

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
 Plaintiff-Appellee, :
 v. :
 BRANDON A. MOCKBEE :
 Defendant-Appellant. :

On appeal from the
 Scioto County Court of Appeals,
 Fourth Appellate District
 Court of Appeals Case No. 14CA003601

Supreme Court Case No. 14-1978

MEMORANDUM OF DEFENDANT-APPELLANT IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

It is well settled that a trial court is not permitted to increase a defendant's remaining sentences after a successful appeal, when that increase is motivated by vindictive retaliation. A presumption of vindictiveness arises when the same judge resents a defendant to a harsher sentence following a successful appeal. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969); *Wasman v. United States*, 468 U.S. 559, 104 S.Ct. 3217 (1984). In order to ensure that a non-vindictive rationale supports an enhanced sentence and that the sentence comports with due process, *Pearce* held that the presumption of vindictiveness can be rebutted only by objective information in the record justifying the increased sentence. 359 U.S., at 723. This objective evidence can arise from a new presentence investigation, from the defendant's prison record, or possibly from other sources. *Wasman*, 104 S.Ct., at 3224. Otherwise, the court will violate a defendant's 14th Amendment due process rights. See *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201 (1989).

What the Court of Appeals in this case did not discuss, but what is squarely presented, is the type or quality of evidence that is necessary to justify an increased sentence. In this case, the Defendant was originally convicted on 12 separate counts, and the court imposed an aggregate sentence of 20 years in prison. Some of the underlying counts were run consecutively and some were run concurrently. On appeal, the Court of Appeals vacated six of the counts, which accounted for 17 of the 20 years. Rather than requiring the trial court to simply impose the remaining time of three years, the Court of Appeals inexplicably remanded the case to the trial court for a resentencing hearing. At that resentencing hearing, the trial court, relying on several prison infractions committed by Mockbee during the intervening period (possession of another's property, a television; two claims of possession of contraband, cigarettes; and one claim for the

possession of gambling paraphernalia, poker chips), along with the effects suffered by the owner of the pharmacy whose store was broken into in the middle of the night, and the Defendant's prior criminal history, enhanced the Defendant's sentence from three years to eight years by ordering the previously-imposed concurrent sentences to now be run consecutively.

Although this Court apparently has not had the opportunity to address the issue, the lower courts have consistently held that any information relied on by the trial court to enhance the sentence must be **new**. The information cannot have been known to the court at the time of the original sentencing hearing. See *State v. Seymour*, 12th Dist., 2014-Ohio-72; *State v. Collins*, 8th Dist., 2014-Ohio-938. In this case, there were three bases which the Court of Appeals held justified the trial court's enhancement of Mockbee's sentence: the various prison infractions, the impact of the break-in on the pharmacist, and Mockbee's previous criminal record. But two of these bases—the impact on the pharmacist and the previous record—were either known to, or should have been known to, the trial court at the time of sentencing. Therefore, they were not new. The trial court presumably would have already taken those factors into account at the time of that original sentence. And even though Mockbee may have committed the various prison infractions, there was no documentation, evidence, or testimony to explain whether Mockbee was disciplined for them or otherwise penalized within the prison system. Indeed, there was evidence (which the Court of Appeals omitted) that Mockbee's security level was actually **reduced** while he was in prison.

This case therefore presents this Court with the opportunity to decide whether minor prison infractions are sufficient to justify an additional five years in prison and whether a trial court is permitted to consider both permissible (prison infractions) and impermissible (effect on pharmacist, prior prison record) factors in deciding to increase a defendant's sentence after a

successful appeal. The Court of Appeals stated, at 11, that “the trial court’s consideration of the State’s remaining arguments (criminal history, impact of crimes on pharmacist) was appropriate for its determination of whether the individual sentences for the offenses should be served consecutively or concurrently.” But those are the specific type of factors that other courts have specifically held are **not** to be considered, given that the trial court should have already accounted for that information at the time of the original sentence.

This Court would also have the opportunity to explain the quantum of evidence that is necessary to elevate a defendant’s sentence such as to overcome the presumption of vindictiveness. After all, the infractions in this case do not contain any violence, there were no additional crimes that were committed, and perhaps not even any disciplinary measures were imposed. Given this lack of evidence, along with the evidence that Mockbee’s security level was actually decreased, any reliance by the trial court on these so-called infractions had to have been a pretext to allow the court to impermissibly increase his sentence.

These are issues that have apparently not been addressed by this Court, yet, given the frequency with which cases are remanded to a trial court for a new sentencing hearing, this Court can provide guidance to the trial courts about what factors are and are not proper for them to consider when resentencing a defendant. As one commentator has stated, “[T]he resentencing judge may properly consider such factors as a presentence report, a prior conviction, **the opprobrious conduct of the accused between trials** and trial testimony relating to the character of the accused.” (Emphasis added; footnotes omitted). Cook, *Constitutional Rights of the Accused*, (3rd Ed. 1996), §29:33. Are these prison infractions sufficient opprobrious conduct within the meaning of *Pearce* to justify an additional five years in prison, or was the trial court simply using this conduct as a pretext to enhance Mockbee’s sentence in order to replicate, as

much as it legally could, the original sentence originally handed down by the trial court? This Court can therefore use this case as a vehicle to explain that a few prison infractions, in and of themselves, are insufficient to overcome the presumption of vindictiveness, especially when relied on in combination with additional impermissible factors.

The second issue in this case involves the authority of a trial court, upon remand from the appellate court after that court vacates several convictions, for the trial court to impose consecutive sentences on the remaining counts, even though the trial court had originally run those counts concurrently. There seems to be confusion and inconsistency in Ohio regarding whether this is permissible. For instance, the Court of Appeals in this case, at 19, relied on several appellate cases and held that this could be done. By contrast, however, this Court, in *State v Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, stated, at ¶15:

A remand for a new sentencing hearing generally anticipates a de novo sentencing hearing. R.C. 2929.19(A). However, a number of discretionary and mandatory limitations may apply to narrow the scope of a particular resentencing hearing. For example, the parties may stipulate to the sentencing court's considering the record as it stood at the first sentencing hearing. . . . In a remand based only on an allied-offenses sentencing error, the guilty verdicts underlying a defendant's sentences remain the law of the case and are not subject to review. [*State v.*] *Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at ¶26-27. **Further, only the sentences for the offenses that were affected by the appealed error are reviewed de novo; the sentences for any offenses that were not affected by the appealed error are not vacated and are not subject to review.**

(Emphasis added).

Thus, this Court has indicated that, upon remand, only those sentences that were affected by the appealed error are to receive de novo consideration by the trial court; those offenses that were not affected by the appealed error are not subject to modification. But that is precisely what the trial court did in this case. Five of the counts were vacated, and Appellant was

discharged on those counts. The Court of Appeals remanded the case to the trial court solely for the trial court to resentence Mockbee on the remaining counts, but those counts were never the subject of the appeal or the remand order. (In Mockbee's first appeal, he did raise several evidentiary issues in addition to the issues related to the vacated counts, but the Court of Appeals affirmed the trial court on those evidentiary issues.) Accordingly, a dichotomy exists in Ohio regarding the limitations of a trial court's authority to modify its original sentence. Some courts indicate that all remaining counts are subject to a de novo sentencing review, yet this Court has stated that only the offenses affected by the appeal are subject to that review. See *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245 (appellate court may remand only sentence for offense appealed by defendant and may not modify entire multiple-offense sentence).

Despite this seemingly straightforward language, though, the lower courts, including the 4th District, have stated that a trial court is not restricted at all in making a new individualistic determination upon remand, even regarding those sentences that were not affected by the appeal. See also *State v. Wells*, 11th Dist., 2013-Ohio-5821, relying on the *Saxon* directive that a sentencing judge must consider each offense individually and impose a separate sentence for each offense. This line of thinking ignores the *Saxon-Wilson* commentary that any unaffected sentences must be left alone by the trial court upon remand. When some convictions of a multi-count sentence are vacated and the case is remanded to the trial court, the only thing left for the trial court to do is to vacate the reversed convictions and to impose the sentence that it had originally handed out.

The third issue in this case involves the applicability of res judicata to a question of allied offenses when, on remand for a new sentencing hearing, the trial court addresses whether convictions for theft and receiving stolen property are allied offenses. At Mockbee's original

sentence, the court sentenced Mockbee on both count 7 (theft) and count 8 (receiving the same property), but ran the sentences concurrently. In the first appeal, Mockbee did not raise the issue of whether those convictions were allied offenses of similar import. When the Court of Appeals vacated a number of Mockbee's convictions, the court remanded the case to the trial court in order to resentence Mockbee. At the second sentencing hearing, the court asked for and entertained arguments from both the State and from Mockbee regarding whether those two counts should be treated as allied offenses. The court, relying on the State's arguments, refused to merge the offenses, and, instead, imposed consecutive sentences on Mockbee for those counts.

In his second appeal, Mockbee claimed that this decision by the trial court was erroneous. In its brief, the State argued that the decision was proper under the factual circumstances of the case; the State did not claim that Mockbee was prevented from pursuing this argument due to res judicata. Nor did the State raise this as an issue during the resentencing hearing itself. It was only when the Court of Appeals issued its decision that, for the first time, Mockbee was placed on notice that res judicata was an issue.

This Court has previously discussed this issue in *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381. In that case, the Court of Appeals remanded the case to the trial court in order for the prosecutor to elect which of certain allied offenses that he wanted to pursue for sentencing. This Court agreed, stating, at ¶14, that “[a] sentence that contains an allied-offenses error is contrary to law.” According to *Wilson*, the trial court in this case should have been precluded from reviewing the sentences that were not affected by the appealed error, see discussion *supra* at 4-5, but the court ignored that mandate and considered the allied offense issue anyway. And once the trial court did reopen the hearing to address the issue of allied offenses, then res judicata would no longer apply. After all, *Wilson* stated that res judicata does

not apply to issues that arise at a resentencing hearing: “The scope of an appeal for a new sentencing hearing is limited to issues that arise at the new sentencing hearing. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, at ¶40. **The doctrine of res judicata does not bar a defendant from objecting to issues that arise at the resentencing hearing or from the resulting sentence.**” ¶30. (Emphasis added). Further, the second syllabus of *Wilson* states:

2. A defendant is not barred by res judicata from raising objections to issues that arise in a resentencing hearing, even if similar issues arose and were not objected to at the original sentencing hearing.

It is true, as stated by the Court of Appeals in this case, at 22-23, that numerous cases have held, as explained in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶16, that “any issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings.” This principle applies to arguments regarding allied offenses of similar import. See *State v. Quinn*, 6th Dist., 2014-Ohio-340. But those cases do not address the scenario when the issue actually arises at the resentencing hearing, the court entertains arguments regarding it, and issues a ruling on the merits. In such a situation, *Wilson* dictates that res judicata would **not** apply.

This Court can therefore use this case to resolve the confusion that exists about when res judicata will bar a defendant from raising the issue of allied offenses in a second appeal after resentencing and when it will not. The Court of Appeals in this case was under the mistaken impression that res judicata prevented Mockbee from asserting this argument in his second appeal, when, in fact, *Wilson* states otherwise. Given the numerous convictions that are reversed in Ohio and remanded for a new sentencing hearing, this is an issue that undoubtedly arises on many occasions. This Court can clarify exactly what the scope of a new sentencing hearing

should consist of and how, if the trial court should entertain new arguments, and whether any ruling based on those new arguments is subject to appeal and not barred by res judicata.

The final issue addresses the ability of a court to “unmerge” previously merged offenses at a new sentencing hearing. Initially, the trial court merged counts 5 and 7 (theft of drugs, grand theft) and counts 6 and 8 (two counts of receiving stolen property). In the first appeal, the Court of Appeals vacated the convictions for counts 5 and 6. Nevertheless, on remand the trial court sentenced Mockbee on counts 7 and 8. This had the effect of sentencing Mockbee for a sentence that had been previously merged and then vacated. It is questionable whether the trial court had jurisdiction to do this. *State v. Couturier*, 2001 WL 1045500 (10th Dist., 9-13-01) (upon remand for resentencing, trial court improperly “unmerged” previously merged sentence in order to impose consecutive sentences). This procedure also violates double jeopardy. See *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129 (2005) (once court grants motion to dismiss after state’s case and before presentation of defense, double jeopardy prevents court from changing mind and sending case to jury).

Given that crimes are frequently merged for purposes of sentencing because they are allied offenses, this court can address the proper procedure in the event one of the merged offenses is later vacated and the other is not. Must the merged offense also be vacated or does it survive to the extent that the defendant can be sentenced on it? Even though this issue was not raised below, it questions the very jurisdiction of the trial court to unbundle offenses and to then impose a sentence. The jurisdiction of a court can be raised at any time, even for the first time on appeal, so Mockbee respectfully requests this Court to consider the propriety of the trial court’s actions. And *Smith* holds that double jeopardy prevents a court from acquitting a defendant and then allowing the case to proceed against him anyway.

STATEMENT OF THE CASE AND FACTS

Appellant, Brandon Mockbee, was originally charged with 12 different counts stemming from a break-in to a pharmacy in the middle of the night. A jury found him guilty on all counts.

The trial court sentenced Mockbee to an aggregate 20 years in prison, broken down as follows: count 1, aggravated possession of drugs, eight years; count 2, possession of drugs, eight years; count 3, aggravated possession of drugs, 12 months; count 4, aggravated possession of drugs, one year; count 5, theft of drugs, two years (merged with count 7); count 6, receiving stolen property, 18 months (merged with count 8); count 7, grand theft, 18 months (merged with count 5); count 8, receiving, 18 months (merged with count 6); count 9, vandalism, one year; count 10, possession of criminal tools, one year; count 11, breaking and entering, 12 months; and tampering with evidence, three years.

The sentences in counts 1, 2, 3, 4, 5, and 7 were to run consecutively with each other. The sentences in counts 6, 8, 9, 10, 11, and 12 were to run concurrently with each other and concurrently with the sentence in counts 1, 2, 3, 4, 5, and 7. This provided for a total aggregate sentence of 20 years, of which 16 years was mandatory.

On December 11, 2013, the Fourth District Court of Appeals reversed Mockbee's convictions for several of the counts, and discharged him on counts 1, 2, and 3. The Court also vacated the felonies in counts 5 and 6, and remanded to the trial court for resentencing. *State v. Mockbee*, 2013 WL 6630941, 2013-Ohio-5504. (*Mockbee I*). The vacated counts encompassed 17 of the previously-imposed 20 years.

On January 23, 2014, the trial court conducted a new sentencing hearing pursuant to the Court of Appeals' mandate. At the hearing, the State informed the court that, in February, July, and October 2013, Mockbee had committed several infractions while in prison, including

possession of property of another (a television set), two counts of possession of contraband (cigarettes), and possession of gambling paraphernalia (poker chips). Counsel for Mockbee also informed the court that Mockbee's security level had been reduced since entering the prison system. In addition to asking the court to consider these infractions, the State also argued that the court should take into account Mockbee's previous prison record and the emotional toll that the break-in to the pharmacy had on the pharmacist (even though the pharmacist was not present at the time of the break-in).

In the middle of Mockbee's allocution, as Mockbee was referring to his previous criminal record, the court stated, "that's the problem right there. You keep recommitting, you see." In handing down the sentence which expanded the previously-imposed sentences from concurrent to consecutive, thereby increasing the sentence from three years to eight years, the court initially provided no explanation, other than to state that consecutive terms were needed to protect the public from future crime by the Defendant. Finally, at the end of the hearing, when counsel pressed the court for an explanation why the sentence was being increased from concurrent sentences to consecutive, the court stated, "Sir, did you listen to all the offenses this man's been to prison for? . . . That's why."

Also, at the outset of the resentencing hearing, the court asked both counsel for arguments relating to counts 7 (grand theft) and 8 (receiving stolen property), as to whether they should be considered allied offenses of similar import. After hearing the arguments, the court stated that it was going to rely on the State's arguments and not treat them as allied offenses of similar import. The court then sentenced Mockbee as follows:

- Count 4, aggravated possession of drugs, 12 months
- Count 7, grand theft, 18 months

- Count 8, receiving stolen property, 18 months
- Count 9, vandalism, 12 months
- Count 10, possession of criminal tools, 12 months
- Count 11, breaking and entering to merge with count 7 (grand theft)
- Count 12, tampering with evidence, 24 months

The court ordered that all sentences were to be run consecutively with each other, for a total aggregate sentence of eight years.

Mockbee appealed the new sentence issued by the trial court, but, on October 1, 2014, the Fourth District affirmed the new sentence. 2014 WL 5089350, 2014-Ohio-4493 (*Mockbee II*). He is now seeking leave to appeal to this Court.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NUMBER I: A TRIAL COURT IS UNABLE TO OVERCOME THE PRESUMPTION OF VINDICTIVENESS UPON REMAND FOR A NEW SENTENCING HEARING WHEN IT RELIES ON PRISON INFRACTIONS FOR WHICH THERE WAS NO EVIDENCE OF DISCIPLINE, ON A DEFENDANT'S PREVIOUSLY-KNOWN PRISON RECORD, AND ON PREVIOUSLY-KNOWN INFORMATION REGARDING THE VICTIM, IN ORDER TO ENHANCE A DEFENDANT'S SENTENCE FROM THREE YEARS TO EIGHT YEARS.

A sentencing court is permitted to impose an enhanced sentence on remand after a successful appeal, but that court must demonstrate that the enhanced sentence is not motivated by vindictiveness towards the defendant for exercising his rights. *North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S.Ct. 2072 (1969). In order to ensure that a non-vindictive rationale supports the enhanced sentence, *Pearce* held that “whenever a judge imposes an increased sentence after a successful appeal, there is a presumption of vindictiveness that can be rebutted only by objective information in the record justifying the increased sentence.” *Id.* Further, the decision to enhance a prison term must be based on information that was not originally available to the trial court at

the time of the defendant's original sentencing. *State v. Seymour*, 12th Dist., 2014-Ohio-72; *State v. Thrasher*, 2nd Dist., 2008-Ohio-5182.

As explained in *Wasman, supra*, the new information can come to the judge's attention from conduct or events that occurred subsequent to the original sentencing proceeding. 104 S.Ct., at 3224. Conversely, if the information was known to the trial court at the time of the original sentencing, or should have been known by the court, then that information is not permissible for the trial court to rely on when enhancing a sentence. Further, any new information that comes to the judge's attention must necessarily consist of opprobrious conduct such that it would justify an enhanced sentence.

In this case, the Court of Appeals stated that the trial court was justified in relying on several prison infractions incurred by Mockbee after his original sentence in this case. But, given the paucity of evidence regarding those infractions, other than their titles, there is no detail in the record to justify a finding of opprobrious conduct sufficient to enhance the sentence from three years to eight years. The Court of Appeals appeared to hold that a trial court is justified in relying on any negative subsequent conduct by the Defendant, no matter how minor or innocuous it might be. And the other two factors approved by the Court of Appeals—impact on the victim and previous prison record—were already well known to the trial court at the time of the original sentence and were therefore inappropriate factors to consider upon remand.

This Court can therefore use this case to establish standards to guide the trial courts in determining how serious subsequent conduct must be in order to justify an enhanced sentence. This Court can also explain whether a trial court must engage in a proportionality analysis in deciding how much additional time a defendant must serve as a result of the relatively minor infractions that he incurred in prison.

PROPOSITION OF LAW NUMBER II: UPON REMAND FROM AN APPELLATE COURT FOR RESENTENCING AFTER THE COURT VACATES CERTAIN CONVICTIONS, THE TRIAL COURT DOES NOT HAVE JURISDICTION TO INCREASE THE REMAINING SENTENCES THAT WERE UNAFFECTED BY THE APPEAL.

An appellate court does not have the authority to “modify, remand, or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single offense.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 3rd Syllabus. This Court explained that res judicata bars a convicted defendant from raising and litigating in any proceeding except an appeal from that judgment, any defense for claimed lack of due process that was raised or could have been raised on appeal from that judgment.

Even though the decision in *Saxon* was directed to a **defendant** who improperly attempted to take advantage of a second day in court regarding an appealed sentence, these same principles apply to the State. In *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, this Court held that both the State and the defendant had the right to appeal a sentence. “This is also true with regard to challenges to a sentencing court’s determination whether offenses are allied **and its judgment as to whether sentences must be served concurrently or consecutively.**” (Emphasis added). Thus, res judicata will apply to an unappealed sentence, including the determination whether sentences must be served concurrently or consecutively. And *Holdcroft* emphasized that, unless a sentence was void, res judicata will prevent modification of that sentence:

Therefore, so long as a timely appeal is filed from the sentence imposed, the defendant and the state may challenge any aspect of the sentence and sentencing hearing, and the appellate court is authorized to modify the sentence or remand for resentencing to fix whatever has been successfully challenged. R.C. 2953.08; see also *Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, at ¶30. **But absent a timely appeal, res judicata generally allows only the correction of a void sentence.** *Fischer*, at ¶40.

Holdcroft, at ¶9. Because the remaining convictions were not affected by the appeal, and because the State did not itself appeal the propriety of the concurrent sentences, res judicata prevented the trial court from reopening those sentences and increasing the prison time.

PROPOSITION OF LAW NUMBER III: WHEN A CASE IS REMANDED TO A TRIAL COURT FOR A NEW SENTENCING HEARING, ALL ISSUES THAT ARISE AT THAT SENTENCING HEARING ARE SUBJECT TO APPEAL AND ARE NOT BARRED BY RES JUDICATA.

Although, as argued above, the trial court should not have resentenced Mockbee on those convictions that were not affected by the first appeal, it did anyway. And once the court decided to hold a hearing on the merits of whether counts 7 and 8 were allied offenses, Mockbee had every right to appeal that determination, notwithstanding his failure to raise that issue in *Mockbee I*. *State v. Wilson* explained that res judicata will not prevent a defendant from appealing issues that arise at a resentencing hearing, even if similar issues arose at the original sentencing hearing, yet were never objected to.

It makes sense that res judicata would not apply in such a situation, because the purpose of that rule is to provide finality and to prevent repetitive litigation over the same issue. But if a new issue should arise at a hearing, and the court issues a ruling on the merits, then the issue would not be final until the affected party has had the opportunity to exhaust his appellate remedies. Application of res judicata would frustrate litigation, not provide finality, and would deprive a party of his statutory and due process right to a first appeal of right. See R.C. 2953.02; *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974).

The Court of Appeals in this case did not recognize that Mockbee had every right to appeal the trial court's ruling on this issue. Even though it was pointed out in *Mockbee II* that the trial court addressed the issue on the merits and that the State opposed the issue on the merits,

the State did not raise the issue of res judicata in its brief, so the Court of Appeals acted to deprive Appellant of judicial review of this issue. *Wilson*, however, provides him with that opportunity. The cases relied on by the Court of Appeals are inapposite, because they do not address an issue that had arisen at a resentencing hearing. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238. Instead, they hold that the time to challenge a conviction based on allied offenses is through a direct appeal—not at a resentencing hearing. Had the trial court in this case refused to hear the issue, then perhaps Mockbee would now be foreclosed from arguing it. But once the court heard the arguments of counsel and the State did not claim res judicata, the State waived the issue. And once the court issued a decision on the merits, Mockbee was entitled to challenge that decision.

PROPOSITION OF LAW NO. IV: ONCE A COURT MERGES OFFENSES FOR PURPOSES OF SENTENCING, IF ONE OF THE COUNTS IS LATER VACATED, THE COURT CANNOT "UNMERGE" THE OFFENSES AND THEN SENTENCE THE DEFENDANT ON THEM.

The trial court initially merged counts 5 and 7 and counts 6 and 8. counts 5 and 6 were later vacated. But, on remand, the court sentenced Mockbee on counts 7 and 8, even though they were merged into offenses that had been vacated. Those counts, too, should have been dismissed because they had been “bundled” with counts 5 and 6. *State v. Couturier, supra*. They had been merged into counts that were later dismissed, so it is a non-sequitur to then state that the counts survived anyway and that Mockbee could be sent to prison on them. Further, double jeopardy does not permit the court to acquit a defendant, change its mind, and then allow him to be convicted. *Smith v Massachusetts, supra*.

CONCLUSION

For the foregoing reasons, Defendant-Appellant respectfully requests this Court to accept jurisdiction in this matter and to reverse the decision of the Fourth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. mail to Mark Kuhn, Scioto County Prosecutor, at 602 7th Street, Room 310, Portsmouth, Ohio 45662, on the 13 day of November, 2014.



Fred S. Miller

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

2014 OCT -1 PM 1:10

Bria Younger
CLERK OF COURTS

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA3601
vs.	:	11CR892
BRANDON A. MOCKBEE,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

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CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED:

ABELE, P.J.

This is an appeal by Brandon A. Mockbee, plaintiff-appellant, from a Scioto County Common Pleas Court judgment that resented him upon multiple convictions on remand after his partially successful prior appeal.

Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT IMPROPERLY

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INCREASED HIS SENTENCE FOLLOWING A SUCCESSFUL APPEAL."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT IMPOSED CONSECUTIVE SENTENCES ON THE CHARGES THAT WERE UNAFFECTED BY HIS INITIAL APPEAL."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT DID NOT MERGE COUNT 7 (GRAND THEFT) AND COUNT 8 (RECEIVING STOLEN PROPERTY)."

FACTS

On July 24, 2011, at approximately 11:00 p.m., a motion-detection security camera recorded a break-in at Staker's Pharmacy in Portsmouth, Ohio. The security system detected various people entering and exiting the pharmacy between 11:00 p.m. and 1:12 a.m. the next morning. Many items, including over-the-counter medications and scheduled narcotics, were stolen. When reviewing a security tape, Scioto County Sheriff's Deputy Detective Denver Triggs recognized that custom-made "wheels" shown on a vehicle seen driving in the area of the pharmacy belonged to either Mockbee or to his girlfriend. After Triggs saw the vehicle's custom-made wheels at the residence shared by Mockbee and his girlfriend, he obtained and executed a search warrant. Triggs discovered and seized a number of the stolen medications from the residence.

The Scioto County Grand Jury returned an indictment that charged Mockbee with multiple counts. After a trial, the jury found Mockbee guilty of all counts. The trial court sentenced appellant as follows:

- Count 1: Aggravated Possession of Drugs (Oxycodone):
8 years
- Count 2: Possession of Drugs (Hydrocodone): 8 years
Count
- Count 3: Aggravated Possession of Drugs (Methylphenidate):
12 months
- Count 4: Aggravated Possession of Drugs
(Amphetamine/Dextroamphetamine): 12 months
- Count 5: Theft of Drugs: 2 years
- Count 6: Receiving Stolen Property: 18 months
- Count 7: Grand Theft: 18 months
- Count 8: Receiving Stolen Property: 18 months
- Count 9: Vandalism: 12 months
- Count 10: Possession of Criminal Tools: 12 months
- Count 11: Breaking and Entering: 12 months
- Count 12: Tampering with Evidence: 3 years

The court merged Counts 5 and 7 and Counts 6 and 8. The court further ordered that appellant's sentences in Counts 1, 2, 3, 4, 5, and 7 must be served consecutively with one another, and that his sentences in Counts 6, 8, 9, 10, 11, and 12 would run concurrently with each other and with the sentence for Counts 1, 2, 3, 4, 5, and 7. Thus, the total aggregate prison sentence was 20 years, with 16 years of mandatory incarceration.

On appeal, we sustained a portion of Mockbee's assignments of error, reversed and vacated his convictions on Counts 1, 2, 3, 5, and 6, and remanded the cause for resentencing. *State v. Mockbee*, 2013-Ohio-5504, 5 N.E.3d 50 (4 Dist.) (*Mockbee I*). The sentences associated with the vacated convictions comprised 17 of

the 20 aggregate prison years. In that appeal, Mockbee did not claim that the trial court erred in failing to merge Counts 7 and 8 as allied offenses of similar import.

On remand, the trial court held a resentencing hearing. Appellant's counsel initially asked whether the parties would address the issue of whether Counts 7 and 8 should be merged as allied offenses of similar import, or whether the court would like to make the hearing "all encompassing." The trial court responded that it would make it "all encompassing just to keep it moving along." After the parties presented argument on the allied-offenses issue, the trial court determined that Counts 7 and 8 are not allied offenses of similar import and should not be merged for purposes of sentencing.

For resentencing, the state presented three arguments to support its contention that appellant's sentence should be increased for the remaining offenses: (1) "the significant criminal record of the Defendant, both in convictions, time spent in prison, and in prior arrests that were later dismissed or there was no action taken on a criminal case"; (2) the psychological and economic harm that the pharmacist suffered; and (3) appellant's prison infractions that occurred after his original sentencing. For the prison infractions, the state specified:

It looks like starting back on February
12th of 2013; the Defendant had an

institutional rules infraction for possession of property of another, this was at R.C.I. On July 29th of 2013, also at R.C.I., the Defendant had an infraction for possession of contraband including any article knowingly possessed, which has been altered, or for which permission has not been given. The Defendant was later transferred to C.C.I., and on October 24th of 2013, had another infraction for possession of contraband. Then on October 30th of 2013, also at C.C.I., had an infraction for gambling or possession of gambling paraphernalia. And finally, there's an infraction that's dated November 23rd, 2013, but a description is not given of what that infraction was. So there have been up to five infractions during the relatively short time the Defendant has been incarcerated for these charges. (Tr. 7)

In response to the state's argument concerning appellant's multiple prison infractions, his counsel did not dispute that the infractions occurred, but instead attempted to minimize their impact:

Your honor, when he was sentenced you ran Count[s] 6, 8, 9, 10, 11 and 12 concurrent with the 20 year sentence of Counts 1, 2, 3, 4, 5 and 7. Nothing has changed as we stand here today that should change anything with [the original sentence]. No new facts, no aggravating circumstances. The only thing that has changed is that Mr. Mockbee had a TV, poker chips, and two cigarettes. He had been moved from a higher secure facility to a lower one due to his good behavior in Chillicothe. Judge, to -- to give him any more than what has already been given would be to punish him for exercising his rights, not only in this court, but at the Court of Appeals. (Tr. 11-12)

Appellant later conceded that his behavior since his incarceration had not been exemplary, and the trial court noted that this is a reason why he deserved a harsher sentence than his

original one:

DEFENDANT: My behavior while I was incarcerated, it probably wasn't the best, probably because I didn't have a reason to change. ***

THE COURT: That's - that's the problem right there. You keep recommitting, you see.

DEFENDANT: I do see.

THE COURT: Yeah, and the reason I ran concurrent sentencing, he wanted me to tell you, is because I thought more than 20 years was outrageous, so that's why I run -- ran the others concurrently at the time. I thought 20 years was plenty of enough time. Then -- now you don't a mandatory sentencing or -- which makes you eligible for judicial release down the road. (Tr. 16)

The trial court also explained to appellant the importance of not committing more prison infractions and disagreed with his counsel's contention that there is no new evidence to support a harsher sentence following his partially successful appeal:

THE COURT: Now I have made this possible for you to get a judicial release at some time. If you can learn how to behave yourself while you're in prison, you can prove to me that you can behave yourself out here. Okay. But right now you haven't done so. You gave one of the most eloquent speeches I've ever heard. I'm -- I'm making note of that in my file, because I'm starting to believe you. Okay. Just do the right things, take the programs they offer you, don't get any more disciplinary conduct marks against you, and we can revisit this someday.

MR. SCHIAVONE IV: Judge, if you could for the record, explain how Mr. Mockbee with - the remaining counts here, why all of these have been run at a maximum except for one year of a Count 3 Tampering. What -- what-

THE COURT: Because sentencing is the sole discretion of the Trial Court, sir.

MR. SCHIAVONE IV: Yes, Judge, but I -- believe on the record that -- that the trier of fact has to state with -- with certain specifics here.

THE COURT: Sir, did you listen to all the offenses this man's been to prison for?

MR. SCHIAVONE IV: Yes, Judge.

THE COURT: Okay.

MR. SCHIAVONE IV: And Judge-

THE COURT: That's why.

MR. SCHIAVONE IV: And Judge, but for the fact that no new evidence is here, the State of Ohio offered a three year plea bargain. No new facts have become into evidence. Your Honor, I believe at this point, this just goes straight towards punishment for going to trial and also the appellant [sic] level.

THE COURT: Well, I disagree sir. (Tr. 24-25)

The trial court resentenced Mockbee as follows:

- Count 4: Aggravated Possession of Drugs (Amphetamine): 12 months
- Count 7: Grand Theft: 18 months
- Count 8: Receiving Stolen Property: 18 months
- Count 9: Vandalism: 12 months
- Count 10: Possession of Criminal Tools: 12 months
- Count 11: Breaking and Entering: Merged with Count 7
- Count 12: Tampering with Evidence: 24 months

These individual sentences are the same as the original sentences, except that the court did not originally merge Counts 7 and 11, and the sentence for Count 12 was originally three years instead of two. The court ordered all of these sentences to be served consecutively to each other, resulting in an aggregate prison sentence of eight years, which is longer than the original aggregate prison sentence of three years for these

offenses (because most were originally ordered to be served concurrently to each other). This appeal followed.

LAW AND ANALYSIS

Standard of Review

In his assignments of error, appellant challenges his felony sentences. In *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 33, we recently held that when reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). *Id.* ("we join the growing number of appellate districts that have abandoned the *Kalish* plurality's two step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated "[t]he appellate court's standard of review is not whether the sentencing court abused its discretion"). See also *State v. Graham*, 4th Dist. Highland No. 13CA11, 2014-Ohio-3149, ¶ 31. R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law."

Due Process-Presumption of Vindictiveness

In his first assignment of error, Mockbee asserts that the trial court erred by improperly increasing his aggregate prison sentence from three years to eight years following his partially

successful appeal. "A trial court violates due process of law when, motivated by retaliation or vindictiveness for a defendant's successful appeal, the court resentences a defendant to a harsher sentence." *State v. Seymour*, 12th Dist. Butler No. CA2013-03-038, 2014-Ohio-72, ¶ 7, citing *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *State v. Storms*, 4th Dist. Athens No. 06CA45, 2007-Ohio-5230, ¶ 15 ("A presumption of vindictive punishment arises when the same judge who presided at trial resentences the defendant after his successful appeal").

Thus, an increased sentence on resentencing is presumptively vindictive. However, that presumption may be rebutted. See, generally, Katz, Martin, Lipton, Giannelli, and Crocker, *Baldwin's Ohio Practice Criminal Law*, Section 74:18 (3d Ed.2013). Subsequent decisions have limited the presumption to circumstances in which there is a reasonable likelihood that the increased sentence was the product of vindictiveness by the trial court; in the absence of a reasonable likelihood of retaliation for a successful appeal, the burden is on the defendant to establish actual vindictiveness on the part of the trial court. *State v. Edwards*, 6th Dist. Wood No. WD-13-037, 2014-Ohio-2436, ¶ 7, citing *Alabama v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) ("Where there is no such reasonable likelihood, the burden remains on the defendant to prove actual

vindictiveness"), and *Wasman v. United States*, 468 U.S. 559, 568, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984) ("If it was not clear from the Court's holding in *Pearce*, it is clear from our subsequent cases applying *Pearce* that due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights").

In the case sub judice, the presumption of vindictiveness arises because the trial court resentenced appellant to a higher aggregate prison sentence (8 years) than he was originally sentenced for the same offenses (3 years) following his partially successful appeal. "In order to rebut that presumption, the reasons for the harsher sentence must appear on the record and must be 'based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' " *Edwards* at ¶ 7, quoting *Pearce* at 726. This " 'information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources.' " (Emphasis added.) *State v. Collins*, 8th Dist. Cuyahoga Nos. 98575 and 98595, 2013-Ohio-938, ¶ 12, quoting *Wasman* at 571. Here, the uncontroverted evidence at resentencing established that appellant committed five different prison infractions, four of which were

specified—one for the possession of another's property (a television), two for the possession of contraband without permission (cigarettes), and one for gambling or the possession of gambling paraphernalia (poker chips). Although appellant now contests the lack of documentation to support the state's citation of these infractions, at the sentencing hearing his counsel and appellant himself conceded that he committed these violations. Additionally, the colloquy between the trial court and appellant manifestly showed that the court was primarily concerned with appellant's continued prison misconduct in determining the appropriate sentence. This evidence is sufficient to rebut the presumption of vindictiveness. See, e.g., *State v. King*, 9th Dist. Lorain No. 10CA9755, 2010-Ohio-4400, ¶ 52-53 (trial court did not act vindictively by increasing defendant's sentence upon resentencing because the sentence was based in part on prison infractions that had occurred since his original sentence); *State v. Johnson*, 2d Dist. Montgomery No. 23297, 2010-Ohio-2010 (sentencing judge who increased defendant's sentence on remand was entitled to rely on evidence of defendant's prison infractions after his original sentencing).

Moreover, the trial court's consideration of the state's remaining arguments regarding Mockbee's prior criminal history, and the impact of the crimes for which he was convicted upon the owner of the pharmacy, was appropriate for its determination of

whether the individual sentences for the offenses should be served consecutively or concurrently. Nothing in the record of the resentencing hearing indicates that the trial court's consideration of these matters resulted from any vindictiveness on the part of the trial court. See *Wasman*, 468 U.S. at 568, 104 S.Ct. 3217, 82 L.Ed.2d 42 (Due Process does not prevent increased sentences on remand; it only prevents increased sentences based on actual vindictiveness).

Accordingly, the trial court did not violate appellant's due process rights by resentencing him to an increased aggregate prison sentence based, in part, on new evidence of his prison infractions that had occurred after his original sentencing. Thus, we overrule appellant's first assignment of error.

Resentencing-Res Judicata and Sentence Packaging

In his second assignment of error, appellant asserts that the trial court erred when it imposed consecutive sentences on the charges that were unaffected by his previous appeal. Appellant claims that res judicata prevented the trial court from ordering the sentences to be served consecutively to one another when it had previously ordered that most of them were to be served concurrently to each other and, that by doing so, the trial court engaged in impermissible sentence packaging.

Initially, we point out that appellant did not object to the trial court's decision to conduct an "all encompassing" de novo

resentencing hearing on remand. Therefore, appellant waived all but plain error. *State v. Wells*, 11th Dist. Ashtabula No. 2013-A-0014, 2013-Ohio-5821, ¶ 15 (defendant waived all but plain error by failing to object to the scope of the trial court's resentencing proceeding); Crim.R. 52(B). "Notice of plain error under Crim.R. 52(B) is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; see also *State v. Steele*, 138 Ohio St.3d 1, 2013-Ohio-2470, 3 N.E.3d 135, ¶ 30. Plain error exists when the outcome clearly would have been otherwise. *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 15.

For his claims under his second assignment of error, appellant relies primarily upon the Supreme Court of Ohio's decision in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824. In *Saxon*, the defendant pleaded guilty to two separate counts of gross sexual imposition and was sentenced to concurrent terms of four years on each count. On appeal, the court of appeals found that the trial court erred by imposing a four-year sentence for one of the counts, but remanded both counts for resentencing. The state appealed to the Supreme Court, which reversed.

In so holding, the court rejected the sentence-package doctrine, "a federal doctrine that requires the court to consider the sanctions imposed on multiple offenses as the components of a single, comprehensive sentencing plan." *Id.* at ¶ 5. Under this doctrine, "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. This doctrine is premised on express congressional authorization for federal appellate courts to vacate and remand an entire sentencing package despite the presence of an unchallenged sentence and federal sentencing guidelines that treat counts grouped together as a single offense. *Id.* at ¶ 7.

By contrast, the Supreme Court determined in *Saxon* at ¶ 8-9 that Ohio's sentencing scheme does not support the application of sentence packaging:

But the rationale for "sentence packaging" fails in Ohio where there is no potential for an error in the sentence for one offense to permeate the entire multicount group of sentences. Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time. Under R.C. 2929.14(A), the range of available penalties depends on the degree of each offense. For instance, R.C. 2929.14(A)(1) provides that "[f]or a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years." (Emphasis added.) R.C. 2929.14(A)(2) provides a different range for second-degree felonies. In a case in which a defendant is convicted of two first-degree felonies and one second-degree felony, the statute leaves the sentencing judge no option but to assign a particular

sentence to each of the three offenses, separately. The statute makes no provision for grouping offenses together and imposing a single, "lump" sentence for multiple felonies.

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 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.

(Emphasis sic and added and footnote omitted).

The Saxon court held that "[a] sentence is the sanction or combination of sanctions imposed for each separate, individual offense" and that "[t]he sentencing-packaging 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." *Id.*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, at paragraphs one and two of the syllabus.

The court further held that "[a]n 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.* a paragraph three of the syllabus. This holding is premised on res judicata so that "a defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by res judicata from appealing that sentence following a remand for resentencing on other offenses." *Id.* at ¶ 19. Res judicata also prevents the state from raising a sentencing challenge that it did not timely appeal. See *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 9 ("so long as a timely appeal is filed from the sentence imposed, the defendant and the state may challenge any aspect of the sentence and sentencing hearing, and the appellate court is authorized to modify the sentence or remand for resentencing to fix whatever had been successfully challenged. * * * But absent a timely appeal, res judicata generally allows only the correction of a void sanction").

Under *Saxon*, the trial court erred in resentencing appellant for each of his individual sentences for Counts 4, 7, 8, 9, 10, 11, and 12 because both he and the state either challenged or could have challenged these convictions and the individual sentences in his prior appeal or a timely appeal by the state. Thus, res judicata barred the trial court from imposing new individual sentences for these counts. In this regard, however,

the trial court imposed the same sentences for Counts 4, 7, 8, 9, and 10 that it had originally ordered and it imposed less harsh individual sentences for Counts 11 and 12 by merging Count 11 with Count 7 and by imposing a sentence of 2 years for Count 12 instead of the original sentence of 3 years. Therefore, although the trial court erred in independently reviewing and revising the individual sentences for the convictions, it amounted to harmless error for appellant because he suffered no prejudice. See Crim.R. 52(A); *State v. Palmer*, 80 Ohio St.3d 543, 561, 687 N.E.2d 685 (1997) (no reversible error when the defendant may have benefitted from the claimed error); *State v. Crenshaw*, 51 Ohio App.3d 61, 66, 366 N.E.2d 84 (2d Dist.1977) (error was harmless because it was beneficial to the accused).

Appellant further claims that res judicata also barred the trial court from deciding to run the counts consecutively when it had previously run them concurrently because neither he nor the state successfully challenged the concurrent sentences for these counts by timely appeal. Appellant's claim lacks merit. In *Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, at ¶ 9, the Supreme Court emphasized that each individual sentence is comprised of only the sanctions, including the prison term, for each offense, and that "[o]nly 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." Thus, because the trial court's decision in its original sentence determining which sentences for the individual convictions should be served concurrently or consecutively was premised on the presence of convictions for Counts 1, 2, 3, 5, and 6, (that we vacated in *Mockbee I*, 2013-Ohio-5504, 5 N.E.3d 50 (4th Dist.)), the court's original decision was impacted by the portion of our holding that vacated its original sentence and therefore, was subject to the trial court's de novo determination on the remaining counts.

This result violates neither the doctrine of res judicata nor the prohibition against the Saxon sentence-packaging doctrine and is supported by precedent. For example, in *State v. O'Neill*, 6th Dist. Wood No. WD-12-002, 2013-Ohio-50, ¶ 13-15, the Sixth District Court of Appeals rejected a similar argument:

In his third assignment of error, O'Neill argues that the trial court erred by ordering his sentences on Counts 1 and 3 to be served consecutively to his sentence on Count 2. He states that in the original sentencing entry, Count 2 was ordered to run concurrently with the sentence for Count 1. Count 2 has never been subject to resentencing. Therefore, he contends that the sentence for Count 2 must run concurrently with the sentence for Count 1.

The issue we must decide is whether the concurrent designation is part of O'Neill's sentence on Count 2. We hold that it is not. In so holding, we are informed by the Ohio Supreme Court's analysis in rejecting the "sentencing package" doctrine and detailing Ohio's sentencing scheme in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 5. The Ohio Supreme Court reasoned that such an approach is not appropriate in Ohio where "there is no potential for an error in the sentence for one offense to permeate the

entire multicount group of sentences;" the felony-sentencing scheme "is clearly designed to focus the judge's attention on one offense at a time." *Id.* at ¶ 8. The Court continued:

"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 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.*" (Emphasis added.) *Id.* at ¶ 9.

Thus, the sentence imposed on O'Neill on Count 2 is comprised of the prison term ordered to be served; it does not include the designation that the term is to be served concurrently. See R.C. 2929.01(EE)

(" 'Sentence' means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense." (Emphasis added.)). Therefore, the trial court retained discretion to impose the sentences for Counts 1 and 3 concurrently or consecutively to the existing sentence for Count 2.

Other courts have similarly held that when a multicount criminal case is remanded for resentencing on one conviction, the trial court retains discretion to order that the new sentence be served consecutively to the defendant's sentence for other offenses, even if they had originally been ordered to be served concurrently. See *State v. Wells*, 11th Dist. Ashtabula No. 2013-A-0014, 2013-Ohio-5821, ¶ 33-36; see also *State v. Huber*, 8th Dist. Cuyahoga No. 98206, 2012-Ohio-6139, ¶ 24 ("We agree with

Huber, however, that the trial court should have sentenced him de novo on the consecutive portion of his sentence. Normally, under the law of the case, the consecutive nature of a defendant's sentence would remain intact upon resentencing if this court affirmed it on direct appeal. But in this case * * *, the effect of [the prior appeal] is that Huber *did not have a sentence for aggravated robbery* when he was brought back into court for resentencing" [emphasis sic.]).

This result is eminently logical. When a defendant is convicted of multiple offenses, the trial court must consider each individual sentence before it determines whether and which sentences should be served consecutively pursuant to R.C. 2929.14(C)(4). When some of those convictions that formed the basis for the trial court's original determination of which sentences should be served consecutively are vacated on appeal, the original determination is impacted by the vacated convictions. In that event, the trial court should be able to exercise its discretion on resentencing to make that determination based solely on the individual convictions and sentences that remain viable. That is, a trial court may make a different determination when there are five convictions instead of ten convictions. If this were not the case, trial courts might be inclined to order that all sentences be served consecutively no matter how many offenses are involved for fear

that some convictions could be vacated on appeal without the court being permitted to exercise its discretion to order them to be served consecutively upon remand.

Moreover, the sentence-packaging doctrine is inapplicable because, as *Saxon* recognized, the determination of whether sentences be served concurrently or consecutively is not made until after the trial court has imposed a separate prison term for each offense. The trial court's solitary statement during resentencing referring to the reason that it initially ordered that the sentences be served concurrently was because an aggregate sentence more than the 20 years the court originally imposed would have been outrageous was thus not objectionable on this basis. See *State v. Mitchell*, 6th Dist. Erie No. E-11-039, 2012-Ohio-5262, ¶ 10 (mere fact that trial court made some statements at resentencing referring to the aggregate sentence did not make the cumulative sentence an impermissible sentence package).

Therefore, the trial court did not commit error, much less plain error, by ordering on remand that appellant's sentences for Counts 4, 7, 8, 9, 10, and 12 be served consecutively for an aggregate sentence of eight years. Accordingly, we hereby overrule appellant's second assignment of error.

Allied Offenses of Similar Import

In his third assignment of error, Mockbee asserts that the trial court erred when it failed to merge Counts 7 (Grand Theft) and 8 (Receiving Stolen Property). As noted previously, however, the trial court erred in determining that it was authorized to redetermine the individual convictions and sentences for these offenses during resentencing because they were not previously challenged by his prior appeal. See *Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, at paragraph three of the syllabus. That is, " 'the time to challenge a conviction based on allied offenses is through a direct appeal—not at a resentencing hearing.' " *State v. Young*, 6th Dist. Erie No. E-11-029, 2012-Ohio-1102, ¶ 17, quoting *State v. Padgett*, 8th Dist. Cuyahoga No. 95065, 2011-Ohio-1927, ¶ 17; see also *State v. Quinn*, 6th Dist. Lucas No. L-12-1242, 2014-Ohio-340, ¶ 14-17 (res judicata barred trial court from considering allied-offenses claim at resentencing where defendant could have raised issue in original direct appeal, but did not).

The trial court ultimately imposed the same sentences for Counts 7 and 8 that it did in its original sentence, although the court exercised its discretion and ordered the sentences be served consecutively rather than concurrently as initially ordered. Although the trial court engaged in an allied-offenses analysis in imposing the same individual sentences for these

counts on resentencing, it did not err in its ultimate result because res judicata barred it from considering Mockbee's allied-offense claim. Even assuming that the trial court's analysis on the merits of the claim was erroneous, reversal is not warranted because its result was dictated by res judicata. *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, ¶ 7 (reviewing court "will not reverse a correct judgment simply because it was based in whole or in part on an incorrect rationale"); *Rice v. Lewis*, 4th Dist. Scioto No. 13CA3551, 2013-Ohio-5890, ¶ 14. Accordingly, we hereby overrule appellant's third assignment of error.

CONCLUSION

Appellant has failed to meet his burden of establishing that the trial court's felony sentencing on remand, after our judgment in *Mockbee I*, is clearly and convincingly contrary to law. Therefore, having overruled his three assignments of error, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

Is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment & Opinion

FOR THE COURT

BY:

Peter B. Abele
Peter B. Abele
Presiding Judge



NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.