[Cite as *State v. Fair*, 2004-Ohio-2971.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82278

STATE OF OHIO,

Plaintiff-appellee

vs.

DWAYNE FAIR,

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT OF DECISION:	JUNE 10, 2004
CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court, Case No. CR-406838
JUDGMENT:	Affirmed in part, vacated in part, and remanded for resentencing only.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For plaintiff-appellee:	ROBERT L. TOBIK, ESQ. CHIEF PUBLIC DEFENDER JOHN T. MARTIN, ESQ. Assistant Public Defender 1200 West Third Street Cleveland, Ohio 44113
For defendant-appellant:	WILLIAM D. MASON, ESQ. CUYAHOGA COUNTY PROSECUTOR DIANE SMILANICK, ESQ. Assistant County Prosecutor The Justice Center, 8th Floor 1200 Ontario Street Cleveland, Ohio 44113

KARPINSKI, J.

{¶1} Defendant, Dwayne Fair, appeals the terms of incarceration imposed by the trial court.

{¶2} In May 2001, a jury convicted defendant of trafficking in cocaine in violation of R.C. 2925.03 and of two counts of possessing cocaine in violation of R.C. 2925.11. The court sentenced him to consecutive terms of two years imprisonment on count one, eight years on count two, and twelve months on count three and imposed a $7,500 fine and court costs.

{¶3} In a prior appeal, defendant argued that he had not received effective assistance of counsel and that the trial court erred in imposing consecutive terms of imprisonment. This court overruled all of defendant's assigned errors except the one related to the sentence imposed by the trial court. The case was remanded for resentencing because the trial court had not given reasons to support its imposition of consecutive prison terms. *State v. Fair*, Cuyahoga App. No. 80501, 2002-Ohio-5561.

{¶4} At a resentencing hearing, the trial court imposed the same three sentences it had imposed during the first sentencing hearing.[1] As before, the trial court ordered all three terms of imprisonment to be served consecutively. Following the resentencing, defendant filed this timely appeal. Because

[1]Two years on count one, eight years on count two, and twelve months on count three.

defendant's first and third assignments of error are related, we address them together.

> ASSIGNMENT OF ERROR I:
> THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THE RESENTENCING AS A SENTENCING DE NOVO, AND INSTEAD TREATED THE RESENTENCING AS SUPPLEMENTAL TO THE ORIGINAL SENTENCING.
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> ASSIGNMENT OF ERROR III:
> THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WHEN IT FAILED TO MAKE FINDINGS REQUIRED BY R.C. 2929.14(E)(4) WITH REASONS IN SUPPORT THEREOF.

{¶5} Defendant contends the trial court failed to conduct a complete resentencing hearing pursuant to R.C. 2929.19(A)(1). Additionally, defendant claims the trial court erred in not making all the findings required by R.C. 2929.14(E)(4) before it imposed consecutive sentences.

{¶6} In the case at bar, the resentencing transcript includes the following statements by the court.

> **{¶7}** THE COURT: Okay. The court has reviewed the opinion of the Court of Appeals and the court adopts its findings made at its original sentencing.
> **{¶8}** The court does find that you have not served a prior prison term, however, minimum term would demean the seriousness of this offense in the case. You were part of a deal in which undercover agent Drake of the North Royalton Police department purchased nearly four ounces of cocaine from you and your co-defendant.
> **{¶9}** Your co-defendant is serving 12 years in the Federal penitentiary. This four ounce purchase was the biggest drug bust in North Royalton history. I find consecutive terms necessary to protect the public and more so to punish the offender. You are convicted of crimes involving two separate incidents, the possession of cocaine on the mirror in the house and then the trafficking deal that took place in North Royalton. This shows to me that you are a user of cocaine as well as a seller of cocaine.
> **{¶10}** I find consecutive sentences are not disproportionate to the seriousness of the offense. And I do find that the harm in this case was so great and unusual that

no single prison term would adequately reflect the seriousness of the conduct.

{¶11} As far as reasons go, again, as far as harm created, it's unusual that a single prison term would reflect the seriousness of the conduct. This was the biggest drug bust in Royalton history that you were part of. I find sentences should be consistent, your co-defendant is serving 12 years[2] in Federal penitentiary for his involvement at the time.

{¶12} You do bring up, however, your sentence is unfair considering, alleging that he is a much worse person. On the other hand, Mr. Shapeek Bey did not have the advances in life that you had. You grew up in University Heights, went to fine schools. You have loving and caring parents who are here to support you. And you choose in life to become a drug dealer, when you had all kinds of other opportunities facing you.

{¶13} In many ways you are a much worse person than your co-defendant who did not have those same opportunities as you. He had few choices in which to make on the road of life. You had many and you choose a life of crime.

{¶14} Tr. at 15-17.

{¶15} This court has previously explained,

{¶16} *** the purpose of resentencing is to allow the judge to consider all relevant factors and make all applicable findings with accompanying reasons in the same proceeding, thus aiding both clarity and consistency. This is not accomplished by the blanket incorporation of a previous sentencing transcript without discussing its contents, a practice which only serves to cloud the question of whether the judge is fulfilling her duty to "consider the record" [citation omitted} in a new proceeding. At a sentencing following remand it is mandatory that the relevant findings and supporting reasons are addressed and considered both in relation to one another and in their totality. Without limiting the statutory requirements or mandating particular proceedings, we find that relevant portions of the previous sentencing may be read into the record or summarized on resentencing, *** but a judge should be careful to ensure that prior determinations are not simply adopted without showing that they have been considered anew.

{¶17} *State v. Steimle*, 2002-Ohio-2238 ¶17.

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[2]In describing co-defendant's sentence as 12 years, the trial judge relied upon an answer of defendant's counsel at the second sentencing.

{¶18} *Steimle* further clarified the nature of a resentencing hearing: "An order vacating a sentence and remanding for resentencing requires a judge to conduct a new sentencing hearing at which all relevant factors are again considered, victims are notified, the defendant is present and allowed to speak, and the appropriate sentence is considered and imposed anew. ¶14, citing R.C. 2929.19(A)(1); accord *State v. Bolling*, (July 19, 2001), Cuyahoga App. No. 78632. In *Steimle*, this court expressly rejected a "remand for resentencing as somehow limited."

{¶19} In support, *Steimle* quoted R.C. 2929.19(A)(1), which states: "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 was 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." The court explained: "This provision requires a judge to hold a new sentencing hearing, including all applicable procedures, whenever a sentence is remanded."

{¶20} In *State v. Gray*, 2003-Ohio-436, this court, citing to *Steimle*

{¶21} and *State v. Bolton* (2001, 143 Ohio App.3d 185, 188-189, explained another basis for requiring an independent hearing upon remand: "The court of appeals does not have the power to vacate just **a portion** of a sentence." (Emphasis added.) *Gray*,¶12. The legislature has specified the actions an appellate court may take: it may "increase, reduce, or otherwise modify a sentence that is appealed under this section or may **vacate the sentence** and remand the matter to the sentencing court for resentencing." R.C. 2934.08 (G)(2). Emphasis added.

{¶22} Whereas a court may impose multiple prison terms for multiple offenses, they are all included under one sentence. See the language of R.C. 2953.08(A)(1)(b). In common usage courts have referred to "consecutive sentences"; however, the statute describes this situation as requiring "the service of prison **terms** consecutively." R.C. 2929.14(E)(4). Emphasis added. Similarly, post-release control is included **in** the sentence; it is not a separate sentence. See R.C.2929.14(F).

{¶23} The language of the sentencing statute does not support the principle that a sentence may be chopped up and remanded piecemeal to the trial court for resentencing. A resentencing hearing is not like a salad bar in which one can return to add another garnish to the salad. Nor is a case that has been remanded like a cold dinner sent back to the chef to be reheated. "***[W]hen a case is remanded for resentencing, the trial court must conduct a complete sentencing hearing and must approach resentencing as an independent proceeding complete with all applicable procedures." *Gray*, supra, ¶ 12.

{¶24} The dissent describes the proceeding in this type of remand for resentencing (that is, when the sentencing error is a failure to give reasons) as "supplemental to the original sentencing hearing." We know of no authority for justifying a "supplemental hearing."

{¶25} The dissent relies upon an amendment to R.C.2953.08(G)(1), which states that if the court fails to provide required findings in certain instances, for example imposing consecutive sentences, the appellate court shall remand the case for the lower court to "state, on the record, the required findings." R.C.2953.08(G)(1). First, this statement does not say that on remand the court need address only those required findings it failed to make. It is a stretch certainly to say this statute even implies that any required findings

previously approved need not be made anew. This statute simply does not explain the nature and full extent of a resentencing hearing.

{¶26} We cite one example to show the obvious limitations of this statute. A case that is remanded for a failure to specify the required findings is also likely to have failed to provide reasons in support of a required finding. Thus, when such reasons are required, as they are in giving consecutive sentences, it would be an absurdity to remand the case and require the trial court to provide only "required findings" and nothing more. But such an interpretation logically follows if R.C. 2953.08(G)(1) is used to define the nature and extent of the resentencing. In fact, in the case at bar this court previously found the court erred in not providing reasons. Sending the case back only for "required findings" would not cure the lack of reasons.

{¶27} It is not clear what the intent of this statute is. It is curious that .08(G)(1) does not include maximum sentences. Rather, as Griffin and Katz observe, it is limited to:

{¶28} RC 2929.13(B)–sentencing fourth or fifth degree
{¶29} felons to prison,
{¶30} RC 2929.13(D)–not sentencing first or second degree felons
{¶31} to prison,
{¶32} (3) RC 2929.14(E)(4)–imposing non-mandatory consecutive
{¶33} sentences, and
{¶34} (4) RC 2929.20(H)–judicial release for first and second degree
{¶35} felons.

{¶36} Ohio Felony Sentencing Law (8 Ed. 2003), T 10.18, 10.19, interpret 2953.08(G)(1) as limiting what an appellate court can do when it finds that the trial court failed to make requisite findings under the statutes listed above. They explain this statute by contrasting it to what appellate courts can usually do. Otherwise, when it finds required findings were not made, the appellate court "is empowered to increase, reduce, or modify the sentence." Id., T 10.19. Griffin and Katz cite to the case of *State v. Jones*

(2001), 93 Ohio St.3d 391, 400, which reversed a decision in which this appellate court had modified the trial court's sentence rather than remand the case. Citing to the current version of R.C. 2953.08, the Ohio Supreme Court explained that "the court of appeals should have given the trial court an opportunity to explain the reason for the sentence it imposed." At 400.

{¶37} The Supreme Court of Ohio, therefore, interpreted the amendment as requiring the court of appeals to remand a case for resentencing rather than to modify the sentence. The amendment, in other words, does not stand for the proposition that cases can be sent back for a limited purpose, as the dissent suggests.

{¶38} In the case at bar, the second resentencing transcript shows, however, that although the court began by merely referencing its prior findings, the court went on to make other findings. The trial court determined that consecutive sentences were "necessary to protect the public and more so to punish the offender" and were "not disproportionate to the seriousness of the offense" and that "the harm in this case was so great and unusual that no single prison term would adequately reflect the seriousness of the conduct."

{¶39} Consecutive sentences are governed by R.C. 2929.14(E)(4), which, in relevant part, provides:

> **{¶40}** The court must find that consecutive sentences are: (1) necessary to protect the public from future crime or to punish the offender; (2) not disproportionate to the seriousness of the defendant's conduct; and (3) not disproportionate to the danger the defendant poses to the public. In addition to these three findings, the trial court must also find one of the following: (1) the defendant committed the offenses while awaiting trial or sentencing on another charge; (2) the harm caused was so great that no single sentence would suffice to reflect the seriousness of defendant's conduct; or (3) the defendant's criminal history is so egregious that consecutive sentences are needed to protect the public. R.C. 2929.14(E)(4)(a)-(c).

{¶41} R.C. 2929.14(E)(4) does not require the court to recite the exact words of the statute so long as the required statutory findings are discernible from the record. R.C. 2929.19(B)(2)(c); *State v. Casalicchio* (June 12, 2003), Cuyahoga App. No. 82216, 2003-Ohio-3028; *State v. Chaney* (Aug. 8, 2002), Cuyahoga App. No. 80496, 2002-Ohio-4020.

{¶42} In the case at bar, the court failed to find that consecutive sentences were "not disproportionate to the danger the defendant poses to the public." Nor did the court offer satisfactory reasons to support this required statutory finding. At its resentencing of defendant in the instant matter, the trial court stated that defendant had been convicted of possessing nearly four ounces of cocaine,

> involving two separate incidents, the possession of cocaine on the mirror in the house and then the trafficking deal that took place in North Royalton. This shows to me that you are a user of cocaine as well as a seller of cocaine. *** As far as reasons go, again, as far as harm created, it's unusual that a single prison term would reflect the seriousness of the conduct. This was the biggest drug bust in Royalton history that you were part of.

{¶43} Defendant was convicted of trafficking in and possessing over 100 but less than 500 grams of cocaine.[3] The corresponding statutes, R.C. 2925.03 and R.C. 2925.11, make trafficking and possession of cocaine a criminal offense if the amount is "more than one hundred grams but less than five hundred grams." Because the 114 grams falls at the low end of the two statutes' gram scales, we do not find that the amount satisfies the unstated but necessary finding that the consecutive sentence "was not disproportional to the danger the defendant poses to the public." We also disagree that defendant's

[3]We rely upon defense counsel's unchallenged calculation: "In that there are 28 grams in an ounce, four ounces of cocaine would be approximately 112 grams." Appellant's Brief, p. 7.

involvement in "the biggest drug bust in Royalton history" necessarily supports this required finding. The proportionality and consistency of a sentence cannot be determined by comparisons limited to a subregion of a county. The court's reasons, therefore, do not justify the imposition of consecutive terms of imprisonment.

{¶44} We conclude that the trial court failed to make all the necessary findings and to give sufficient reasons for all the required findings and, therefore, erred when it imposed consecutive sentences upon defendant. Accordingly, we find defendant's first assignment of error moot and sustain his third assignments of error.

ASSIGNMENT OF ERROR II:
THE CONVICTIONS FOR DRUG TRAFFICKING IN COUNT ONE AND FOR DRUG POSSESSION IN COUNT TWO ARE ALLIED OFFENSES OF SIMILAR IMPORT AND MR. FAIR CAN ONLY BE CONVICTED OF ONE OF THESE OFFENSES, NOT BOTH.

{¶45} Defendant argues that because drug trafficking and drug possession are allied offenses he could be convicted of only one offense, not both. We disagree.

{¶46} R.C. 2941.25 provides:

> Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶47} In determining whether crimes are allied offenses of similar import under R.C. 2941.25(A), the court must assess whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other. *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699. If the elements

correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus. Id. The defendant has the burden of establishing that two offenses are allied. *State v. Banks,* Cuyahoga App. Nos. 81679, 81680*,* 2003-Ohio-1530.

{¶48} Relevant to this appeal is R.C. 2925.03, which defines trafficking in drugs:

{¶49} No person shall knowingly do any of the following:

{¶50} Sell or offer to sell a controlled substance;

{¶51} Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

{¶52} ***

{¶53} (C) Whoever violates division (A) of this section is guilty of one of the following:

{¶54} ***

{¶55} If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

{¶56} ***

{¶57} (e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. ***.

{¶58} R.C. 2925.11 defines the crime of possession of drugs as follows:

{¶59} No person shall knowingly obtain, possess, or use a controlled substance.

{¶60} ***

{¶61} 4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

{¶62} ***

{¶63} (d) If the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

{¶64} After comparing the elements of both statutes, we conclude that each offense requires proof of an additional fact that the other does not. The possession charge requires proof that a person obtained, possessed, or used crack cocaine. The trafficking charge requires proof that a person sold or offered to sell crack cocaine. It is possible to possess crack cocaine without offering it for sale, and it is possible to sell or offer to sell crack cocaine without having it in one's possession or control. *State v. Bridges,* Cuyahoga App. No. 80171, 2002-Ohio-3771. Accordingly, possession of and trafficking in cocaine are distinguishable because the elements do not correspond to such a degree that the commission of one will result in the commission of the other. We find no error in the court's judgment, because the offenses are not allied offenses of similar import. Assignment of Error No. II is without merit.

ASSIGNMENT OF ERROR IV:
THE TRIAL COURT ERRED IN IMPOSING A MAXIMUM SENTENCE FOR DRUG POSSESSION, AS ALLEGED IN COUNT TWO.

ASSIGNMENT OF ERROR V:

THE TRIAL COURT ERRED IN IMPOSING A MAXIMUM SENTENCE FOR DRUG POSSESSION, AS ALLEGED IN COUNT THREE.

{¶65} Defendant argues that the trial court erred in sentencing him to maximum terms of imprisonment in counts two and three. A trial court may impose the maximum allowable sentence, under R.C. 2929.14(C), "*** only upon offenders who committed the worst forms of the offense, [or] upon offenders who pose the greatest likelihood of committing future crimes or upon repeat violent offenders or major drug offenders." In imposing the maximum, the trial judge is required to find one[4] of the above criteria applicable to the offender and is also required to state the reasons underlying the finding. R.C. 2929.19(B)(2)(d); *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131; *State v. Rodrigues*, Cuyahoga App. No. 80610, 2003-Ohio-1334.

{¶66} In the instant case, the trial court sentenced defendant to maximum terms of incarceration but it never used the word "maximum." However, by not mentioning the word "maximum," the record remains silent as to which of the trial court's findings specifically relate to its consideration of maximum terms. Nor did the court give reasons specifically tied to a finding. Without more information, particularly the court's reasons in support of such sentences, we conclude the trial court erred in imposing maximum terms upon defendant. Defendant's Assignments of Error IV and V are sustained.

ASSIGNMENT OF ERROR VI:
THE TRIAL COURT FAILED TO ADEQUATELY ENSURE THAT ITS TOTAL SENTENCE WAS PROPORTIONATE TO SENTENCES BEING GIVEN TO SIMILARLY SITUATED OFFENDERS WHO HAVE COMMITTED SIMILAR OFFENSES.

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[4]This court has previously held that the alternatives set forth in section (C) of the statute are to be read in the disjunctive. *State v. Johnson*, Cuyahoga App. No. 80533, 2002-Ohio-5960; *State v. Hogan*, Cuyahoga App. No. 80157, 2002-Ohio-1773.

{¶67} Defendant claims that his sentences are not proportionate to other similarly situated[5] offenders who have committed similar offenses.

{¶68} The relevant statute is R.C. 2929.11, which explains the purposes of felony sentencing as follows:

> **{¶69}** A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.
>
> **{¶70}** 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.
>
> **{¶71}** A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

{¶72} Defendant requested that his sentence be compared to that received by Abdul Shafeek-Bey, one of the other people involved in the same drug transactions as defendant. Responding to that request during defendant's resentencing hearing, the trial court observed that Bey was serving twelve years in a federal penitentiary. State and federal sentencing guidelines, however, are not necessarily comparable, and the trial court did not attempt to analyze the differences and similarities.[6] More importantly, the record in

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[5]The statute describes not "similarly situated offenders" but rather "similar crimes committed by similar offenders." The focus is on the crime, not the offender's situation.

[6]In his appellate brief, defense counsel provided substantial references to the United States Sentencing Guidelines and U.S.C. to establish a basis for a comparison. The trial court did not have the advantage of these sources.

the case at bar does not describe the nature of the offenses for which Bey was convicted in the federal court.

{¶73} At the second hearing, defense counsel explained the following significant differences between the two defendants. The co-defendant was implicated in four separate transactions; Fair had only one transaction. The co-defendant was involved in selling a gun to the officers, which finding tacked an additional five years to his sentence; Fair, however, was not involved with any weapons. The co-defendant had been incarcerated three times for drug offenses, which number caused him to be classified as a major drug offender and added additional time to his sentence; Fair, on the other hand, had never been incarcerated. Under the federal guidelines, defense counsel argued, Fair's comparable sentence would have been 30 months with the possibility of serving only 18 months. No evidence was introduced, however, in the resentencing hearing to support these assertions. Morever, on appeal, a different defense counsel, providing a formula from 18 U.S.C. 3624(b)for computing good time credits, concluded defendant "would serve approximately 26 months***." Appellant's Brief p. 7.

{¶74} In any event, the court ignored these differences and focused, instead, on the comparative advantages of family and education the defendant had over the co-defendant. The judge said: "You do bring up, however, your sentence is unfair considering, alleging that he is a much worse person. On the other hand, Mr. Shapeek Bey did not have the advances in life that you had."

{¶75} First we note, defendant never said Mr. Bey was a "much worse person." Rather he listed objective differences in the specific details of the crimes, for example, selling a gun to an officer, and also stressed specific differences in the number of transactions. More fundamental is a serious question here as to whether the statute

envisioned the sort of difference the trial judge articulated in explaining similar sentences between two offenders. The larger context of the statute is whether the sentence is proportionate to sentences of "similar crimes of similar offenders." What is to be considered is the defendant and co-defendant as "offenders," not as beneficiaries of class, education, or any other social difference. While these details might provide mitigating circumstances, mitigation is not what is asked for here. The larger purpose is to punish the "offender's conduct" for this crime, to protect the public from this crime, and to rehabilitate the offender of this crime. The larger purpose always returns to the crime, not to the social history of the defendant.

{¶76} Because we have already determined the trial court erred in the explanation it provided in sentencing defendant to consecutive and maximum terms of imprisonment, however, Assignment of Error VI is moot.

> ASSIGNMENT OF ERROR VII:
> ASSUMING, ARGUENDO, THAT THIS COURT FINDS THAT ANY OF THE AFOREMENTIONED ASSIGNMENTS OF ERROR WERE NOT PROPERLY PRESERVED BEFORE THE TRIAL COURT, THEN COUNSEL WAS INEFFECTIVE AND APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION.

{¶77} Defendant argues that his attorney's failure to object to the sentences he received at his first sentencing hearing deprived him of effective counsel in the trial court.

{¶78} Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

{¶79} *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶80} In his prior appeal, defendant raised the issue of ineffective assistance of trial counsel, but never argued his attorney was ineffective because of the sentences imposed by the trial court. Defendant's argument is now barred by the doctrine of res judicata. Accordingly, defendant's seventh assignment of error is overruled. For all the foregoing reasons, the judgment of the trial court as to the conviction is affirmed; the sentence is vacated, and the case remanded for resentencing proceedings consistent with this opinion.

Judgment accordingly.

It is ordered that appellee and appellant split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KENNETH A. ROCCO, P.J., AND

ANNE L. KILBANE, J., CONCURS.

DIANE KARPINSKI
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J. CONCURRING & DISSENTING.

{¶81} I agree with the majority that the common pleas court did not make the finding necessary to impose the maximum term of imprisonment for drug possession, and I also agree that, on this basis, we must vacate the sentence and remand for a new sentencing hearing. I further agree that drug possession and drug trafficking are not allied offenses of similar import, as this court has previously held on any number of occasions. See, e.g., *State v. Washington*, Cuyahoga App. No. 80418, 2002-Ohio-5834, at ¶74; *State v. Hudson*, Cuyahoga App. No. 79010, 2002-Ohio-1408.

{¶82} Because a new sentencing hearing is already required, I would find that appellant's challenges to the imposition of consecutive sentences, and to the proportionality of his sentence in comparison to other similarly situated offenders, are moot. I would also find that his alternative allegation of ineffective assistance of counsel is moot, given that this court has not determined that counsel failed to preserve any issue for appeal. I

write separately not to discuss any of these points, however, but to discuss the seemingly endless stream of cases(of which this case is one)in which resentencing hearings are ordered even though resentencing has been rendered unnecessary by amendments to R.C. 2953.08(G).

{¶83} The prior order of remand in this case was broader than it had to be.[7] Upon finding that the common pleas court failed to give the reasons to support the findings necessary to impose consecutive sentences, this court reversed the sentence imposed on appellant and remanded for resentencing, although R.C. 2953.08(G)(1) only required a remand for the purpose of stating the required findings on the record.

{¶84} Even though the legislature amended R.C. 2953.08(G) more than three years ago, we have neglected to incorporate this important change into our disposition of sentencing matters. But see *State v. Gopp* (2003), 154 Ohio App.3d 385, 392, ¶22; *State v. Kennedy*, Montgomery App. No. 19635, 2003-Ohio-4844, ¶8 (recent cases discussing the amended statute). Under R.C. 2953.08(G)(1), if the sentencing court fails to state on the record the findings necessary to, e.g., impose a prison term upon a fourth or fifth degree felony offender, impose community control when there is a presumption that a prison term is necessary, impose consecutive terms of imprisonment for multiple offenses, or grant judicial release, the appellate court "*shall* remand the case to the

[7]Mea culpa.

sentencing court and instruct the sentencing court to state, on the record, the required findings."[8] The proceeding in this type of remand is supplemental to the original sentencing hearing. On the other hand, when the appellate court "clearly and convincingly finds" that the record does not support findings actually made by the trial court, or that the sentence is otherwise contrary to law, then the appellate court may modify or vacate the sentence and remand for resentencing. R.C. 2953.08(G)(2)(a).

{¶85} We do a grave disservice to finality principles when we reverse and remand for resentencing cases in which the sentence is not necessarily incorrect, but only incomplete.[9] In my view, given the statute's mandate, we should demand a record containing the findings necessary to support the sentence imposed, then review the correctness of that sentence, rather than reopen the entire sentencing proceeding and ask the common pleas court to reconsider a decision which we did not find to be wrong.[10] Vacating a sentence

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[8]The intent of the statute is not unclear, as the majority suggests, simply because it does not require a remand in all instances in which the trial court failed to state required findings on the record. The fact that the legislature did not include a failure to make the findings necessary to impose the maximum sentence as a circumstance requiring a remand, for example, while "curious," does not obscure the legislature's intent as to the circumstances in which a remand is required.

[9]Because the remand is only for the purpose of stating findings on the record, and does not affect the sentence imposed, the majority's "salad bar" analogy, though amusing, is inapt. The sentence is not being "chopped up and remanded piecemeal", as the majority suggests; it is only being returned for findings to support what was done.

{¶a} [10]This procedure will undoubtedly delay the final disposition of some appeals. Instead of disposing of the

and remanding the matter for resentencing allows for multiple appeals of the same sentence[11] on different grounds, either because new issues arise as a result of the remand, or because, as here, the defendant chooses to argue issues after the remand which could have been raised before. See, e.g., *State v. Morton*, Cuyahoga App. No. 82095, 2003-Ohio-4063; *State v. Rotarius*, Cuyahoga App. No. 81555, 2003-Ohio-1526. Neither of these situations would arise if the matter was simply remanded for supplementation; a single appeal would conclude all issues surrounding the sentencing issues to which R.C. 2953.08(G)(1) applies.

{¶86} In this case, the appropriate outcome of the first appeal should have been a remand for the purpose of stating the findings and reasons for imposing consecutive sentences. Had we done so, most of the issues raised in this appeal – the arguments that the drug trafficking and drug possession charges were allied offenses

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appeal, a remand for findings presumably leaves the appeal pending. Once the common pleas court returns the case to us, the parties may need to be given leave to supplement the briefs to address the additional new findings. A supplemental journal entry and opinion may then need to be issued. In my view, however, this delay in a single appeal is both statutorily mandated and preferable to the multiple appeals now allowed when appellate courts vacate and remand cases for resentencing upon finding that the trial court has failed to make complete findings on the record.

{¶b} Of course, no remand would be needed in cases in which the appellate court requires a new trial or a new sentencing hearing on other grounds. In that case, the common pleas court's failure to make all of the findings necessary to support its sentence would be moot.

[11]As a practical matter, the trial court generally imposes the same sentence on remand that it imposed before.

of similar import, that the court erred by imposing the maximum sentences for drug possession, and that the sentence was not proportionate to the sentences given to similarly situated offenders – would have been barred by res judicata. The only issue in this appeal would have been the imposition of consecutive sentences.

{¶87} This court having vacated the original sentence and remanded for resentencing, I perceive no error in the common pleas court's readoption of the findings it made at the original sentencing hearing. The court could certainly reach the same conclusions for the same reasons it found persuasive before. Indeed, no new evidence was before the court, so it would have been surprising for the court to reach a different result. I see no reason why the common pleas court should have had to re-analyze the sentencing factors on the record, especially when no error was alleged or found in the analysis in the first appeal. In my opinion, the court's reference to the original sentencing is nothing more than judicial economy, and does not render the resentencing "supplemental" to the original sentencing. *State v. Bryant,* Cuyahoga App. No. 81535, 2003-Ohio-1518, ¶21.

{¶88} Accordingly, I concur and dissent.