[Cite as *State v. Moore*, 2004-Ohio-6303.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83703

STATE OF OHIO	:	
	:	
Plaintiff-appellant	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
LAVELLE MOORE	:	
	:	
Defendant-appellee	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 24, 2004
CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Cuyahoga County Court of
	:	Common Pleas
	:	Case No. CR-407662
JUDGMENT	:	VACATED AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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For defendant-appellee : PAUL MANCINO, JR. Attorney at Law

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KENNETH A. ROCCO, J.:

{¶ 1} Plaintiff-appellant the State of Ohio appeals from the sentence imposed by the trial court upon defendant-appellee Lavelle Moore at the resentencing hearing ordered by this court in *State v. Moore*, Cuyahoga App. No. 80416, 2003-Ohio-1154.

{¶ 2} The state asserts the trial court exceeded the scope of this court's remand by imposing a completely different sentence since Moore's original sentence on the underlying offenses had been affirmed. This court agrees with the state's assertion. Consequently, Moore's new sentence is vacated, and this case is remanded once again for a resentencing hearing.

{¶ 3} The facts resulting in Moore's convictions were reviewed and his convictions were affirmed in *Moore*, supra. Succinctly stated, Moore and two of his friends, Dallas King and Eugene Barrow, along with a woman accomplice, invaded a home on Paxton Avenue on March 23, 2001. The men tied up the victim, a woman nine months pregnant, and stole jewelry and money before they fled.

{¶ 4} Moore subsequently was indicted with Barrow and was found guilty by the jury of aggravated burglary, aggravated robbery, and kidnapping. The trial court further found Moore guilty of the repeat violent offender specifications attached to those counts. The trial court ultimately sentenced Moore to a total term of twenty years: concurrent terms of ten years for each of his convictions, to be served consecutively with a term of ten years for the specification.

{¶ 5} On appeal, Moore raised sixteen assignments of error that challenged both his convictions and his sentence; only one was sustained. This court held in relevant part as follows:

{¶ 6} "In his seventh assignment of error, Moore contends that the trial court failed to make the requisite findings pursuant to R.C. 2929.14(D)(2)(a)(b)(i)(ii) (sic) in sentencing Moore to an additional ten years for the repeat violent offender specification.

{¶ 7} "Although Moore contends that R.C. 2929.14(D)(2)(a) requires a finding that actual harm was inflicted on the victim, we disagree. It merely states that the court may impose the maximum sentence if the violent offender causes harm to the victim. In the instant case, the trial court had already imposed the maximum sentence***.***

{¶ 8} "R.C. 2929.14(D)(2)(b), however, states that after imposing the maximum term for the underlying offense, the trial court may impose additional time on the repeat violent offender***

{¶ 9} "***The[] findings made by the trial court fall short of what is required pursuant to R.C. 2929.14(D)(2)(b) because the trial court failed to find that [1] the sentence for the underlying offenses did not adequately punish him for the offense or that [2] the [imposition of only the underlying] sentence was demeaning to the seriousness of the offense. Accordingly, Moore's seventh assignment of error is sustained and his sentence vacated and the matter remanded for a new sentencing hearing." (Emphasis added.)

{¶ 10} Upon making the foregoing pronouncement, this court went on to address Moore's additional challenge to the maximum sentence of ten years total on the underlying convictions for aggravated burglary, aggravated robbery, and kidnapping. Moore's challenge was rejected; this court specifically stated that the trial court's imposition of the maximum sentence was "supported" in the record.

{¶ 11} The opinion, in retrospect perhaps too imprecisely, simply concluded Moore's "sentence [was] vacated and the case remanded for a new sentencing hearing."

{¶ 12} Moore subsequently sought further review of his convictions and sentences by the Ohio Supreme Court, but his attempt was rebuffed; the supreme court declined to accept his case.

{¶ 13} The record reflects the trial court eventually issued a journal entry setting Moore's resentencing hearing for September 29, 2003. The hearing took place as scheduled, but for reasons unexplained, the state had no representative present; only Moore and his new defense counsel appeared.

{¶ 14} After reviewing the mandate from this court and listening to Moore and his counsel, the trial court decided that although incarceration was "warranted" under the circumstances of this case, upon resentencing, it now could not "justify the maximum term" because the terms it this time decided to impose were sufficient "to protect the public." Thus, "[a]s to Counts 1, 2, and 3, Mr. Moore, this court sentences you to concurrent five year terms***."

{¶ 15} The court went on to elaborate that "the maximum term for this offense (sic) is not warranted in this instance, nor is a term of incarceration for the repeat violent offender specifications." (Emphasis added.) In explanation, the court advised Moore that "[i]n real simple terms, Mr. Moore, this court just knocked off 15 years from the original sentence that was imposed."

{¶ 16} Upon receiving notice of Moore's new sentence, the state filed an appeal pursuant to R.C. 2953.08(B)(2).[1]

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[1]R.C. 2953.08(B) provides in pertinent part that "a prosecuting attorney***may appeal as a matter of right a sentence imposed upon a defendant who is convicted of***a felony, or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed***" on the ground that "(2) The sentence is "contrary to law."

{¶ 17} The state argues the trial court's new sentence is contrary to law because it exceeds the scope of the remand in *Moore*. On the facts of this case, the state's argument is persuasive.

{¶ 18} An analogous situation recently was presented in *State v. Gates*, Cuyahoga App. No. 82385, 2004-Ohio-1453. Gates argued the trial court was required to treat the hearing on remand as a "sentencing de novo" and thus to reconsider the entire original sentence it imposed; however, this court noted that on the contrary, under the circumstances, "the law of the case doctrine and res judicata" demonstrated the trial court "was not free to disregard a mandate of this Court." Id., *P.9. This court went on to remind Gates that "identical arguments***made to and rejected by" the appellate court thereafter constrain the trial court to follow the law of the case. Id., *P.12.

{¶ 19} The law of the case doctrine as applied to resentencing hearings earlier was discussed in *State v. Gauntt* (Dec. 29, 1994), Cuyahoga App. No. 66791. Quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, this court reiterated "the doctrine provides that the decision of a reviewing court in a

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Subsection (B)(3) applies to judicial releases for felonies "of the first or second degree," however, that section is inapplicable to this case. The trial court did not grant appellee judicial release. Rather, its order constituted an entirely new "sentence" on remand pursuant to R.C. 2945.67(A). Cf., *State v. Raitz*, Lucas App. No. L-03-1118, 2003-Ohio-5687.

case remains the law of that case on the legal questions involved for all subsequent proceedings in the case***." The rule is necessary to "ensure consistency of results in a case***." The doctrine therefore "functions to compel trial courts to follow the mandates of reviewing courts." Consequently, "where at a rehearing following a remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law.***[T]he trial court is without authority to extend or vary the mandate given." (Emphasis in original.) This court concluded by reminding the appellant that the trial court had authority to sentence him "only in accordance with law."

{¶ 20} The same result was reached in *Gates*. Gates already had appealed his sentence; thus, the trial court was authorized only to correct the portion of his sentence that this court determined to be inadequately justified.

{¶ 21} Appellate courts have recognized that resentencing hearings may be conducted by the trial court for the purpose of stating the required findings, if applicable, on the record. *State v. Gopp*, 154 Ohio App.3d 385, 2003-Ohio-4908, ¶22; *State v. Kennedy*, Montgomery App. No. 19635, 2003-Ohio-4381, ¶8.

{¶ 22} In *Moore*, this court gave the trial court the same directive. Moore's underlying sentence of concurrent maximum terms of incarceration was in every respect affirmed. The trial court, however, had "fallen short" of stating the R.C. 2929.14(D)(2)(b) findings for the imposition of the additional ten year term for his conviction of the repeat violent offender specification.

{¶ 23} The case, therefore, was remanded only for the purpose of making those findings, if the trial court deemed them appropriate. Subsequently, the Ohio Supreme Court declined to review this court's mandate.

{¶ 24} The trial court, on remand, thus was not free to vary the terms of incarceration on the underlying offenses that ultimately had been ruled proper in the original appeal. It reasonably could have concluded it could not make the required findings for the imposition of an additional term for the repeat violent offender specifications; nevertheless, because Moore's other challenge to his sentence had been rejected on appeal, for Moore's underlying convictions the trial court could only re-impose the sentence that had been deemed "supported" in the record.

{¶ 25} If this were not so, the disposition of that assignment of error in Moore's original appeal would have been purely "advisory." More importantly, the directive to this court set forth in App.R. 12(A)(1)(c) would have no meaning. Pursuant to the rule, this court is mandated to "decide each assignment of error" that is not made moot by a ruling on another.

{¶ 26} The fact that the trial court ignored the law of the case as stated by this court in Moore's original appeal, therefore, renders its decision to alter the terms of incarceration on the underlying offenses in order to "knock off 15 years from" Moore's sentence "contrary to law" pursuant to R.C. 2953.08(G)(2). Cf., *State v. Ali*, Cuyahoga App. No. 82076, 2004-Ohio-1782.

{¶ 27} For the foregoing reasons, the state's assignment of error is sustained.

{¶ 28} The trial court's order that purported to impose an entirely new sentence upon Moore is vacated. This case is remanded for further proceedings consistent with this opinion.

{¶ 29} Appellee's sentence is vacated and this cause is remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that appellant recover of appellee its costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

KENNETH A. ROCCO

JUDGE

TIMOTHY E. McMONAGLE, J. CONCURS

DIANE KARPINSKI, P.J. DISSENTS
SEE SEPARATE DISSENTING OPINION)

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).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

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	:	DISSENTING
v.	:	
	:	OPINION
LAVELLE MOORE	:	

:
:
Defendant-appellee :

DATE: NOVEMBER 24, 2004

KARPINSKI, J., DISSENTING:

{¶ 30} I respectfully dissent.

{¶ 31} The majority determined that because this court, in the prior appeal of this case, ruled that the trial court had not erred in the manner in which it sentenced defendant to the maximum term, the maximum sentence is the law of the case. When this court affirmed the maximum sentence, however, this court was not ruling on the appropriateness of the sentence. More precisely, it was ruling on the discrete question of whether there was evidence to support sentencing Moore to the maximum.[1] *State v. Moore*, Cuyahoga App. No. 80416, 2003-Ohio-1154 at ¶70.

{¶ 32} This court ruled that the trial court had indeed made the necessary findings to allow it to impose that sentence and gave a reason in support. This court did not state that the sentence imposed was the only correct sentence; it merely stated that it was not error to impose it.

{¶ 33} The issue before this court is how to view the appellate court's response to those assignments of error in which the appellant's argument was overruled. When this court rules that it finds no error in a particular action of the lower court, this court is not saying that only that action was possible. Indeed, in many cases the trial court has a range of permissible options.

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[1]Unfortunately, the opinion does not state verbatim the assignment of error.

{¶ 34} We understand, moreover, that trial judges customarily view the sentence as a package in which the trial judge balances various parts to arrive at the desired end. On remand they should have the opportunity to move within the prescribed range of possible sentences. Trial judges should continue to have the power to fashion such a package.

{¶ 35} The Tenth District has stated this principle most forcefully:

> **{¶ 36}** The sentence package doctrine provides that, when a defendant is sentenced under a multi-count indictment and the sentences imposed on those counts are interdependent, the trial court has the authority to reevaluate the entire aggregate sentence, including those on the unchallenged counts, on remand from a decision vacating one or more of the original counts. *In the Matter of Fabiaen L. Mitchell* (June 28, 2001), Franklin App. No. 01AP-74, 2001 Ohio App. LEXIS 2856. The underlying theory is that, in imposing a sentence in a multi-count conviction, the trial court typically looks to the bottom line, or the total number of years. Id. Thus, when part of a sentence is vacated, the entire sentencing package doctrine becomes "unbundled," and the trial judge is, therefore, entitled to resentence a defendant on all counts to effectuate its previous intent. Id.
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> **{¶ 37}** *State v. Jackson*, (Franklin App. No. 03AP-698) 2004-Ohio-1005.
>
> **{¶ 38}** Moreover, because we vacated the lower court sentence in the case at bar, the trial court was implicitly authorized to begin sentencing anew. R.C. 2953.08 does not authorize "partial remands" for limited sentencing. As this court has previously stated:
>
> The court of appeals does not have the power to vacate just a portion of sentence. *State v. Bolton* (2001), 143 Ohio App.3d 185, 188-189, 757 N.E.2d 841. Therefore, when 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. ***See, also, *State v. Steimle*, Cuyahoga App. Nos. 79154 and 79155, 2000-Ohio-2238; R.C. 2929.19(A)(1)
>
> **{¶ 39}** *State v. Gray*, Cuyahoga App. No. 81474, 2003-Ohio-436 ¶12.

{¶ 40} The majority complains that to allow a total resentencing that changes terms in which this court found no error would render the court's ruling advisory. That is true. To rule otherwise, however, is to turn language upside down. The majority would agree with the Hatter from *Alice's Adventures in Wonderland*:

{¶ 41} "Take some more tea," the March Hare said to Alice, very earnestly.

{¶ 42} "I've had nothing yet," Alice replied in an offended tone: "so I can't take more."

{¶ 43} "You mean you can't take *less*," said the Hatter: "it's very easy to take *more* than nothing."

{¶ 44} This court's earlier ruling on the maximum is of no consequence to this case, because this court then proceeded to vacate that sentence. Black's Law Dictionary defines "vacate" as "to annul; to set aside; to cancel or rescind. To render an act void; as to vacate an entry of record or a judgment." In the prior appeal of this case, this court vacated defendant's sentence. It no longer exists; it is a nullity. As a nullity, that sentence is treated as though it had not taken place. It cannot be "more than nothing."

{¶ 45} As a result of this court's vacating the sentence, the trial court was required to have a de novo hearing. Such a hearing allows the trial court to consider new evidence, and the defendant is to be judged on what is available at that moment of sentencing. Thus, for example, if a defendant has shown a remarkable record in prison since the earlier sentencing, that record is admissible. To proceed otherwise, would reduce a re-sentencing to a mere rerun of an old movie. Indeed, if the lower court had failed to revisit each and every part of the sentence, we would have found error.

{¶ 46} A decision finding no error in a judgment that this court subsequently vacated and, therefore, is now a nullity, cannot be transmuted into the law of the case serving to forbid any other alternative.

{¶ 47} Finally, I would, sua sponte, find plain error[2] in the sentencing for the RVO under

[2]See *State v. Wilson,* Cuyahoga App. No. 82770, 2004-Ohio-499, in which this court found plain error in the trial court's failure to inform defendant of his constitutional right to compulsory process.

R.C. 2929.14(D)(2)(b). In its prior opinion, this court said it was not necessary for any finding to be made that defendant caused harm to the victim because the court had already imposed the maximum. This holding runs afoul of the very recent U.S. Supreme Court decision in *Blakely*, 124 S.Ct. 2531; 159 L.Ed.2d 403l 72 U.S.L.W. 4546, as well as *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and *Ring v. Arizona* (2002), 536 U.S. 584 122 S.Ct. 2428, 153 L.Ed.2d 556. These cases establish that it is the jury, not the trial judge, that must make the necessary findings to support a sentence beyond the statutory maximum for the underlying offense.

{¶ 48} Therefore, I would remand the case for proceedings consistent with *Blakely*. Accordingly, I dissent.