

[Cite as *State v. Douse*, 2003-Ohio-5238.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82008

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	and
-vs-	:	
	:	OPINION
JOHN S. DOUSE	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION:	<u>OCTOBER 2, 2003</u>
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CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-365121
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JUDGMENT:	Judgment Reversed in part; Sentence Vacated and Remanded.
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DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor DAVID ZIMMERMAN Assistant County Prosecutor 8 th Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	MARK B. MAREIN STEVEN L. BRADLEY Marein & Bradley 222 Leader Building
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PATRICIA ANN BLACKMON, P.J.:

{¶1} Appellant John S. Douse appeals from the trial court's denial of his motion to vacate his plea to three counts of corruption of a minor, three counts of illegal use of a minor in a nudity- oriented performance, one count of gross sexual imposition, and two counts of voyeurism, and also appeals from the subsequent sentence imposed. On appeal he assigns the following errors for our review:

{¶2} "I. The trial court erred by denying appellant's motion to withdraw his guilty pleas filed prior to sentencing without having first held a hearing."

{¶3} "II. The trial court erred by imposing maximum sentences on felonies of the fourth degree."

{¶4} "III. The trial court erred by imposing three, six-year sentences for an aggregate term of eighteen years for taking partially nude photographs of his teenage daughter."

{¶5} "IV. The trial court erred by imposing consecutive sentences for an aggregate term of twenty-four years."

{¶6} "V. The trial court erred by vindictively sentencing appellant on remand to a longer sentence than originally imposed thereby violating due process considerations."

{¶7} "VI. The trial court erred by resentencing on counts other than Counts 21-23."

{¶8} Having reviewed the record and pertinent law, we reverse the trial court's denial of Douse's motion to withdraw his plea and remand for a hearing on the matter. We also vacate Douse's sentence and remand the matter for resentencing. The apposite facts follow.

{¶9} Douse was indicted by the grand jury in a multiple count indictment that included seven counts of rape with a sexually violent predator specification, seven counts of corruption of a minor, six counts of gross sexual imposition, twenty counts of illegal use of a minor in a nudity-oriented performance, and four counts of voyeurism.

{¶10} On July 24, 1998, Douse entered into a plea to three counts of corruption of a minor, three counts of illegal use of a minor in a nudity-oriented performance, one count of gross sexual imposition, and two counts of voyeurism. The counts involved six different victims.

{¶11} On January 28, 1999 a sentencing hearing was conducted and Douse was sentenced to seven years each on the use of a minor in a nudity performance, with the terms to run consecutive to each other, thirty days for each for the two voyeurism counts for which sentence was suspended, and five years community control sanction for the gross sexual imposition count and three counts of corruption of a minor, to commence upon Douse's release from prison.

{¶12} Douse directly appealed the sentence to this court and we remanded the matter to the trial court to conduct a hearing on Douse's motion regarding the fact that the counts for illegal use of a minor in a nudity-oriented performance were allied offenses of similar import.¹ This court subsequently issued a nunc pro tunc entry five-and-a-half months later, also ordering the court to conduct a resentencing hearing since the trial court failed to state its findings and reasons in support of imposing consecutive sentences.

{¶13} On remand, another trial judge was appointed to the case. After conducting a hearing, the new judge determined that the counts were not allied offenses of similar import, and imposed the original sentence without conducting a resentencing hearing, because the trial court never received this court's nunc pro tunc entry ordering it to resentence Douse.²

{¶14} Douse appealed the trial court's decision denying his motion regarding allied offenses and failure to resentence. This court affirmed the trial court's finding that the counts were not allied offenses, but remanded the matter for resentencing

¹*State v. Douse* (2000), 140 Ohio App.3d 42.

²At the September 27, 2002 resentencing hearing, the trial court noted for the record that it had never received this court's nunc pro tunc entry ordering it to conduct a resentencing hearing. (Transcript at 44).

because the trial court failed to conduct a resentencing hearing as ordered.³

{¶15} Prior to his resentencing on September 27, 2002, Douse filed a written motion to withdraw his guilty plea, contending that his pleas were not knowingly, voluntarily and intelligently entered because he was not advised which photographs related to the counts of illegal use of a minor in a nudity-oriented performance. The trial court orally denied the motion prior to conducting the sentencing hearing.

{¶16} The trial court then proceeded with the sentencing hearing where the victims, the victims' parents, defense counsel, the prosecutor and Douse were all permitted to address the court. Afterwards, the court sentenced Douse to eighteen months on each of the corruption of a minor counts, eighteen months on the gross sexual imposition count and six years each on the illegal use of a minor in a nudity-oriented performance counts, all to be served consecutively. The trial court also sentenced Douse to sixty days on the voyeurism counts to be served consecutive with each other, but concurrent with the other terms in the case. This resulted in a sentence three years longer than the sentence imposed by the prior judge.

³*State v. Douse* (Dec. 10, 2001), Cuyahoga App. No. 79318.

{¶17} In his first assigned error, Douse argues that the trial court erred by denying his presentence motion to vacate his plea without first conducting a hearing.⁴

{¶18} Although a defendant is not vested with an absolute right to withdraw a guilty plea, a motion for withdrawal made prior to sentencing is to be freely allowed and liberally treated.⁵ The decision to grant or deny such motion is fully within the trial court's discretion and shall remain undisturbed absent a showing that the trial court abused its discretion.⁶ "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable * * *." ⁷

{¶19} "A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered

⁴We note that the trial court failed to journalize an entry reflecting its denial of the motion. However, the trial court did orally deny the motion on the record prior to sentencing. Furthermore, a reviewing court presumes that any outstanding motions at the conclusion of the proceeding have been overruled. *State v. Wagner*, 12th Dist. No. CA2002-07-056, [2003-Ohio-2369](#) (failure to journalize oral pronouncement by the trial court denying the motion to vacate plea, did not render the ruling not final).

⁵*State v. Xie* (1992), 62 Ohio St.3d 521; *State v. Peterseim* (1980), 68 Ohio App.2d 211, quoting *Barker v. United States* (1978), 579 F.2d 1219.

⁶*Xie; Peterseim*.

⁷*State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted).

the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.”⁸

{¶20} In the instant case, a review of the record indicates the trial court’s consideration of Douse’s motion to withdraw his plea consisted of the court stating the following:

{¶21} “The Court has reviewed the Defendant’s motion to withdraw his plea and upon review of the plea hearing, which was conducted before the Honorable Richard Lillie, the Court finds there was compliance with Rule 11. The Defendant was advised of the possible penalties which he was facing at the time of the plea; therefore, [the court] finds no merit in the motion to withdraw [the] plea and denies the motion.”⁹

{¶22} The trial court then proceeded to sentencing. The trial court’s pronouncement of its decision on the motion falls far short of the court’s requirement to conduct “a complete and impartial hearing” on the motion. Although the hearing need not be extensive, it must be “complete and impartial”.¹⁰ The trial court did not conduct a hearing in this case. It merely recited its

⁸*Peterseim*, paragraph three of the syllabus.

⁹Transcript at 4.

¹⁰*State v. Pratt*, Cuyahoga App. Nos. 80189 and 80190, [2002-Ohio-4433](#), citing *State v. Sherrills* (Nov. 30, 2000), Cuyahoga App. No. 77178.

ruling denying the motion. Under such circumstances, when the trial court does not even give the parties an opportunity to discuss the motion, the trial court abuses its discretion.

{¶23} Although the state argues that counsel invited the error by failing to request a hearing at the time the trial court declared its ruling, we find that where the trial court, as mandated by the Ohio Supreme Court in *State v. Xie*,¹¹ "must" conduct a hearing prior to its ruling, that a waiver or invited error argument fails.

{¶24} We note the dissent argues the trial court did not have jurisdiction to rule on the motion to withdraw the plea. In support of this, the dissent cites to *State ex. rel. Special Prosecutors v. Judges, Court of Common Pleas*,¹² in which the Ohio Supreme Court held that Crim. R. 32.1 "does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court."¹³ However, we conclude the instant case is distinguishable from that case because this court did not enter an affirmance of the trial court's judgment on the prior appeal, but vacated the matter for resentencing. A judgment of conviction

¹¹*Xie* at syllabus.

¹²(1978), 55 Ohio St.3d 94.

¹³*Id.* at 98.

consist of both the plea and sentence.¹⁴ Therefore, the trial court did have jurisdiction to consider the matter.¹⁵

{¶25} We equally are compelled to respond to the dissent's conclusion that res judicata prevents Douse from raising the issue because it could been raised on direct appeal. It was not until this court found the original sentence invalid and remanded for resentencing during the original appeal that Douse could properly raise the issue in a motion to vacate the plea. As this court held in *State v. Carmon*,¹⁶ "the failure to file a Crim.R. 32.1 motion or otherwise challenge a guilty plea at the trial level constitutes waiver of the issue on appeal." Therefore, because the opportunity to file the motion to withdraw was not presented until resentencing, res judicata did not prevent Douse from attempting to withdraw the plea.

{¶26} Douse's first assigned error has merit and is sustained.

¹⁴*State v. Henderson* (1979), 58 Ohio St.2d 171, 177, citing to Crim.R. 32(B).

¹⁵Cf. *State v. Hacker*, 2nd Dist. No. 2001-CA-85, [2002-Ohio-2920](#) (trial court considered withdrawal of plea prior to resentencing); *State v. Steimle*, Cuyahoga App. No. 79154, 79155, [2002-Ohio-2238](#) (court found failure to grant withdrawal of plea prior to resentencing moot since case remanded for another resentencing); *State v. Glavic* (2001), 143 Ohio App.3d 583, 588 (court held that it was proper to set forth motion to withdraw at resentencing); *State v. Smith* (Sept. 29, 1993), 2nd Dist. No. 92CA115-116 (court considered motion to withdraw plea upon remand for resentencing); *State v. Thomas* (1992), 80 Ohio App.3d 452 (court considered motion to withdraw plea at resentencing); *State v. McGee*, Cuyahoga App. No. 82092, [2003-Ohio-1966](#) (because we affirmed both the plea and the sentence, the trial court was without jurisdiction to consider the withdrawal of plea.)

¹⁶(Nov. 18, 1999), Cuyahoga App. No. 75377.

{¶27} In his second assigned error, Douse argues that the trial court erred by imposing maximum sentences of eighteen months on the three counts of corruption of a minor counts and one count of gross sexual imposition, without making the requisite findings pursuant to R.C. 2929.14(C), and without first considering the minimum sentence.

{¶28} The law is well settled that we will not reverse a trial court on sentencing issues unless the defendant shows by clear and convincing evidence that the trial court has erred.¹⁷

{¶29} A sentencing court may only impose a maximum term of imprisonment upon a previously imprisoned offender "who committed the worst form of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section."¹⁸ The trial court must state these findings on the record at the time of sentencing.¹⁹

{¶30} In addition to findings, the trial court must give its reasons for imposing a maximum sentence.²⁰ Reasons are the

¹⁷R.C. 2953.08(G)(1); *State v. Hollander* (July 5, 2001), Cuyahoga App. No. 78334; *State v. Haamid* (June 21, 2001), Cuyahoga App. No. 78761.

¹⁸R.C. 2929.14(C).

¹⁹See *State v. Edmonson* (1999), 86 Ohio St.3d 324.

²⁰R.C. 2929.19(B)(2)(d).

trial court's bases for its findings which evince its adherence to the General Assembly's policies of establishing consistency in sentencing and curtailing maximum sentences.²¹

{¶31} In imposing the maximum sentence for these four specific charges, the trial court never indicated that it was engaging in the appropriate analysis pursuant to R.C. 2929.14(C). Although it listed multiple reasons for why it was going to impose the total sentence it anticipated to impose, including Douse's high risk or recidivism, nowhere did it explain why Douse would receive the maximum on these particular charges, while it imposed less than the maximum on the other charges, which were supported by the trial court's same reasons.

{¶32} We note the dissent sets forth at length the trial court's statements in sentencing Douse, but disagree that it is discernable which statements applied to the maximum sentences and which applied to the less than maximum sentences.

{¶33} Therefore, because the trial court failed to indicate why it was specifically imposing the maximum sentence as to these counts, it failed to comply with R.C. 2929.14(C) and we remand for yet another resentencing hearing.

{¶34} Douse's second assigned error is sustained.

{¶35} In his third assigned error, Douse argues that the trial court failed to conduct a proportionality review as required

²¹See R.C. 2929.11 et seq.; see, also, *Edmonson*.

by R.C. 2929.11(B) in imposing a total of eighteen years on the three counts of illegal use of a minor in a nudity-oriented performance.

{¶36} R.C. 2929.11(B) states:

{¶37} "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentences *** commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶38} This court in *State v. Bolton*²² distinguished the proportionality finding pursuant to R.C. 2929.14(E)(4) and that required by R.C. 2929.11(B) as follows:

{¶39} "While R.C. 2929.14(E)(4) demands the trial court make findings on the record to evidence the proportionality of consecutive sentences, R.C. 2929.11 entails no such burden. The reason for this disparity is clear from Senate Bill 2's construction. As we previously noted, R.C. 2929.11 sets forth Ohio's purposes and principles of felony sentencing, which are to be implemented by sentencing courts via application of sections such as R.C. 2929.14(E)(4). R.C. 2929.11 does not require

²²Cuyahoga App. No. 80263, [2002-Ohio-4571](#).

findings; rather it sets forth objectives for sentencing courts to follow.”²³

{¶40} We conclude that since the trial court was not required to make any findings that it complied with R.C. 2929.11(B), and because nothing exists in the record that demonstrates that the trial court failed to consider the purposes and principles of R.C. 2929.11 in sentencing Douse to the several counts of illegal use of minor in a nudity performance, the trial court’s sentence of three consecutive six year terms was proportional to the seriousness of Douse’s conduct.

{¶41} Although Douse has cited to various other cases in which lesser sentences for greater crimes were imposed, we find that a list of cases alone does not reflect the proportionality of the sentence for the crime committed. As the First District court in *State v. Ryan*²⁴ held,

{¶42} “[A] random list of citations to appellate decisions is of dubious value in this regard since it does not necessarily take into account all the unique factors that may distinguish one case from another.”

²³Id. at ¶20. See, also *State v. Gooden*, Cuyahoga App. No. 81320, [2003-Ohio-2864](#), at ¶82; *State v. Pempton*, Cuyahoga App. No. 80255, [2002-Ohio-5831](#) at ¶10.

²⁴1st Dist. No. C-020283, [2003-Ohio-1188](#) at ¶12. See, also, *State v. Johnson*, Cuyahoga App. No. 80533, [2002-Ohio-5960](#) (there is at present no instrument by which to assess proportionality of sentences, citing similar cases is not sufficient); *State v. Elder*, Cuyahoga App. No. 80677, [2002-Ohio-3797](#) (citation to similar case insufficient to prove imposed sentence disproportionate).

{¶43} Accordingly Douse's third assigned error is overruled.

{¶44} In his fourth assigned error, Douse argues that the trial court erred by imposing consecutive sentences without making the mandatory findings pursuant to R.C. 2929.14(E)(4) and failing to state its reasons in support of imposing consecutive sentences as required by R.C. 2929.19(B)(2)(c).

{¶45} In imposing consecutive prison terms for convictions of multiple offenses, the trial court must make certain findings enumerated in R.C. 2929.14(E)(4). R.C. 2929.14(E)(4) states:

{¶46} "If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶47} "(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶48} "(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses

committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

{¶49} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶50} Along with making the above findings, the trial court must also state its reasons on the record why it is imposing the consecutive sentence.²⁵

{¶51} A review of the sentencing transcript reveals that the trial court clearly made the requisite findings required by R.C. 2929.14(E)(4) in imposing consecutive sentences. The court found that consecutive sentences were necessary to protect the public from future crime and to protect the public. The court also found that a consecutive sentence was not disproportionate to the harm Douse caused and the danger he posed to the public, and, that the harm he inflicted was so great that a single term would not adequately reflect the seriousness of his conduct.

{¶52} The trial court also stated its reasons in support of consecutive sentences. It found that Douse had multiple victims; he preyed upon troubled young females who were susceptible to the attention of men; one of the victims was his daughter; that Douse admitted to compiling a journal of his fantasies involving teenagers for more than twenty years; that Douse used his daughter

²⁵*State v. Anderson* (2001), 146 Ohio App. 3d 427; *State v. McGee*, Cuyahoga App. No. 77463; [2001-Ohio-4238](#).

in order to lure other minor girls into the home; he exhibited a pattern of criminal behavior; he expressed no remorse regarding his conduct, but claimed either the teenagers initiated the conduct or approved of the behavior; and, that his behavior caused ridicule and harassment to the victims and their families.

{¶53} Because we find the trial court imposed consecutive sentences in accordance with R.C. 2929.14(E)(4) and gave sufficient reasons for imposing the sentence, Douse's fourth assigned error is overruled.²⁶

{¶54} In his fifth assigned error, Douse argues the trial court's imposing a longer sentence than the original sentence exhibited vindictive retaliation against Douse for successfully appealing his sentence twice before.

{¶55} The United States Supreme Court has held that a trial court violates the Due Process Clause of the Fourteenth Amendment when it resentences a defendant to a harsher sentence motivated by vindictive retaliation.²⁷ A presumption of vindictiveness arises when the same judge resentences a defendant

²⁶ Although the trial court did not explicitly link its reasons to its findings, this court has found that the sentencing statutes do not require such an analysis, but merely requires the court to set forth its reasons for imposing the consecutive sentences. See, *State v. Webb*, Cuyahoga App. No. 80206, [2003-Ohio-1718](#); *State v. Casalicchio*, Cuyahoga App. No. 82216, [2003-Ohio-3028](#). See, also, *State v. Rich*, 4th Dist. No. 00CA46, OOCA47, [2001-Ohio-2613](#) (the requirement that court give its reasons for selecting consecutive sentences is separate and distinct from duty to make the findings required by R.C. 2929.14(E)(4)).

²⁷ *North Carolina v. Pearce* (1969), 395 U.S. 711, 724.

to a harsher sentence following a successful appeal.²⁸ Such a presumption does not apply when the resentencing judge is different than the original sentencing judge.²⁹

{¶56} In the instant case, the trial judge who resentenced Douse was different from the original sentencing judge. Although the resentencing judge was also reversed on appeal, it was because he merely reinstated the original judge's sentence without conducting a resentencing hearing. The trial court noted on the record that it did not conduct a resentencing hearing during the previous remand because it did not receive this court's nunc pro tunc order, in which we ordered the trial court to also resentence Douse at the same time it conducted the allied offenses hearing. Under such circumstances, where the trial court never exercised its own discretion in imposing the sentence, a presumption of vindictiveness does not arise.

{¶57} Douse's fifth assigned error is overruled.

{¶58} In his sixth assigned error, Douse argues that the trial court erred by resentencing him on all counts, instead of only resentencing on the counts that this court found error with on the prior appeal.

²⁸Id.

²⁹*State v. Gonzales*, 151 Ohio App.3d 160, [2002-Ohio-4937](#), at P25; *Lodi v. McMasters* (1986), 31 Ohio App.3d 275, 277.

{¶59} When this court vacates a sentence and remands for resentencing, the trial court is required to hold a complete sentencing hearing.³⁰ Pursuant to R.C. 2929.19(A)(1):

{¶60} "The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who has been convicted of or pleaded guilty to a felony and whose case was remanded pursuant to R.C. 2953.07 or 2953.08 of the Revised Code. ***"

{¶61} R.C. 2953.08(G)(1) also only gives the court of appeals the power to modify or vacate and remand a "sentence" on appeal. We do not have the power to only vacate a portion of the sentence.

{¶62} Accordingly, because the trial court must conduct a complete sentencing hearing upon resentencing a defendant, Douse's sixth assigned error is overruled.

{¶63} Judgment is reversed in part, and sentence vacated and remanded for resentencing.

This cause is reversed and remanded for a hearing on appellant's motion to withdraw his plea. Sentence is vacated and remanded for resentencing.

³⁰*State v. Bolton* (2001), 143 Ohio App. 3d 185; *State v. Steimle*, Cuyahoga App. No. 79154, 79155, [2002-Ohio-2238](#); *State v. Bolling* (July 19, 2001), Cuyahoga App. No. 78632.

It is, therefore, ordered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, J., DISSENTS;
(SEE ATTACHED DISSENTING OPINION.)

TIMOTHY E. McMONAGLE, J., CONCURS IN PART
IN JUDGMENT ONLY AND DISSENTS IN PART
WITH ATTACHED DISSENTING OPINION.

PATRICIA ANN BLACKMON
PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶64} I respectfully dissent from the majority's decision on two grounds. First, the majority contends the trial court should have held a hearing on Douse's motion to withdraw his plea because his request for a hearing came prior to resentencing. The majority considers a resentencing hearing to be absolutely equivalent to the initial sentencing hearing and holds that "a motion for withdrawal made prior to sentencing is to be freely allowed and liberally treated."

{¶65} However, there is a difference between the initial sentencing hearing and resentencing after appeal. In *State ex. rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 98, the Ohio Supreme Court held that Crim.R. 32.1 does not vest jurisdiction in a trial court to maintain and

determine a motion to withdraw a guilty plea subsequent to an appeal and an affirmance by the appellate court. In other words, Crim.R. 32.1 does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for such action would affect the decision of the reviewing court, which is not within the power of the trial court. Id.

{¶66} In the instant case, Douse's conviction was affirmed on appeal, two years before he moved to withdraw his guilty plea; the case was remanded only to conduct an allied offenses hearing and a resentencing. Therefore, the trial court was without jurisdiction to consider the motion and properly denied it without a hearing.

{¶67} Assuming arguendo that the trial court had jurisdiction, res judicata bars further consideration of Douse's arguments. The doctrine of res judicata bars further litigation in a criminal case of issues which were raised previously or could have been raised previously in a direct appeal. *State v. Leek*, Cuyahoga App. No. 74338, 2000 Ohio App. Lexis 2909, citing *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. The plea issues raised in Douse's motion to withdraw his guilty plea should have been raised on direct appeal. Therefore, they are barred by res judicata.

{¶68} Secondly, I disagree with the majority's conclusion that the trial court failed to indicate why it was imposing maximum sentences. When sentencing Douse to the maximum sentence on each

of the three counts of corruption of a minor and one count of gross sexual imposition, the court stated:

"* * * In this case there is no lower risk of recidivism. He continues his behavior with multiple victims. He is absolutely a candidate for recidivism.

In the indictment the Defendant was charged with violating a total of seven teenage girls. The charges to which the Defendant pled guilty named five of those girls aged 14 and 15, including his biological daughter.

Obviously, the Defendant's relationship as parent to the biological daughter facilitated the offense against her but the Defendant also used both of his children to pimp for him in order to lure other minor girls into the home where he committed criminal acts upon them.

The crime with which the Defendant has been charged suggests a pattern of criminal behavior as the course of conduct with which the Defendant has been charged spans a period in excess of 15 months.

From letters submitted to the Court by Defense counsel it would appear the Defendant preyed on minor female children who were vulnerable, and craving attention and affection."

{¶69} After reading several letters the victims wrote to Douse, the court continued:

"In this case the shortest prison term would demean the seriousness of the Defendant's conduct. He preyed upon, victimized, and committed crimes against multiple young females. Females who were at the ages which they were at the time the crimes were committed just growing into young womanhood and susceptible to attentions of men, self-conscious of their developing bodies. Further, the shortest prison term would not adequately protect the public from future crime by him. Studies indicate pedophilia is not curable. In fact, the Defendant in his statement to the probation department admitted that he wrote fantasies in his journal involving nudity of someone coming, usually teenagers, since his 20s. That is a period of more than 20 years.

* * *

The Defendant expresses no remorse about his behavior that this court takes seriously and the Defendant suggests these teenagers either initiated the conduct or approved of his behavior that this court takes seriously and the Defendant suggests these teenagers either initiated the conduct or approved of his behavior.

The Defendant had some perverse influence over these children and used it to fulfill his sexual fantasies and needs, and that behavior poses a continued serious threat to civilized society.

The acts of the Defendant caused at least one girl to obtain counseling as a result of his criminal behavior. However, the damage the Defendant did to these young women and their families caused ridicule, harassment, and that ridicule and harassment was from the Defendant's own children at the North Olmsted High School.

The sentences the court will impose are necessary to protect the public from future crime and punish the Defendant, and these sentences are not disproportionate to the seriousness of his conduct and the harm that he caused to these victims and the families of these young women. He preyed upon children that had serious problems in their homes. The harm the Defendant caused in the history of committing these crimes demonstrated consecutive sentences are necessary to protect the public, and the harm he caused was so unusual no single prison term adequately reflects the seriousness of his conduct."

{¶70} Thus, the court stated it was imposing the maximum because of Douse's great likelihood of recidivism and the seriousness of his conduct. The court's reasons for anticipating that Douse would reoffend are reasonable and explicit. Because I find the court complied with the sentencing requirements of R.C. 2929.14(C) and 2929.19(B)(2)(d), I would affirm. Accordingly, I respectfully dissent.

TIMOTHY E. McMONAGLE, J.:

{¶71} I respectfully concur in part in judgment only with the majority opinion. I dissent, however, regarding the majority's resolution of appellant's third assignment of error.

{¶72} The majority concludes that the trial court's sentence of three consecutive six-year terms was proportional "to the seriousness of Douse's conduct" even though the record is silent regarding whether the trial court conducted any analysis to insure that appellant's sentence was consistent with sentences imposed on similar offenders.

{¶73} The mandate for consistency in sentencing is set forth in R.C. 2929.11(B) as follows:

{¶74} "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, *and consistent with sentences imposed for similar crimes committed by similar offenders.*" (Emphasis added.)

{¶75} Thus, as an initial matter, the majority misconstrues the statute in concluding that appellant's sentence was proportional to the seriousness of his conduct. The statute requires that a sentence be commensurate with the seriousness of the offender's conduct and consistent, i.e., proportional, *with sentences imposed on other offenders.*

{¶76} "The requirement of consistency addresses the concept of proportionality by directing the court to consider sentences imposed upon different offenders in the same case or on offenders in other similar cases. The consistency concept gives legal relevance to the sentences of other judges. It adopts the premise that an overwhelming majority of judges sentence similarly, that a relatively small minority sentence outside of the mainstream, and that sentences outside of the mainstream of judicial practice are inappropriate." Griffin & Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W.Res.L.Rev. 1, 12-13.

{¶77} As this court has previously determined, because the mandate of consistency in sentencing is directed to the trial court, it is the trial court's responsibility to insure consistency among the sentences it imposes. See *State v. Lyons*, Cuyahoga App. No. 80220, 2002-Ohio-3424, at ¶30. See, also, *State v. Stern* (2000), 137 Ohio App.3d 110. As we stated in *Lyons*, "with the resources available to it, a trial court will, and indeed it must, make these sentencing decisions in compliance with this statute." *Id.* at ¶33.

{¶78} Here, the record is devoid of any indication that the trial judge either recognized the consistency mandate or made any attempt to comply with its requirement. The majority attempts to rationalize this obvious deficiency by asserting that there is no requirement that a trial court make findings on the record to

demonstrate that it complied with the mandate contained in R.C. 2929.11(B). It is apparent, however, that the statute *requires* that "a sentence imposed for a felony *shall be **** consistent with sentences imposed for similar crimes committed by similar offenders." Thus, although unlike many parts of the sentencing statutes R.C. 2929.11(B) does not require the trial judge to make express findings, it does require the trial judge to engage in adequate analysis to ensure consistency among the sentences it imposes.

{¶79} There is no indication in this record that the trial court did so. As the Ohio Supreme Court stated recently, "consistency and proportionality are hallmarks of the new sentencing law." *State v. Comer*, __ Ohio St.3d __, 2003-Ohio-4165, at ¶21. If that is true, given appellant's reference to other cases in which lesser sentences for greater crimes were imposed, I cannot, on this silent record, find that the trial court complied with the statutory mandate of R.C. 2929.11(B) to ensure consistency in appellant's sentence. Accordingly, I would reverse and remand for resentencing in accordance with R.C. 2929.11(B).