

SUPREME COURT OF OHIO

State v. Saxon, 109 Ohio St. 3d 176

846 N.E.2d 824 (Ohio 2006) · Decided March 20, 2006

SUMMARY

The Ohio Supreme Court held that an appellate court may modify or vacate only the sentence for an offense that was appealed, and may not vacate the entire multiple-offense sentence based on an error involving a single unchallenged offense. The court rejected the federal sentencing-package doctrine as incompatible with Ohio's offense-by-offense sentencing scheme and held that res judicata bars later challenges to sentences not raised on direct appeal.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	O'Connor, J.; Moyer, C.J.; Resnick, J.; Lundberg Stratton, J.; O'Donnell, J.; Lanzinger, J.; Pfeifer, J.
JURISDICTION	Ohio
DECIDED	March 20, 2006
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The State appealed from an Eighth District Court of Appeals decision that vacated both the challenged sentence for a fourth-degree felony and an unchallenged sentence for a third-degree felony and remanded for resentencing. The Supreme Court of Ohio accepted jurisdiction to determine whether an appellate court may vacate or modify a sentence for an offense that the defendant did not appeal.
STANDARD OF REVIEW	De novo review of the meaning and application of R.C. 2953.08(G)(2), App.R. 12(A)(1)(b), and the Ohio sentencing statutes.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Ohio
PARTIES	State of Ohio v. Mark Saxon

TOPICS

[sentencing](#)[appellate procedure](#)[statutory interpretation](#)[preservation of error](#)[criminal procedure](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether an appellate court may vacate or modify the sentence for an offense that the defendant did not challenge on appeal when another sentence in a multiple-offense case is erroneous.
2. Whether Ohio recognizes or permits application of the federal sentencing-package doctrine.
3. Whether Ohio's sentencing statutes require appellate review and resentencing of each offense separately rather than treatment of multiple sentences as one sentencing package.

HOLDINGS

1. An appellate court may modify or vacate only a sentence appealed under R.C. 2953.08 and may not vacate the entire multiple-offense sentence based on an error in the sentence for one offense when the other sentence was not appealed.
2. Ohio does not recognize the federal sentencing-package doctrine; neither sentencing courts nor appellate courts may treat multiple Ohio felony sentences as an interdependent sentencing package.
3. A defendant who fails to challenge a sentence for a particular offense on direct appeal is barred by res judicata from challenging that sentence after remand for resentencing on other offenses.

KEY QUOTATIONS

“The question before this court is whether an appellate court may modify or vacate the entire multiple-offense sentence when a defendant assigns as error the sentence as to only one or more of those offenses but not the entire multiple-offense sentence. We find that it may not.” (176, ¶ 1)

“The sentencing-package’ doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant, and appellate courts may not utilize the doctrine when reviewing a sentence or sentences.” (180, ¶ 10)

“An appellate court may modify or vacate only a sentence that is appealed by the defendant and may not modify or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single offense.” (183, ¶ 30)

FACTUAL BACKGROUND

A Cuyahoga County grand jury indicted Mark Saxon on six sexual-offense counts. Saxon pleaded guilty to one third-degree felony count of gross sexual imposition involving a victim under thirteen and one fourth-degree felony count of gross sexual imposition; the remaining charges were dismissed. The trial court imposed four years on each count, to be served concurrently, although four years exceeded the statutory maximum for the fourth-degree felony.

PROCEDURAL HISTORY

Saxon pleaded guilty to one count of gross sexual imposition involving a victim under age thirteen and one count of gross sexual imposition, while the State dismissed the remaining indictment counts. The trial court

imposed concurrent four-year sentences on both counts. On appeal, Saxon challenged only the sentence for the fourth-degree felony; the Eighth District vacated both sentences and remanded. The Supreme Court of Ohio reversed and remanded for further proceedings consistent with its opinion.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The case was remanded to the Eighth District Court of Appeals for further proceedings consistent with the opinion, without vacating the unchallenged sentence.

CASES CITED

- State v. Saxon, 8th Dist. No. 83889, 2004-Ohio-5017, 2004 WL 2340106
- State v. Webb, 8th Dist. No. 85318, 2005-Ohio-3839, 2005 WL 1792364
- State v. Jackson, 10th Dist. No. 03AP-698, 2004-Ohio-1005, 2004 WL 396331
- In re Mitchell, 10th Dist. No. 01AP-74, 2001 WL 722104 (Ohio Ct. App. June 28, 2001)
- United States v. Clements, 86 F.3d 599 (6th Cir. 1996)
- State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470
- State v. Mathis, 109 Ohio St. 3d 54, 2006-Ohio-855, 846 N.E.2d 1
- State v. Hutton, 100 Ohio St. 3d 176, 2003-Ohio-5607, 797 N.E.2d 948
- State v. D'Ambrosio, 73 Ohio St. 3d 141, 652 N.E.2d 710 (1995)
- State v. Perry, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967)
- State ex rel. Willys-Overland Co. v. Clark, 112 Ohio St. 263, 147 N.E. 33 (1925)
- Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)

OPINION

CONNOR, J.

O'Connor, J. {¶ 1} The question before this court is whether an appellate court may modify or vacate the entire multiple-offense sentence when a defendant assigns as error the sentence as to only one or more of those offenses but not the entire multiple-offense sentence.

We find that it may not. {¶ 2} The Cuyahoga County Grand Jury indicted appellee, Mark Saxon, in a six-count indictment alleging two counts of gross sexual imposition involving a victim under the age of 13, in violation of R.C. 2907.05, one count of importuning, in violation of R.C. 2907.07, two counts of gross sexual imposition, in violation of R.C. 2907.05, and one count of attempted gross sexual imposition, in violation of R.C.

2907.05. Appellee pleaded guilty to one count of gross sexual imposition involving a victim under the age of 13, a felony of the third degree, and one count of gross sexual imposition, a felony of the fourth degree.

In return, the state dismissed the remaining charges. The trial court sentenced appellee to four years on each count and ordered the sentences to be served concurrently. {¶ 3} On appeal, appellee challenged his four-year sentence for the fourth-degree felony of gross sexual imposition, but failed to raise any alleged errors as to the four-year sentence on the third-degree felony of gross sexual imposition.

The state conceded that the trial court lacked the authority to impose a four-year sentence of incarceration on a defendant for a fourth-degree felony. See R.C. 2929.14(A)(4) (maximum penalty for a fourth-degree felony is 18 months).

The appellate court, however, vacated not only the sentence for the fourth-degree felony, but also the properly imposed sentence for the third-degree felony, and remanded the case for resentencing. *State v. Saxon*, 8th Dist. No. 83889, 2004-Ohio-5017, 2004 WL 2340106.

The state appealed that decision to this court, and we accepted jurisdiction to determine whether an appellate court may vacate or modify the sentence for an offense that a defendant fails to appeal. {¶ 4} R.C. 2953.08(G)(2) permits an appellate court to “increase, reduce, or otherwise modify a [felony] sentence that is appealed under this section” or to “vacate the sentence and remand the matter to the sentencing court for resentencing” if the sentence is contrary to law.¹ In this case, appellee specifically argued on appeal that his sentence for the fourth-degree felony of gross sexual imposition was erroneous.

The Eighth District, therefore, had the authority to vacate that admittedly erroneous sentence. The court, however, went further and vacated both sentences. {¶ 5} Over the years, some appellate courts have adopted the “sentencing package” doctrine, a federal doctrine that requires the court to consider the sanctions imposed on multiple offenses as the components of a single, comprehensive sentencing plan.

See, e.g., *State v. Webb*, 8th Dist. No. 85318, 2005-Ohio-3839, 2005 WL 1792364, ¶ 9-11; *State v. Jackson*, 10th Dist. No. 03AP-698, 2004-Ohio-1005, 2004 WL 396331, ¶ 5; *In re Mitchell* (June 28, 2001), 10th Dist. No. 01AP-74, 2001 WL 722104. {¶ 6} According to this view, an error within the sentencing package as a whole, even if only on one of multiple offenses, may require modification or vacation of the entire sentencing package due to the interdependency of the sentences for each offense.

United States v. Clements (C.A.6, 1996), 86 F.3d 599, 600-601. Thus, in a direct appeal from multiple-count criminal convictions, the appellate court has the authority to vacate all sentences even if only one is reversed on appeal. *Id.*, citing Section 2106, Title 28, U.S.Code. Significantly,

by enacting Section 2106, Congress, unlike our General Assembly, has expressly *179endowed the federal appellate courts with the authority to vacate and remand an entire sentencing package despite the fact that it includes an unchallenged sentence. {¶ 7} This rationale makes good sense when considering the many multicount and interrelated sentencing enhancements considered and used by federal judges applying the Federal Sentencing Guidelines.

See, e.g., United States Sentencing Commission, Guidelines Manual (Nov.2005) 342 (providing rules “for determining a single offense level that encompasses all the counts of which the defendant is convicted. The single, ‘combined’ offense level that results from applying these rules is used * * * to determine the sentence. * * * In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines ”).

(Emphasis added.) {¶ 8} But the rationale for “sentence packaging” fails in Ohio where there is no potential for an error in the sentence for one offense to permeate the entire multicount group of sentences. Ohio’s felony-sentencing scheme is clearly designed to focus the judge’s attention on one offense at a time.

Under R.C. 2929.14(A), the range of available penalties depends on the degree of each offense. For instance, R.C. 2929.14(A)(1) provides that “[f]or a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.” (Emphasis added.) R.C. 2929.14(A) (2) provides a different range for second-degree felonies.

In a case in which a defendant is convicted of two first-degree felonies and one second-degree felony, the statute leaves the sentencing judge no option but to assign a particular sentence to each of the three offenses, separately.

The statute makes no provision for grouping offenses together and imposing a single, “lump” sentence for multiple felonies. {¶ 9} Although imposition of concurrent sentences in Ohio may appear to involve a “lump” sentence approach, the opposite is actually true. Instead of considering multiple offenses as a whole and imposing one, overarching sentence to encompass the entirety of the offenses as in the federal sentencing regime, a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense.

See R.C. 2929.11 through 2929.19.2 Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus, *180¶ 100, 102, 105; R.C.

2929.12(A); *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. Under the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses. {¶ 10} This court has never adopted the sentencing-package doctrine, and we decline to do so now.

The sentencing-package' doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant, and appellate courts may not utilize the doctrine when reviewing a sentence or sentences. {¶ 11} Not only does sentencing in Ohio lack the underpinning interdependency that supports the federal doctrine, but the doctrine conflicts with the plain meaning of “sentence,” as defined by the Revised Code, ignores the requirements of the Ohio sentencing statutes, and abrogates the doctrine of res judicata. {¶ 12} R.C.

2929.01(FF) defines a sentence as “the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.” Appellee in the case at bar points to the “combination of sanctions” language in this definition and urges us to find that that language necessarily indicates that a “sentence” includes all sanctions given for all offenses and is not limited to the sanction given for just one offense.

But a trial court may impose a combination of sanctions on a single offense, for example, a fine and incarceration. See R.C. 2929.15 to 2929.18; Foster, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 45. Therefore, appellee’s insistence that the “combination of sanctions” language supports his contentions is misplaced. This language merely recognizes the availability of multiple sanctions for a single offense. {¶ 13} Further, the statute explicitly defines “a sentence” as those sanctions imposed for “an offense.” (Emphasis added.)

The use of the articles “a” and “an” modifying “sentence” and “offense” denotes the singular and does not allow for the position urged by appellee. A finding that the statute intended to package the sanctions for all sentences into one, appealable bundle would ignore the plain meaning of the statutory language: a sentence is the sanction or combination of sanctions imposed on each separate offense.

If the legislature had intended to package sentencing together, it easily could have defined “sentence” as the sanction or combination of sanctions imposed for all offenses. {¶ 14} This interpretation is further supported by consideration of the current comprehensive sentencing scheme originally enacted by the General Assembly as part of Am.Sub.S.B. No. 2 in 1996.

146 Ohio Laws, Part IV, 7136. The current scheme provides precise guidance for criminal sentencing within clearly defined constraints. As described above, the sentencing judge may not impose one term of incarceration and additional sanctions as to the total number of offenses before *181him, but must consider each offense separately. See R.C. 2929.11 through 2929.19. {¶ 15} Because the sentencing judge must consider each individual offense, the logical conclusion is that a “sentence” is the sanction or combination of sanctions imposed for each offense.

Adopting the sentencing-package doctrine ignores the critical differences between the Ohio and federal sentencing schemes and implies that sentencing judges must disregard the law and focus

on the entire array of offenses when imposing sentence. Ohio law has no mechanism for such an approach.

Because Ohio does not “bundle” sentences, nothing is “unbundled” when one of several sentences is reversed on appeal. {¶ 16} Our holding that a “sentence” includes only the sanction or combination of sanctions imposed for a single offense also comports with our long-standing precedent that any issue that could have been raised on direct appeal and was not *res judicata* and not subject to review in subsequent proceedings.

State v. Hutton, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶ 37; *State v. D’Ambrosio* (1995), 73 Ohio St.3d 141, 143, 652 N.E.2d 710. As we explained nearly 40 years ago: {¶ 17} “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel 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 * * * on an appeal from that judgment.” (Emphasis added.)

State v. Perry (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraph nine of the syllabus. {¶ 18} Thus, the doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue.

In so doing, *res judicata* promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard. See *State ex rel. Willys-Overland Co. v. Clark* (1925), 112 Ohio St. 263, 268, 147 N.E.

33. {¶ 19} When a defendant fails to appeal the sentence for a certain offense, he cannot take advantage of an error in the sentence for an entirely separate offense to gain a second opportunity to appeal upon resentencing.

To hold otherwise would essentially abrogate the doctrine of *res judicata* for multicount sentences and precludes finality in sentencing. Accordingly, a defendant who fails on direct appeal to challenge the sentence imposed on him for an offense is barred by *res judicata* from appealing that sentence following a remand for resentencing on other offenses. {¶ 20} This court’s interpretation is not only in accord with the legal principles of *res judicata* and finality of judgments, but it is faithful to the language of the *182statute and the General Assembly’s intent in promulgating a comprehensive sentencing scheme.

The legislature crafted the sentencing statutes in a manner that mandates individual consideration of each offense during sentencing and allows meaningful review of the sentence for each offense individually on appeal. R.C. 2929.11 through 2929.19; R.C. 2953.08; *Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶ 23-24, 35-36, 38. {¶ 21} Any adoption of the sentencing-package doctrine would dismantle that carefully crafted statutory scheme: an error in the sentence

for a single offense would require the sentencing judge to reconsider the sentences for every other offense, even if the defendant pleaded guilty to 100 counts.

No purpose can be served by forcing a sentencing judge to revisit properly imposed, lawful sentences based upon an error in the sentence for a separate offense. {¶ 22} Adoption of appellee's definition would further produce an unprecedented and unsupported result when considering the plain language of R.C. 2929.14(A): {¶ 23} "[I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following: {¶ 24} "(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years. {¶ 25} "(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years. {¶ 26} "(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years. {¶ 27} "(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months. {¶ 28} "(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months." {¶ 29} The statute explicitly allows a court to impose only "one of the following" prison terms each time it imposes "a sentence" on an offender.

(Emphasis added.) If we adopted appellee's definition of "a sentence" as including the entire sentencing package, the trial court could impose only one of the terms of imprisonment per case regardless of the number or variety of felonies committed. A defendant found guilty of multiple counts each of first-, second-, third-, fourth-, and fifth-degree felonies could only receive one prison term of no more than ten years.

There is no doubt that the legislature did not intend to punish a defendant guilty of a multiple number of crimes in the same manner as one who committed only one. *183{¶ 30} App.R. 12(A) (1)(b) mandates that an appellate court "[d]etermine the appeal on its merits on the assignments of error," and R.C. 2953.08(G)(2) permits the court to modify or vacate only a sentence appealed under that section.

In this case, the appellate court exceeded its authority by essentially considering an assignment of error not raised and vacating a sentence not appealed. An appellate court may modify or vacate only a sentence that is appealed by the defendant and may not modify or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single offense.

Accordingly, we reverse the decision of the Eighth District Court of Appeals and remand for further proceedings consistent with this opinion. Judgment reversed and cause remanded. Moyer, C.J., Resnick, Lundberg Stratton, O'Donnell and Lanzinger, JJ., concur. Pfeifer, J., dissents..

Although we held in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, that certain portions of the sentencing statutes that require judicial fact-finding to impose a sentence of

more than the statutory minimum, to impose consecutive sentences, and to impose repeat-violent-offender and major-drug-offender sentence enhancements are unconstitutional in light of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct.

2531, 159 L.Ed.2d 403, the sentencing review statute, R.C. 2953.08(G), remains effective, although no longer relevant with respect to the statutory sections severed by Foster. See *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph two of the syllabus, ¶ 23, 35-36; *State v. Foster* at ¶ 97, 99..

We recognize that certain portions of these statutes, including R.C. 2929.14(B), (C), (D)(2), (D)(3), and (E)(4) and 2929.19(B)(2), are unconstitutional. *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraphs one, three, and five of the syllabus. Each citation of these sections throughout this opinion is intended to refer only to those statutory provisions that remain effective following Foster.