

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 27361

Appellee

v.

TRAMELL RAYSHAWN WILSON

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 12 02 0332

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 27, 2015

WHITMORE, Judge.

{¶1} Defendant-Appellant, Tramell Rayshawn Wilson, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

I

{¶2} In June 2011, Wilson instigated a confrontation with two men outside of a nightclub in Akron. During the course of the confrontation, Wilson pulled out a gun, shot at one of the men, and actually shot the second man multiple times. A grand jury indicted Wilson on two counts of felonious assault and one count of having a weapon while under disability. Each felonious assault count also contained a repeat violent offender specification, pursuant to R.C. 2941.149, and a firearm specification, pursuant to R.C. 2941.145. A jury found Wilson guilty on both of his felonious assault counts, the firearm specifications linked to those counts, and his weapon under disability count. Thereafter, Wilson stipulated that he had a prior felonious assault conviction and, due to his prior conviction, qualified as a repeat violent offender.

{¶3} The court merged Wilson’s repeat violent offender specifications for purposes of sentencing, but sentenced him on all of his remaining counts. Specifically, the court sentenced Wilson to (1) three years on his repeat violent offender specification; (2) six years on each of his felonious assault counts; (3) three years on each of his firearm specifications; and (4) 36 months on his weapon under disability count. The court ordered each of Wilson’s prison terms to run consecutively with the exception of the weapon under disability count. Thus, the court sentenced Wilson to a total of 21 years in prison.

{¶4} On appeal from his convictions, Wilson argued that the trial court erred by failing to merge his convictions for felonious assault and having a weapon under disability. *See State v. Wilson*, 9th Dist. Summit No. 26683, 2014-Ohio-376, ¶ 41. Because there was no evidence that the trial court had analyzed the merger issue under *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, we determined that the trial court had to apply *Johnson* in the first instance. *Id.* at ¶ 45. Consequently, we remanded the matter to the trial court “for it to apply *Johnson* and to determine whether the felonious assault and having weapons under disability offenses should merge.” *Id.*

{¶5} On remand, the trial court conducted a new sentencing hearing and ultimately concluded that Wilson’s counts for felonious assault and having a weapon under disability should not merge. In keeping with its original decision, the court once again merged Wilson’s repeat violent offender specifications and sentenced him to a total of 21 years in prison. Nevertheless, the court changed the individual prison terms that it had originally ordered Wilson to serve. The court sentenced Wilson to (1) ten years on his repeat violent offender specification; (2) eight years on each of his felonious assault counts; (3) three years on each of his firearm specifications; and (4) 36 months on his weapon under disability count. The court

then ordered the ten-year repeat violent offender specification, one of the eight-year felonious assault counts, and one of the three-year firearm specifications to be served consecutively to reach the 21-year total. The court ordered the remaining counts to run concurrently.

{¶6} Wilson now appeals from the trial court’s judgment and raises three assignments of error for our review. For ease of analysis, we rearrange the assignments of error.

II

Assignment of Error Number Two

THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO 10 YEARS IN PRISON FOR A REPEAT VIOLENT SPECIFICATION BECAUSE HE WAS A JUVENILE AT THE TIME OF HIS FIRST AND ONLY OTHER OFFENSE; THEREFORE, PER R.C. 2901.08(B), THAT CONVICTION IS BARRED FROM BEING CONSIDERED ON WHETHER OR NOT A DEFENDANT IS A REPEAT VIOLENT OFFENDER.

{¶7} In his second assignment of error, Wilson “moves this Court to reverse his Repeat Violent Offender Specification conviction because he was a juvenile at the time his first offense of violence occurred.” He argues that an adjudication of delinquency is not a qualifying offense for purposes of the repeat violent offender statute, so the trial court erred when it sentenced him as a repeat violent offender. *See* R.C. 2901.08 (previous adjudication of delinquency “is not a conviction * * * for purposes of determining * * * whether [a] person should be sentenced as a repeat violent offender * * *”). Because Wilson could have raised the foregoing argument in his first appeal, we decline to address it.

{¶8} “In a remand based only on an allied-offenses sentencing error, the guilty verdicts underlying a defendant’s sentences remain the law of the case and are not subject to review.” *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 15. An appeal following a remand for resentencing under *Johnson* is not an opportunity for a defendant to raise issues that should have been raised in the earlier appeal. *See, e.g., State v. McDaniel*, 9th Dist. Summit No.

26997, 2014-Ohio-183, ¶ 17; *State v. Ross*, 9th Dist. Summit No. 26399, 2013-Ohio-786, ¶ 7; *State v. McIntyre*, 9th Dist. Summit No. 26449, 2012-Ohio-5657, ¶ 13. A defendant only may raise issues that arise directly as a result of the resentencing. *See Wilson* at paragraph two of the syllabus.

{¶9} In this assignment of error, Wilson seeks to challenge the court’s finding of guilt on his repeat violent offender specification, not the particular sentence that he received on the specification. Because this Court remanded this matter strictly on an allied-offenses sentencing error, Wilson cannot now challenge the court’s finding of guilt. *See Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, at ¶ 15. His argument is one that he should have raised in his prior appeal. As such, it is now precluded by res judicata and/or the law of the case doctrine. *See McDaniel* at ¶ 17; *Ross* at ¶ 7; *McIntyre* at ¶ 13. Wilson’s second assignment of error is overruled.

Assignment of Error Number Three

IN THE ALTERNATIVE OF ASSIGNMENT OF ERROR ONE, THE APPELLANT ASSERTS THAT THE TRIAL COURT ERRED IN INCREASING THE HIS (sic) SENTENCE ON THE REPEAT VIOLENT OFFENDER SPECIFICATION FROM THREE YEARS TO TEN YEARS AND HIS FELONIOUS ASSAULT CONVICTIONS FROM SIX YEARS TO EIGHT YEARS WITHOUT JUST CAUSE.

{¶10} In his third assignment of error, Wilson argues that the trial court erred by increasing the length of his prison terms on his repeat violent offender specifications and his felonious assault counts. We agree in part.

{¶11} “[A] trial court’s failure to merge allied offenses does not result in a void sentence.” *State v. Jones*, 9th Dist. Summit No. 26854, 2013-Ohio-3710, ¶ 7. Nevertheless, “[a] sentence that contains an allied-offenses error is contrary to law,” and an appellate court has the authority to vacate “sentences that [are] affected by the allied-offenses error and remand the matter for a new sentencing hearing.” *Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, at ¶ 14. “A

remand for a new sentencing hearing generally anticipates a de novo sentencing hearing.” *Id.* at ¶ 15. Yet, “only the sentences for the offenses that were affected by the appealed error are reviewed de novo; the sentences for any offenses that were not affected by the appealed error are not vacated and are not subject to review.” *Id.*, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, paragraph three of the syllabus. A trial court lacks the authority to review and/or modify the sentences for the unaffected offenses. *See Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, at ¶ 15. *See also State v. Martin*, 9th Dist. Summit No. 26325, 2012-Ohio-4919, ¶ 5 (court lacks authority to address allied offense issue when the matter has been remanded strictly for the court to correct the defendant’s post-release control notification).

{¶12} In *Wilson*’s first appeal, this Court determined that the matter had to be “remanded to the trial court for it to apply *Johnson* and to determine whether [Wilson’s] felonious assault and having weapons under disability offenses should merge.” *Wilson*, 2014-Ohio-376, at ¶ 45. We did not vacate *Wilson*’s sentence in its entirety or reverse any of *Wilson*’s other sentences. Instead, we only reversed the portion of the trial court’s judgment that related to *Wilson*’s offenses for felonious assault and having a weapon under disability. We remanded the matter strictly for the trial court to apply *Johnson* to those offenses. *Id.* at ¶ 45, ¶ 61.

{¶13} On remand, the court held a de novo sentencing hearing. Rather than resentence *Wilson* strictly on his offenses for felonious assault and having a weapon under disability, however, the court resentenced *Wilson* on all of his offenses. The trial court lacked the authority to do so. Because our remand did not pertain to *Wilson*’s repeat violent offender specifications or his firearm specifications, the scope of the resentencing hearing did not include those offenses. *See Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, at ¶ 15, citing *Saxon* at paragraph three of the syllabus. Accordingly, the trial court erred by increasing *Wilson*’s sentence on his repeat violent

offender specifications. To the extent Wilson's assignment of error pertains to his sentence on his repeat violent offender specifications, it is sustained.

{¶14} Wilson also argues that the court erred by increasing his sentence on his felonious assault convictions. Those convictions, however, were reversed on appeal and were before the court for resentencing. At the resentencing hearing, the State notified the court that there was a defect in its prior sentence. In particular, the State notified the court that Wilson could not be ordered to serve a term of imprisonment on his repeat violent offender specification unless the court imposed the maximum penalty on Wilson's felonious assault offenses. *See* R.C. 2929.14(B)(2)(a)(iii). The State asked the court to impose the maximum prison term of eight years on each of Wilson's felonious assault offenses, and Wilson did not object to the State's request. In fact, Wilson agreed that the trial court had the authority to resentence him as it saw fit. Wilson asked the court to impose a lower sentence than it had originally imposed upon him.

{¶15} Because Wilson's felonious assault counts were before the court for resentencing, the court had the authority to resentence Wilson on those counts. To the extent Wilson argues that the court erred by imposing a different prison term for those offenses than it had originally imposed, we conclude that Wilson has forfeited his argument. *See State v. Ibn-Ford*, 9th Dist. Summit No. 26386, 2013-Ohio-2172, ¶ 60 ("Where a party fails to preserve the claimed error * * * at a time when the trial court has the opportunity to resolve the issue when it arises, he has forfeited the issue on appeal."). Wilson did not object when the State asked the court to increase his prison terms on those counts. In fact, he agreed that the court had the authority to alter his sentence and asked the court to impose a lower sentence than it had before. Wilson cannot now argue that the court erred by sentencing him to eight years on his counts for felonious assault.

See id. Insofar as Wilson’s third assignment of error relates to his felonious assault convictions, it is overruled.

Assignment of Error Number One

THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT ON THE REPEAT VIOLENT OFFENDER SPECIFICATION BECAUSE, CONTRARY TO THE TRIAL COURT’S FINDING WITHIN ITS SENTENCING ENTRY, THE APPELLANT WAS NOT FOUND GUILTY OF THE REPEAT VIOLENT OFFENDER SPECIFICATIONS BY A JURY OR BY THE TRIAL COURT.

{¶16} In his first assignment of error, Wilson argues that the trial court erred by sentencing him on his repeat violent offender specifications because he was never found guilty of those offenses. We disagree.

{¶17} At Wilson’s original sentencing hearing, he stipulated that he had a prior felonious assault conviction and that, due to his prior conviction, he qualified as a repeat violent offender. The court issued its original sentencing entry on September 28, 2012. In its original sentencing entry, the court mistakenly noted that the jury had found Wilson guilty on his repeat violent offender specifications. The court subsequently corrected its error by way of a nunc pro tunc entry. Specifically, on October 25, 2012, the court issued a nunc pro tunc entry in which it noted that Wilson had stipulated to a prior felonious assault conviction and that it found Wilson to be a repeat violent offender. This Court noted on direct appeal that Wilson “was convicted of all charges * * *.” *Wilson*, 2014-Ohio-376, at ¶ 4.

{¶18} Following this Court’s remand, the trial court issued a new sentencing entry. Unfortunately, the court, in its new entry, repeated the error that it had made when it originally sentenced Wilson. That is, it mistakenly noted in the entry that the jury had found Wilson guilty on his repeat violent offender specifications. Because the jury did not find him guilty on the

specifications, Wilson argues that he was never actually found guilty on his repeat violent offender specifications and that his sentence for the specifications is void.

{¶19} Wilson’s argument overlooks the nunc pro tunc entry that the court issued on October 25, 2012. In that entry, the court found Wilson guilty on his repeat violent offender specifications. This Court specifically recognized in the first appeal in this matter that Wilson had been found guilty on all charges. *Id.* The record reflects that the court’s latest entry contains a simple clerical error. Because the trial court must issue a new sentencing entry on remand, the court may correct the error at that time. *See* Crim.R. 36 (“Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time.”). Wilson’s argument that he was never found guilty of his repeat violent offender specifications lacks merit. As such, his first assignment of error is overruled.

III

{¶20} Wilson’s third assignment of error is sustained in part and overruled in part. His remaining assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
CONCURS.

CARR, J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶21} When this case was last here on appeal, Wilson argued that his convictions for felonious assault and having a weapon under disability should merge because he used the same gun to commit all of his offenses. *See State v. Wilson*, 9th Dist. Summit No. 26683, 2014-Ohio-376, ¶ 41. We declined to conduct an allied offense analysis in the first instance and remanded the matter for the trial court to do so. Our instruction to the court upon remand was “to apply *Johnson* and to determine whether the felonious assault and having weapons under disability offenses should merge.” *Id.* at ¶ 45. Our remand did not pertain to any other portion of Wilson’s

sentence. Accordingly, the court only had the authority to resentence Wilson with regard to those counts. *See State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 15, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, paragraph three of the syllabus.

{¶22} On remand, the court resented Wilson on all counts. It: (1) increased the length of his prison term for his repeat violent offender specification; (2) increased the length of his prison term for his felonious assault counts; and (3) made several changes regarding whether he would serve individual prison terms consecutively or concurrently. Originally, the court had ordered Wilson to serve consecutive prison terms on all of his offenses except for his conviction for having a weapon under disability. When the court resented Wilson on remand, however, it only ordered three of his prison terms to run consecutively and ran the remainder concurrently. That modification affected Wilson's felonious assault convictions (which previously had both run consecutively) and one of his firearm specifications (which previously had run consecutively). While I agree that the court could alter Wilson's sentence for his felonious assault and having a weapon under disability convictions, it lacked the authority to modify other portions of his sentence. Specifically, it lacked the authority to increase his prison term on his repeat violent offender specification *and* it lacked the authority to alter the manner in which he would serve that term and the terms linked to his firearm specifications (i.e., whether he would serve those terms consecutively or concurrently).

{¶23} I agree with the majority that this matter must be remanded because the trial court lacked the authority to increase Wilson's prison term for his repeat violent offender specification. I do not agree, however, that a simple remand for the court to reinstate Wilson's original sentence on that specification solves the problem here. Doing so leaves intact another unauthorized sentencing change the court made; to wit: ordering one of the terms for Wilson's

firearm specifications to run concurrently instead of consecutively. That modification exceeded the scope of this Court's remand and, consequently, was contrary to law. *See State v. O'Neal*, 9th Dist. Medina No. 10CA0140-M, 2012-Ohio-396, ¶ 13. Because the modification was contrary to law, I would address it. *See, e.g., State v. Johnson*, 9th Dist. Summit No. 26788, 2013-Ohio-4680, ¶ 8 (recognizing sua sponte that defendant's sentence term was contrary to law and remanding the matter for resentencing on that basis). I would also give the trial court the opportunity to properly exercise its sentencing discretion in the first instance.

{¶24} When a trial court sentences a defendant on multiple counts, it does not view his or her counts in isolation. Instead, the court considers the interplay between the various counts and fashions an appropriate sentence based on that interplay. It is clear from the record that both the parties and the trial court were confused regarding the scope of the trial court's resentencing authority upon remand. Accordingly, rather than simply ordering the reinstatement of a portion of Wilson's original sentence, I would vacate the entire resentencing entry and place the parties in the positions they occupied when this Court last remanded the matter. The trial court would then have the opportunity to properly exercise its sentencing authority in the first instance and issue a lawful sentence. Because the majority has only ordered a limited remand, I concur in part, and dissent in part.

APPEARANCES:

TRAMELL RAYSHAWN WILSON, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RACHEL M. RICHARDSON, Assistant Prosecuting Attorney, for Appellee.