[Cite as *State v. Edwards*, 2014-Ohio-2436.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-13-037

Appellee — Trial Court No. 11 CR 145

v.

Richard Edwards — **DECISION AND JUDGMENT**

Appellant — Decided: June 6, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Heather Baker and David E. Romaker Jr., Assistant Prosecuting Attorneys, for appellee.

Lorin J. Zaner and Jill M. Varnes-Richardson, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Richard Edwards, was charged in a three-count indictment in connection with his sexual assault of a nine-year-old girl whom he was babysitting on February 16, 2011. Count 1 charged Edwards with attempted rape, and

Counts 2 and 3 charged him with gross sexual imposition. On October 17, 2011, in exchange for dismissal of Count 1, Edwards entered a guilty plea under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the two counts of gross sexual imposition, one a violation of R.C. 2907.05(B), and the other a violation of R.C. 2907.05(A)(4), both third-degree felonies. On November 28, 2011, the trial court imposed prison sentences of 54 months on each count, to be served consecutively.

{¶ 2} Edwards appealed those sentences to this court arguing (1) that consecutive sentences were inappropriate because the offenses of which he was convicted are allied offenses of similar import; and (2) that the trial court was required to sentence him under the version of R.C. 2929.14(A) that existed at the time he committed the offense. Before it was amended, R.C. 2929.14(A) required the trial court to sentence Edwards in increments of years, not months.

{¶ 3} In a decision dated February 15, 2013, we rejected Edwards' first argument, but we found merit to his second argument. *State v. Edwards*, 6th Dist. Wood No. WD-11-078, 2013-Ohio-519. We reversed and remanded the matter to the trial court for resentencing under R.C. 2929.14(A) as it existed on the date Edwards committed the offenses. Consistent with our decision, on April 29, 2013, the trial court sentenced Edwards to five years' incarceration on Count 2, and four years' incarceration on Count 3. This meant that the sentence on Count 2 was reduced by six months and the sentence on Count 3 was increased by six months. The total length of his sentences was the same as the initial sentences imposed.

{¶ 4} Edwards now appeals only the five-year sentence and assigns the following error for our review:

> The Appellant states that the trial court impermissibly sentenced the Defendant to an increased sentence as to Count 2, Gross Sexual Imposition.

{¶ 5} Edwards claims that by imposing a harsher sentence following his successful appeal with respect to Count 2, the trial court's sentence was presumptively vindictive. He claims that the trial court failed to rebut this presumption and that there exists no new facts or additional information justifying a harsher sentence. Anticipating the state's position that the sentence was proper because the total aggregate sentence on remand remained the same as the initial sentence, Edwards contends that the Ohio Supreme Court has rejected the doctrine of "sentence packaging," and that we are limited to reviewing only the particular sentence being appealed without taking into consideration that the aggregate sentence did not increase.

{¶ 6} The state argues that two new facts have arisen since the original sentencing proceedings: (1) the court became obligated under R.C. 2914.14(A) to sentence in one-year increments, and (2) the victim's mother expressed to the court at the second sentencing hearing that her daughter has experienced fear since learning that Edwards was to be resentenced. The state also argues that the trial court ordered separate sentences on each count, thus the sentence was not part of an improperly-ordered sentencing package.

{¶ 7} The United States Supreme Court held in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), that when a defendant succeeds on appeal and his or her case is remanded to the trial court for resentencing, a presumption of vindictiveness arises where the court imposes a sentence harsher than the original sentence. 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." *Id.* at 726. The Supreme Court later clarified in *Wasman v. United States*, 468 U.S. 559, 568, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984), that enhanced sentences on remand are not prohibited unless the enhancement was motivated by actual vindictiveness. In *Alabama v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), it further clarified that unless there is a "reasonable likelihood" that the increased sentence was the product of actual vindictiveness, the burden is on the defendant to show actual vindictiveness. Examples where no reasonable likelihood of actual vindictiveness exists include situations in which the judge who imposed the original sentence and the judge who imposes the new sentence are not the same person, or cases where the original sentence was imposed after the defendant entered a plea but the resentencing occurs after a trial. *Id.* at 800.

{¶ 8} Applying *Pearce* and *Smith*, we have determined that "a presumption of vindictiveness arises only in circumstances in which an *unexplained* increase makes it reasonably likely that the second sentence resulted from 'actual vindictiveness.'" *State v.*

Mitchell, 6th Dist. Erie No. E-11-039, 2012-Ohio-1992, ¶ 9. We have agreed with other courts that have concluded that "*Pearce* requires no more than that the second sentencer provide an on-the-record, wholly logical, nonvindictive reason for the sentence." (Internal citations and quotations omitted.) *Id.*

{¶ 9} In this case, the trial court articulated no reasons for imposing an enhanced sentence with respect to Count 2. In fact, the court's explanation for the sentences it imposed on remand virtually mirror the explanation provided at the original sentencing hearing. What appears to have driven the enhanced sentence on Count 2 was the court's desire that the aggregate sentence for Counts 2 and 3 remain the same.

{¶ 10} In *State v. Johnson*, 174 Ohio App.3d 130, 2007-Ohio-6512, 881 N.E.2d 289 (1st Dist.), the state argued that *Pearce* did not apply because the total length of the sentences imposed did not increase. The First District Court of Appeals recognized that some courts had held that "when one or more counts of a multi-count conviction are vacated and remanded, a court does not violate the principles of *Pearce* as long as the aggregate length of the new sentence does not exceed the total length of the original sentence." *Id.* at ¶ 14, quoting *State v. Nelloms*, 144 Ohio App.3d 1, 7, 759 N.E.2d 416 (2d Dist.2001). But the court observed that that line of cases relied on the "sentence packaging" doctrine that was rejected by the Ohio Supreme Court in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824. *See also State v. Collins*, 8th Dist. Cuyahoga No. 98575, 98595, 2013-Ohio-938, ¶ 16-17.

{¶ 11} In *Saxon,* the court made clear that under Ohio sentencing laws, a trial court "must consider each offense individually and impose a separate sentence for each offense." *Id.* at ¶ 9. Trial courts may not impose a single "lump" sentence for multiple offenses, and on appeal, an appellate court may consider the propriety of only the sentence that was appealed. *Id.* at ¶ 8, 19. It is not permitted to consider the aggregate sentence as a bundle. *Id.* at ¶ 15.

{¶ 12} In *State v. Wagner*, 3d Dist. Union No. 14-06-030, 2006-Ohio-6855, ¶ 15, the Third District held

> [u]nder these circumstances, where the trial court has expressly referred without elaboration to the exact same set of findings and factors in both sentencings, we are not convinced that the record in support of the resentence to a higher prison term is sufficient to dispel a 'reasonable likelihood of vindictiveness' in order to overcome the application of the United State Supreme Court authorities cited earlier.

We must reach the same conclusion here.

{¶ 13} Where a trial court imposes a sentence that is clearly and convincingly contrary to law, we may increase, reduce, or modify the sentence or we may vacate the sentence and remand the matter to the trial court for resentencing. R.C. 2953.08(G)(2)(b). Here, because the trial court failed to provide a rationale for enhancing Edwards' sentence on remand, we find that the sentence imposed was contrary to law. We, therefore, find Edwards' assignment of error well-taken, and we reverse and

remand the matter to the trial court for resentencing. The costs of this appeal are assessed to the state pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE