[Cite as *State v. Mockbee*, 2014-Ohio-4493.]

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

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

APPEARANCES:

COUNSEL FOR APPELLANT: Fred Miller, 246 High Street, Hamilton, Ohio 45011

Frank J. Schiavone IV, 6 South Second Street, Key Bank Building, Suite 520, Hamilton, Ohio 45011

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay S. Willis, Scioto County Assistant Prosecuting Attorney, 612 Sixth Street, Suite E, Courthouse Annex, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 10-1-14
ABELE, P.J.

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

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

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

{¶ 3} 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.

{¶ 4} 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 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

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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)

{¶ 9} 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)

{¶ 10} 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

{¶ 11} 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

{¶ 12} 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").

{¶ 13} 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").

{¶ 14} 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).

{¶ 15} 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).

{¶ 16} 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

{¶ 17} 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.

{¶ 18} 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.

{¶ 19} 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.

{¶ 20} 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.

{¶ 21} 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).

{¶ 22} 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.

{¶ 23} 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").

{¶ 24} 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).

{¶ 25} 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.

{¶ 26} 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.
>
> i. 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.

{¶ 27} 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.]).

{¶ 28} 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.

{¶ 29} 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).

{¶ 30} 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

{¶ 31} 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).

{¶ 32} 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

{¶ 33} 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
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.

TOPICS & ISSUES