**[Cite as *State v. Webb*, 2005-Ohio-3839.]**

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85318

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| | : | |
| | : | JOURNAL ENTRY |
| Plaintiff-Appellee | : | |
| | : | AND |
| v. | : | |
| | : | OPINION |
| FRANK J. WEBB, | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | |

DATE OF ANNOUNCEMENT
OF DECISION: JULY 28, 2005

CHARACTER OF PROCEEDING: Criminal Appeal from
Common Pleas Court,
Case No. CR-237404.

JUDGMENT: REVERSED AND REMANDED.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee: William D. Mason
Cuyahoga County Prosecutor
Diane Smilanick, Assistant
8th Floor Justice Center
1200 Ontario Street
Cleveland, OH 44113

For Defendant-Appellant: Frank J. Webb, pro se
Inmate No. A220-662
Richland Correctional Institution
P.O. Box 8107
Mansfield, OH 44901

CHRISTINE T. McMONAGLE, J.:

**{¶ 1}** Defendant-Appellant, Frank J. Webb, appeals pro se from the judgment of the Common Pleas Court denying his motion to vacate and modify his sentence. For the reasons that follow, we reverse and remand.

**{¶ 2}** The record reflects that in 1989, Webb and his co-defendant, Merl Sharpley, were jointly indicted in two separate cases for offenses arising out of three armed robberies and a shooting. The cases were consolidated for trial. After a jury trial, Webb was convicted of five counts of aggravated robbery, three counts of kidnapping, felonious assault, attempted murder, possession of a dangerous ordnance, and having a weapon while under disability.

**{¶ 3}** On appeal, this court reversed Webb's and Sharpley's convictions for the firearm specification appurtenant to the conviction for the aggravated robbery which occurred on January 31, 1989, and reversed Webb's conviction for felonious assault. We affirmed the remaining convictions. *State v. Webb* (Jan. 2, 1992), Cuyahoga App. Nos. 59544/59626/59627.

**{¶ 4}** In light of this court's decision reversing two of his convictions, Webb subsequently filed a motion to vacate and modify his sentence, which the trial court denied. This appeal followed.

FAILURE TO CONDUCT A RESENTENCING HEARING

**{¶ 5}** In his first assignment of error, Webb contends that the trial court erred in failing to conduct a resentencing hearing pursuant to this court's decision reversing his conviction on the

firearm specification appurtenant to the conviction for aggravated robbery which occurred on January 31, 1989, and his felonious assault conviction.

**{¶ 6}** The State concedes this error, but argues that the matter should be remanded for resentencing only on the reversal of the firearm specification on the aggravated robbery conviction and the reversal on the felonious assault conviction. The State contends that a "completely new sentencing hearing" is not necessary. We disagree.

**{¶ 7}** As this court previously stated in *State v. Gray*, Cuyahoga App. Nos. 81474, 2003-Ohio-436, at ¶12:

**{¶ 8}** "The court of appeals does not have the power to vacate just a portion of a sentence. *State v. Bolton* (2001), 143 Ohio App.3d 185, 188-189. 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 *Bolton*, supra at 188-189. See, also, *State v. Steimle*, Cuyahoga App. Nos. 79154 and 79155, 2002-Ohio-2238."

**{¶ 9}** Furthermore, this court has recognized that trial judges customarily view the sentence as a package in which the trial judge balances various parts to arrive at the desired end. *State v. Moore*, Cuyahoga App. No. 83703, 2004-Ohio-6303, at ¶34. Thus, on remand, trial judges should have the opportunity to move within the prescribed range of possible sentences.

**{¶ 10}** The Tenth District explained this principle as follows:

**{¶ 11}** "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. 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." *State v. Jackson*, 2004-Ohio-1005, at ¶5, Franklin App. No. 03AP-698.

**{¶ 12}** Accordingly, upon remand, the trial court is to conduct a complete sentencing hearing upon resentencing Webb.

**{¶ 13}** Appellant's first assignment of error is sustained.

SENTENCING ON THE FIREARM SPECIFICATIONS

**{¶ 14}** In his second assignment of error, Webb argues that the trial court erred in sentencing him under former R.C. 2929.71(B) to consecutive three-year terms on the firearm specifications because it did not find that any of the felonies were committed as part of the same act or transaction. Former R.C. 2929.71(B) provided that if a defendant were found guilty of one or more felonies and two or more firearm specifications, the firearm specifications were to be

served consecutively, unless the felonies were part of the same act or transaction. Webb argues that the trial court erred in sentencing him to four consecutive three-year terms on the firearm specifications because the jury did not consider whether any of the felonies were committed as part of the same act or transaction.

**{¶ 15}** Webb's argument, however, is barred by the doctrine of res judicata. Under the doctrine of res judicata, a final judgment of conviction bars a defendant 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 an appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. "Res judicata may be applied to bar further litigation of issues that were raised previously or could have been raised previously in an appeal." *State v. Houston* (1995), 73 Ohio St.3d 346, 347, citing *Perry*, supra.

**{¶ 16}** Webb filed a direct appeal of his conviction and could have raised any sentencing errors on appeal. Accordingly, his argument is barred by the doctrine of res judicata.

**{¶ 17}** Appellant's second assignment of error is therefore overruled. *BLAKELY* ISSUE

**{¶ 18}** In his third assignment of error, Webb contends that the imposition of consecutive sentences for the firearm specifications violates the United States Supreme Court's recent decision in *Blakely v. Washington* (2004), -- U.S. --, 124 S.Ct. 2531, 159

L.Ed.2d 403, because the jury did not determine whether the underlying offenses were part of the same act or transaction, a fact allegedly exposing him to an enhanced penalty beyond the statutory maximum. Webb's argument is without merit.

**{¶ 19}** Webb was sentenced on March 15, 1990, nearly 15 years before the United States Supreme Court decided *Blakely*. Since the decision in *Blakely* was announced, numerous federal courts have declined to apply *Blakely* retroactively. See, e.g., *In re Dean* (C.A.11, 2004), 375 F.3d 1287; *Cuevas v. Derosa* (C.A.1, 2004), 386 F.3d 367; *United States v. Stoltz* (D.Minn.2004), 325 F.Supp.2d 982; *United States v. Stancell* (D.D.C.2004), 346 F.Supp.2d 204; *United States v. Traeger* (N.D.Ill.2004), 325 F.Supp.2d 860; *Patterson v. United States* (E.D.Mich, June 25, 2004), 2004 U.S. Dist. LEXIS 12402.

**{¶ 20}** As explained by the Eleventh Circuit Court of Appeals:

**{¶ 21}** "For a new rule to be retroactive to cases on collateral review ***, the Supreme Court itself must make the rule retroactive. *** Additionally, the Supreme Court does not make a rule retroactive through dictum. Multiple cases can, together, make a rule retroactive, but only if the holdings in those cases necessarily dictate retroactivity of the new rule.

**{¶ 22}** "*** [T]he Supreme Court has not expressly declared *Blakely* to be retroactive to cases on collateral review. Moreover, no combination of cases necessarily dictate retroactivity of the *Blakely* decision. *Blakely* itself was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a

case on collateral review. The same day the Supreme Court decided *Blakely*, the Court also issued its decision in *Schriro v. Summerlin*, — U.S. — , 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), holding that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which extended application of *Apprendi* to facts increasing a defendant's sentence from life imprisonment to death, is not retroactive to cases on collateral review. *** Because *Blakely*, like *Ring*, is based on an extension of *Apprendi*, [defendant] cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review." *In re: Dean*, supra.

**{¶ 23}** Webb's third assignment of error is therefore overruled.

Reversed and remanded.

This cause is remanded for further proceedings consistent with the opinion herein.

It is, therefore, ordered that appellant recover from 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.

CHRISTINE T. McMONAGLE
JUDGE

MARY EILEEN KILBANE, J., CONCURS.

SEAN C. GALLAGHER, P.J., CONCURS

IN PART AND DISSENTS IN PART WITH
SEPARATE CONCURRING AND 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

COUNTY OF CUYAHOGA

No. 85318

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| | : | CONCURRING AND |
| | : | |
| Plaintiff-Appellee | : | DISSENTING |
| | : | |
| vs. | : | OPINION |
| | : | |
| FRANK J. WEBB | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | |
| | : | |

DATE: JULY 28, 2005

SEAN C. GALLAGHER, J., CONCURRING IN PART AND DISSENTING IN PART:

**{¶ 24}** I respectfully dissent from the majority position to vacate the entire sentence based on the first assignment of error. I would remand for resentencing only on the earlier reversal of the firearm specification associated with the aggravated robbery conviction and the reversal of the felonious assault conviction. I write separately to address my concerns about the application of

*State v. Bolton,* cited by the majority opinion. With respect to the second and third assignments of error, I concur in the judgment and analysis of the majority.[1]

**{¶ 25}** The majority decision, relying on *Bolton* and *Steimle*, mandates that appellate courts do not have the power to vacate "just a portion of a sentence." The decision requires a trial court to conduct a completely independent sentencing hearing, complete with all the applicable procedures, on remand. This, however, is not an exclusive view in this district.

**{¶ 26}** Some have viewed R.C. 2953.08 to apply only to the limited circumstances where trial courts are required to state findings or give reasons for a particular sentence. A close reading of the statute, however, reveals it is far broader in its application. R.C. 2953.08 reads in part as follows:

**{¶ 27}** "(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds: * * *

**{¶ 28}** "(4) The sentence is contrary to law."

**{¶ 29}** The pertinent language of R.C. 2953.08(G)(2)[2] reads as follows: "The appellate court may increase, reduce, or otherwise

---

[1] With respect to the third assignment of error, see my concurring and dissenting opinion in *State v. Lett*, Cuyahoga App. Nos. 84707 and 84729, 2005-Ohio-2665, and Judge James J. Sweeney's dissenting opinion in *State v. Atkins-Boozer*, Cuyahoga App. No. 84151, 2005-Ohio-2666, in which I concurred.

modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing."

**{¶ 30}** This language has largely been read to mean the appellate court may increase, reduce or modify a sentence, or may vacate the sentence and remand the case for resentencing. The portion of the statute often overlooked is the language "* * * a sentence that is appealed under this section * * *." This language indicates the matter under review is not necessarily the full sentence, but rather that which is expressly assigned as error. It is that portion of the sentence that the court may either increase, reduce or modify, or in the alternative, vacate.

**{¶ 31}** Often, an appeal focuses on one or two aspects of a sentence rendered by a trial court. While we often look at a sentence in a singular context, the plain language of the phrase "* * * a sentence that is appealed under this section * * *" certainly suggests that what is under review is the claimed error, not necessarily the entire sentence. Judge Kenneth A. Rocco of our court pointed out the merit of this position in his concurring and dissenting opinion in *State v. Fair*, Cuyahoga App. No. 82278, 2004-Ohio-2971, when he stated the following:

**{¶ 32}** "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. In my view, given

---

[2] This language is often attributed to R.C. 2953.08(G)(1), but the passage in question is found in subsection 2.

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. Vacating a sentence and remanding the matter for resentencing allows for multiple appeals of the same sentence 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."

**{¶ 33}** Issues involving resentencing also impact the law of the case doctrine. Again, Judge Kenneth A. Rocco outlined the impact of the doctrine on vacated sentences and resentencing hearings in *State v. Moore,* Cuyahoga App. No. 83703, 2004-Ohio-6303, when he stated the following: "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, 1994 Ohio App. LEXIS 5951. Quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 11 Ohio B. 1, 462 N.E.2d 410, this court reiterated 'the doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in

the case***.' 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.*** The trial court is without authority to extend or vary the mandate given.' [Emphasis omitted.] This court concluded by reminding the appellant that the trial court had authority to sentence him 'only in accordance with law.'"

**{¶ 34}** It is my view that vacating an entire sentence on review, when only a portion of the total sentence contains error, is inconsistent with the scope of appellate review. While I recognize there may be instances where the underlying error so undermines the legitimacy of the original sentence that it must be fully vacated, I do not believe this premise is automatic. Appellate courts are in the best position to determine the rare circumstances when, or if, a sentence must be fully vacated.

**{¶ 35}** In light of the statutory language, I respectfully disagree with the view in *Bolton* that the entire sentence must be vacated and remanded. I believe the decision to increase, reduce, modify, or vacate should be limited, in the absence of a clearly defined reason, to that which the court finds erroneous.