

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellant,

v.

KEVIN L. BRADLEY,

Appellee.

} Case No.

**08-0488**

} On Appeal from the Champaign

} County Court of Appeals,

} Second Appellate District

} Court of Appeals Case No.

} 2006-CA-31

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT STATE OF OHIO

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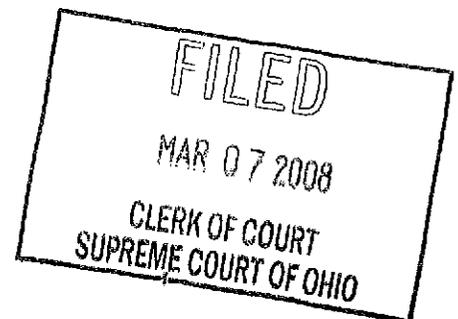


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EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES  
A SUBSTANTIAL CONSTITUTIONAL QUESTION; OR WHY LEAVE TO APPEAL  
SHOULD BE GRANTED IN THIS FELONY CASE

This case involves an interesting question: If a defendant, following a successful appeal, pleads guilty to fewer charges, may the dismissed charges be used to increase his sentence for some of the remaining charges, without violating either *North Carolina v. Pearce* (1969), 395 U.S. 711 or *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245.

In the present case, Defendant-Appellee, Kevin L. Bradley (“Bradley”), received a series of concurrent and consecutive sentences that resulted in an actual sentence of 27 years, 6 months. In particular, he received a six-month sentence for vandalism, a fifth degree felony, and a four-year sentence for the illegal assembly or possession of chemicals for the manufacture of drugs, a third degree felony.

The Champaign County Court of Appeals, Second Appellate District reversed Bradley’s convictions and sentences. See *State v. Bradley*, Champaign App. No. 2004-CA-15, 2005-Ohio-6533. On remand, Bradley pleaded guilty to vandalism, aggravated possession of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, and solicitation of attempted perjury. He received an actual sentence of eight years. More specifically, he received a 12-month sentence for vandalism and a five-year sentence for the drug manufacturing charge. The sentences for these offenses were greater than the ones initially imposed, yet the overall sentence was less than one-third the original one.

The Second District initially rejected Bradley’s argument that the increased sentences for vandalism and drug manufacturing were the result of vindictiveness on the

trial court's part, and affirmed his convictions and sentences. See *State v. Bradley*, Champaign App. No. 06CA31, 2007-Ohio-6583.

Thereafter, in a Decision and Entry, dated February 11, 2008, the Second District granted Bradley's application for reconsideration in part, vacated his sentences for vandalism and drug manufacturing, and remanded the matter for re-sentencing. Copy of said decision attached herein at page A-1 of the Appendix. In its decision, the Second District concluded that the trial court had not rebutted the presumption of vindictiveness that arises under *Pearce* whenever a trial court imposes a harsher sentence on remand following a successful appeal. The Second District also found that the trial court, by increasing the sentences for vandalism and drug manufacturing, had engaged in sentence packaging, in violation of *Saxon*.

The State believes that this case presents two questions of public or great general interest:

1. Is *Pearce* implicated when a trial court imposes longer sentences for some crimes following a successful appeal, yet the defendant's effective punishment does not exceed his original sentence?
2. Does a trial court engage in sentence packaging in violation of *Saxon* when it increases a defendant's sentence for some crimes following a successful appeal, even though his effective punishment does not exceed his original sentence?

This case also involves a substantial constitutional question since the holding of *Pearce* is that a trial court violates the Due Process Clause of the Fourteenth Amendment when it re-sentences a defendant to a harsher sentence, if motivated by vindictiveness. 395 U.S. at 724.

A review of the case law shows that Ohio's intermediate courts are in disagreement as to whether increasing a defendant's sentence for a particular crime

following a successful appeal is permissible under *Pearce* and *Saxon*. The Second District Second District, in *State v. Nelloms* (2001), 144 Ohio App.3d 1, a pre-*Saxon* case, held that “when one or more counts of a multi-count conviction are vacated and remanded, a court does not violate the principles of *Pearce* as long as the aggregate length of the new sentence does not exceed the total length of the original sentence.” *Id.* at 7.

The First District Court of Appeals, however, in *State v. Johnson*, 1<sup>st</sup> Dist. No. C-070051, 2007-Ohio-6512, found that the *Nelloms* line of cases had been superseded by this Court’s rejection of the “sentence packaging” doctrine in *Saxon*.<sup>1</sup> *Id.* at ¶14. The Third District Court of Appeals appears to have reached the opposite conclusion in *State v. Troglin*, 3<sup>rd</sup> Dist. No. 14-06-57, 2007-Ohio-4368, suggesting that *Saxon* does not affect the continued viability of the *Nelloms* line of cases. *Id.* at ¶20.

The Second District’s decision in the present case is also inconsistent with this Court’s decision in *State v. Wiles* (1991), 59 Ohio St.3d 71. In *Wiles*, this Court held that a sentencing court was free to consider other charges even if they did not result in conviction. *Id.* at 78. The Second District, in its February 11, 2008 Decision and Entry, recognized *Wiles*, when it stated that the trial court was free to consider the charges that were dismissed as part of the plea agreement when weighing Bradley’s conduct in committing the offenses of which he was convicted in relation to the purposes and principles of felony sentencing set forth in R.C. 2929.11. See Decision and Entry at p. 7. Yet the February 11, 2008 Decision and Entry effectively precludes using those charges to alter a defendant’s sentence for a particular crime. If they cannot be used for this

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<sup>1</sup> The Second District Second District, in its February 11, 2008 Decision and Entry, makes no mention of *Nelloms*.

purpose, what other use could they possibly have? The State submits none. This inconsistency with *Wiles* is further reason for this Court to accept review of this case.

In sum, this case puts at issue what role, if any, charges that are dismissed as part of a post-remand plea agreement can play in sentencing under *Pearce* and *Saxon*. This issue needs to be resolved in light of this Court's rejection of the "sentence packaging" doctrine in *Saxon*. Therefore, this Court must review the case in order to resolve this issue.

#### STATEMENT OF THE CASE AND FACTS

Bradley was convicted of 15 offenses resulting from drug activity and a chase with officers from the Mechanicsburg Police Department. The trial court imposed a series of concurrent and consecutive sentences that resulted in an actual sentence of 27 years, 6 months. Bradley received a six-month sentence for vandalism, a fifth degree felony, and a four-year sentence for the illegal assembly or possession of chemicals for the manufacture of drugs, a third degree felony.

The Second District reversed Bradley's convictions and sentences because he had appeared before the jury on the third and fourth day of his trial in jail garb and the record did not show a knowing and voluntary waiver of his right not to wear such attire. See *State v. Bradley*, Champaign App. No. 2004-CA-15, 2005-Ohio-6533. The matter was remanded for further proceedings.

On remand, the State brought additional charges that arose out of three telephone calls Bradley placed to family members on the eve of his trial. In the calls, Bradley demanded that his son testify falsely so as to provide him with an alibi. Bradley was

indicted on three counts of solicitation of perjury and three counts of witness intimidation as a result of these calls.

Bradley eventually pleaded guilty to vandalism, aggravated possession of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, and solicitation of attempted perjury. He received an actual sentence of eight years. More particularly, he received a 12-month sentence for vandalism and a five-year sentence for the drug manufacturing charge.

In its Opinion and Judgment, dated December 7, 2007, the Second District rejected Bradley's assignments of error and affirmed his convictions and sentences.

Among the assignments of error presented by Bradley was the following:

Appellant's due process rights were violated when following the successful appeal of the original convictions, the same sentencing judge imposed increased sentences for appellant's crimes of conviction and based such increases on vindictive and biased reasons.

The Second District rejected this assignment of error, finding that the reduced number of convictions justified the increased sentences for the vandalism and drug manufacturing charges. See *State v. Bradley*, Champaign App. No. 06CA31, 2007-Ohio-6583.

Bradley filed an application for reconsideration.<sup>2</sup> In his application, Bradley claimed that the trial court had not satisfied the requirements of *North Carolina v. Pearce* (1969), 395 U.S. 711, when it imposed harsher sentences for the aforementioned crimes. In a Decision and Entry, dated February 11, 2008, the Second District granted Bradley's application with regard to this issue, sustained the aforementioned assignment of error,

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<sup>2</sup> The State did not file a response to Bradley's application. To date, the Champaign County Prosecutor's Office has not been able to determine whether it actually received a copy of the application prior to the Second District's February 11, 2008 decision.

vacated his sentences for those crimes, and remanded the matter for re-sentencing. Copy of said decision attached herein at page A-1 of the Appendix.

In its decision, the Second District concluded that the trial court had not rebutted the presumption of vindictiveness that arises under *Pearce* whenever a court imposes a harsher sentence on remand following a successful appeal. The Second District also found that the trial court, by increasing the sentences for vandalism and drug manufacturing, had engaged in sentence packaging, in violation of *Saxon*.

The State submits that the Second District erred with regard to both conclusions. In support of its position, the State presents the following arguments.

#### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: *Pearce* is not implicated when a defendant receives an enhanced sentence for some of his crimes following a successful appeal as long as his effective sentence does not exceed the one originally imposed.

The United States Supreme Court has held that a defendant's due process rights are violated when, after a successful appeal, a harsher sentence is imposed as a result of vindictiveness. *Pearce*, 395 U.S. at 725. Enhanced sentences on remand are not prohibited unless the enhancement is motivated by actual vindictiveness against the defendant as punishment for having exercised his constitutionally guaranteed rights. *Wasman v. United States* (1984), 468 U.S. 559, 568.

A presumption of vindictiveness arises when the same judge re-sentences a defendant to a harsher sentence following a successful appeal. *Pearce*, 395 U.S. at 726. In order to overcome this presumption, the trial court must make affirmative findings on the record regarding conduct or events that occurred or were discovered after the original sentencing. *Id.* Thus, a trial court may impose an enhanced sentence, but it must

demonstrate that it was not motivated by vindictiveness toward the defendant for exercising his rights. *Id.* at 723.

In its February 11, 2008 decision, the Second District found that the dismissal of a significant number of charges pursuant to the plea agreement did not justify harsher sentences. See February 11, 2008 Decision & Entry, at p. 7. More specifically, the Second District, citing *Wasman*, stated “[t]he fact that Defendant was convicted of fewer offenses did not involve any conduct of the Defendant in relation to the offenses of which he was convicted. Neither did that fact throw ‘new light’ on Defendant’s life, health, habits, conduct and mental and moral propensities.” *Id.*

Yet the Second District also stated that the trial court could consider the dismissed charges when weighing Bradley’s conduct in committing the four offenses of which he was convicted in relation to the purposes and principles of felony sentencing set forth in R.C. 2929.11. *Id.* Left unexplained, however, is what role the dismissed charges are to play under R.C. 2929.11.

In that regard, R.C. 2929.11 provides in relevant part:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

Division (B) makes clear that a defendant's sentence is to be commensurate with and not demeaning to the seriousness of his conduct. The dismissed charges are part of his conduct and may be considered in relation to the remaining charges. Yet according to the Second District, dismissed charges may not be used to increase a defendant's punishment for the charges of which he is eventually convicted. As such, they never actually become part of the sentencing calculus under R.C. 2929.11.

"[I]t is well-established that a sentencing court may weigh such factors as arrests for other crimes. . . . [T]he function of the sentencing court is to acquire a thorough grasp of the character and history of the defendant before it. The court's consideration ought to encompass negative as well as favorable data. Few things can be so relevant as other criminal activity of the defendant[.]" *State v. Burton* (1977), 52 Ohio St.2d 21, 23 (citations omitted). Thus, a sentencing court may consider other charges even if they did not result in conviction. *Wiles*, 59 Ohio St.3d at 78. R.C. 2929.11(B), with its reference to the offender's conduct, is wholly consistent with *Burton* and *Wiles*.

The State also references R.C. 2929.12(A), which provides as follows:

Unless otherwise required . . . , a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

Clearly, the dismissed charges qualify as "any other factors that are relevant to achieving those purposes and principles of sentencing." To hold otherwise would not comport with *Burton* and *Wiles*, which allow charges dismissed as part of a plea

agreement to be factored into the sentencing calculus. If the dismissed charges cannot be used to enhance a defendant's punishment for the charges of which he is eventually convicted, they never become a sentencing factor, even though R.C. 2929.12(A) allows for their use.

Moreover, the Second District had previously held that a re-sentencing implicates *Pearce* only if it results in a longer sentence than was originally imposed. *Nelloms*, 144 Ohio App.3d at 7. “[W]hen one or more counts of a multi-count conviction are vacated and remanded, a court does not violate the principles of *Pearce* as long as the aggregate length of the new sentence does not exceed the total length of the original sentence.” *Id.* at 7. Thus, *Nelloms* allows any charges dismissed pursuant to a post-remand plea agreement to be considered in relation to the remaining charges.

*Nelloms* is wholly consistent with Ohio's felony sentencing law. Under R.C. 2929.12, a sentencing court must consider a myriad of factors when determining how best to satisfy the purposes and principles of sentencing forth in R.C. 2929.11. Among the factors the court may consider is the accused's actual conduct during the criminal enterprise, not just the charges of which he has been found guilty. Furthermore, as set forth in R.C. 2929.11(A), “[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” Consideration of the defendant's actual conduct, including any dismissed charges, ensures that the

punishment will suit not merely the offense but the individual defendant as well, the overriding goal of Ohio's felony sentencing law.

Therefore, in the context of a post-remand guilty plea, a trial court should be free to use the charges dismissed as part of the plea agreement to enhance a defendant's sentence on the remaining charges, as long as his effective sentence does not exceed the one originally imposed. This proposition is wholly consistent with R.C. 2929.11 and 2929.12, which anticipate reviewing an offender's conduct in its entirety, including any dismissed criminal charges. Nor is this proposition, for the reasons set forth below, impermissible sentence packaging in violation of *Saxon*.

Proposition of Law No. II: A trial court does not engage in sentence packaging when it uses charges dismissed as part of a post-remand plea agreement to enhance a defendant's punishment on the remaining charges.

In its February 11, 2008 decision, the Second District also determined that the trial court's sentencing decision violated the prohibition against sentence packaging set forth in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245. The sentencing package doctrine is a product of the Federal Sentencing Guidelines and requires federal courts to consider the sanctions imposed for multiple offenses as components of a single, comprehensive sentencing plan. *Id.* at ¶5.

By contrast, in the Ohio system, a trial court must consider each offense individually and impose a separate sentence for each offense. *Id.* at ¶8. Only thereafter may the judge consider in his or her discretion whether the offender should serve those terms concurrently or consecutively. *Id.* at ¶9. Thus, in the context of multiple offenses, the purposes and principles of sentencing set forth in R.C. 2929.11 are to be applied to each offense, not the group as a whole.

In its February 11, 2008 decision, the Second District concluded that *Saxon's* rejection of the sentencing package doctrine prohibits a court from imposing harsher sentences in order to obtain a longer aggregate sentence since the net effect is consideration of the offenses as a group and the imposition of an omnibus sentence for them. See February 11, 2008 Decision & Entry, at p. 13. The Second District also found that the trial court, when it imposed harsher sentences for the vandalism and drug manufacturing charges, engaged in sentence packaging since it considered Bradley's offenses as a group. *Id.* at p. 14.

Yet the Second District also stated that the dismissed charges could be used when weighing Bradley's conduct in committing the four offenses of which he was convicted in relation to the purposes and principles of felony sentencing set forth in R.C. 2929.11. *Id.* at p. 7. These charges, however, cannot be used to enhance a defendant's sentence for a particular offense post-remand if the net result would be, as in the present case, a finding that the trial court engaged in sentence packaging. The Second District's decision effectively precludes the utilization of dismissed charges in the sentencing context following a successful appeal.

Rather than engaging in sentence packaging, the trial court simply re-weighed Bradley's conduct, including the dismissed charges, in order to reach an appropriate sentence for each offense, in accordance with *Nelloms* and R.C. 2929.11 and 2929.12. Moreover, the Third District Court of Appeals, in *Troglin*, recognized the continued viability of *Nelloms*, notwithstanding the Supreme Court's rejection of the sentencing-package doctrine, when it stated: "In the context of resentencing, 'when one or more counts of a multi-count conviction are vacated and remanded, a court does not violate the

principles of *Pearce* as long as the aggregate length of the new sentence does not exceed the total length of the original sentence.” 2007-Ohio-4368, at ¶20, quoting *Nelloms*, 144 Ohio App.3d at 7. As such, the State submits that the trial court’s post-remand sentencing decision cannot be construed as sentence packaging.

Moreover, the re-weighing undertaken by the trial court in the present case is wholly consistent with R.C. 2929.11 and 2929.12. 2929.12(A) require a sentencing court to consider all factors that are relevant to achieving the purposes and purposes of sentencing set forth in R.C. 2929.11. *Burton* and *Wiles* both allow courts to consider dismissed charges, or even charges that resulted in acquittal, when sentencing an offender.

Had Bradley initially entered into a plea agreement, instead of proceeding to trial, the trial court clearly could have considered any dismissed charges in its sentencing decision. There should be no reason why the trial court should not be free to consider these charges in the context of a post-remand plea agreement, like the one Bradley entered into in the present case. Such consideration is consistent with Ohio’s felony sentencing law.

The State believes that this Court’s rejection of the sentence-package doctrine in *Saxon* cannot be read as precluding consideration of charges dismissed as part of a post-remand plea agreement. Rather, *Saxon*’s admonition that a sentencing court must consider each offense individually and impose a separate sentence for each offense, see *Saxon*, at ¶9, only precludes a trial court from imposing a single sentence for multiple offenses. It does not preclude a trial court from considering dismissed charges when sentencing a defendant following an appeal.

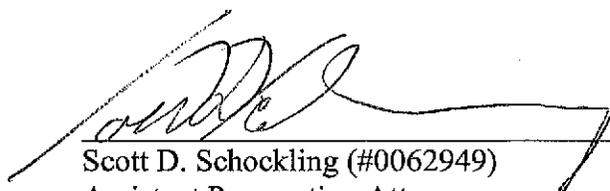
Finally, the State notes that the Second District, by effectively precluding consideration of charges dismissed pursuant to a post-remand plea agreement, compels trial courts to be in “lockstep” with the sentence previously imposed for each offense. Such a practice gives the State no incentive to consider plea agreements following remands since the dismissed charges play no role in the sentencing decision, even if they arose from the very same conduct as the charges to which the defendant has agreed to plead guilty. This public policy concern is further reason to find that the utilization of charges dismissed pursuant to a post-remand plea agreement is wholly consistent Ohio’s felony law and does not act as sentence packaging in violation of *Saxon*.

CONCLUSION

For the reasons outlined above, this case involves a substantial constitutional question, is a matter of public or great general interest, and involves a felony. The State asks this Court to accept jurisdiction so that the issue presented by this case will be reviewed on the merits.

Respectfully submitted,

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PROSECUTING ATTORNEY (#0055607)



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CERTIFICATE OF SERVICE

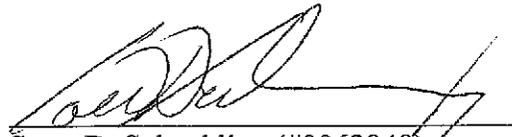
The undersigned hereby certifies that on March 7, 2008, a copy of the foregoing was mailed via regular first class mail, to:

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\_\_\_\_\_  
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Counsel for Appellant State of Ohio

In accordance with Sup. Ct. Prac. R. XIV, § 2(A), a copy of this notice of cross-appeal was also served, on March 7, 2008, via regular first class mail on the Ohio Public Defender, 8 East Long Street, 11<sup>th</sup> Floor, Columbus, Ohio 43215.

  
\_\_\_\_\_  
Scott D. Schockling (#0062949)  
Counsel for Appellant State of Ohio

FILED

FEB 11 2008

EDWARD L. PRESTON

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO  
CLERK OF COURT OF APPEALS

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 06CA31

vs. : T.C. CASE NOS. 06CR234  
06CR06

KEVIN L. BRADLEY :

Defendant-Appellant : ON RECONSIDERATION

DECISION AND ENTRY

Rendered on the 11<sup>TH</sup> day of FEBRUARY, 2008.

PER CURIAM:

This matter is before the court on an App.R. 26(A) application for reconsideration filed by Defendant-Appellant, Kevin L. Bradley. Plaintiff-Appellee, State of Ohio, has not filed a memorandum in opposition to Bradley's application.

"The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *City of Columbus v. Hodge* (1987), 37 Ohio App.3d 68, at 68.

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Bradley asks us to reconsider two findings in our decision of December 7, 2007, in which we affirmed Bradley's conviction and sentence. The first is our finding that the prosecutor presented a non-vindictive reason for charging Bradley with offenses in Case No. 06-CR-234 additional to offenses that were charged in Case No. 04-CR-06, following our reversal of Bradley's convictions in Case No. 04-CR-06. *State v. Bradley*, Champaign App. No. 2005-CA-15, 2005-Ohio-6533. The second is our finding that the trial court satisfied the requirement of *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, when, upon Bradley's second conviction for two of the charges in Case No. 04-CR-06, the court imposed harsher sentences than it had previously imposed for the same offenses, because the court's announced purpose in doing so was non-vindictive.

Following our reversal of Bradley's convictions, the State proceeded on remand on the charges in Case No. 04-CR-06, and, in addition, indicted Bradley on several new charges in Case No. 06-CR-234. Those additional charges were for perjury and witness intimidation, and arose from telephone calls Bradley allegedly made from jail over the weekend days preceding the commencement of his trial in Case No. 04-CR-06 on Monday. The prosecutor explained that those new offenses

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had not been charged in Case No. 04-CR-06 for two reasons. First, because to procure an indictment would have required a continuance of the scheduled trial. Second, proof of those new charges would require additional testimony from Bradley's son, who was deeply troubled by the evidence he had agreed to give against Bradley on the offenses alleged in Case No. 04-CR-06.

We found that the explanation the prosecutor presented portrayed a non-vindictive reason for the new, additional charges in Case No. 06-CR-234 that were joined with the charges in Case No. 04-CR-06 for trial following our reversal and remand. We noted that on remand the testimony of Bradley's son would be required in any event, and that a continuance was no longer an issue. Bradley challenges our rationale in his application for reconsideration, but offers no compelling reason to conclude that we committed an obvious error. *Hodge*. Therefore, that prong of Bradley's application for reconsideration is Denied.

Following our reversal of Bradley's convictions in Case No. 04-CR-06, and his indictment in Case No. 06-CR-234, and the joinder of all charges in a single proceeding, Bradley entered negotiated pleas of guilty to four offenses: vandalism, solicitation of attempted perjury, illegal assembly

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or possession of chemicals for the manufacture of drugs, and aggravated possession of drugs. For the latter two offenses, which were charged in Case No. 04-CR-06, the sentences the court imposed were increased, in relation to those previously imposed, from four to five years and from six to twelve months, respectively. The aggregate sentence for all four offenses is eight years.

Because harsher sentences for the same offenses were imposed by the same judge following a reversal and remand, a presumption of vindictiveness arose which the court was required to rebut by affirmative findings regarding conduct or events discovered since the prior sentencing. *Pearce; Wasman v. United States* (1984), 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424. The subject of the finding must be the defendant's conduct. *Pearce*. To overcome the presumption of vindictiveness, the conduct or events associated with them must "throw 'new light upon the defendant's life, health, habits, conduct, and mental and moral propensities.'" *Wasman*, 468 U.S. 559, at 570-71, quoting *Williams v. New York* (1949), 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337.

The sentences the court previously imposed in Case No. 04-CR-06 were on fourteen offenses of which Bradley was convicted, and in their aggregate totaled twenty-seven and

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one-half years. Bradley's pleas of guilty to but four offenses charged in Case Nos. 04-CR-06 and 06-CR-234 exposed Bradley to far fewer penalties and a smaller aggregate sentence. In imposing harsher sentences than it previously had imposed for two of those offenses, the court explained:

"{¶ 24} 'Considering the totality of the sentences that were imposed previously and the sentences that are imposed now, the Court believes it has the authority to impose maximum and consecutive sentences. The Court believes that the position stated by the prosecutor is a correct one.'

"{¶ 25} 'That the sentence in the previous case was imposed in view of all the convictions. The Court has the same responsibility now to decide what sentence to impose when considering matters before the Court.' (T. 18-19).

"{¶ 26} 'The reduction in possible prison time in the present situation compared to what was originally imposed is of significant reduction. The Court had to think long and hard about authorizing the plea to take affect.'

"{¶ 27} 'The Court realizes that from the statements that were made after the negotiations were completed-By statements, I mean the ones on the record-that each side gave up something in the negotiation process to reach the position that was reached.'

"{¶ 28} 'The Court also is giving up something in authorizing the plea to be accepted because the Court believed in the sentence that it imposed originally or the Court wouldn't have imposed it then, so it required the Court to look freshly at what the result is. After considering all of that information, Case No.2004-CR-06, COURT FOUR, vandalism, fifth degree felony. Sentence is twelve months to the Ohio Department of Corrections. Fine is \$500.'

"{¶ 29} 'Same case, amended COUNT SIX is aggravated possession of drugs, fifth degree felony. Sentence is twelve months to the Ohio Department of corrections. Fine is \$500.'

"{¶ 30} 'COUNT FIFTEEN, illegal assembly or possession of chemicals for the manufacture of drugs, third degree felony. Sentence is five years to the Ohio Department of Corrections. Fine is \$500.'

"{¶ 31} 'Case number 2006-CR-234, solicitation of attempt to perjury, fourth degree felony. Sentence is twelve months to the Ohio Department of Corrections. Fine is \$500. Fines are concurrent. Confinement is consecutive, and that makes eight years." (T. 20-21).'" *State v. Bradley*, ¶24-31.

Addressing the *Pearce* and *Wasman* requirements in our decision of December 7, 2007, we concluded that the significant event that had occurred since Bradley's prior

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sentencing was that the number of the offenses of which he was convicted was reduced from fourteen to but four as a result of Bradley's negotiated guilty pleas. While, as a factual matter, that is correct, on reconsideration we find that we erred in finding that the fact is one that justified the imposition of harsher sentences.

The fact that Defendant was convicted of fewer offenses did not involve any conduct of the Defendant in relation to the offenses of which he was convicted. Neither did that fact throw "new light" on Defendant's life, health, habits, conduct and mental and moral propensities. *Wasman*. The court could consider other charges that were dismissed by the State in weighing Defendant's conduct in committing the four offenses of which he was convicted in relation to the purposes and principles of felony sentencing in R.C. 2929.11. *State v. Wiles* (1991), 59 Ohio St.3d 71. However, the fact that charges were dismissed, which as a result diminished the number of sentences the court could impose, portrays no basis for imposing harsher sentences. Therefore, while the court's explanation does not suggest a vindictive purpose, neither is it sufficient as a matter of law to rebut the presumption of vindictiveness that arose from the harsher sentences the court imposed. *Pearce*.

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Bradley argues that, in addition, the trial court's rationale for imposing harsher sentences, to achieve a particular aggregate sentence, violates the prohibition against sentence-packaging announced in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245. We approved the trial court's rationale in our decision of December 7, 2007. However, on reconsideration, we agree with Bradley.

The defendant in *Saxon* was convicted on his negotiated pleas of guilty of two counts of gross sexual imposition, R.C. 2907.05, one a fourth degree felony and the other a felony of the third degree because the age of the victim. The trial court imposed a sentence of four years on each count, to be served concurrently. On appeal, the defendant challenged the sentence for the fourth degree felony. The appellate court held that the trial court erred, because the maximum sentence for a fourth degree felony is eighteen months. R.C. 2929.14(A)(4). The court of appeals then vacated the sentences imposed for both the third and fourth degree felonies and remanded the case for resentencing.

The state appealed, arguing that the court of appeals erred when it also vacated the four-year sentence for the third degree felony, which the trial court is authorized by R.C. 2929.14(A)(3) to impose. The Supreme Court agreed, and

held:

"1. A sentence is the sanction or combination of sanctions imposed for each separate, individual offense.

"2. The sentencing-package doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant and appellate courts may not utilize the doctrine when reviewing a sentence or sentences.

"3. An appellate court may modify, remand, or vacate only a sentence for an offense that is appealed by the defendant and may not modify, remand, or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single offense." *Id.*, Syllabus by the Court.

Writing for the court in *Saxon*, Justice O'Connor explained that the "sentencing package" doctrine is employed in federal courts and is a product of the Federal Sentencing Guidelines, which require federal courts to consider the sanctions imposed on multiple offenses as the components of a single, comprehensive sentencing plan. Therefore, "an error within the sentencing package as a whole, even if only on one of multiple offenses, may require modification or vacation of the entire sentencing package due to the interdependency of the sentences for each offense." *Id.*, at ¶ 6. For that

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purpose, a federal appellate court has the authority to vacate all sentences, even if only one is reversed on appeal. *Id.*, citing § 2106, Title 28, U.S. Code.

In contrast, and with respect to the particular error the court of appeals in *Saxon* committed, R.C. 2953.08(G)(2) authorizes Ohio's courts of appeals to "increase, reduce, or otherwise modify a [felony] sentence that is appealed under this section," or to "vacate the sentence and remand the matter to the sentencing court for resentencing" if the sentence is contrary to law. Limiting the court's authority in that respect to the particular sentence tainted by error corresponds to R.C. 2929.14(A)(1)-(5), which sets out the range of available terms "(f)or a felony" of each degree concerned. "The statute makes no provision for grouping offenses together and imposing a single, 'lump' sentence for multiple felonies." *Saxon*, ¶ 8. (Emphasis supplied). The *Saxon* court further stated:

"(¶ 9) Although imposition of concurrent sentences in Ohio may appear to involve a "lump" sentence approach, the opposite is actually true. Instead of considering multiple offenses as a whole and imposing one, overarching sentence to encompass the entirety of the offenses as in the federal sentencing regime, a judge sentencing a defendant pursuant to

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Ohio law must consider each offense individually and impose a separate sentence for each offense. See R.C. 2929.11 through 2929.19. Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus, ¶ 100, 102, 105; R.C. 2929.12(A); *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. Under the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses.

"{¶ 10} This court has never adopted the sentencing-package doctrine, and we decline to do so now. The sentencing-package doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant, and appellate courts may not utilize the doctrine when reviewing a sentence or sentences.

(Emphasis supplied.)

\* \* \*

"{¶ 15} Because the sentencing judge must consider each individual offense, the logical conclusion is that a

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'sentence' is the sanction or combination of sanctions imposed for each offense. Adopting the sentencing-package doctrine ignores the critical differences between the Ohio and federal sentencing schemes and implies that sentencing judges must disregard the law and focus on the entire array of offenses when imposing sentence. Ohio law has no mechanism for such an approach. Because Ohio does not 'bundle' sentences, nothing is 'unbundled' when one of several sentences is reversed on appeal."

Justice O'Connor further pointed out that R.C. 2929.01(F)(F) defines a sentence as "the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense, and that the "combination" to which that section refers are those sanctions imposed on a single offense, such as a fine and incarceration. Justice Pfeifer filed a dissenting opinion, and viewed R.C. 2929.01(F)(F) as defining a sentence to mean the entire combination of sanctions imposed on an offender.

The particular error that Saxon involved, the appellate court's reversal of multiple sentences on a finding that one was imposed contrary to law, doesn't implicate the issue presented by Pearce and Wasman, which is whether the

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sentencing court made affirmative findings sufficient as a matter of law to rebut the presumption of vindictiveness that arises when a harsher sentence is imposed following a reversal and remand. Nevertheless, we believe that Saxon's clear and unequivocal rejection of the sentence packaging doctrine for the reasons it did denies courts the authority to impose harsher sentences in order to obtain a longer aggregate sentence, which, in effect, considers the offenses as a group in order to impose an omnibus sentence for the group of offenses to satisfy the purposes and principles of sentencing in R.C. 2929.11, as the trial court did in the present case.

R.C. 2929.11, like R.C. 2929.14(A)(1)-(5), to which Saxon referred, applies when a court "sentences an offender for a felony." (Emphasis supplied.) As Saxon pointed out, "[t]he use of the articles 'a' and 'an' modifying 'sentence' and 'offense' denotes the singular and does not allow for" sentence packaging. *Id.*, ¶ 13. The same applies to R.C. 2929.11, which sets out the purposes and principles of sentencing applicable to the sentence imposed for each separate offense of which a defendant is convicted. Had the General Assembly intended that the purposes and principles in R.C. 2929.11 apply to all sentences imposed as a group, it easily could have made those purposes and principles

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applicable to the group of sanctions imposed on a defendant who is convicted of multiple offenses, but it didn't. Instead, R.C. 2929.11 applies to each discrete sentence the court imposes.

The trial court erred when it imposed harsher sentences in order to serve the purposes and principles of sentencing with respect to the aggregate of the four separate offenses the court imposed, because in so doing the court applied the sentence packaging doctrine, which Ohio courts may not employ. *Saxon*. That error does not portray a vindictive attitude. However, as with respect to the matter of the fewer offenses of which Defendant Bradley was convicted on his guilty pleas, and because it constitutes an error of law, the court's purpose to achieve a greater aggregate sentence cannot serve to rebut the presumption of vindictiveness arising from those harsher sentences.

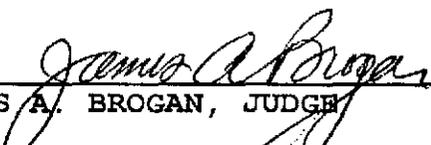
Defendant failed to raise a *Pearce* challenge in the trial court with respect to the erroneous findings on which the court relied. That failure forfeits his right to raise the issue on appeal. *State v. Payne*, 114 Ohio St.3d 502. However, forfeiture does not apply to plain error. *Id.* Because on this record the outcome would clearly have been different had the error not occurred, plain error is

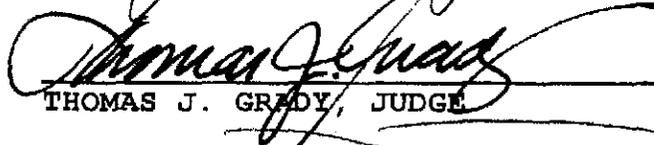
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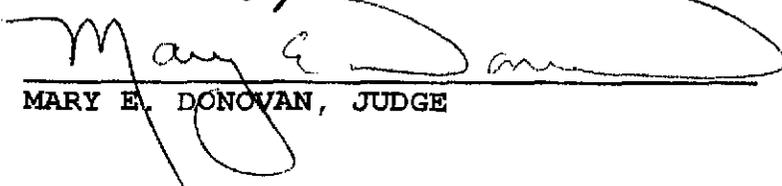
demonstrated. *State v. Long* (1978), 53 Ohio St.2d 91.

Bradley's application for reconsideration is Granted. On reconsideration, our judgment of December 7, 2007, overruling Defendant-Appellant's second assignment of error, concerning the trial court's imposition of harsher sentences for the offenses of aggravated possession of drugs and illegal assembly or possession of chemicals for the manufacture of drugs, is reversed and vacated, and the assignment of error is instead sustained. The sentences imposed for those offenses are also reversed and vacated, and the case is remanded to the trial court for the limited purpose of resentencing for those offenses, consistent with this Decision and Entry.

SO ORDERED.

  
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 JAMES A. BROGAN, JUDGE

  
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 THOMAS J. GRADY, JUDGE

  
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 MARY E. DONOVAN, JUDGE

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