[Cite as *State v. Hill*, 2015-Ohio-1122.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. SHAUNTAE MARIE HILL Appellant	C.A. No. 27263 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 11 04 1091 (A)

DECISION AND JOURNAL ENTRY

Dated: March 25, 2015

MOORE, Judge.

{¶1} Defendant-Appellant, Shauntae Hill, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} A jury found Ms. Hill guilty of (1) aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1); (2) involuntary manslaughter, in violation of R.C. 2903.04(B); and (3) operating a vehicle under the influence of alcohol or drugs ("OVI"), in violation of R.C. 4511.19(A)(1)(a). All three counts stemmed from the same incident, but the trial court only merged two of the counts at sentencing. Specifically, it merged the involuntary manslaughter count with the aggravated vehicular homicide count. The court sentenced Ms. Hill to six years in prison on the aggravated vehicular homicide count and, on the OVI count, sentenced her to an additional 24 days of "local incarceration, to be served at the appropriate penal institution."

{¶3} On appeal, Ms. Hill argued that the trial court had erred by failing to merge her aggravated vehicular homicide and OVI convictions as allied offenses of similar import. *See State v. Hill*, 9th Dist. Summit No. 26519, 2013-Ohio-4022, ¶ 21-23. Because the trial court had not analyzed the question of merger under *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, we remanded the matter for the court to apply *Johnson* in the first instance. *Id.* at ¶ 23.

{¶4} On remand, the trial court held a resentencing hearing and ultimately determined that Ms. Hill's counts for aggravated vehicular homicide and OVI should not merge. The court sentenced Ms. Hill to six years in prison on the aggravated vehicular homicide count and, on the OVI count, sentenced her to serve 24 days "at the appropriate penal institution."

{¶5} Ms. Hill now appeals from the trial court's judgment and raises one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO MERGE THE AGGRAVATED VEHICULAR [HOMICIDE] AND THE OVI CONVICTIONS.

{¶6} In her sole assignment of error, Ms. Hill argues that the trial court erred by sentencing her to allied offenses of similar import. Because her OVI count served as the predicate offense for her aggravated vehicular homicide count, she argues that the two had to merge for sentencing. We disagree.

{¶7} At issue in this case is a perceived conflict between the allied offense statute, R.C. 2941.25, and the multiple sentences statute, R.C. 2929.41. The allied offense statute "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. Beeler*, 9th Dist. Summit No. 27309, 2015-Ohio-275, ¶ 25, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 23. It provides:

> (A) Where the same conduct by 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.

R.C. 2941.25. Thus, the allied offense statute only permits two or more offenses to result in multiple convictions if "(1) they are offenses of dissimilar import; (2) they are separately committed; or (3) the defendant possesses a separate animus as to each." *State v. Litten*, 9th Dist. Summit No. 26812, 2014-Ohio-577, ¶ 51. "To ensure compliance with both R.C. 2941.25 and the Double Jeopardy Clause, 'a trial court is required to merge allied offenses of similar import at sentencing.'" *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 15, quoting *Underwood* at ¶ 27.

{¶8} R.C. 2929.41 concerns the imposition of multiple sentences. The statute "creates a presumption that a sentencing court will impose concurrent sentences," but also permits the imposition of consecutive sentences in a variety of circumstances. *State v. Bushner*, 9th Dist. Summit No. 26532, 2012-Ohio-5996, ¶ 20. In 1999, the General Assembly amended R.C. 2929.41 "to establish stricter penalties" for OVIs and, "in certain circumstances[,] to eliminate for [OVIs] * * * the prohibition against imposing a term of imprisonment imposed for a misdemeanor consecutively to a prison term imposed for a felony * * *." 1999 Am.Sub.S.B. No. 22. Relevant to this appeal, the statute provides that

> [a] jail term or sentence of imprisonment imposed for a misdemeanor violation of * * * [R.C.] 4511.19 * * * *shall be served consecutively* to a prison term that is

> imposed for a felony violation of [R.C.] 2903.06, 2903.07, 2903.08, or 4511.19 * * * and that is served in a state correctional institution *when the trial court specifies that it is to be served consecutively*.

(Emphasis added.) R.C. 2929.41(B)(3). R.C. 4511.19 governs OVI offenses and R.C. 2903.06 governs the offense of aggravated vehicular homicide.

{¶9} As previously noted, the jury found Ms. Hill guilty of OVI, a first-degree misdemeanor, and aggravated vehicular homicide, a first-degree felony. In considering whether the two counts should merge for sentencing, the trial court looked to the intent of the legislature. *See Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, at ¶ 46 ("In determining whether two offenses should be merged, the intent of the General Assembly is controlling."). The court determined that the plain language of R.C. 2929.41(B)(3) evidenced the General Assembly's "clear intent" to allow for separate, consecutive sentences on certain offenses. It treated R.C. 2929.41(B)(3) as an exception to the allied offense statute (R.C. 2941.25). As such, it sentenced Ms. Hill on both her OVI and aggravated vehicular homicide counts and ordered the sentences to run consecutively. *See* R.C. 2929.41(B)(3).

{¶10} Ms. Hill argues that the trial court erred by failing to merge her convictions. Because her OVI charge was the predicate offense for her aggravated vehicular homicide charge, she argues that the two offenses were committed with the same conduct and had to merge under R.C. 2941.25. According to Ms. Hill, the court violated the Double Jeopardy Clause when it ordered her to serve multiple punishments for the same offense.

{¶11} "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Accordingly, the question becomes "whether the General Assembly intended to permit multiple

punishments for the offenses at issue." *State v. Childs*, 88 Ohio St.3d 558, 561 (2000). "R.C. 2941.25 generally provides the appropriate test to determine whether the court may impose multiple punishments for offenses arising from the same conduct." *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, ¶ 10. Yet, it is not "the sole legislative declaration in Ohio" on the issue of multiple punishments. *Id.*, quoting *Childs* at 561. "Depending upon the offense at issue, [R.C. 2941.25] must be read in concert with other legislative statements on the issue." *Childs* at 561. If the legislature has specifically authorized cumulative punishment, no double jeopardy violation occurs. *See State v. Midcap*, 9th Dist. Summit No. 22908, 2006-Ohio-2854, ¶ 12. *See also Miranda* at ¶ 10 ("[I]n this case, we find that the RICO statute evinces the General Assembly's intent that a court may sentence a defendant for both the RICO offense and its predicate offenses.").

{¶12} Several of our sister districts have considered the interplay between R.C. 2941.25 and R.C. 2929.41(B)(3). In *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469, the Tenth District heard the appeal of a defendant who had been sentenced on counts of aggravated vehicular assault and OVI, the predicate offense for the former count. The court determined that the allied offense statute reflects the legislature's general intent as to the merger of offenses, but, at times, may yield to "more specific legislative statements of legislative intent." *Bayer* at ¶ 19. The court determined that the General Assembly, through R.C. 2929.41(B)(3), had set forth a more specific pronouncement of its intent with regard to the merger of OVI offenses. *Id.* at ¶ 21. Specifically, the legislature had "clearly reflected its intent that a trial court may, in its discretion, sentence a defendant for both OVI and [aggravated vehicular assault]." *Id.* The Tenth District held that, even assuming Ms. Bayer's charges were allied offenses under R.C. 2941.25, "R.C. 2929.41(B)(3) create[d] an exception to the general rule provided in R.C.

2941.25 * * *." *Id.* at ¶ 22. Consequently, it affirmed the trial court's decision to sentence Ms. Bayer on both counts. *Id.*

{¶13} The Fifth, Eighth, and Eleventh Districts have all relied upon *Bayer* to uphold similar sentences. *See State v. Dunham*, 5th Dist. Richland No. 13CA26, 2014-Ohio-1042, ¶ 69-78 (upholding sentences for aggravated vehicular homicide and OVI); *State v. Earley*, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643, ¶ 7-21 (upholding sentences for aggravated vehicular assault and OVI); and *State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399, ¶ 39-50 (upholding sentences for aggravated vehicular assault and OVI). The most recent case, *State v. Earley*, has been accepted for review by the Ohio Supreme Court. *See State v. Earley*, 140 Ohio St.3d 1450, 2014-Ohio-4414. Additionally, the Supreme Court has accepted for review the Eighth District's certification of a conflict between its decision in *Earley* and the decisions of the Second District in *State v. West*, 2d Dist. Montgomery No. 23547, 2010-Ohio-1786, the Sixth District in *State v. Mendoza*, 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988, and the Twelfth District in *State v. Phelps*, 12th Dist. Butler No. CA2009-09-243, 2010-Ohio-3257. The certified issue is:

> When the offense of [OVI] in violation of R.C. 4511.19(A)(1) is the predicate conduct for aggravated vehicular assault in violation of R.C. 2903.08(A)(1), are the two offenses allied, and if so, does R.C. 2929.41(B)(3) create an exception that allows a trial court to impose a sentence for both offenses?[1]

State v. Earley, 140 Ohio St.3d 1450, 2014-Ohio-4414. At present, the Supreme Court has yet to issue its decision in the matter.

[1] Although the issue before the Supreme Court concerns aggravated vehicular assault under R.C. 2903.08 rather than aggravated vehicular homicide under R.C. 2903.06, we note that both statutes receive identical treatment under the multiple sentences statute. *See* R.C. 2929.41(B)(3).

{¶14} Having reviewed the relevant authority, we agree with the position taken by our sister districts in *Bayer*, *Demirci*, *Dunham*, and *Earley*. We recognize that the Supreme Court has identified a conflict between the Eighth District's decision in *Earley* and the decisions of the Second, Sixth, and Twelfth Districts. We find it noteworthy, however, that none of the latter districts, in their respective decisions, were presented with an argument under the multiple sentences statute. *See West*, 2010-Ohio-1786, at ¶ 28-46; *Mendoza*, 2012-Ohio-5988, at ¶ 9-11; and *Phelps*, 2010-Ohio-3257, at ¶ 18-33. The courts only considered the merger of the offenses at issue under the allied offense statute, and, in one case, the State conceded that the offenses were allied. *See Mendoza* at ¶ 9. As such, neither the Second, nor the Sixth, nor the Twelfth Districts took a position on the impact of R.C. 2929.41(B)(3) in their respective analyses.

{¶15} When the General Assembly amended R.C. 2929.41 in 1999, it specifically noted that its purpose in doing so was "to establish stricter penalties" for OVIs and, "in certain circumstances[,] to eliminate for [OVIs] * * * the prohibition against imposing a term of imprisonment imposed for a misdemeanor consecutively to a prison term imposed for a felony * * *." 1999 Am.Sub.S.B. No. 22. R.C. 2929.41(B)(3)'s plain language authorizes consecutive sentences for misdemeanor OVIs and felony violations of the aggravated vehicular homicide statute. To conclude that the allied offense statute requires the merger of those two offenses would be to thwart the specific intention of the General Assembly, as it is plainly expressed in R.C. 2929.41(B)(3). In this particular instance, the allied offense statute must yield to a more specific statement of legislative intent. *See Bayer*, 2012-Ohio-5469, at ¶ 19. *See also Childs*, 88 Ohio St.3d at 561 ("Depending upon the offense at issue, [R.C. 2941.25] must be read in concert with other legislative statements on the issue.").

{¶16} Even assuming that Ms. Hill's OVI and aggravated vehicular homicide offenses would be allied offenses under R.C. 2941.25, "R.C. 2929.41(B)(3) creates an exception to the general rule provided in R.C. 2941.25 * * *." *Bayer* at ¶ 22. R.C. 2929.41(B)(3) gave the trial court the authority to impose consecutive sentences upon Ms. Hill. As such, her argument that the court erred by refusing to merge her offenses lacks merit. Ms. Hill's sole assignment of error is overruled.

III.

{¶17} Ms. Hill's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

GREGORY A. PRICE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.