

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
	:	CASE NOS. CA2011-04-029
Plaintiff-Appellee,	:	CA2011-04-030
	:	
- vs -	:	<u>OPINION</u>
	:	3/5/2012
	:	
JEREMIAH C. CRAYCRAFT,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007 CR 0489

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

The Farrish Law Firm, Michaela M. Stagnaro, 810 Sycamore Street, 6th Floor, Cincinnati, Ohio 45202, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Jeremiah C. Craycraft, appeals from a Clermont County Court of Common Pleas decision resentencing him upon remand from this court to correct an allied-offenses sentencing error. For the reasons outlined below, we affirm.

{¶ 2} Appellant was indicted for two counts of felonious assault, two counts of domestic violence, two counts of second-degree felony child endangering, and two counts of third-degree felony child endangering after K.C. and S.C., his two-month-old fraternal twins,

were diagnosed with multiple injuries that included bruising, broken bones, and severe head injuries. Following a jury trial, appellant was found guilty on all eight offenses. Thereafter, upon merging the two second-degree child endangering offenses with the two third-degree child endangering offenses, the trial court sentenced appellant to serve a total of 22 years in prison. As part of his sentence, the trial court ordered appellant to serve two consecutive six-year prison terms on the felonious assault offenses.

{¶ 3} This court affirmed appellant's conviction and sentence on direct appeal. See *State v. Craycraft*, 12th Dist. Nos. CA2009-02-013 and CA2009-02-014, 2010-Ohio-596. However, upon establishing a new two-part test used to determine whether offenses are allied offenses of similar import under R.C. 2941.25, the Ohio Supreme Court reversed this court's decision and remanded the matter for application of its decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. See *State v. Craycraft*, 128 Ohio St.3d 337, 2010-Ohio-6332. Upon remand, this court found the four charged offenses relating to K.C., as well as the four charged offenses relating to S.C., were allied offenses of similar import that must be merged for purposes of sentencing. See *State v. Craycraft*, 193 Ohio App.3d 594, 2011-Ohio-413, ¶ 20 (12th Dist.). This court then remanded the matter to the trial court to merge the offenses at sentencing after the state elected which allied offenses to pursue. *Id.* at ¶ 21-22.

{¶ 4} Upon remand from this court, the trial court held a new sentencing hearing during which time the state elected to pursue appellant's two felonious assault offenses, one relating to K.C. and one relating to S.C., for purposes of sentencing. The trial court then merged the remaining offenses and sentenced appellant to serve two consecutive eight-year prison terms, or, stated differently, a total of 16 years in prison. Appellant now appeals from the trial court's decision, raising one assignment of error for review.

{¶ 5} THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPROPERLY RESENTENCING APPELLANT.

{¶ 6} In his single assignment of error, appellant presents three issues for review. Each of the three issues raised by appellant will be addressed more fully below.

De Novo Sentencing Hearing

{¶ 7} Initially, appellant argues that the trial court erred by holding a de novo sentencing hearing upon remand from this court to correct the allied-offenses sentencing error. We disagree.

{¶ 8} In *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, the Ohio Supreme Court analyzed the scope of a trial court's resentencing hearing following a remand to correct an allied-offenses sentencing error. As the court stated, "[i]n a remand based only on an allied-offenses sentencing error," such as the case here, "the guilty verdicts underlying a defendant's sentences remain the law of the case and are not subject to review. Further, *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." (Emphasis added and internal citations omitted.) *Id.* at ¶ 15. The court also found that a "remand for a new sentencing hearing generally anticipates a de novo sentencing hearing." *Id.*

{¶ 9} While not addressing the exact issue raised by appellant here, based on the Ohio Supreme Court's decision in *Wilson*, we find the trial court did not err by holding a de novo sentencing hearing upon remand from this court to correct the allied-offenses sentencing error. See *State v. Weathers*, 12th Dist. No. CA2011-01-013, 2011-Ohio-6793, ¶ 25 (remanding matter for new sentencing hearing upon finding an allied-offenses sentencing error); *State v. McClendon*, 2nd Dist. No. 23558, 2011-Ohio-5067, ¶ 33 (remanding matter to

trial court to hold a new sentencing hearing to correct an allied-offenses sentencing error). As the Ohio Supreme Court's decision in *Wilson* indicates, a trial court is required to conduct a de novo sentencing hearing to correct an allied-offenses sentencing error upon remand. See *id.* at ¶ 13, 15, 18. Therefore, contrary to appellant's claim, because all of the sentences originally imposed by the trial court were affected by the allied offenses-sentencing error, the trial court was required to accept the offenses the state elected to pursue at sentencing, merge those offenses for purposes of sentencing, and impose an appropriate sentence upon remand. *Id.* at ¶ 18, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2. Accordingly, appellant's first issue presented is overruled.

Vindictive Resentencing

{¶ 10} Next, appellant argues that the trial court "vindictively increased" his sentence upon remand "after a successful appeal to the Ohio Supreme Court." As noted above, appellant was originally sentenced to serve a total of 22 years in prison. As part of this sentence, the trial court ordered appellant to serve two consecutive six-year prison terms, or, stated differently, a total of 12 years in prison, on the two felonious assault offenses. However, upon remand from this court, the trial court ordered appellant to serve two consecutive eight-year prison terms, for a total of 16 years in prison, on the two felonious assault offenses. According to appellant's argument, which implicates *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969), and its progeny, the trial court violated his due process rights by increasing the sentence he received on each felonious assault offense from a six-year prison term to an eight-year prison term. We disagree.

{¶ 11} In *Pearce*, the U.S. Supreme Court explained that due process precludes vindictiveness from playing any role in a defendant's sentence following a remand. *Id.* at 725. Under some circumstances, a presumption of vindictiveness exists when a defendant

receives a more severe sentence on remand. *State v. Johnson*, 2nd Dist. No. 23297, 2010-Ohio-2010, ¶ 5. Cases subsequent to *Pearce* indicate that such a presumption arises only when circumstances establish a "reasonable likelihood" that an increased sentence is the product of vindictiveness. See, e.g., *Alabama v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201 (1989). "Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." *Id.*, citing *Wasman v. United States*, 468 U.S. 559, 569, 104 S.Ct. 3217 (1984).

{¶ 12} At the outset, although we note that the same judge presided over both appellant's original sentencing hearing and his new sentencing hearing upon remand, we question whether the presumption of vindictiveness automatically applies when a defendant is resentenced following a remand for the application of the Ohio Supreme Court's decision in *Johnson*. As in those cases requiring a remand for resentencing under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, these are not cases in which a trial court judge has been reversed for erroneously applying the law. See *State v. Andrews*, 12th Dist. No. CA2006-06-142, 2007-Ohio-223, ¶ 23 (questioning whether presumption of vindictiveness automatically applies when a defendant is resentenced as a result of the Ohio Supreme Court's decision in *Foster*).

{¶ 13} That said, to support his vindictive resentencing claim, appellant initially argues that the trial court engaged in impermissible "sentence packaging" during its original sentencing hearing by sentencing him to serve two consecutive six-year prison terms on the felonious assault offenses knowing "it was able to impose more time on the other offenses which now required merger." However, even if we were to find the trial court originally engaged in impermissible sentence packaging, it is clear that upon remand the trial court properly considered each of the state elected felonious assault offenses before ordering appellant to serve two consecutive eight-year prison terms. Each of the two elected offenses

related to only one of the two victims. In other words, appellant was sentenced to serve eight years in prison for assaulting K.C., his two-month-old son, and an additional eight years for assaulting S.C., his two-month-old daughter. Therefore, because the sentences imposed relate to each individual victim, this is simply not a case in which the trial court considered the offenses as a group before imposing one overarching sentence.

{¶ 14} Appellant also argues that there was no evidence presented to justify increasing his sentence from two consecutive six-year prison terms to two consecutive eight-year prison terms. According to appellant, this indicates actual vindictiveness on the part of the trial court. However, as noted above, the trial court was required to conduct a de novo review of the affected sentences and "impose a sentence that [was] appropriate for the merged offense" upon remand. *Wilson*, 2011-Ohio-2669 at ¶ 15, 18; *Whitfield*, 2010-Ohio-2 at ¶ 24.

{¶ 15} Furthermore, prior to sentencing appellant to serve two consecutive eight-year prison terms upon remand, the trial court specifically stated that it had considered appellant's extensive criminal history, the severity of the victims' injuries, the victims' ages at the time of the assault, appellant's relationship to the victims, and his lack of remorse. We find no error in the trial court's decision finding two consecutive eight-year prison terms was an appropriate sentence. Accordingly, because the record is devoid of any evidence indicating the trial court's sentencing decision was vindictive, appellant's second issue presented is overruled.

Application of 2011 Am.Sub.H.B. No. 86

{¶ 16} Finally, appellant argues that 2011 Am.Sub.H.B. No. 86, effective September 30, 2011, which revised several felony sentencing provisions previously invalidated and severed by the Ohio Supreme Court in *Foster*, should be applied here "since this court will be reviewing his sentence after the effective date" and this matter may be remanded back "to be

dealt with by the trial court after the effective date." However, nothing in the language of 2011 Am.Sub.H.B. No. 86, nor anything in its legislative history, suggests that the General Assembly intended for those newly enacted statutory provisions to be applied by this court when reviewing a sentence imposed by the trial court prior to its effective date. Furthermore, because we find no error in the trial court's decision resentencing appellant upon remand, any questions appellant may have regarding what law the trial court would have applied had this matter been remanded to the trial court are moot. Accordingly, appellant's third issue is overruled.

{¶ 17} In light of the foregoing, having found no merit to any of the three issues appellant raised on appeal, we overrule appellant's single assignment of error.

{¶ 18} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.