[Cite as *State v. Daboni*, 2020-Ohio-832.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case Nos. 19CA3
	:	19CA4
vs.	:	19CA5
	:	
	:	DECISION AND
JACQUES GOERGES K. DABONI,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for Appellant.

James K. Stanley, Meigs County Prosecuting Attorney, Pomeroy, Ohio, for Appellee.

Smith, P.J.

{¶1} This is an appeal from three different judgment entries that were issued after this Court remanded these matters for resentencing. On remand, the trial court sentenced Appellant, Jacques Daboni, to an aggregate prison term of twenty-four years as a result of a jury verdict finding him guilty of ten felony drug offenses, two of which were counts of engaging in a pattern of corrupt activity. On appeal, Appellant contends that 1) his sentence is void; and 2) the trial court erred when it denied his motion for a new trial.

{¶2} In light of our finding that the trial court erred in merging five of the offenses that were determined to be allied offenses of similar import, we sustain Appellant's first assignment of error. Further, we have vacated the sentences imposed on those offenses and have modified those sentences accordingly. Because we find Appellant's motion for a new trial was unrelated to the matters being handled at the re-sentencing hearing on remand, it was improperly made and the trial court did not abuse its discretion in denying the motion. Accordingly, this matter is affirmed in part, reversed in part, vacated in part, and modified in part.

FACTS

{¶3} This matter is now before our Court on direct appeal for a third time. Appellant was originally indicted on a total of eleven felony counts in three separate cases. Appellant was first indicted in case no. 14CR173 on September 24, 2014, on five felony counts as follows:

Count one: trafficking in heroin, a felony of the fifth degree (July 28, 2014)

Count two: trafficking in heroin, a felony of the fifth degree (August 16, 2014)

Count three: trafficking in heroin, a felony of the first degree (September 4, 2014)[1]

[1] Appellant was eventually found guilty by the jury on this count; however, the degree of the offense was reduced to a second-degree felony.

Count four: possession of heroin, a felony of the first degree (September 4, 2014)[2]

Count five: engaging in a pattern of corrupt activity, a felony of the first degree (July 28, 2014 through September 4, 2014)

{¶4} Appellant was then indicted in case no. 14CR232 on December 22, 2014, on five additional felony counts as follows:

Count one: trafficking in heroin, a felony of the fifth degree (May 1, 2014)

Count two: trafficking in heroin, a felony of the fifth degree (May 23, 2014)

Count three: trafficking in heroin, a felony of fifth degree (April 8, 2014)

Count four: trafficking in heroin, a felony of the fifth degree (April 3, 2014)

Count five: trafficking in heroin, a felony of the second degree (September 4, 2014)

{¶5} Finally, Appellant was indicted in case no. 15CR023 on March 18, 2015, on one more felony count:

Count one: engaging in a pattern of corrupt activity, a felony of the second degree (May 1, 2014)

{¶6} This matter was first appealed in 2016 but was dismissed by this Court for lack of a final appealable order on January 5, 2018, because one count in one of

[2] Appellant was eventually found guilty by the jury on this count; however, the degree of the offense was reduced to a second-degree felony.

the cases remained pending. *State v. Daboni*, 4th Dist. Meigs Nos. 16CA5, 16CA6, and 16CA7, 2018-Ohio-68 (hereinafter "*Daboni I*").[3] Thereafter, the trial court dismissed the pending count and Appellant filed a second appeal. In his second appeal, Appellant raised eight assignments of error, four of which were raised through counsel and four of which were raised by Appellant, pro se. *State v. Daboni*, 4th Dist. Meigs Nos. 18CA3, 18CA4, and 18CA5, 2018-Ohio-4155 (hereinafter "*Daboni II*"). This Court addressed all eight assignments of error and found merit in only one of the assignments of error that was raised by counsel. *Daboni II* at ¶ 2. More specifically, this Court found merit to Appellant's argument that the trial court failed to merge the sole drug possession count (identified as count four in case no. 14CR173) with one of the drug trafficking counts (count three) contained in the same case and another drug trafficking count (count five) contained in case no. 14CR232. The record indicates that counts three and four in case no. 14CR173 and count five in case no. 14CR232 all occurred on September 4, 2014. The trial court had already determined, at the original sentencing hearing, that count three in case no. 14CR173 and count five in case no. 14CR232 were allied offenses of similar import and the State had elected to

[3] This was a consolidated appeal from three separate common pleas court cases, identified as 14CR173, 14CR232 and 15CR023, that were consolidated below only for purposes of the jury trial. This Court found that the trial court failed to formally dismiss count four in case no. 14CR232 and therefore we dismissed the consolidated appeal for lack of a final, appealable order.

proceed on count five of case no. 14CR232.[4] On appeal, this Court determined that count four in case no. 14CR173, which also occurred on September 4, 2014, should have been merged as well and, as a result, we reversed the trial court's imposition of sentence as to the three counts that all occurred on September 4, 2014, and remanded the matter with the following instructions to the trial court:

> * * * [W]e conclude that the trial court erred in failing to merge the possession of heroin with the already-merged trafficking in heroin counts, for purposes of sentencing. For this reason, we sustain Appellant's first assignment of error. Accordingly, we reverse the trial court's imposition of sentences on these counts and remand this matter to the trial court with instructions to impose a single, mandatory sentence of eight years for the all [sic] three merged offenses. *Daboni II* at ¶ 58.

{¶7} Our holding in *Daboni II* in effect ordered Appellant's aggregate prison sentence of thirty-two years to be reduced to twenty-four years. *Daboni II* at ¶ 3.

{¶8} On remand for a second time, the trial court appears to have held a de novo re-sentencing hearing in that it re-sentenced Appellant on all of the above

[4] The trial court also determined at the original sentencing hearing that count one in case no. 15CR023 (second-degree felony engaging in a pattern of corrupt activity) merged with count five in case no. 14CR173 (first-degree felony engaging in a pattern of corrupt activity), and the State elected to proceed on count five in case no. 14CR173.

counts, rather than just the three counts that were part of the limited remand. For instance, in both the sentencing hearing and in the sentencing entry, the trial court imposed separate sentences for each and every offense of which the jury found Appellant guilty and appears to have thereafter merged the sentences, rather than the offenses. Due to the number of sentencing errors identified by Appellant and noticed sua sponte by this Court, the sentences imposed by the trial court at both the original sentencing hearing as well as at the re-sentencing hearing will be compared and discussed in more detail below. Presently on appeal and post-remand for a second time, Appellant raises two assignments of error for our review.

ASSIGNMENTS OF ERROR

I. "APPELLANT'S SENTENCE IS VOID."

II. "THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION FOR A NEW TRIAL."

ASSIGNMENT OF ERROR I

{¶9} In his first assignment of error, Appellant contends his sentence is void. More specifically, Appellant argues that the trial court's failure to follow the correct procedure when merging allied offenses of similar import made his sentence void. He contends that the trial court, on re-sentencing, stated certain offenses were allied offenses of similar import, yet proceeded to sentence him on

all ten offenses of which he was found guilty, and then merged the sentences. Appellant argues the trial court should have merged the offenses that were allied, and then sentenced on the remaining seven counts. Appellant argues this error rendered his sentence void. In light of this Court's prior reasoning in *State v. Dailey*, 4th Dist. Adams No. 18CA1059, 2018-Ohio-4315, which was released just five days after our decision in *Daboni II*, *supra*, we agree with Appellant's argument and it is sustained.

Allied Offenses of Similar Import

{¶10} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," and this protection applies to Ohio citizens through the Fourteenth Amendment and is additionally guaranteed by Article I, Section 10 of the Ohio Constitution. *State v. Neal*, 2016-Ohio-64, 57 N.E.3d 272, ¶ 50 (4th Dist.). This constitutional protection prohibits multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

{¶11} " 'R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the

same offense.' " *State v. Pickett*, 4th Dist. Athens No. 15CA13, 2016-Ohio-4593, ¶ 54, quoting *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. *Accord State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603; *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 11. R.C. 2941.25, the allied offense statute, provides as follows:

> (A) Where the same conduct by [a] 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.
>
> (B) 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.

{¶12} For purposes of R.C. 2941.25 "a 'conviction' consists of a guilty verdict and the imposition of a sentence or penalty." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 12. *Accord State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 17. Consequently, "R.C. 2941.25(A)'s mandate that a defendant may be 'convicted' of only one allied

offense is a protection against multiple sentences rather than multiple convictions." *Whitfield* at ¶ 18. Accordingly, "once the sentencing court decides that the offender has been found guilty of allied offenses of similar import that are subject to merger, R.C. 2941.25 prohibits the imposition of multiple sentences." *Williams* at ¶ 19 (citation omitted). The sentencing court thus has a mandatory duty to merge allied offenses. *Williams* at ¶ 27. "[I]mposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void." *Id.* at ¶ 2. Therefore, "a judgment of sentence is void * * * when the trial court determines that multiple counts should be merged but then proceeds to impose separate sentences in disregard of its own ruling." *State ex rel. Cowan v. Gallagher*, 153 Ohio St.3d 13, 2018-Ohio-1463, 100 N.E.3d 407, ¶ 19, citing *Williams* at ¶ 28–29.

{¶13} For example, in *Williams*, the Court determined that the trial court's imposition of concurrent sentences for allied offenses rendered the sentence void, and that "the imposition of concurrent sentences is not the equivalent of merging allied offenses." *Id.* at ¶ 3. The *Williams* Court explained as follows:

> It therefore follows that when a trial court concludes that an accused has in fact been found guilty of allied offenses of similar import, it cannot impose a separate sentence for each offense. Rather, the court has a mandatory duty to merge

> the allied offenses by imposing a single sentence, and the imposition of separate sentences for those offenses—even if imposed concurrently—is contrary to law because of the mandate of R.C. 2941.25(A). In the absence of a statutory remedy, those sentences are void. *Id.* at ¶ 28.

{¶14} However, as we observed in *State v. Dailey*, *supra*, in *Williams*, "[r]ather than remanding, the court 'modif[ed] the [appellate court's] judgment * * * to vacate the sentences' that the trial court improperly imposed for the allied offenses." *Dailey* at ¶ 59, quoting *Williams* at ¶ 3 and 33. Further, the *Williams* Court explained that a remand for resentencing is not always necessary when a trial court possesses a mandatory duty to merge allied offenses and impose a single sentence. *Williams* at ¶ 31. Thus, as noted in *Dailey*, "if the record indicates which offense the state elected to pursue at sentencing, then a reviewing court may invoke its authority to modify the lower court's judgment." *Dailey* at ¶ 59, citing *Williams* at ¶ 31.

{¶15} In *Dailey*, having found 1) that the trial court correctly found Dailey's rape and sexual battery offenses constituted allied offenses of similar import; 2) that it was clear the State had elected to proceed to sentencing on the rape offense; 3) that despite finding that the offenses were allied the trial court imposed separate sentences for each offense; and 4) the trial court then attempted to merge the two

sentences, this Court exercised its authority "to modify the trial court's judgment and vacate the separate sentence that the trial court imposed for sexual battery." *Dailey* at ¶ 60-61. In doing so, we explained that "the remaining four-year prison sentence for rape and the court's finding of guilt for the sexual battery offense remain intact." *Dailey* at ¶ 61; citing *Whitfield*, *supra*, at paragraph three of the syllabus (observing that "the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing"). We then affirmed the trial court's decision in all other respects. *Id.* at ¶ 62.

Legal Analysis

{¶16} Here, a review of both the combined re-sentencing hearing transcript and the sentencing entries in each of the three cases reveals that the trial court, on remand for the second time, held a de novo resentencing hearing at which it re-sentenced Appellant on each of the offenses for which he was convicted. Rather than following this Court's remand order, which reversed and vacated the sentences imposed on counts three and four of case no. 14CR173 and count five of case no. 14CR232 and ordered the trial court to merge the three offenses and then impose a single, eight-year sentence - the trial court instead imposed separate eight-year sentences on all three counts, and then ordered that the sentences merge

with one another.[5] For instance, during the re-sentencing hearing, the trial court sentenced Appellant to eight years each on count three of case no. 14CR173, count four of case no. 14CR173 and count five of case no. 14CR232, all while noting that the offenses were supposed to merge. For example, in the judgment entry of sentence issued post-remand in case no. 14CR173, the trial court expressly stated as follows: "[t]he sentence as to Count Four herein merges with the sentence as to Count Three herein and the sentence as to Count Five in case number 14 CR 232." This language is mirrored in the judgment entry of sentence issue post-remand in case no. 14CR232. Thus, the method used by the trial court was identical to that used in *Dailey*, which we held was incorrect.

{¶17} Rather than simply modifying the errors made on remand, however, we must also address additional errors made by the trial court, both at the original sentencing hearing as well as the re-sentencing hearing, which we raise sua sponte in the interests of justice. At the re-sentencing hearing, the trial court sentenced Appellant as follows:

> Case no. 14CR173
> Count one: 12 months
> Count two: 12 months
> Count three: 8 years
> Count four: 8 years
> Count five: 11 years

[5] Appellant repeatedly states in his brief that this Court remanded the two engaging in a pattern of corrupt activity counts for re-sentencing. This, however, is inaccurate. As explained herein, this Court's remand order addressed the two trafficking in heroin counts and one possession of heroin count that all occurred on September 4, 2014. Our remand order did not pertain to the two counts of engaging in a pattern of corrupt activity.

Case no. 14CR232
Count one: 12 months
Count two: 12 months
Count three: 12 months
Count five: 8 years

Case no. 15CR023
Count one: 8 years

{¶18} After re-sentencing Appellant on each offense, the trial court then gave a verbal summary of the sentences imposed, noting which *sentences* merged. For instance, the court stated as follows:

> BY THE JUDGE: * * * I've got fifteen 'c' 'r' twenty-three (15CR23) and fourteen 'c' 'r' one seventy-three (14CR173), Three (III) and Four (IV) are all eight (8) years, as well as Count Five (V) of fourteen 'c' 'r' two thirty-two (14CR232), which was eight (8) years. So, eight (8), eight (8), eight (8), eight (8) and there's a merger and then we have eleven (11) years for Count Five (V), eleven (11) and eight (8), nineteen (19) and Count One (I) is twelve (12) months, Count Two (II) is twelve (12) months, uh as to fourteen 'c' 'r' one seventy-three (14CR173) and fourteen 'c' 'r' two thirty-two (14CR232), Count One (I) is twelve (12) months, Count Two (II) is twelve (12) months, Count Three (III)

is twelve (12) months. So, nineteen (19) plus five (5) is twenty-four (24) is what I got. Does that sound about right?

BY PROSECUTOR STANLEY: Yes, Your Honor.

BY ATTORNEY CORNELY: Yes, as long as you add both uh Engaging of Corrupt Activities [sic] merging?

BY THE JUDGE: Yes.

BY ATTORNEY CORNELY: Yes. Okay.

BY THE JUDGE: I, I think that's correct.

BY ATTORNEY CORNELY: Yep.

BY THE JUDGE: The bottom line is it should come out to twenty-four (24) years.

BY ATTORNEY CORNELY: That's correct, Your Honor –

BY THE JUDGE: And that's uh going to be a finding of this Court that it is, and should be and will be in conformity with the Court of Appeals Decision. Anything else that uh the very fine counsel needs or wants?

BY PROSECUTOR STANLEY: Nothing from the State, Your Honor.

{¶19} Thus, not only did the trial court exceed the remand

order by re-sentencing Appellant on each and every offense, it incorrectly merged one of the engaging in a pattern of corrupt activity charges, the sole count in case no. 15CR023, with the three offenses that all occurred on September 4, 2014, which were the subject of the remand order (counts three and four in case no. 14CR173 and count five in case no. 14CR232).

{¶20} Our remand order, as set forth in *Daboni II*, was a limited remand order and only directed the trial court to re-sentence Appellant on counts three and four in case no. 14CR173 and count five in case no. 14CR232. The trial court did this, but erroneously imposed eight-year sentences for each offense, rather than imposing a single eight-year sentence in accordance with the remand instructions, and then it merged the sentences. Further, the trial court erroneously merged the sole count in case no. 15CR023 (engaging in a pattern of corrupt activity) with the three remanded counts. Additionally, the trial court exceeded its authority when it went on to re-sentence Appellant on all of the other counts. *See State v. Grayson*, 8th Dist. Cuyahoga No. 106578, 2019-Ohio-864, ¶ 8 ("It is evident that the trial court exceeded the scope of the remand from *Grayson* and, therefore, exceeded its jurisdiction in conducting a de novo resentencing on all counts."); *see also State v. Butcher*, 11th Dist. Portage No. 2019-P-0005, 2019-Ohio-3728, ¶ 19; *see generally American Savings Bank v. Pertuset*, 4th Dist. Scioto No. 13CA3564, 2014-Ohio-

1290, relying on *State of Ohio, ex rel. Jim Petro v. Marshall*, 4th Dist. Scioto No. 05CA3004, 2006-Ohio-5357.

{¶21} As further explained in *Grayson*:

> It is well settled that although a remand for a new sentencing hearing anticipates a de novo sentencing, there are a number of limitations that inherently narrow the scope of that particular resentencing hearing. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 15.
>
> "[O]nly 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" by the trial court. *Id.*, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, paragraph three of the syllabus. *Grayson* at ¶ 17.

{¶22} The *Grayson* court ultimately held that the trial court patently lacked jurisdiction to alter the valid and final sentences that were unaffected by the direct appeal. *Grayson* at ¶ 18; citing *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 14 and *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-

6238, 942 N.E.2d 332, ¶ 17 (a void sanction may be modified at any time, but a valid sanction cannot be modified).

{¶23} Thus, based upon the reasoning of *Grayson*, this Court must vacate the new sentences imposed by the trial court on the counts that were not subject to the remand order, and then, based upon the reasoning of *Dailey*, we must exercise our authority to modify the trial court's judgment and vacate the separate sentences that the trial court imposed on counts three and four in case no. 14CR173. As such, the new sentences imposed by the trial court at the re-sentencing hearing for counts one, two, and five in case no. 14CA173, counts one, two and three in case no. 14CR232 and count one in case no. 15CR023 are all hereby vacated due to the fact that the trial court exceeded its authority on remand and patently lacked jurisdiction to re-sentence Appellant on those non-remanded counts. Further, we exercise our authority to modify the trial court's judgment on re-sentencing to the extent that the separate eight-year sentences imposed by the trial court for the allied offenses identified as counts three (possession of heroin) and four (trafficking in heroin) in case no. 14CR173 are hereby vacated.[6] The remaining eight-year prison sentence imposed on count five of case no. 14CR232 (trafficking in heroin) and the jury's finding of guilt for the offenses contained in counts three and four of case no. 14CR173 remain intact, in accordance with our prior remand

[6] It was clear at the original sentencing hearing that the State elected to proceed on count five of case no. 14CR232.

order. *Dailey*, *supra*, at ¶ 61, citing *Whitfield* at paragraph three of the syllabus (observing that "the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing").

{¶24} Unfortunately, our modifications to Appellant's sentences do not end here. Although it has not been raised by the parties on appeal, we have observed during our review of this matter that upon closer inspection, the manner in which the sentences were imposed and the merger analysis used by the trial court at the original sentencing hearing for the allied offenses of similar import was also erroneous and resulted in those original sentences being void as well. More specifically, a review of the original sentencing hearing transcript reveals that the trial court correctly determined that count one in case no. 15CR023 (second-degree felony engaging in a pattern of corrupt activity) should be merged with count five in case no. 14CR173 (first-degree felony engaging in a pattern of corrupt activity).[7] However, the trial court actually imposed an eight-year prison term on the second-degree count and an eleven-year prison term on the first-degree count, and then merged the sentences for a total term of eleven years for both offenses. Thus, in accordance with *Dailey*, we hereby modify the trial court's original judgment entry

[7] The transcript further reveals that the State expressly elected to go forward with sentencing on the first-degree felony count of engaging in a pattern of corrupt activity contained in case no. 14CR173.

of sentence and vacate the eight-year prison term imposed on count one of case no. 15CR023 (second-degree felony engaging in a pattern of corrupt activity). The remaining eleven-year prison term for count five of case no. 14CR173 (first-degree felony engaging in a pattern of corrupt activity) and the jury's finding of guilt for the second-degree felony count contained in case no. 15CR023 remain intact. *Dailey*, *supra,* at ¶ 61; *Whitfield*, *supra*, at paragraph three of the syllabus.

{¶25} Thus, to recap, now that all of our required sentencing modifications have been made and leaving in place the sentences that were correctly imposed by the trial court at the original sentencing hearing, it must be understood that Appellant has been found guilty by a jury of ten felony counts in three separate cases. Further, taking into the consideration the necessary mergers of the allied offenses of similar import, Appellant has been sentenced on seven counts as follows:

Case no. 14CR173
Count one: 12 months
Count two: 12 months
Count three: merged with count five of case no. 14CR232
Count four: merged with count five of case no. 14CR232
Count five: 11 years

Case no. 14CR232
Count one: 12 months
Count two: 12 months
Count three: 12 months
Count five: 8 years

Case no. 15CR023
Count one: merged with count five of case no. 14CR173

{¶26} As a result, for purposes of R.C. 2941.25, Appellant will have seven convictions that result in an aggregate prison sentence of twenty-four years. *State v. Whitfield*, *supra*, at ¶ 12 ("[A]'conviction' consists of a guilty verdict and the imposition of a sentence or penalty."). *Accord State v. Williams*, *supra*, at ¶ 17. Furthermore, the trial court's notification to Appellant during the original sentencing hearing that he would be subject to a mandatory period of five years for post-release control remains intact as well.[8]

{¶27} Accordingly, based upon the foregoing reasons, we sustain Appellant's first assignment of error. As a result, we reverse and vacate the new sentences imposed by the trial court on the non-remanded counts at the re-sentencing hearing. We further modify the trial court's judgment on re-sentencing as to the remanded counts, as well as the original sentencing entry as to the two counts of engaging in a pattern of corrupt activity, as set forth above.

[8] The trial court notified Appellant he would be subject to a mandatory term of five years of post-release control for count five of case no. 14CR173, in addition to his eleven-year prison term imposed on that count. Appellant was originally correctly sentenced on that count and neither our remand order nor this decision affects the sentence originally imposed as to that count. Further, although Appellant was sentenced on multiple felony counts, he was only statutorily entitled to a single notice of the longest post-release control term that would be imposed. *See State v. Reed*, 2012-Ohio-5983, 983 N.E.2d 394, ¶ 12 (6th Dist.), citing R.C. 2967.28(F)(4)(c) (which mandates that only one post-release control sanction (the longest term) can be imposed for all of the offenses); *see also State v. Davic*, 10th Dist. Franklin No. 18AP-569, 2019-Ohio-1320, ¶ 13; *State v. Walker*, 8th Dist. Cuyahoga No. 106571, 2019-Ohio-2211, ¶ 15.

ASSIGNMENT OF ERROR II

{¶28} In his second assignment of error, Appellant contends that the trial court erred when it denied his motion for a new trial. Appellant argues the trial court abused its discretion when it failed to engage in a sound reasoning process in reaching its decision. Appellant cites the trial court's confusion as to whether the motion was made pursuant to Crim.R. 32.1 or Crim.R. 33 in support of his argument. The State responds by arguing that motions for new trial are addressed to the sound discretion of the court, and the court did not abuse its discretion in denying Appellant's motion.

{¶29} "Generally, a decision on a motion for a new trial is within the discretion of the trial court." *State v. Lusher*, 982 N.E.2d 1290, 2012-Ohio-5526, ¶ 25 (4th Dist.), citing *State v. Ward*, 4th Dist. Meigs No. 05CA13, 2007-Ohio-2531, ¶ 41, citing *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54, paragraph one of the syllabus (1990). Accordingly, we will not reverse a trial court's decision on a motion for a new trial absent an abuse of discretion. *State v. Nichols*, 4th Dist. Adams No. 11CA912, 2012-Ohio-1608, ¶ 61. An abuse of discretion implies that the trial court's judgment is arbitrary, unreasonable or unconscionable. *State v. Petrone*, 5th Dist. Stark No. 2013CA00213, 2014-Ohio-3395, ¶ 67; *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987). Moreover, a trial court generally

abuses its discretion when it fails to engage in a " 'sound reasoning process.' " *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Additionally, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶30} Here, however, before reaching the merits of Appellant's argument we note that Appellant's motion was made at his re-sentencing hearing that was being conducted as part of a limited remand by this Court. As recently observed by the Ninth District Court of Appeals, when a case is before the trial court on a limited remand based only on an allied offenses sentencing error, a defendant may only raise issues directly related to the re-sentencing. *State v. Wilson*, 2015-Ohio-2023, 33 N.E.3d 104, ¶ 8. The *Wilson* court stated as follows at ¶ 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, 951 N.E.2d 381, ¶ 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, 2014 WL 258618, ¶ 17; *State v. Ross*, 9th Dist. Summit No. 26399, 2013-Ohio-786, 2013 WL 865399, ¶ 7; *State v. McIntyre*, 9th Dist. Summit No. 26449, 2012-Ohio-5657, 2012 WL 6042609, ¶ 13. A defendant only may raise issues that arise directly as a result of the resentencing. *See Wilson* at paragraph two of the syllabus.

{¶31} Moreover, as explained in *State v. Anthony*, 8th Dist. Cuyahoga No. 106240, 2018-Ohio-2050, ¶ 8 " 'any prior issues not successfully challenged in [a prior] appeal are outside the scope of [the] re-sentencing remand and will be precluded from further review under the principles of res judicata.' " quoting *Wilson*, *supra*, at ¶ 33.

{¶32} Here, the record indicates Appellant made an oral motion for a new trial, which was outside the time limits of Crim.R. 33 and without seeking leave to do so. Furthermore, the grounds cited for the motion were 1) an alleged lack of probable cause; 2) the suppression of evidence; and 3) an allegedly invalid search warrant. No additional explanation was given regarding the stated grounds. Additionally, as argued by the State during the re-sentencing hearing, these three issues were already argued by Appellant in his second direct appeal and this Court found no merit to any of the arguments. To the extent the stated grounds of

Appellant's motion sought to overturn the jury's determinations of guilt, the substantive grounds of Appellant's motion were barred by res judicata. Moreover, because the motion for a new trial in no way related to an issue arising during the re-sentencing hearing held pursuant to our limited remand order, the motion was outside the scope of the remand and was therefore barred procedurally by res judicata as well. Accordingly, we find no abuse of discretion on the part of the trial court in denying Appellant's motion, despite the fact that Appellant was unclear whether his oral motion for a new trial was based upon Crim.R. 33 or Crim.R. 32.1. Thus, Appellant's second assignment of error is overruled.

Conclusion

{¶33} In conclusion, and in light of the foregoing reasoning, we have sustained Appellant's first assignment of error and hereby order that Appellant's prison sentences are to be imposed and carried into execution as follows:

Case no. 14CR173
Count one: 12 months (as imposed by the trial court at the original sentencing)
Count two: 12 months (as imposed by the trial court at the original sentencing)
Count three: merged with count five of case no. 14CR232 (as modified currently on appeal)
Count four: merged with count five of case no. 14CR232 (as modified currently on appeal)
Count five: 11 years (as imposed by the trial court at the original sentencing)[9]

[9] This first-degree felony conviction for engaging in a pattern of corrupt activity carries with it the five-year mandatory term of post release control, which was properly imposed by the trial court at the original sentencing, and

Case no. 14CR232
Count one: 12 months (as imposed by the trial court at the original sentencing)
Count two: 12 months (as imposed by the trial court at the original sentencing)
Count three: 12 months (as imposed by the trial court at the original sentencing)
Count five: 8 years (as imposed by the trial court at the original sentencing)

Case no. 15CR023
Count one: merged with count five of case no. 14CR173 (as modified currently on appeal)

{¶34} Furthermore, as set forth above, because Appellant's motion for a new trial was outside the scope of the limited remand and was further barred by res judicata, we cannot find the trial court abused its discretion in denying the motion. Thus, Appellant's second assignment of error has no merit and is overruled. Accordingly, the judgment of the trial court is affirmed in part, reversed in part, vacated in part, and modified in part.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND MODIFIED IN PART.

satisfied the mandatory post release control notification requirement when sentencing on multiple felony counts, as governed by R.C. 2967.28(F)(4)(c).

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND MODIFIED IN PART and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hess, J.: Concurs in Judgment and Opinion.
Abele, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.