

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

STATE OF OHIO,	:	Case No. 14CA5
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
RUSTY CARSEY,	:	
	:	
Defendant-Appellant.	:	<b>RELEASED: 8/11/2014</b>

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APPEARANCES:

Timothy Young, State Public Defender, and Carrie Wood, Assistant State Public Defender, Columbus, Ohio, for appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

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Harsha, J.

{¶1} In Rusty Carsey’s consolidated direct appeal we found his convictions for theft and burglary in Athens County Common Pleas case number 11CR0126 were allied offenses of similar import that the trial court should have merged. We reversed his convictions in that case and remanded the matter for resentencing. However, Carsey did not assign any errors regarding his convictions in Athens County Common Pleas case number 11CR0055 and they were unaffected by our decision.

{¶2} Carsey now argues that at the new sentencing hearing the trial court exceeded the scope of our remand by reducing the period of time he had to pay restitution in both case numbers 11CR0055 and 11CR0126. We agree that the trial court lacked jurisdiction to modify Carsey’s restitution in case number 11CR0055 because we neither vacated his sentence nor remanded for resentencing in that case.

Thus the portion of the trial court's judgment entry resentencing Carsey in case number 11CR0055 is void.

{¶3} Nevertheless, the trial court had to review his burglary sentence in case number 11CR0126 de novo on remand. And because restitution is part of a felony sentence, the court was free to modify his restitution in that case as part of his sentence and we reject that portion of his argument.

{¶4} Carsey also argues that his trial counsel was ineffective for failing to object when the trial court exceeded the scope of remand. However because the trial court's modification of restitution upon resentencing actually benefited Carsey by providing him more time to pay, he has not established prejudice and we find his argument meritless.

#### I. FACTS

{¶5} In case number 11CR0055 the Athens County grand jury indicted Carsey on three counts of theft. In case number 11CR0126 the Athens County grand jury indicted him on one count of burglary and one count of theft. Carsey pleaded guilty to all of the charges and the trial court sentenced him to one year in prison on each of the five counts. The court ordered him to serve the sentences consecutively, for an aggregate term of five years. The court also ordered Carsey to pay restitution jointly and severally with his co-defendant, in the amount of \$323 to Karen Pierce and \$3,120 to Wal-Mart "within four (4) years."

{¶6} Carsey filed a direct appeal, which we considered in *State v. Carsey*, 4th Dist. Athens Nos. 12CA37, 12CA38, 2013-Ohio-4482. We found that Carsey's convictions for theft and burglary in case number 11CR0126 were allied offenses of similar import that the trial court should have merged. *Carsey* at ¶ 16. We remanded

the case for a new sentencing hearing, at which the state had to elect which offense to pursue. *Id.* However, Carsey did not assign any errors regarding his convictions in case number 11CR0055 and they were unaffected by our decision. *Id.* On remand, although the trial court acknowledged that our decision in *Carsey* affected only one of his common pleas cases, it resentenced Carsey in both case numbers 11CR0055 and 11CR0126. Specifically, the trial court resentenced Carsey to one year on each of his three theft convictions in case number 11CR0055, the same as his previous sentence. The trial court also merged his theft conviction with his burglary conviction in case number 11CR0126 and sentenced Carsey to two years in prison in that case. The court again ordered Carsey's convictions to run consecutively, for an aggregate term of five years. However, the court determined that four years was "a little lon[g]" to repay the restitution and ordered Carsey to repay the restitution amounts "within two (2) years of his release from the State Penal Institution." This appeal followed.

## II. ASSIGNMENTS OF ERROR

{¶7} Carsey raises two assignments of error for our review:

1. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT EXCEEDED THE SCOPE OF THE REMAND.
2. MR. CARSEY'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE TRIAL COURT EXCEEDED THE SCOPE OF THE REMAND.

## III. LAW AND ANALYSIS

### A. Scope of Remand

{¶8} In his first assignment of error Carsey argues that the trial court exceeded its scope of remand by reducing the length of time he had to repay the ordered restitution in both cases from four years to two years. The state concedes that the trial

court exceeded its scope of remand, but points out the court's judgment entry actually benefited Carsey by increasing the time for payment.

{¶9} “Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.” *Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410 (1984), paragraph one of the syllabus. “Ohio courts have consistently followed *Nolan* and found reversible error when the trial court exceeds the scope of its authority upon remand of the case from a reviewing court.” *State v. Letts*, 2nd Dist. Montgomery No. 17084, 1999 WL 42011, \*3 (Jan. 29, 1999).

{¶10} “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.” *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 15. “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. \* \* \* 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.” *Id.* Under the law of the case doctrine a trial court lacks jurisdiction to exceed the scope of an appellate court's remand. See *State v. Blevins*, 4th Dist. Scioto No. 11CA3431, 2012-Ohio-573, ¶ 6.

{¶11} Here, the trial court's original judgment entry ordered Carsey to “pay restitution, jointly and severally with Co-defendant, in the amount of \$323.00 to Karen

Pierce and \$3120.00 to Wal-Mart. All restitution shall be paid in full *within four (4) years.*” (Emphasis added). Upon resentencing, the court’s judgment entry ordered Carsey to “pay restitution, jointly and severally with Co-defendant, in the amount of \$323.00 to Karen Pierce and \$3120.00 to Wal-Mart. All restitution shall be paid in full *within two years of his release from the State Penal System.*” (Emphasis added). The trial court could only resentence Carsey on the burglary conviction in case number 11CR0126 because that was the offense affected by our remand. It lacked jurisdiction to address any aspect of his sentence in case number 11CR0055 because that case was unaffected by our decision in Carsey’s direct appeal. See *Belvins* at ¶ 6 (finding the trial court lacked jurisdiction to resentence defendant when we did not remand for that purpose). Accordingly, we agree that the trial court exceeded the scope of our remand to the effect that it altered Carsey’s period of restitution payment in case number 11CR0055 and that portion of its judgment entry constitutes a void judgment. See *id.*

{¶12} Nevertheless, the state points out that contrary to Carsey’s assertion, the trial court’s change in the restitution payment actually benefited Carsey. The trial court’s original judgment entry ordered Carsey to pay restitution within four years of the date of sentencing. However, upon resentencing the court ordered Carsey to pay restitution within two years of his release from prison. And because the court sentenced Carsey to five years incarceration, he received an additional three years to pay restitution upon resentencing. Carsey contends that the court’s original judgment entry actually intended for the four year term to also begin upon his release from prison as evidenced by the court’s statements at the resentencing hearing. We agree that the

court's statements support Carsey's argument; however "[a] court speaks through its journal entry and not its oral pronouncements." *State v. Marcum*, 4th Dist. Hocking Nos. 11CA8, 11CA10, 2012-Ohio-572, ¶ 6.

{¶13} Carsey further asserts that trial court intended that the original judgment entry grant him four years upon his release from prison to pay the restitution because to accept the state's interpretation that it began from the date of sentencing would not make sense, i.e. he has no way to make payments while incarcerated. However, Carsey did not contest this issue in his direct appeal. The only errors he assigned for our review involved whether his convictions for burglary and theft in case number 11CR0126 were allied offenses of similar import and whether his trial counsel was ineffective for failing to object to the court's imposition of sentences for both convictions. However, "[t]he scope of an appeal from a new sentencing hearing is limited to issues that arise at the new sentencing hearing." *Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, at ¶ 30. And because "[t]he doctrine of res judicata bars claims that the defendant raised or could have raised on direct appeal," Carsey is precluded from raising this argument now. *State v. Miller*, 4th Dist. Lawrence No. 11CA14, 2012-Ohio-1922, ¶ 5.

{¶14} Carsey also argues that the trial court exceeded the scope of our remand in case 11CR0126 because "the time period for payment of restitution was unaffected by the merger of the allied offenses." However, "[t]he sentence is the sanction or combination of sanctions imposed by the sentencing court on an offender who pleads guilty to or is convicted of an offense." *State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, 823 N.E.2d 444, ¶ 6; R.C. 2929.01(EE). "The sentence imposed on an

offender for a felony may include financial sanctions, including restitution in an amount based on the victim's economic loss. R.C. 2929.18(A)(1).” *Danison* at ¶ 6. Accordingly, “an order of restitution imposed by the sentencing court on an offender for a felony is part of the sentence \* \* \*.” *Id.* at ¶ 8.

{¶15} In his direct appeal we reversed the court's sentence in 11CR0126, and remanded for a new sentencing hearing at which the state had to elect which of the allied offenses it would pursue against Carsey. The state elected to pursue his burglary conviction and the trial court had to “accept the state's selection, merge the offenses accordingly for the purposes of sentencing, and impose a sentence that is appropriate for the remaining offense \* \* \*.” *Wilson* at ¶ 18. And because restitution is part of a felony sentence, we see no reason why the trial court in this case could not modify Carsey's restitution as part of his burglary sentence. This is especially so because Carsey benefited from the court's resentencing, as it increased the time he has to pay restitution. Thus, we reject Carsey's argument that the trial court exceeded the scope of our remand by altering his restitution in case number 11CR0126.

#### B. Ineffective Assistance of Counsel

{¶16} In his second assignment of error, Carsey argues that his trial counsel was ineffective for failing to object when the trial court exceeded the scope of remand. He bases this assignment of error on the same arguments in his first assignment of error.

{¶17} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish: 1.) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and 2.) prejudice, i.e., a

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Baker*, 4th Dist. Athens No. 13CA18, 2014-Ohio-1967, ¶ 32. Failure to establish either part of the test is fatal to an ineffective-assistance claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶18} Under Carsey's first assignment of error we found that the trial court's modification of his restitution in case number 11CR0126 actually benefited him by increasing the time which he has to pay. Because he was not prejudiced by the trial court's judgment, he has not established that his trial counsel was ineffective. And because our determination of his first assignment of error renders the remainder of his second assignment of error moot, we decline to address it. See App.R. 12(A)(1)(c).

#### IV. CONCLUSION

{¶19} We agree that the trial court exceeded the scope of our remand by altering the time period for which Carsey has to pay restitution in case number 11CR0055. We sustain his first assignment of error in part and reverse the portion of the trial court's judgment that modified Carsey's restitution in case number 11CR0055 because his initial sentence remains the law of the case. However because the court had to review his burglary sentence de novo on remand, it was free to modify his restitution in case number 11CR0126 as part of his sentence. And because Carsey was not prejudiced by the trial court's modification of his restitution he has not established that his trial counsel was ineffective and we overrule his second assignment of error.

JUDGMENT AFFIRMED IN PART  
AND REVERSED IN PART.



**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split 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 Athens 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.

Abele, P.J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, 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.**