

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

STATE OF OHIO,	:	APPEAL NO. C-180165
Plaintiff-Appellee,	:	TRIAL NO. B-1506673
vs.	:	<i>JUDGMENT ENTRY.</i>
MAURICE SMITH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Maurice Smith was convicted of one count of burglary, one count of trafficking in cocaine, one count of possession of cocaine, one count of possession of marijuana, and tampering with evidence. Smith appealed his convictions and sentences. On appeal, this court reversed the imposition of multiple sentences for the allied offenses of trafficking in cocaine and possession of conviction, but affirmed the court's judgment in all other respects. We remanded the cause for a new sentencing hearing to allow the state to elect which offense to pursue for resentencing.

Smith now appeals from his resentencing, raising four assignments of error. For the following reasons, we overrule the first, second, and fourth assignments of error, and sustain the third assignment of error because the court erred in imposing consecutive sentences without the requisite findings.

First, Smith contends that this court instructed the trial court to dismiss either the trafficking or possession-of-cocaine convictions on remand. He further argues that the trial court erred by merging rather than dismissing one of the convictions in violation of his due-process rights.

We remanded the cause for the state to elect which allied offense to pursue for sentencing, and the state elected to pursue the trafficking-in-cocaine offense. When the state elects which allied offense to seek sentencing for, the trial court must accept the state's choice and merge the crimes into a single conviction for sentencing. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 41. “[T]he determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing.” *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 27. Here, the trial court properly merged the convictions for purposes of sentencing and sentenced Smith on the trafficking conviction. *See id.* at ¶ 26. We, therefore, overrule the first assignment of error.

Next, Smith argues that his burglary conviction was secured in violation of the double inference rule because the evidence was insufficient to prove the trespass element. However, Smith is barred from setting forth new arguments seeking to overturn the conviction because this court affirmed his burglary conviction in his first appeal. *See State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 15 (explaining that when a case is remanded 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”). Accordingly, we overrule his second assignment of error.

In his third assignment of error, Smith asserts that the trial court erred in imposing consecutive sentences because the trial court failed to make the required statutory findings. The record shows that the trial court failed to make the required statutory findings prior to imposing consecutive sentences. Accordingly, and as conceded by the state, Smith's consecutive sentences are contrary to law and must be reversed. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. We sustain his third assignment of error.

In his fourth assignment of error, Smith claims that his counsel was ineffective for failing to argue that the court did not require the state to choose which offense he was to be sentenced for, failing to argue that the burglary conviction was not supported by sufficient evidence, and failing to require the court to make the consecutive-sentencing findings.

Based on this record, Smith failed to demonstrate that counsel was deficient. A review of the record confirms that the state requested that Smith be sentenced on the trafficking offense. Because we have already determined that the guilty verdict underlying the burglary sentence was not subject to review, Smith failed to demonstrate that counsel was deficient for failing to raise the issue.

We have already concluded that the trial court erred by failing to make the statutory findings, therefore, the ineffective-assistance claim, based on the same issue, is moot. *See State v. Cockrell*, 2016-Ohio-5797, 70 N.E.3d 1168, ¶ 27 (1st Dist.); App.R. 12(A)(1)(c) (explaining that an appellate court need not decide an assignment of error that is made moot by a ruling on another assignment of error). Accordingly, we overrule the fourth assignment of error and affirm the trial court's judgment.

OHIO FIRST DISTRICT COURT OF APPEALS

Because the trial court erred in imposing consecutive sentences without making the required statutory findings, we vacate the consecutive sentences, and remand the cause to the trial court for further proceedings consistent with this judgment entry and the law.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., ZAYAS and BERGERON, JJ.

To the clerk:

Enter upon the journal of the court on April 10, 2019
per order of the court _____.

Presiding Judge