[Cite as *State v. Cochran*, 2015-Ohio-1102.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-447
v.	:	(C.P.C. No. 10CR-1333)
Gianna Y. Cochran,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 24, 2015

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Kura, Wilford & Schregardus Co., L.P.A., Sarah M. Schregardus and *Barry W. Wilford*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant, Gianna Y. Cochran, appeals from a sentence imposed on May 19, 2014 by the Franklin County Court of Common Pleas following a hearing. Cochran argues that the trial court erred at the hearing in failing to resentence her de novo as to one count (Count 2), failed to make required findings before imposing consecutive sentences, and imposed a sentence that was not authorized by law on four other counts. We reverse the trial court, vacate the sentence imposed on Count 2, and remand for de novo resentencing on that count only.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On April 26, 2010, Cochran was indicted for 18 counts of endangering children, in violation of R.C. 2919.22. Some of the children in question were her own, and some were children for whom she babysat. Cochran was alleged to have roughly handled

the children and, on some occasions, smothered them (apparently not to the point of causing death or lasting physical damage). Counts 1 and 10 concerned two incidents that were indicted only as misdemeanors. Counts 2 through 9 and 11 through 18 concerned eight incidents that were indicted as third-degree felonies and, in the alternative, as first-degree misdemeanors.

{¶ 3} Cochran waived jury, and the case was tried to the court. The bulk of the evidence against Cochran came from video captured via a hidden video camera known as a "nanny cam" and installed by her long-time boyfriend, who was acknowledged to be the father of her two children. After a trial, which included review of the video evidence and the testimony of several witnesses, the trial court found Cochran guilty of Counts 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 17, and 18 and not guilty of Counts 4, 5, 6, 7, 15, and 16. The trial court found the video images and audio caught by the nanny cam were not clear enough to ascertain guilt beyond a reasonable doubt with respect to Counts 4, 5, 6, 7, 15, and 16. However, Cochran's proposed innocent explanations of what was happening in the videos regarding Counts 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 17, and 18 were not credible, said the trial court, and her explanations did not raise any reasonable doubt about her guilt in light of the content of the videos and accompanying audio.

{¶ 4} On April 1, 2011, the trial court sentenced Cochran to five years on Counts 2, 8, 11, 13, and 17, each to run consecutively to one another for a total of 25 years in prison. The trial court also sentenced Cochran to six months on each misdemeanor count, Counts 1, 3, 9, 10, 12, 14, and 18, all to run concurrently with each other and with the felony sentences.

{¶ 5} After sentencing and an unsuccessful postconviction petition based on alleged ineffective assistance of counsel, Cochran appealed to this court. We concluded Cochran's postconviction petition was properly rejected by the trial court without a hearing. *State v. Cochran*, 10th Dist. No. 12AP-73, 2012-Ohio-4077 ("*Cochran I*"). A divided panel of this court also concluded that, although initially, Counts 2 through 9 and 11 through 18 were indicted and intended to be regarded in the alternative, the progress of the trial showed that there were separate abusive acts on each of the relevant dates that justified independent sentences for both misdemeanor and felony counts and thus, on the unique facts of this case, it became unnecessary to merge most of the counts as would

otherwise have been required. *State v. Cochran*, 10th Dist. No. 11AP-408, 2012-Ohio-5899, ¶ 58-77 ("*Cochran II*"). However, we noted a single exception: Counts 2 and 3, we said, concerned the same conduct and, therefore, the state needed to make an election about which to pursue for sentencing. *Id.* at ¶ 78-79, 88. Thus, we vacated the sentences imposed on Counts 2 and 3 and remanded Cochran's case to the trial court for resentencing on those two counts in accordance with our decision. *Id.* at ¶ 88.

{¶ 6} The trial court, however, failed to hold a resentencing hearing. Rather, it held a hearing on May 16, 2014, and allowed the state to merge the counts while keeping the original sentence intact. The transcript reads, in relevant part:

> MR. WILFORD: * * * I do believe the Court [of Appeals] did vacate the sentences imposed on Counts Two and Three or One and - -
>
> MS. SCHREGARDUS: Two and Three.
>
> MR. WILFORD: Two and Three, so the Court does have to impose sentence. And the Court can impose any sentence that is lawful.
>
> That's all I have.
>
> THE COURT: I disagree with you on that issue. And, of course, you can - - again, we'll probably find out some day. But I don't think they did vacate the sentence for Count Two. They simply said that Counts Two and Three should merge for sentencing, and so I don't really view it as a resentence.
>
> I think the sentence for Count Two is - - of five years is still lawful, and the sentence for Count Three merges with Count Two.

(May 16, 2014 Tr. 15.)

II. ASSIGNMENT OF ERROR

{¶ 7} Cochran advances a single assignment of error for our review:

> The trial court abused its discretion and imposed an illegal sentence upon Appellant.

III. DISCUSSION

{¶ 8} Cochran makes four distinct arguments under her single assignment of error. For a cogent discussion, we address that assignment of error in separate sections.

A. First Issue – Whether the Trial Court Should Have Held a New Sentencing Hearing on Remand

{¶ 9} The state correctly concedes that the trial court should have, but failed to, conduct a resentencing. In our prior decision in this case, we stated:

> We * * * affirm appellant's sentence except for the sentences imposed for Counts 2 and 3. Those counts are hereby vacated and remanded for a new sentencing hearing, at which the state must elect which offense to pursue for sentencing, the trial court must accept the state's selection and merge the offenses accordingly.

Cochran II at ¶ 88. Rather than conduct a resentencing, the trial court simply merged the counts, purported to allow the original sentence to stand, and stated:

> I don't think [the Court of Appeals] did vacate the sentence for Count Two. They simply said that Counts Two and Three should merge for sentencing, and so I don't really view it as a resentence.
>
> I think the sentence for Count Two is - - of five years is still lawful, and the sentence for Count Three merges with Count Two.

(May 16, 2014 Tr. 15.)

{¶ 10} The state, Cochran, and we agree; this was error.

B. Second Issue – Whether the Trial Court, Upon Resentencing, Should Have Sentenced Cochran Under the Statutory Criminal Penalty in Effect at that Time

{¶ 11} The state also correctly concedes that the maximum term available for Count 2 is three, rather than five, years. Upon resentencing, because of a change in statute between the time Cochran was sentenced before her first appeal and after her first appeal, the trial court should have imposed only up to a maximum of three years on Count 2. R.C. 2929.14(A)(3)(b); *see also* R.C. 1.58(B).

{¶ 12} Cochran was first convicted and sentenced on April 1, 2011, before the time at which the Ohio Legislature (effective September 30, 2011) reduced the maximum penalty for third-degree felonies from five years to three years. *See* 2011 H.B. No. 86. R.C. 1.58(B) provides, "If the * * * punishment for any offense is reduced by * * * amendment of a statute, the * * * punishment, if not already imposed, shall be imposed according to the statute as amended." Because the sentences for Counts 2 and 3 were vacated, the punishments had not already been imposed when the case was set for resentencing on May 16, 2014. *See State v. Allen*, 10th Dist. No. 13AP-460, 2014-Ohio-1806, ¶ 13. Thus, consistent with R.C. 1.58(B) and the current version of R.C. 2929.14(A)(3)(b), the trial court, despite the seriousness of the conduct to be punished, should not have imposed a sentence in May 2014 on Count 2 exceeding three years. It was therefore error for the trial court following appeal and remand to have, in effect, "reached back" to impose the five-year sentence it imposed during the first sentencing in April 2011.

C. Third Issue - Whether the Trial Court Should, Upon Resentencing, Have Made the R.C. 2929.14(C)(4) Statutory Findings Before Sentencing Cochran to Consecutive Sentences

{¶ 13} The Supreme Court of Ohio has explained the history of statutory findings required for the imposition of consecutive sentences:

> In 1996, the General Assembly limited trial court discretion to impose consecutive sentences by directing courts to make statutorily enumerated findings and to give supporting reasons for doing so at the time of sentencing. Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136. However, in accordance with decisions from the United States Supreme Court, this court held in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, that requiring judicial fact-finding prior to imposing consecutive sentences violated the Sixth Amendment guarantee of trial by jury. We therefore severed the requirement of judicial fact-finding from the statute, struck the presumption in favor of concurrent sentences, and held that judges had discretion to impose consecutive sentences.
>
> Subsequent to our decision in Foster, however, the United States Supreme Court issued *Oregon v. Ice*, 555 U.S. 160, 129

> S.Ct. 711, 172 L.Ed.2d 517 (2009), holding that a statutory requirement for judges in a jury trial to find certain facts before imposing consecutive sentences is constitutional. Accordingly, in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, we held that *Ice* did not automatically revive the consecutive-sentencing provisions held unconstitutional and severed from the statute in Foster, and as a result, we stated that judicial fact-finding would not be required prior to imposing consecutive sentences unless the General Assembly enacted new legislation requiring the court to make findings when imposing consecutive sentences.
>
> Subsequent to *Hodge*, the General Assembly enacted Am.Sub.H.B. No. 86, effective September 30, 2011, reviving some of the statutory language we severed in Foster. That legislation created a statutory presumption in favor of concurrent sentences and further directed courts to make statutorily enumerated findings prior to imposing consecutive sentences * * *.

State v. Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 2-4.

{¶ 14} As applied to this case, this history means that Cochran was sentenced for the first time on April 1, 2011 during the window after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, but before H.B. No. 86, when trial courts were briefly not required to make findings before imposing consecutive sentences. However, when Cochran was to be resentenced on Counts 2 or 3 in May 2014, the window was closed. Thus, when resentencing Cochran, before running the sentence for Count 2 consecutive to the other felony counts, the trial court needed to make the findings set forth by R.C. 2929.14(C)(4) (if the facts herein enable it to make them). *See State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 14-18 (holding that R.C. 2929.14(C)(4) applies to a defendant sentenced after the effective date but who had committed the offenses prior to the effective date); *see also State v. Williams*, 5th Dist. No. 2013CA00189, 2013-Ohio-3448, for the same posture and outcome. As already discussed, the trial court did not hold a genuine resentencing and instead essentially reapplied with little comment the prior sentence. The trial court did not make the findings set forth by R.C. 2929.14(C)(4), holding that the hearing was not a resentencing. Accordingly, we find error in that the

trial court ran the sentence for Count 2 consecutively to the other felony sentences with no requisite statement of findings and reasons.

D. Fourth Issue – Whether the Trial Court, at Resentencing, Needed to Reimpose Sentences for the Other Counts and, Then, Whether Those Sentences Needed to Comply With the Statutory Penalty Scheme Relevant at the Time of Resentencing

{¶ 15} Cochran notes that the Supreme Court held that "[o]nly one document can constitute a final appealable order." *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, ¶ 17. Based on this principle, Cochran concludes that, although this court only vacated the sentences on Counts 2 and 3 and remanded for de novo resentencing on only those counts, the trial court was (and should again be) compelled to issue an entry as to all counts in order for the entry to constitute a final appealable order. Cochran also notes that, as discussed above, the current version of R.C. 2929.14(A)(3)(b) only allows a maximum sentence of three years to be imposed for third-degree felonies. Cochran reasons that, even though she is not entitled to a de novo resentencing on the other counts, the trial court's single entry of her total sentence (for all the crimes in the indictment of which she was convicted) cannot record a sentence on the other counts in the case in excess of the maximum now set forth in R.C. 2929.14(A)(3)(b). Cochran argues that the trial court entry from which she now appeals was contrary to law in that it recorded five-year sentences not just for Count 2, but for all the felony counts. In effect, Cochran would have us hold that, because we vacated and ordered resentencing as to two counts, the entire sentence, even those parts that remained undisturbed by our first decision on appeal, must be newly imposed and now must be for no more than three years under R.C. 2929.14(A)(3)(b).

{¶ 16} Ten years ago, Cochran's argument would have been more persuasive. That is, the law of this district previously was that trial courts sentence as a package and hence, had authority, even if an appellate court did not disturb some counts, to resentence on all counts within the sentencing package. Previously, this court had found that, when the trial court issues its sentencing entry after resentencing and lists the sentences for all counts, it is, in fact, reimposing sentence on those counts as part of an entire package and therefore needed to consider whether changes in the available penalties and R.C. 1.58(B)

required a lower sentence. This holistic view of felony sentencing was based on what is known as the "sentencing-package doctrine." In 2001, for instance, we explained:

> In his second and fourth assignments of error, appellant argues that the trial court lacked the authority to modify on remand the original sentences imposed on those counts not otherwise disturbed by this court's decision in *Couturier I*.
>
> The state, however, contends that the trial court was authorized to modify the sentences on remand under the sentencing package doctrine. We agree with the state.
>
> As recently recognized by this court, the sentencing package doctrine provides that, when a defendant is sentenced under a multi-count indictment and the sentences imposed on those counts are interdependent, the trial court has the authority to reevaluate the entire aggregate sentence, including those on the unchallenged counts, on remand from a decision vacating one or more of the original counts. *In the matter of Fabiaen L. Mitchell* (June 28, 2001), Franklin App. No. 01AP-74, unreported. The underlying theory is that in imposing a sentence in a multi-count conviction, the trial court typically looks to the bottom line, or the total number of years. *Id*. Thus, when part of a sentence is vacated, the entire sentencing package becomes "unbundled," and the trial judge is, therefore, entitled to resentence a defendant on all counts to effectuate its previous intent. *Id*. *See, also*, *State v. Nelloms* (June 1, 2001), Montgomery App. No. 18421, unreported ("when one or more counts constituting the original sentence are vacated, the trial court should be able to review what remains and reconstruct the sentence in light of the original sentencing plan").

State v. Couturier, 10th Dist. No. 00AP-1293 (Sept. 13, 2001).

{¶ 17} Subsequent to this, however, in 2006, the Supreme Court decided *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, which recognized:

> Over the years, some appellate courts have adopted the "sentencing 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. See, e.g., *State v. Webb*, 8th Dist. No. 85318, 2005-Ohio-3839, 2005 WL 1792364, ¶ 9-11; *State v. Jackson*, 10th Dist. No. 03AP-698, 2004-Ohio-1005, 2004 WL 396331,

> ¶ 5; *In re Mitchell* (June 28, 2001), 10th Dist. No. 01AP-74, 2001 WL 722104.
>
> According to this view, 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. *United States v. Clements* (C.A.6, 1996), 86 F.3d 599, 600-601. Thus, in a direct appeal from multiple-count criminal convictions, the appellate court has the authority to vacate all sentences even if only one is reversed on appeal. Id., citing Section 2106, Title 28, U.S.Code.

Id. at ¶ 5-6. Nonetheless, the Supreme Court in *Saxon* held:

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

Id. at ¶ 10. The state high court in *Saxon* also held:

> 1. A sentence is the sanction or combination of sanctions imposed for each separate, individual offense.
>
> * * *
>
> 3. An appellate court may modify, remand, or vacate only a sentence for an offense that is appealed by the defendant and may not modify, remand, or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single offense.

Id. at paragraphs one and two of the syllabus.

{¶ 18} In 2011, the Supreme Court, similar to the case sub judice, considered a case wherein the Eighth District Court of Appeals had remanded a sentence to the trial court for resentencing based on the trial court's initial failure to merge allied offenses. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669. The Supreme Court stated, "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." *Id*. at ¶ 15, citing *Saxon* at paragraph three of the syllabus.

{¶ 19} The difficulty with Cochran's argument as the case law stands today is it presumes that criminal sentences are still to be regarded as a bundle or package, and disturbing one means that all must be reimposed upon resentencing. But the Supreme Court has repudiated this model of sentencing and, in fact, has flatly explained that "any offenses that were not affected by the appealed error are not vacated and are not subject to review." *Id.*, citing *Saxon* at paragraph three of the syllabus. Since this court only vacated the sentence of one felony count, that felony count, and only that felony count, was subject to a resentencing in May 2014. *Cochran II* at ¶ 88. The other sentences remained undisturbed.

{¶ 20} R.C. 1.58(B) should have reduced the penalty for Count 2 upon resentencing because, having been vacated, it was as though the penalty for that count had "not already [been] imposed," with H.B. No. 86 reducing the maximum penalty available for third-degree felonies from five years to three years. R.C. 1.58(B); H.B. No. 86; *Allen* at ¶ 13. Conversely, however, the other sentences for the other four felony counts, since they remained undisturbed by our court, had "already [been] imposed" for purposes of R.C. 1.58(B). Thus, they did not and will not get the benefit of the lesser term of punishment contained in H.B. No. 86 because the sentence on those offenses was imposed before H.B. No. 86 reduced the penalties.

{¶ 21} Nevertheless, Cochran is still correct when she notes that "[o]nly one document can constitute a final appealable order" and, therefore, all the sentences must be contained in a single sentencing entry. *Baker* at ¶ 17. But we find that *Baker* requires a single document, and not a single sentencing. It is perfectly permissible, in accord with both *Baker* and *Saxon*, for a trial court to issue a single entry memorializing the results of more than one sentencing. In this case, the trial court should have resentenced Cochran de novo on Count 2 and then issued a single entry describing all the sentences imposed on her from the subject indictment. Simply put, the entry should set forth the procedural history of the case, explaining when the sentence for each count was imposed and thereby set forth the sentence for each count proved beyond a reasonable doubt.

{¶ 22} A court cannot impose a criminal sentence after the effective date of H.B. No. 86 for five years for a third-degree felony. The procedural history of this case remains what it is, including the imposing of prior sentences that we have left undisturbed. The

sentences for the four felony counts in this case were "not affected by the appealed error [we]re not vacated and are not subject to review." *Wilson* at ¶ 15, citing *Saxon* at paragraph three of the syllabus. By the terms of our prior decision, along with *Saxon* and *Wilson*, Counts 2 and 3 merged into a single felony count, and only that count was subject to a resentencing in May 2014. The fact that the trial court must memorialize the result of all proceedings in a single entry did not suffice to vacate the other counts and require resentencing for them as well. R.C. 1.58(B) only operates to apply more lenient penalties to offenses where the punishment has "not already [been] imposed." Since the sentences on the four felony counts imposed in April 2011 have "already [been] imposed," R.C. 1.58(B) does not apply and the sentences stand and must be recorded in a single entry in accord with *Baker*.

{¶ 23} The ruling of the trial court is reversed, and Cochran's assignment of error is sustained in part and overruled in part.

IV. CONCLUSION

{¶ 24} Cochran's assignment of error is sustained in part and overruled in part. The judgment of the Franklin County Court of Common Pleas is reversed; the sentence on Count 2 is, and remains, vacated. This case is remanded for resentencing on Count 2. The trial court shall hold a de novo resentencing hearing on that count and shall consider, consistent with the appropriate statutory framework, whether or not the sentence for it should be imposed concurrently with or consecutively to the sentences previously imposed on Counts 1, 8, 9, 10, 11, 12, 13, 14, 17, and 18. The trial court shall then issue a single sentencing entry setting forth all the sentences imposed in the case.

Judgment reversed and
cause remanded with instructions.

BROWN, P.J., and LUPER SCHUSTER, J., concur.