

[Cite as *State v. North*, 2010-Ohio-2766.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090406
	:	TRIAL NO. B-0610711
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
DAVID E. NORTH,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Sentences Vacated and Cause Remanded

Date of Judgment Entry on Appeal: June 18, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela M. Stagnaro, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Raising a single assignment of error, defendant-appellant David E. North challenges the sentences imposed after this court had remanded the case to the trial court for resentencing. Because the trial court’s sentencing entry inadvertently reflected the original, erroneous sentences, we reverse.

{¶2} In April 2008, following his no-contest plea, North was convicted of aggravated robbery, robbery, kidnapping, felonious assault, and menacing by stalking. The trial court imposed a prison term for each offense. The aggregate prison term imposed was 25 years.

{¶3} North appealed, asserting that the indictment had omitted the mens rea for several of the offenses, that several of the offenses were allied offenses of similar import, and that the imposition of maximum, consecutive sentences of imprisonment for several of the offenses had been improper. In May 2009, this court held that the aggravated-robbery and robbery offenses were allied offenses of similar import.¹ We also held that the two kidnapping offenses were allied offenses. Therefore, we vacated those sentences and “remand[ed] the cause so that the court [could] merge the offenses and sentence North for either robbery or aggravated robbery and for one of the kidnapping offenses.” In all other respects, we affirmed the trial court’s judgment.²

{¶4} On remand, the trial court conducted a thorough hearing prior to resentencing North. As the transcript of the proceedings reflects, the trial court orally announced that it would merge the aggravated-robbery and robbery charges, and that it would merge the two kidnapping charges. But the trial court’s judgment entry,

¹ See *State v. North* (May 13, 2009), 1st Dist. No. C-080322, appeal not accepted for review, 123 Ohio St.3d 1423, 2009-Ohio-5340, 914 N.E.2d 1064.

² *Id.*

OHIO FIRST DISTRICT COURT OF APPEALS

journalized five days later, imposed the identical, un-merged sentences that this court had found to be erroneous in North's first appeal.

{¶5} Since a court of record speaks only through its journal,³ it is clear that the trial court inadvertently, but erroneously, reimposed the original sentence. "Upon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant."⁴ The assignment of error is sustained.

{¶6} Therefore, as in North's first appeal, we vacate the sentences imposed by the trial court for robbery, aggravated robbery, and kidnapping, and remand the matter for a new sentencing proceeding on the offenses charged in counts 1, 2, 3, and 4 consistent with law and this court's May 2009 decision.

{¶7} We note that North has also challenged whether the trial court erred in imposing maximum, consecutive sentences, and whether, based upon the United States Supreme Court's decision in *Oregon v. Ice*,⁵ the trial court erred in imposing consecutive sentences of imprisonment. Our mandate that North be sentenced anew renders any decision on these issues moot.⁶

Sentences vacated and cause remanded.

CUNNINGHAM, P.J., SUNDERMANN and HENDON, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

³ See *State v. King*, 70 Ohio St.3d 158, 162, 1994-Ohio-412, 637 N.E.2d 903, quoting *State ex rel. Worcester v. Donnellon* (1990), 49 Ohio St.3d 117, 118, 551 N.E.2d 183.

⁴ *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph two of the syllabus.

⁵ See (2009), ___ U.S. ___, 129 S. Ct. 711; but, see, *State v. McCrary*, 1st Dist. No. C-080860, 2009-Ohio-4390, ¶35; *State v. Long*, 1st Dist. No. C-080860, 2010-Ohio-1062, ¶36 (holding that, even after *Ice*, Ohio courts have the authority to impose consecutive sentences).

⁶ See App.R. 12(A)(1)(c).