

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, } Case No. 08-0488
}
Appellant, } On Appeal from the Champaign
} County Court of Appeals,
v. } Second Appellate District
}
KEVIN L. BRADLEY, } Court of Appeals Case No.
} 06CA31
Appellee. }

REPLY BRIEF OF APPELLANT STATE OF OHIO

Nick A. Selvaggio (#0055607)
CHAMPAIGN COUNTY PROSECUTING ATTORNEY
Scott D. Schockling (#0062949), **Counsel of Record**
Assistant Prosecuting Attorney
200 North Main Street
Urbana, Ohio 43078
(937) 484-1900
Fax: (937)-484-1901
e-mail: sdsccpo@ctcn.net

COUNSEL FOR APPELLANT, STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER
Stephen P. Hardwick (#0062932), **Counsel of Record**
Assistant State Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
Fax: (614) 752-5167
e-mail: stephen.hardwick@opd.ohio.gov

COUNSEL FOR APPELLEE, KEVIN L. BRADLEY

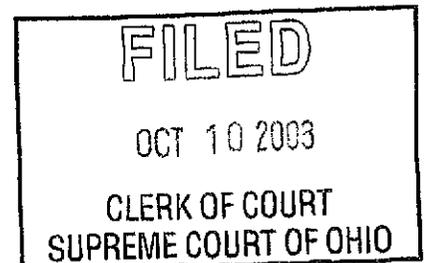


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INTRODUCTION

In *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, this Court stated that “Ohio’s felony sentencing-scheme is clearly designed to focus the judge’s attention on one offense at a time.” *Id.* at ¶8. “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 Ohio law must consider each offense individually and impose a separate sentence for each offense.” *Id.* at ¶9. Ergo, according to Defendant-Appellee, Kevin L. Bradley (“Bradley”), *Saxon* requires a trial court, following the reversal of a defendant’s conviction and sentence, to impose the same sentence as it did originally. (Appellee’s Brief at pp. 4-5).

The State, however, submits that *Saxon* is not applicable to the present situation since Bradley’s convictions and sentences were reversed in their entirety on appeal. In such situations, there is no conviction to which a sentence can attach itself. Nor can it be said that the parties have in some manner bound themselves to a particular sentence since review of the trial court’s sentencing decision has been rendered moot by the reversal of the underlying convictions.

Rather, *Saxon* simply states, in the context of a multiple-offense sentence, that the only sentences that can be modified, remanded, or vacated are those affected by an error. *Saxon*, at paragraph three of the syllabus. Those unaffected by the error are to remain undisturbed. Due to this factual difference, the State believes that Bradley’s interpretation of and reliance upon *Saxon* is misplaced. The State will address this contention within its proposed propositions of law.

REPLY ARGUMENT IN SUPPORT OF PROPOSITONS 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. *North Carolina v. Pearce* (1969), 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656. Enhanced sentences on remand are not prohibited unless they result from actual vindictiveness against the defendant for having exercised his constitutionally guaranteed rights. *Wasman v. United States* (1984), 468 U.S. 559, 568, 104 S.Ct. 3217, 82 L.Ed.2d 424.

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 the present case, the Champaign County Court of Appeals, Second Appellate District ("Second District"), in its decision granting Bradley's application for reconsideration, stated that the charges that were dismissed pursuant to the post-remand plea agreement could be used in weighing the defendant'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. See *State v. Bradley*, Champaign App. No.

06CA31, 2008-Ohio-720, at ¶18. Yet the Second District also stated that the fact that charges were dismissed, thereby reducing the number of sentences that could be imposed, offered no basis for imposing harsher sentences. *Id.*

The State submits that this statement is inconsistent with well-established case law allowing the consideration of factors such as prior arrests and other charges that did not result in conviction. E.g., *State v. Wiles* (1991), 59 Ohio St.3d 71, 78, 591 N.E.2d 97; *State v. Burton* (1977), 53 Ohio St.2d 21, 23, 368 N.E.2d 297. Furthermore, the Second District failed to articulate what role the dismissed charges could play, if they could not be used to increase Bradley's sentences on the remaining charges. The State submits that there is no other role.

It should also be noted that the dismissed charges are relevant to the purposes and principles of sentencing, as set forth in R.C. 2929.11. In that regard, R.C. 2929.11(B) states that a “[s]entence shall be reasonably calculated to achieve the . . . overriding purposes of felony sentencing. . . , commensurate with and not demeaning to the seriousness of the offender's conduct. . . .” As *Wiles* makes clear, charges dismissed pursuant to a plea agreement are part of the offender's conduct and may be considered by a sentencing court.

The dismissed charges are also relevant to the seriousness and recidivism factors set forth in R.C. 2929.12. In that regard, R.C. 2929.12(A) provides that “a court that imposes a sentence . . . has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11 of the Revised Code. In exercising that discretion, the court . . . may consider any other factors that are relevant to achieving those purposes and principles of sentencing.” Clearly, charges dismissed as

part of a plea agreement qualify as “any other factors that are relevant to achieving those purposes and principles of sentencing.”

When some counts are dismissed pursuant to a post-remand plea agreement, the State believes that *Pearce* is not implicated unless the aggregate sentence imposed for the remaining counts exceeds the aggregate sentence imposed originally for all counts. This proposition is wholly consistent with existing case law, as expressed by *Burton* and *Wiles*, and Ohio’s felony sentencing scheme, as articulated in R.C. 2929.11 and 2929.12.

Furthermore, in the present case, Bradley continued to engage in criminal conduct after charges were first brought against him in Champaign County Court of Common Pleas Case No. 2004-CR-06. (September 13, 2006 Sentencing Transcript, at p. 21, line 25 to p. 22, line 4). A criminal conviction obtained between the original sentencing and a sentencing after a post-remand guilty plea amply rebuts any presumption of vindictiveness. *Wasman*, 468 U.S. at 569-570. Quite simply, Bradley’s perjury conviction in Champaign County Court of Common Pleas Case No. 2006-CR-234, by itself, justifies the longer sentences imposed in Case No. 2004-CR-06 for vandalism and the illegal assembly or possession of chemicals for the manufacture of drugs.

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 *Saxon*, the question before this Court was whether an appellate court could modify or vacate the entire multiple-offense sentence where a defendant assigns as error the sentence as to only one or more of those offenses but not the entire multiple-offense sentence. This Court answered that question in the negative, finding that a trial court must consider each offense individually and impose a separate sentence for each offense.

Saxon, at ¶8. Only thereafter may the trial judge consider whether the offender should serve the terms concurrently or consecutively. *Id.* at ¶9. *Saxon*, however, does not attempt to address the situation where an appellate court reverses a judgment in its entirety.

Ordinarily, the reversal of a judgment starts the litigation process anew. For example, a trial court's ruling on a suppression motion is restored to interlocutory status since the final judgment into which it merged was vacated, and the parties are free to present additional evidence in support of their respective positions. E.g., *State v. Davis*, 166 Ohio App.3d 468, 2006-Ohio-1592, 851 N.E.2d 515, at ¶22. Similarly, a trial court is free to consider a new motion for summary judgment, even though it had previously granted summary judgment, which judgment was subsequently reversed on appeal, where the new motion is based upon an expanded record. E.g., *GZK, Inc. v. Schumaker*, Montgomery App. No. 22172, 2008-Ohio-1980, at ¶102.

While the law-of-the case doctrine may, under certain circumstances, bind a trial court to its own prior rulings, such a situation normally involves the failure to appeal an issue. E.g., *State ex rel. Dannaher v. Crawford* (1997), 78 Ohio St. 3d 391, 395, 678 N.E.2d 549. *Saxon's* pronouncement that an appellate court lacked the authority to modify, remand, or vacate a multiple-offense sentence based upon an appealed error in the sentence for a single offense is simply reflective of the law-of-case doctrine.

For example, the defendant in *Saxon* pleaded guilty to one count of gross sexual imposition involving a victim under the age of 13 years, a third degree felony, and one count of gross sexual imposition, a fourth degree felony. He was sentenced to two concurrent four-year prison terms, even though 18 months is the maximum sentence for a

fourth degree felony. On appeal, the defendant only challenged his sentence for the fourth degree felony. At that point, the defendant's four-year sentence for the third degree felony became the law of the case under *Dannaher*.

In the present case, the Court of Appeals did not consider the propriety of Bradley's sentences in his original appeal, even though he raised the issue. See *State v. Bradley*, Champaign App. No. 2004-CA-15, 2005-Ohio-6533, at ¶62. Having reversed the convictions in their entirety, the Court of Appeals found that this issue was moot. As such, there was no decision of a reviewing court, and hence no law of the case.

Rather, Bradley's original sentences, much like the rulings on the motions at issue in *Davis* and *Schumaker*, no longer merged into the final judgment, and the trial court was free to reconsider its sentencing decision since there was no law of the case. This statement is wholly consistent with *Saxon*, which only holds that a multiple-offense sentence cannot be modified, reversed, or vacated based upon an appealed error in the sentence for a single offense. *Saxon*, at paragraph three of syllabus. Quite simply, *Saxon* makes no attempt to address the situation where a multiple-offense sentence is reversed because of an error that invalidates the underlying convictions in their entirety. Limiting *Saxon* to the situation set forth in paragraph three of its syllabus renders it consistent with the law of the case doctrine.

Prior to *Saxon*, it was commonly understood, in the context of re-sentencing, 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." E.g., *State v. Nelloms* (2001), 144 Ohio App.3d 1, 7, 759 N.E.2d 416. *Saxon* does not change this rule. Rather,

Saxon simply states that only those sentences affected by an error are subject to modification, remand, or vacation. *Saxon* does not address the appropriate length of the sentences affected by the error on remand.

Nor does *Saxon* seek to address the situation where a defendant's convictions are reversed in their entirety because of an error that affects the entire proceeding. In such situations, there is no conviction to which a sentence can attach itself. Nor can it be said that the parties have bound themselves to a particular sentence since review of the trial court's sentencing decision has been rendered moot by the reversal of the underlying convictions.

Accordingly, the State believes that *Saxon* should be limited to the situation set forth in paragraph three of its syllabus,

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.

As such, the Second District erred when it found that *Saxon* required the trial court to impose the same sentences for vandalism and illegal assembly or possession of chemicals for the manufacture of drugs as it did prior to Bradley's initial appeal. Rather, in such situations, trial courts should be free to re-evaluate a defendant's conduct, including any charges dismissed as part of a post-remand plea agreement, and to impose any sentence within the statutory range so long as the aggregate sentence for all crimes does not exceed that originally imposed. See generally *Pearce* supra.

In its decision granting Bradley's application for reconsideration, the Second District stated that the charges dismissed pursuant to the post-remand plea agreement could be considered when weighing his 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. See *State v. Bradley*, Champaign App. No. 06CA31, 2008-Ohio-720, at ¶18. Yet the Second District, by requiring the trial court to impose the same sentences for vandalism and illegal assembly or possession of chemicals for the manufacture of drugs, is precluding any consideration of the dismissed charges in the context of sentencing.

As set forth above, *Saxon* simply holds, in the context of a multiple-offense sentence, that the only sentences that can be modified, remanded, or vacated are those affected by an error. *Saxon*, at paragraph three of the syllabus. *Saxon* does not preclude a trial court from considering dismissed charges when sentencing a defendant who enters into a post-remand plea agreement in a case where his convictions are set aside in their entirety on appeal due to a trial court error. Nor does *Saxon* prohibit a trial court from imposing harsher sentences as a result of additional criminal conduct that occurs after the initial indictment, such as Bradley's attempts to solicit perjured testimony on the eve of his initial trial in Case No. 2004-CR-06.

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 would 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. By limiting *Saxon* to the scenario set forth in paragraph three of its syllabus, this Court would encourage prosecutors to consider post-remand plea

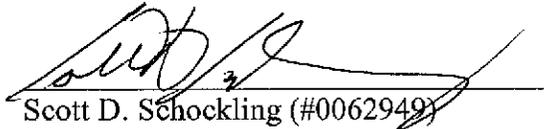
agreements since sentencing issues could be considered anew. This public policy concern is further reason to find that the utilization of charges dismissed pursuant to a post-remand plea agreement is wholly consistent with Ohio's felony sentencing law and does not act as sentence packaging in violation of *Saxon*.

CONCLUSION

For the reasons outlined above, the State urges this Court to reverse the Second Appellate District's decision in *State v. Bradley*, Champaign App. No. 06CA31, 2008-Ohio-720, and to reinstate its decision in *State v. Bradley*, Champaign App. No. 06CA31, 2007-Ohio-6583, in its entirety.

Respectfully submitted,

NICK A. SELVAGGIO, CHAMPAIGN COUNTY
PROSECUTING ATTORNEY (#0055607)

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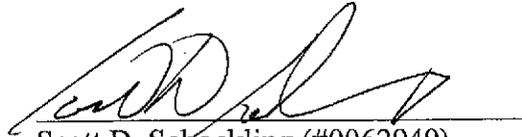
Scott D. Schockling (#0062949)
Assistant Prosecuting Attorney
Counsel for Appellant State of Ohio

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 10, 2008 a copy of the foregoing
was served via regular first class mail on:

Counsel for Defendant-Appellee:

Stephen P. Hardwick, Esq.
Assistant State Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215

A handwritten signature in black ink, appearing to read 'Scott D. Schockling', written over a horizontal line.

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

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APPENDIX TO REPLY BRIEF OF APPELLANT STATE OF OHIO

Nick A. Selvaggio (#0055607)
CHAMPAIGN COUNTY PROSECUTING ATTORNEY
Scott D. Schockling (#0062949), **Counsel of Record**
Assistant Prosecuting Attorney
200 North Main Street
Urbana, Ohio 43078
(937) 484-1900
Fax: (937)-484-1901
e-mail: sdsccpo@ctcn.net

COUNSEL FOR APPELLANT, STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER
Stephen P. Hardwick (#0062932), **Counsel of Record**
Assistant State Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
Fax: (614) 752-5167
e-mail: stephen.hardwick@opd.ohio.gov

COUNSEL FOR APPELLEE, KEVIN L. BRADLEY

2929.11 Purposes of felony sentencing.

(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.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

Effective Date: 07-01-1996

2929.12 Seriousness of crime and recidivism factors.

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, 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.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

Effective Date: 07-08-2002