[Cite as *State v. Mockbee*, 2015-Ohio-3469.]

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

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

APPEARANCES:

Jeffrey M. Brandt, ROBINSON & BRANDT, P.S.C., Covington, Kentucky, for appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay S. Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS
DATE JOURNALIZED:8-18-15
ABELE, J.

{¶ 1} This is a reopened appeal by Brandon Mockbee, plaintiff-appellant, from a Scioto County Court of Common Pleas judgment that resentenced him upon multiple convictions on remand after his partially successful prior appeal. Because Mockbee has established that the performance of his initial appellate counsel was deficient for failing to raise the assignment of error raised by his current appellate counsel, and that he was prejudiced by that deficiency, we

vacate our prior judgment, sustain Mockbee's assignment of error, reverse the judgment of the trial court in part, and remand the cause to the common pleas court to enter judgment accordingly.

I. FACTS

{¶ 2} 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 his girlfriend. After Deputy Triggs saw the vehicle's custom-made wheels at the residence shared by Mockbee and his girlfriend, he obtained and executed a search warrant. He discovered and seized a number of the stolen medications from the residence.

{¶ 3} The Scioto County Grand Jury returned an indictment charging Mockbee with multiple counts. Following a trial, the jury found Mockbee guilty of all counts, and the trial court entered the following sentences:

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

{¶ 4} The Scioto County Court Common Pleas Court merged Counts 5 and 7 and Counts 6 and 8. The court further ordered that Mockbee's sentences in Counts 1, 2, 3, 4, 5, and 7 would be served consecutively with one another, and that his sentences in Counts 6, 8, 9, 10, 11, and 12 would be served concurrently with each other and with the sentence for Counts 1, 2, 3, 4, 5, and 7. (Id.) The total aggregate prison sentence was 20 years, with 16 years of mandatory incarceration. (Id.)

{¶ 5} 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 by failing merge Counts 7 and 8 as allied offenses of similar import. Mockbee also did not challenge the sufficiency of the evidence for Count 7.

{¶ 6} On remand, at the trial court's resentencing hearing Mockbee's counsel initially asked whether the parties would just 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." The parties then presented argument on the allied-offenses issue. The trial court determined that Counts 7 and 8 are not allied offenses of similar import and would not be merged for purposes of

sentencing.

{¶ 7} For resentencing, the state presented three arguments to support its contention that Mockbee'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 suffered by the pharmacist in the case; and (3) Mockbee's prison infractions that occurred after his original sentencing. In response to the state's argument concerning Mockbee's multiple prison infractions, his counsel did not dispute that the infractions occurred, but instead attempted to minimize their impact. Mockbee 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.

{¶ 8} 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

{¶ 9} These individual sentences are the same as the original sentences for the offenses, except that the trial court did not originally merge Counts 7 and 11, and the sentence for Count 12 was originally three years instead of two years. Nevertheless, the trial court ordered all sentences to be served consecutively to each other, resulting in an aggregate prison sentence of eight years, 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.

{¶ 10} On appeal, we affirmed the trial court judgment. *Mockbee*, 2014-Ohio-4493, 20 N.E.3d 1127 (*Mockbee II*). We held that: (1) the trial court did not violate Mockbee'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; (2) although the trial court erred by independently reviewing and revising the individual sentences for the convictions, it amounted to harmless error because Mockbee suffered no prejudice; (3) neither res judicata nor the prohibition against the sentence-packaging doctrine prevented the trial court from conducting a de novo determination that a new sentence be served consecutively to the defendant's sentences for other offenses, even if they had originally been ordered to be served concurrently; and (4) res judicata barred the trial court from considering Mockbee's claim that Counts 7 and 8 were allied offenses of similar import. *Id*. Mockbee, through his original appellate counsel, filed an appeal from our judgment in *Mockbee II* and submitted a memorandum in support of jurisdiction. Subsequently, the Supreme Court of Ohio did not accept his appeal for review and dismissed it. *State v. Mockbee*, 142 Ohio St3d 1449, 2015-Ohio-1591, 29 N.E.3d 1004.

{¶ 11} Subsequent to appealing our judgment in *Mockbee II*, but prior to the Supreme Court's dismissal, Mockbee obtained new appellate counsel and timely submitted an application to reopen his appeal in *Mockbee II*. The state submitted a response in opposition. We initially denied Mockbee's application to reopen his appeal pursuant to App.R. 26(B) because Mockbee did not meet his burden to establish a genuine issue about whether he had a colorable claim of ineffective assistance of appellate counsel. Mockbee raised four proposed assignments of error.

In our entry, we rejected Mockbee's proposed assignments of error, including his contention in his third proposed assignment of error that the trial court erred by altering sentences for which he had already served the prison term imposed when he was resentenced several months after he was originally sentenced.

{¶ 12} On reconsideration, however, we determined that Mockbee's proposed third assignment of error in his application for reopening raised a genuine issue as to whether he has a colorable claim of ineffective assistance of counsel on appeal. Accordingly, we reconsidered our previous denial and granted Mockbee's application for reopening. We specified that "[i]n accordance with App.R. 26(B)(7), this case shall proceed as an initial appeal in compliance with the applicable appellate rules" and that "[t]he appeal shall be limited to Mockbee's proposed third assignment of error as set forth in his application for reopening." The parties have now submitted their briefs on reopening.

II. ASSIGNMENT OF ERROR

{¶ 13} As specified in his application for reopening, Mockbee asserts that his initial appellate counsel was ineffective for failing to raise the following assignment of error:

> "THE TRIAL COURT ERRED BY ALTERING, AND INCREASING, SENTENCES THAT HAD BEEN FULLY EXECUTED."

III. STANDARD OF REVIEW

{¶ 14} The two-pronged analysis in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel. *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10. In order to establish ineffective assistance of his

original appellate counsel, Mockbee must prove that his appellate counsel was deficient for failing to raise the issue he now presents and that a reasonable probability of success exists had he presented that claim on appeal. *Id.* at ¶ 11. To determine whether Mockbee met this burden, we indulge the strong presumption that his appellate counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 7, citing *Strickland* at 689.

{¶ 15} Moreover, for Mockbee's assignment of error raised on reopening, "[w]hen reviewing felony sentences we apply the standard of review set forth in R.C. 2953.08(G)(2)." *See State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 57, citing *State v. Brewer*, 2014–Ohio–1903, 11 N.E.3d 317, ¶ 33, 4th Dist. ("we join the growing number of appellate districts that have abandoned the Kalish plurality's second-step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated that '[t]he appellate court's standard of review is not whether the sentencing court abused its discretion' "). 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 that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law."

IV. LAW AND ANALYSIS

Compliance with App.R. 26(B)(7)

{¶ 16} Before we address the merits of Mockbee's assigned error, we consider the state's preliminary arguments that Mockbee's claim is barred by his failure to comply with App.R. 26(B)(7) and res judicata. For its first contention, the state argues that this reopened appeal

"should be denied" because Mockbee's initial brief on reopening did not include any argument on Mockbee's assertion that his representation by prior appellate counsel was deficient and that he was prejudiced by that deficiency. Mockbee counters that this court has already found that his original appellate counsel was ineffective by granting his application for reopening, and the state cannot relitigate that issue.

{¶ 17} Under App.R. 26(B)(1), "[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of counsel." "App.R. 26(B) creates a special procedure for a thorough determination of a defendant's allegations of ineffective assistance of counsel." *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, ¶ 26. "The rule contemplates a two-step process with respect to an appeal in which an application to reopen on the ground of ineffective assistance of counsel is filed." Painter and Pollis, *Ohio Appellate Practice*, Section 7:39 (2014); *State v. Gover*, 71 Ohio St.3d 577, 579, 645 N.E.2d 1246 (1995).

{¶ 18} For the first step, the application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). To justify reopening his appeal, the applicant bears the burden to establish that a genuine issue exits as to whether he has a colorable claim of ineffective assistance of counsel on appeal. *State v. Myers*, 102 Ohio St.3d 318, 2004-Ohio-3075, 810 N.E.2d 436, ¶ 9; *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶ 19} For the second step, if the applicant satisfies the burden to establish a genuine issue of a colorable claim of ineffective assistance of counsel on appeal, the court grants the application and the applicant must finally establish the ineffective assistance of counsel claim by

proving that the performance of appellate counsel was defective and that the applicant was prejudiced by that deficiency. App.R. 26(B)(9); *Gover* at 579, quoting Staff Note to App.R. 26(B) ("[t]he second stage requires the appellant to 'establish that prejudicial errors were made in the trial court and that ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to the court of appeals' ").

App.R. 26(B)(7) specifies the procedure for the second step:

> If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

As specified in our order granting Mockbee's application, this case proceeded as an initial appeal in compliance with the applicable appellate rules and we limited our review to Mockbee's third proposed assignment of error, which we had not previously considered in his appeal in *Mockbee II* from the trial court's resentencing entry. Nevertheless, this did not relieve Mockbee of the duty to address in his brief the claim that representation by his prior appellate counsel was deficient and that he was prejudiced by that deficiency. This is expressed in the requirement in App.R. 26(B)(7) that "[t]he parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency." Consequently, we reject Mockbee's assertion that this issue was already settled by our grant of his application for reopening, and that the state is barred from relitigating this issue. By granting his application, we only determined that he had established a genuine issue as to whether he has a

colorable claim of ineffective assistance of counsel on appeal. Mockbee still must establish his ineffective-assistance claim before we can vacate our prior judgment. *See* App.R. 26(B)(9) ("If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment").

{¶ 20} As for the state's claim that Mockbee's failure to include any argument concerning his claim of ineffective assistance of appellate counsel requires that we must "deny" his appeal and reaffirm our prior judgment, the state does not cite any precedent that requires this result, nor does App.R. 26(B) specify this as a sanction for failing to comply with the rule's requirement that the parties brief the issue. We are aware, however, that one appellate court has held that when an application for reopening has been granted, but the appellant fails to argue in the reopened appeal that he received ineffective assistance of appellate counsel in his brief, the court need not address the assigned error:

> Appellant does not argue, in his sole assignment of error, that he received ineffective assistance of appellate counsel. Instead, appellant merely claims that the trial court erred in denying his motion to suppress. Thus, we will not address the assignment of error because it is not properly before us in accordance with App.R. 26(B. Appellant's sole assignment of error is overruled. For the foregoing reasons, pursuant to App.R. 26(B)(9), we confirm the prior decision of this court.

State v. Dye, 5th Dist. Licking No. 99 CA 2, 2000 WL 1752244 (Nov. 27, 2000); *see also State v. Hamilton*, 5th Dist. Guernsey No. 96 CA 15A, 2000 WL 1591117 (Oct. 23, 2000).

{¶ 21} Nevertheless, another court of appeals noted that the failure of an appellant to argue ineffective assistance of appellate counsel in his brief in the reopened appeal, but addressed

the merits of the assigned errors on reopening, determined that the failure of appellate counsel to raise them did not constitute ineffective assistance of appellate counsel. *See State v. Jones*, 11th Dist. Ashtabula No. 96-A-0009, 1999 WL 689944 (Aug. 27, 1999).

{¶ 22} In this case, although his initial brief did not comply with App.R. 26(B)(7) by briefing the issue of ineffective assistance of his original appellate counsel, Mockbee's application for reopening did do so and the parties manifestly knew that the issue was implicit in the relative merits of the assignment of error that Mockbee's current counsel raised. Moreover, the state was not prejudiced by Mockbee's failure to comply with the rule for his first brief because the state includes a full argument in its brief about why it believes Mockbee's first appellate counsel was not ineffective for failing to raise the assigned error. In addition, Mockbee himself includes an argument about the issue, albeit in his reply brief in response to the state's argument. Finally, we remain " 'mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds.' " *State ex rel. Busby v. O'Connell*, 2d Dist. Montgomery No. 26292, 2015-Ohio-1050, ¶ 5, quoting *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 466, 650 N.E.2d 1343 (1995).

{¶ 23} Therefore, in the interests of justice, we decline to impose the sanction that the state requests, although we warn future litigants that they risk losing their reopened appeal should an appellate court exercise its discretion to do so if the appellant fails to strictly comply with App.R. 26(B)(7) by failing to brief the issue of ineffective-assistance of appellate counsel.

Res Judicata

{¶ 24} The state argues that res judicata bars a consideration of the merits of Mockbee's assigned error because he could have raised his claim of ineffective assistance of appellate

counsel in his appeal in *Mockbee II,* or in his appeal from our decision in *Mockbee II* to the Supreme Court of Ohio. The state nevertheless concedes that the same attorney represented Mockbee during the resentencing hearing after *Mockbee I,* the appeal to this court in *Mockbee II,* and the appeal from this court to the Supreme Court from our decision in *Mockbee II*. Only after Mockbee's original appellate counsel filed the notice of appeal to the Supreme Court did he obtain new appellate counsel and timely sought to reopen of his *Mockbee II* appeal.

{¶ 25} Mockbee's original appellate counsel could not have raised the issue of his own ineffectiveness in the appeal to this court or to the Supreme Court because an attorney "cannot realistically be expected to argue his own incompetence." *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169, fn. 1 (1982). "[T]he doctrine of res judicata does not apply to bar a claim of ineffective assistance of appellate counsel not previously raised in an appeal where a defendant was represented on appeal by the same attorney who allegedly earlier provided the ineffective assistance, even where the defendant was also represented on that appeal by another attorney who had not represented the defendant at the time of the alleged ineffective assistance." *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶ 42.

{¶ 26} Moreover, the Supreme Court of Ohio has held that "[t]he filing of a motion seeking a discretionary appeal in this court does not create a bar to a merit ruling on a timely filed application to reopen an appeal claiming ineffective assistance of appellate counsel under App.R. App.R. 26(B)." *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, syllabus. Res judicata does not apply to bar a court of appeals from addressing the merits of a timely filed application for reopening by the appellant raising or failing to raise the issue in a discretionary appeal to the Supreme Court. "Because a claim for ineffective assistance of

appellate counsel arises in the appellate court, and because [the Supreme Court's] jurisdiction in most cases is discretionary, if [the Supreme Court's] denial of jurisdiction were considered res judicata on the issue of ineffective assistance or appellate counsel—thus foreclosing a substantive App.R. 26(B) review—a defendant * * * would never have an opportunity to fully present his case to *any* court. That result would run counter to our recognition of effective appellate counsel as a constitutional right guaranteed to all defendants." *Id.* at ¶ 27. Therefore, based on the pertinent precedent, we reject the state's argument that this reopened appeal is barred by res judicata.

C. Resentencing a Defendant for an Offense when the Defendant has Already Served the Sentence

{¶ 27} Having rejected the state's preliminary arguments, we now address the merits of Mockbee's assigned error. In his sole assignment of error, Mockbee contends that the trial court erred by altering and increasing sentences that had been fully executed at the time of resentencing. Mockbee claims that by the time he was resentenced following our remand in *Mockbee I*, 21 months had passed so that he could not be resentenced for his original sentences that were less than that—Counts 4 (12 months), 7 (18 months), 8 (18 months), 9 (12 months), and 10 (12 months). In the original sentencing entry, Counts 4 and 7 were imposed consecutively to each other, and Counts 8, 9, and 10 would run concurrently to each other and to Counts 4 and 7. The sentencing entries in Mockbee's criminal case indicate that he was originally sentenced in early July 2012, and that he was resentenced in late January 2014 following our remand in *Mockbee I*, i.e., over 18 months after his original sentencing.

{¶ 28} In *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, at

paragraph three of the syllabus, the Supreme Court of Ohio held that "[a] trial court does not have the authority to resentence a defendant for the purpose of adding a term of postrelease control as a sanction for a particular offense after the defendant has already served the prison term for that offense." In that case, a trial court sentenced the defendant to a prison term of ten years for aggravated arson to be served consecutively to a five-year prison term for arson. After the defendant completed his prison term for aggravated arson and began to serve his term for arson, the trial court held a new sentencing hearing to correct its errors relating to the imposition of postrelease control for the aggravated-arson offense. On appeal, the court of appeals held that the trial court could resentence a defendant to properly impose postrelease control as long as the defendant was still serving a prison term for any of the other offenses included in the same sentencing entry. The Supreme Court reversed, holding that the trial court lacked jurisdiction to resentence a defendant who had already served the originally ordered term of imprisonment to include another sanction for that offense.

{¶ 29} Here, the state argues that Mockbee's reliance on the Supreme Court's discussion in *Holdcraft* is misplaced and that it applies only to cases in which postrelease control is attempted to be imposed after the sentence for the corresponding offense has been served. We, however, disagree. Although the Supreme Court's specific holding in *Holdcraft* is limited to postrelease control, the general rule that the court discussed to reach that holding is not. In so holding, the Supreme Court recognized that "[n]either this court's jurisprudence nor Ohio's criminal-sentencing statutes allow a trial court to resentence a defendant for an offense when the defendant has already completed the prison sanction for that offense." *Holdcraft* at ¶ 19. In these circumstances, "[i]t is irrelevant whether the defendant is still in prison for other offenses."

Id.; *see also Holdcraft* at ¶ 16, citing *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684 ("Directly pertinent to the issue here, we held that Raber—who had served the imposed sentence of incarceration—had a legitimate expectation of finality in his sentence and the trial court was precluded from imposing additional punishment upon him").

{¶ 30} In this regard, the state relies on *State v. Martin-Williams*, 5th Dist. Stark No. 2014CA86, 2015-Ohio-780, in which the court of appeals recently declined to apply *Holdcraft* to a case in which the resentencing occurred after a remand for the limited purpose of the trial court making the statutory findings required to support its imposition of consecutive sentences. That case is inapposite to the resentencing here, which modified concurrent sentences that had already expired to run them consecutive to each other. This case does not involve resentencing to include findings to support previously imposed consecutive sentences, i.e., the sentences were not altered or the aggregate time of the pertinent offenses increased in *Martin-Williams*.

{¶ 31} At the time Mockbee was resentenced, his original sentences for Counts 8, 9, and 10 were for 18 months or less, and they were ordered to be served concurrently to each other and to his Count 12 conviction. In addition, Mockbee's original sentences for Counts 4 and 7 were also less than 18 months, but they were ordered to be served consecutively to each other for an aggregate term of 30 months—and concurrent to the other counts—including Counts 8, 9, 10, and 12.

{¶ 32} "[W]hen a defendant is sentenced to concurrent terms, * * * the sentences are served simultaneously." *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 22. By the time he was resentenced, Mockbee had already served his original sentences for his convictions on Counts 8, 9, and 10, which had been ordered to be served concurrently to each

other and to his convictions on Counts 4, 7, and 12. Therefore, the trial court lacked jurisdiction to resentence him on Counts 8, 9, and 10 and to order that they be served consecutively to each other because his original sentences for those convictions had already been served. *Holdcraft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 19.

{¶ 33} For Counts 4 (12 months) and 7 (18 months), which the trial court ordered to be served consecutively in its original sentencing entry, the aggregate 30-month term had not expired at resentencing. In *Holdcraft*, the court held that for consecutive sentences, the defendant served the lengthier sentence first (i.e., Holdcraft served his ten-year sentence for aggravated arson before his five-year sentence for arson). *See also State v. Powell*, 2d Dist. Montgomery No. 24433, 2014-Ohio-3842, ¶ 28 (noting the general absence of authority for the order in which a defendant serves his or her sentences when consecutive sentences are imposed on multiple counts, but observing that the court should construe any ambiguity in sentencing entry in favor of the defendant). The state relies on Ohio Adm.Code 5120-2-03.1(F) to argue that Counts 4 and 7 are treated as an aggregate 30-month sentence so that Mockbee had not served his sentence for either of them at resentencing. However, that provision specifies only the aggregate sentence to be served when consecutive sentences are imposed; it does not specify a rule as to which of the individual sentences ordered to be served consecutive to each other is served first. Applying *Holdcraft* here, Mockbee served his original 18-month sentence for Count 7 first and that sentence expired by the time the trial court resentenced him. Therefore, the trial court lacked authority to resentence Mockbee on that count as well.

{¶ 34} Consequently, we conclude that the trial court erred by resentencing Mockbee on Counts 7, 8, 9, and 10 because his original sentences for those convictions had been completely

served by him by that time. Because resentencing on these convictions was clearly and convincingly contrary to law, we sustain Mockbee's sole assignment of error on reopening.

V. CONCLUSION

{¶ 35} Mockbee has established that his original appellate counsel provided deficient counsel by failing to raise the assignment of error to contest the trial court's authority to resentence him and to increase his aggregate prison term based on convictions for which he had already served the originally imposed sentences. There is no rational justification for appellate counsel to fail to raise this meritorious issue. In addition, Mockbee has proven that he was prejudiced by his appellate counsel's failure to raise this issue. Therefore, we vacate our prior judgment in *Mockbee II*, reverse the trial court's judgment in part, and remand the cause to that court to vacate its judgment resentencing Mockbee on Counts 7, 8, 9, and 10. The trial court retained authority to resentence him on Counts 4 and 12, and it did so with an aggregate three-year prison term and we affirm that portion of the resentencing judgment. Consequently, the trial court shall determine on remand whether Mockbee has now served the properly imposed three-year prison term and discharge him if he has done so.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. 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 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.

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

For the Court

BY:_____
Peter B. Abele, 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.