended information adding a firearm enhancement under Arkansas Code Annotated section 16-90-120 (Supp. 2011). Appellant filed a motion to quash the amendment, arguing that it was the result of prosecutorial vindictiveness following his successful exercise of his right to a jury trial.

The court held a hearing on appellant's motion to quash on January 23, 2012. After the defense presented its argument, the court denied the State's motion to deny the motion to quash based on a failure to make a prima facie case. The burden then shifted to the State to rebut the presumption that the amendment to the information was the result of prosecutorial vindictiveness. The State called two deputy prosecutors to testify regarding the filing of the amended information. Both testified that in the week before trial they noticed that the firearm enhancement had been omitted from the initial information. They discussed whether to amend the information at that time but decided not to do so in order to avoid a possible continuance. The circuit court found that the State had successfully rebutted the presumption of prosecutorial vindictiveness. Accordingly, the court denied appellant's motion to quash.

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<sup>1</sup>Before trial, the possession-of-a-firearm charge was severed, and appellant pled no contest to that offense on February 28, 2012.



The second jury trial was held on February 8, 2012. Immediately before the trial began, the State made an oral motion to amend count 2, changing it from felony to misdemeanor theft of property. At trial, the State presented evidence that appellant and another man took a jar of money and a cell phone from the victim at gunpoint. The jury returned verdicts of guilty on all charges, including the firearm enhancement, and appellant was sentenced as follows: forty years for aggravated robbery; one year (concurrent) in the county jail for theft of property; and seven years for the firearm enhancement—for a total of forty-seven years' imprisonment. Appellant appeals from the sentencing order that was entered on February 17, 2012.

#### I. *Prosecutorial Vindictiveness*

Appellant contends that the circuit court clearly erred in finding that the State rebutted the presumption of prosecutorial vindictiveness that arose when the State added a firearm-enhancement charge to the information two days after his first trial ended in a mistrial. Appellant cites *Blackledge v. Perry*, 417 U.S. 21 (1974); *Phavixay v. State*, 2009 Ark. 452, 352 S.W.3d 311; and *Townsend v. State*, 355 Ark. 248, 134 S.W.3d 545 (2003), for the proposition that “[a] presumption of prosecutorial vindictiveness arises when a prosecuting attorney files an additional charge after the defendant’s initial trial that exposes the defendant to a longer possible period of imprisonment.”

We agree with the State that no presumption arose in the present case because appellant’s unopposed mistrial motion due to a hung jury was not the exercise of a legal right as contemplated by the United States Supreme Court in *Blackledge* and by the Arkansas Supreme Court in cases including *Phavixay*. In those cases, the amendment to bring more



serious charges followed the defendants’ successful exercise of their appeal rights. In general, a modification in a charging decision that follows a mistrial for neutral reasons, such as a hung jury, and without objection from the government, raises no presumption of vindictiveness because there is no reason why the prosecutor would consider the defendant responsible for the need for a new trial. *E.g.*, *United States v. Rodgers*, 18 F.3d 1425 (8th Cir. 1994) (the defendants’ acquittals in the first trial did not involve the exercise of a right by the defendants that would raise a presumption of vindictiveness); *United States v. Perry*, 335 F.3d 316 (4th Cir. 2003) (no presumption of vindictiveness arises following unopposed mistrial due to deadlocked jury). Appellant has not cited any authority to the contrary, and we hold that a presumption of prosecutorial vindictiveness did not arise on this record.

Even if the presumption had arisen, we would still affirm because the trial court’s finding that the State successfully rebutted the presumption was not clearly erroneous. In *Gardner v. State*, 332 Ark. 33, 963 S.W.2d 590 (1998), our supreme court summarized the law on vindictive prosecution and wrote the following:

We hold that Gardner has established a prima facie due process violation by showing that the State added a charge against him so as to expose him to a greater range of punishment following the successful collateral attack of his guilty plea. Thus, this case turns on whether the State sufficiently rebutted a presumption of vindictiveness.

....

We agree that in the case of added counts, a prosecutor should be able to rebut a presumption of vindictiveness with an objective, on-the-record explanation. In the present case, there is more than a simple subjective assertion of the prosecutor’s good faith. Rather, the prosecutor explained that “a lot of times” he did not completely review a case “until just before trial.” He stated that the cost of obtaining these records was a factor in waiting until trial was imminent. Because the case did not proceed to trial, the prosecutor did not discover the existence of the prior convictions. Moreover, the prosecutor pointed out that when he filed the information



against Gardner on the escape count, prior to the federal grant of habeas relief, he charged Gardner as a habitual offender. Thus, this also arguably rebuts a likelihood of vindictiveness given that the prosecutor had charged Gardner as a habitual offender before the exercise of his federal habeas rights. In sum, the prosecutor produced objective, on-the-record evidence from which the trial court could find a sufficient justification for the addition of the habitual count. Based on these facts, we cannot say that the trial court was clearly erroneous in allowing the State to amend the information to add the habitual count.

*Gardner*, 332 Ark. at 44–47, 963 S.W.2d at 596–97. Here, the deputy prosecutors provided an objective, on-the-record explanation with their testimony that they initially decided not to amend the information to include the firearm enhancement in the interest of judicial economy, to avoid a continuance. After the first trial ended in a hung jury, the threat of delay was no longer a factor. On this record, the trial court did not clearly err in determining that the State rebutted the presumption of prosecutorial vindictiveness.

## II. *Illegal Sentence*

Second, appellant argues that the seven-year sentence he received under the firearm enhancement statute is illegal because it violates the plain language of Arkansas Code Annotated section 5-4-104(a) (Supp. 2011), which provides that “[n]o defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter.” Thus, he reasons that the firearm enhancement in Arkansas Code Annotated section 16-90-120(a)–(b) was repealed on January 1, 1976, when the Arkansas Criminal Code took effect. Appellant concedes that the Arkansas Supreme Court rejected this argument in *Williams v. State*, 364 Ark. 203, 217 S.W.3d 817 (2005). The *Williams* court held that “§ 5-4-104(a) and § 16-90-120(a–b) can be read harmoniously to mean that § 16-90-120(a–b) is only a sentence enhancement, while the Arkansas Criminal Code provides the minimum sentences to be



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imposed for each specific offense.” *Williams*, 364 Ark. at 209, 217 S.W.3d at 820. Our supreme court has declined subsequent invitations to overturn *Williams*. E.g., *Neely v. State*, 2010 Ark. 452, 370 S.W.3d 820. We must follow the precedent set by our supreme court, and we are powerless to overrule its decisions. *Brewer v. State*, 68 Ark. App. 216, 221, 6 S.W.3d 124, 127 (1999). Accordingly, we affirm on this point pursuant to our supreme court’s holding in *Williams*.

Affirmed.

GLADWIN, C.J., and HIXSON, J., agree.

*William R. Simpson, Jr.*, Public Defender, Deputy Public Defender, by: *Clint Miller*, for appellant.

*Dustin McDaniel*, Att’y Gen., by: *Kathryn Henry*, Ass’t Att’y Gen., for appellee.