[Cite as *State v. Teagarden*, 2015-Ohio-2563.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 14-CA-56
	:	
TREVOR J. TEAGARDEN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 07 CR 00365
JUDGMENT:	REVERSED AND REMANDED FOR RESENTENCING
DATE OF JUDGMENT ENTRY:	June 23, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
KENNETH W. OSWALT LICKING CO. PROSECUTOR 20 S. Second St., 4th Floor Newark, OH 43055	ELGINE HECETA MCARDLE, ESQ. McArdle Law Office 2139 Market St. Wheeling, WV 26003

Delaney, J.

{¶1} Appellant Trevor J. Teagarden appeals from the November 26, 2013 Judgment Entry of the Licking County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal convictions is not necessary to our resolution of this appeal. Appellant's criminal convictions arise from sex offenses committed on June 29, 2007 against victims ages 10 and 12.

{¶3} On July 9, 2007, appellant was charged by indictment with one count of rape of a minor under the age of 13 in violation of R.C. 2907.02(A)(1)(b) [Count I], three counts of gross sexual imposition with a child victim under the age of 13 in violation of R.C. 2907.05(A)(4) [Counts II, III, and IV], and one count of attempted gross sexual imposition with a child victim under the age of 13 in violation of R.C. 2923.02(A) and R.C. 2907.05(A)(4) [Count V]. Upon bench trial appellant was found guilty upon Counts I through IV and not guilty upon Count V.

The Original Sentencing: March 10, 2008

{¶4} The court sentenced appellant to seven years on Count I and two years each on Counts II, III, and IV. The two-year terms on Counts II through IV were to be served concurrently but consecutive to the seven-year term on Count I.

{¶5} Appellant filed a direct appeal from his convictions and sentence in *State v. Teagarden*, 5th Dist. Licking No. 08-CA-39, 2008-Ohio-6986 [*Teagarden I*], appeal not allowed, 121 Ohio St.3d 1501, 2009-Ohio-2511, 907 N.E.2d 325, and habeas corpus dismissed, *Teagarden v. Warden, Madison Correctional Inst.*, S.D.Ohio No.

2:10-CV-495, 2011 WL 2160466, *1 (June 1, 2011), raising 12 assignments of error. We overruled all but the twelfth assignment of error in which appellant argued the counts of rape and gross sexual imposition should have merged for sentencing. We agreed in part and found Counts III and IV should have merged with Count I, but Count II was committed with separate animus and therefore did not merge. *Teagarden I*, supra, 2008-Ohio-6986, at ¶ 178. We remanded the case to the trial court for resentencing.[1]

The First Re-Sentencing: February 9, 2009

{¶6} On February 9, 2009, the trial court resentenced appellant to an aggregate term of 7 years on Count I and 3 years each on Counts II and III. Counts II and III were concurrent with each other but consecutive to Count I. (The trial court found Count IV merged with Count III.)

{¶7} No appeal was filed from the Judgment Entry of February 9, 2009.

{¶8} On September 25, 2013, appellee filed an amended motion to correct the judgment entry in accord with our opinion, arguing the trial court should have sentenced appellant to "seven years on [Count I] and three years on [Count II] with those terms to be consecutive to one another. There should have been no sentence imposed on counts three and four as those offenses merge with [**Count I**]." (Emphasis in original.) Appellee also filed a motion pursuant to *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332 asking the trial court to resentence to properly impose

[1] Appellee filed a motion to reconsider our decision that the sentences for rape and two of the G.S.I. offenses should have merged. Appellee also filed a motion to certify conflict with *State v. Herron*, 2nd Dist. Champaign No. 95-CA-23, 1996 WL 715445 (Dec. 13, 1996). Both motions were overruled by Judgment Entry on February 18, 2009.

postrelease control. Appellant responded with motions in opposition and also filed a motion to vacate allied offenses of similar import, arguing Counts II, III, and IV should merge with Count I.

{¶9} On November 25, 2013, appellant filed a motion for new trial premised upon alleged defects with the trial transcript.

The Second Re-Sentencing Hearing: November 26, 2013

{¶10} On November 26, 2013, the trial court held another resentencing hearing. The trial court found Counts III and IV merge with Count I. Appellee elected to sentence on Count I and the trial court thereupon sentenced appellant to an aggregate term of 10 years: 7 years on Count I consecutive to 3 years on Count II.

{¶11} Appellant appealed from the November 26, 2013 Judgment Entry and raised two assignments of error: 1) The trial court erred in failing to conduct a de novo sentencing hearing upon the allied-offenses remand; and 2) the trial court erred in imposing consecutive prison terms. This appeal was filed as *State v. Teagarden*, 5th Dist. Licking No. 13CA0125 [*Teagarden II*].

{¶12} On April 29, 2014, in this Court, the parties filed a "Joint Motion to Stay and Remand this Case for Resentencing of Defendant-Appellate (*sic*)" stating in pertinent part: "* * * *. [A]ll issues raised in this case concern the proper sentence for [appellant]. The undersigned are in agreement that the [appellant] should be resentenced once again to ensure the lawfulness of his sentence. * * * *."

{¶13} Also on April 29, 2014, in the trial court, the parties filed a "*Joint* Motion to Amend Indictment and Documentation of Related Agreements to End Further Litigation" (emphasis in original), moving the trial court to amend Count I to a count of "attempted

rape" as part of a "global resolution" of the underlying criminal case and a second criminal case, Licking County Court of Common Pleas case number 07-CR-739.[2] The motion states appellee discovered the sentence on Count I in the instant case is invalid because appellant should have received an indefinite term of 10 years to life. Therefore, appellee consented to amend Count I to "attempted rape" to avoid the mandatory sentence and permit the 7-year sentence instead. Attached to the motion is a detailed "Agreement" of the parties stating the specific terms of the sentence in the instant case, including, e.g., a resulting sentence of seven years on Count I consecutive with three years on Count II. Counts III and IV merge into Count I. The Agreement further states that in return for the agreed-upon sentence, appellant would not initiate any further litigation related to either criminal case.

{¶14} We issued a Judgment Entry on May 12, 2014 stating in pertinent part: "* * * * [T]his case is hereby stayed and remanded to the trial court for the purpose of resolving pending issues on or before May 30, 2014."

The Third Re-Sentencing Hearing: May 20, 2014

{¶15} The trial court held a resentencing hearing on May 20, 2014, resulting in a Judgment Entry of May 23, 2014 stating by agreement of the parties, Count I is amended to "Attempted Rape" with no cited section number; "Counts III and IV merge with Count I for sentencing purposes, and [appellee] elected to proceed with sentencing on Count I." Appellant was sentenced to a prison term of 7 years on Count I consecutive to a term of 3 years on Count II. The parties' "Agreement" is appended to the Judgment Entry.

[2] In the latter case, appellant was sentenced to a prison term of 6 months.

{¶16} *Teagarden II* was then dismissed by Judgment Entry on May 27, 2014.

{¶17} Appellant now appeals from the Judgment Entry of the third resentencing dated May 23, 2014.

{¶18} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶19} "I. THE LOWER COURT ERRED IN ITS THREE ATTEMPTS TO RESENTENCE DEFENDANT PURSUANT TO THE MANDATES OF THIS COURT'S DECEMBER 22, 2008 OPINION."

ANALYSIS

{¶20} Appellant argues the trial court erred in its attempts to resentence him. Because we find the sentences imposed are inconsistent with our 2008 opinion, we reverse the decision of the trial court and remand this matter for resentencing for the following reasons.

{¶21} In *Teagarden I, w*e determined the trial court's original sentence did not comply with R.C. 2941.25 and remanded. The effect of the remand was to vacate the sentence. The effect of vacating the sentence places the parties in the same position they would have been in had there been no sentence. *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 13, overruled on other grounds, citing *Romito v. Maxwell*, 10 Ohio St.2d 266, 267, 39 O.O.2d 414, 227 N.E.2d 223 (1967).

{¶22} Our remand in *Teagarden I* should have had the effect of vacating appellant's sentences and permitting the trial court to resentence appellant de novo, subject to our decision on the allied-offenses issue. In *State v. Wilson,* the Supreme

Court of Ohio analyzed the scope of a trial court's resentencing hearing following an allied-offenses error, holding:

> 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. * * * In a remand based only on an allied-offenses sentencing error, the guilty verdicts underlying a defendant's sentences remain the law of the case and are not subject to review. *[State v.] Whitfield,* 124 Ohio St.3d 319, 2010–Ohio–2, 922 N.E.2d 182, ¶ 26–27. Further, only the sentences for the offenses that were affected by the appealed error are reviewed de novo; the sentences for any offenses that were not affected by the appealed error are not vacated and are not subject to review. [*State v.] Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824 at paragraph three of the syllabus.
>
> *State v. Wilson,* 129 Ohio St.3d 214, 2011–Ohio–2669, 951 N.E.2d 381, ¶ 15.

{¶23} It was error for the trial court to amend appellant's conviction upon Count I in the third attempt at resentencing. The “law of the case” doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). The decision of this Court in the first appeal remains the law of the case as to all subsequent

proceedings both at the trial level and upon review. *State v. Boyd*, 5th Dist. Stark No. 1999CA00352, 2000 WL 1055798, at *3 (July 24, 2000).

{¶24} On remand, a trial court is bound to adhere to the appellate court's determination of the applicable law. *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32, 391 N.E.2d 343 (1979). Further, the trial court lacks jurisdiction to exceed the scope of an appellate court's remand. *State v. Carsey*, 4th Dist. Athens No. 14CA5, 2014-Ohio-3682, ¶ 10. "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*, supra, 11 Ohio St.3d at syllabus, approving and following *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32 (1979).

{¶25} Appellant thus remains convicted of Count I, rape of a child under the age of 13 pursuant to R.C. 2907.02(A)(1)(b)[3] and Counts II, III, IV, gross sexual imposition

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[3] (Former) R.C. 2907.02(A)(1)(b) states in pertinent part: No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

And (former) R.C. 2907.02(B) provides in pertinent part: Whoever violates this section is guilty of rape, a felony of the first degree. * * * *. Except as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code.

And (former) R.C. 2971.03(B)(1)(a) states in pertinent part: Notwithstanding section 2929.13, division (A), (B), (C), or (F) of section 2929.14, or another section of the Revised Code other than division (B) of section 2907.02 or divisions (D) and (E) of section 2929.14 of the Revised Code that authorizes or requires a specified prison term or a mandatory prison term for a person who is convicted of or pleads guilty to a felony or that specifies the manner and place of service of a prison term or term of imprisonment, if a person is convicted of or pleads guilty to a violation of division

against a child under the age of 13 pursuant to R.C. 2907.05(A)(4).[4] Counts III and IV merge with Count I for purposes of sentencing. *Teagarden I*, supra, at ¶ 178. (The original conviction and sentence upon Count II was not affected by the remand and thus was not vacated.)

{¶26} The ensuing trial court litigation post-*Teagarden I* related to resentencing is void, including the attempt to amend Count I to "attempted rape," because we affirmed appellant's conviction upon one count of rape of a child under 13, a judgment which became final upon the Ohio Supreme Court's decision to decline further review.

{¶27} Appellant argues the possibility of an increased sentence upon remand violates his constitutional protection against double jeopardy. We will not speculate what the trial court's sentence will be. See, *State v. Aylward*, 159 Ohio App.3d 284, 2004-Ohio-6176, 823 N.E.2d 894, ¶ 40 (11th Dist.) (Christley, J., concurring) ("[A] possible double jeopardy claim would not be ripe on the current appeal, as the trial court

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(A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment, if division (A) of this section does not apply regarding the person, and if the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, the court shall impose upon the person an indefinite prison term consisting of one of the following: Except as otherwise required in division (B)(1)(b) or (c) of this section, a minimum term of ten years and a maximum term of life imprisonment.

[4] (Former) R.C. 2907.05(A) states: No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

And (former) R.C. 2907.05(B)(2) provides in pertinent part: Gross sexual imposition committed in violation of division (A)(4) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) of this section there is a presumption that a prison term shall be imposed for the offense. * * * *.

has yet to issue a new sentence that increased appellant's punishment or issue a new sentence that failed to credit appellant for time served.")

{¶28} Nevertheless, the trial court's original sentence, and its subsequent attempts at re-sentencing, did not comply with (former) R.C. 2907.02(A)(1)(b) *et seq*. It is well-established that no court has the authority to substitute a different sentence for that which is required by law. *Colegrove v. Burns*, 175 Ohio St. 437, 438, 25 O.O.2d 447, 195 N.E.2d 811 (1964). Because no judge has the authority to disregard the law, a sentence that clearly does so is void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶14, overruled on other grounds. The Ohio Supreme Court has consistently held that a sentence that does not contain a statutorily-mandated term is a void sentence. *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984) (superseded on other grounds). Jeopardy does not attach to a void sentence. Id.

{¶29} Moreover, this is appellant's third appeal of his sentence. Where the appellant has repeatedly appealed the sentence, of course there can be no expectation of finality. "[I]t should be self-evident that a defendant does not have a legitimate expectation in the finality of his original sentence when he appeals the sentence; [t]o hold otherwise would result in a no-lose situation for the defendant in every sentencing appeal." *State v. McAninch*, 1st Dist. Hamilton No. C-010456, 2002-Ohio-2347, ¶ 10.

{¶30} A defendant's expectation of finality in a sentence plays a role in resentencing, but only to a point. In this case, appellant has served a portion of his sentence.

> * * * [A]ll of these cases provide a clear demonstration of the role that a defendant's legitimate expectation of finality plays in

> constraining a court's authority to review a sentence, and three principles provide a framework for future reference. First, when a sentence is subject to direct review, it may be modified; second, when the prison-sanction portion of a sentence that also includes a void sanction has not been completely served, the void sanction may be modified; and third, when the entirety of a prison sanction has been served, the defendant's expectation in finality in his sentence becomes paramount, and his sentence for that crime may no longer be modified.
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> *State v. Holdcroft*, 137 Ohio St.3d 526, 533, 2013-Ohio-5014, 1 N.E.3d 382, 389, ¶ 18 (2013).

{¶31} Double jeopardy thus does not bar resentencing in this case, even where the sentence appellant receives is greater than his original sentence. Id. See also, *State v. Simpkins*, 117 Ohio St.3d 420, 427-28, 2008-Ohio-1197, 884 N.E.2d 568, 576-77, ¶¶ 31-37 (2008) (superseded on other grounds), in which the Ohio Supreme Court stated:

> As the federal appellate courts have recognized, "'a trial court not only *can* alter a statutorily-invalid sentence in a way which might increase its severity, but *must* do so when the statute so provides.'" [Citations omitted]. "Even after the defendant has commenced to serve his sentence, that power and that obligation continue." In cases in which the increase to the defendant's sentence is due to a "legally incomplete" sentence rather than in response to a mistake

of fact, a change of heart, or vindictiveness, we find no due-process or other constitutional violation.

{¶32} Appellant summarily argues he received ineffective assistance of counsel in the multiple attempts to resentence him, although this issue is not raised an assignment of error. As we have explored exhaustively, and as appellant must tacitly admit in his double-jeopardy argument, the errors in resentencing were to his "benefit" because he purportedly received a definite 10-year prison term rather than the statutorily-prescribed term of 10 years to life on Count I alone. We cannot say that counsel's failure to argue otherwise was not a strategic maneuver. Granted, the trial court erred and the prosecutor erred in going so far as to amend appellant's conviction to avoid the indefinite term. "But, [n]either constitutional principles nor the doctrine of res judicata requires that sentencing become a game in which a wrong move by the judge or prosecutor means immunity for a defendant." *Simpkins*, supra, 2008-Ohio-1197 at ¶ 29, citing *Bozza v. United States*, 330 U.S. 160, 166–167, 67 S.Ct. 645, 91 L.Ed. 818 (1947). Appellant's trial counsel may have strategically decided against risking exposure to an increased penalty. Appellant has thus demonstrated neither incompetence nor prejudice. See, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

{¶33} Our remand requires the trial court to conduct a new sentencing hearing at which the trial court must accept the state's choice among allied offenses, “merge the crimes into a single conviction for sentencing, * * * and impose a sentence that is appropriate for the merged offense.” *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-

2669, 951 N.E.2d 381 at ¶ 24, citing *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 41.

{¶34} Appellant's sole assignment of error is sustained.

CONCLUSION

{¶35} The judgment of the Licking County Court of Common Pleas is reversed and this matter is remanded for resentencing in accord with this opinion.

By: Delaney, J. and

Farmer, J., concur.

Hoffman, P.J. concurs separately

Hoffman, P.J., concurring

{¶36} I concur in the majority's thorough analysis and disposition of Appellant's sole assignment of error.

{¶37} I write separately only to acknowledge our discussion of whether double jeopardy would bar resentencing Appellant to a greater sentence is dicta given the fact such resentencing has not yet occurred.