[Cite as *State v. Caston*, 2010-Ohio-6498.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-09-051

Appellee — Trial Court No. 2008-CR-552

v.

Shawn W. Caston — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Ron Nisch, for appellant.

* * * * *

COSME, J.

{¶1} Appellant, Shawn W. Caston, appeals from the Erie County Common Pleas Court's imposition of sentences for both aggravated vehicular assault and operating a vehicle under the influence of alcohol or drug of abuse.

{¶2} We hold that aggravated vehicular assault under R.C. 2903.08(A)(1) and operating a vehicle while under the influence of alcohol or drug of abuse as defined in R.C. 4511.19(A)(1)(a) ("OVI") are allied offenses of similar import, and in this case, they

were committed with a similar animus. Appellant may only be sentenced on one of these offenses. Accordingly, we reverse.

I. BACKGROUND

{¶3} On September 23, 2008, Sandusky Police Officer Brad Pfanner was on Cleveland Road in Sandusky, Ohio, when he heard a crash and turned to see appellant's vehicle swerving across the road at a high rate of speed. As the vehicle passed Officer Pfanner, he could see that it was damaged; the front bumper was peeled back. Officer Pfanner gave chase, but the vehicle did not pull over when Officer Pfanner caught up to it. Instead, the vehicle stopped at a gas station where the driver fled on foot. The driver was apprehended and identified as appellant.

{¶4} Further investigation revealed that an accident involving a motorcycle had occurred on Cleveland Road in the area where Officer Pfanner heard the crash. The front license plate of appellant's vehicle was at the scene of the accident. The operator of the motorcycle was life-flighted to St. Vincent Mercy Medical Center in Toledo.

{¶5} Appellant submitted to field sobriety tests at the Sandusky police station. He did poorly on the horizontal gaze nystagmus test, could not perform the one leg stand, or the walk and turn tests. Appellant also submitted to a breathalyzer test, which indicated his blood alcohol content was .185 percent.

{¶6} The first indictment filed October 10, 2009, contained three counts: aggravated vehicular assault (R.C. 2903.08(A)(1)); failure to stop after accident (R.C. 4549.02(A)); and tampering with evidence (R.C. 2921.12(A)). A second indictment filed

November 14, 2009, added two counts: operation while under the influence of alcohol or drug of abuse under R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(h) (both referenced as "OVI"). Only aggravated vehicular assault (Count 1) and the first OVI charge (Count 4) are relevant to appellant's first assignment of error.

{¶7} In exchange for a plea on the remaining counts of the indictment, the state agreed to dismiss Count 3 (tampering with evidence). Appellant pled guilty to Count 1 (aggravated vehicular assault); Count 2 (failure to stop after accident); Count 4 (OVI); and Count 5 (OVI). At the plea change hearing, the state argued that Counts 4 and 5 were committed with a separate animus, allowing that Count 4 should merge with Count 1. The trial court, however, merged Counts 4 and 5 for sentencing. The trial court sentenced appellant to a prison term of five years on Count 1; eleven months on Count 2; and six months on Count 4. The trial court ordered that Counts 1 and 2 be served consecutively to each other but served concurrently with Count 4 for a total of five years, eleven months.

{¶8} Appellant appeals, raising two assignments of error.

II. ALLIED OFFENSES/SEPARATE ANIMUS

{¶9} In his first assignment of error, appellant maintains that:

{¶10} "The trial court's decision not to merge the sentences of appellant for two counts of driving under the influence of alcohol with the appellant's sentence for aggravated vehicular assault was reversible error."

{¶11} Here, the trial court merged Counts 4 and 5, R.C. 4511.19(A)(1)(a) and (h), respectively, for purposes of sentencing. Appellant argues that since these two OVI charges were merged, the resulting OVI offense upon which he was sentenced, Count 4, must necessarily be merged with the offense of aggravated vehicular assault as they are offenses of similar import and the acts were not committed separately or with a separate animus.

{¶12} We agree that Counts 1 and 4 are allied offenses of similar import. However, as to the merger of Counts 4 and 5, we conclude that the trial court had a duty to determine whether these two OVI offenses were committed with a separate animus.

{¶13} The state maintained during both the plea change hearing and the sentencing hearing that Counts 4 and 5 were committed with a separate animus. But because no facts exist in the record from which it can be determined whether the two OVI offenses were committed separately or with a separate animus, we must remand this matter to the trial court for further hearing. See *State v. Hartwell* (Dec. 13, 1989), 2d Dist. No. 11422.

{¶14} Here, where appellant pled guilty to multiple offenses of similar import and the trial court accepted the pleas, the court "has a duty to conduct a hearing and make a determination" as to whether the crimes were committed separately or with a separate animus for each offense prior to entering a judgment sentencing the appellant. *State v. Mangrum* (1993), 86 Ohio App.3d 156, 158. See *State v. Thrower* (1989), 62 Ohio App.3d 359, 376; *State v. Dunihue* (1984), 20 Ohio App.3d 210, 211; *State v. Kent*

(1980), 68 Ohio App.2d 151, 154-156. The trial court may either conduct an evidentiary hearing or accept a stipulated statement of facts and from such facts determine whether or not the OVI offenses of which appellant was convicted were part of the same transaction or act. See *State v. Yee* (Nov. 18, 1994), 6th Dist. No. E-93-72. See, also, *State v. Wills* (1994), 69 Ohio St.3d 690, 691.

{¶15} We do not decide in this case whether Counts 4 and 5 were committed separately or with a separate animus. The police report suggests that appellant's collision with the motorcycle and act of driving away constituted a single course of conduct "bound together by time, space, and purpose." *State v. Hamilton*, 8th Dist. No. 91896, 2009-Ohio-3595, ¶ 41. Further, it suggests that appellant's conduct was "directed toward a single objective.'" *Wills*, supra, quoting *State v. Caldwell* (Dec. 4, 1991), 9th Dist. No. 14720.

{¶16} However, it was never determined whether the crash was an intervening event sufficient to conclude that appellant made a decision to leave the victim and drive away. See *State v. Newberry*, 6th Dist. No. H-01-020, 2002-Ohio-3972, ¶ 23. Each OVI case must be decided on its particular facts.

{¶17} Although we remand Counts 4 and 5 for consideration of whether the OVI offenses were committed with a separate animus, we proceed to consider whether Counts 1 and 4 are allied offenses of similar import.

A. Double Jeopardy Clause

{¶18} The Double Jeopardy Clause of the United States Constitution prohibits (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656.

{¶19} This case involves the double jeopardy prohibition against multiple punishments for the same offense. We are mindful of both the Supreme Court of Ohio and the United States Supreme Court's decisions that the Double Jeopardy Clause only prevents courts from imposing sentences greater than those intended by the legislature, thus does not prevent all multiple punishments arising out of the same offense. *State v. Rance* (1999), 85 Ohio St.3d 632, 635. See *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and *State v. Moss* (1982), 69 Ohio St.2d 515, 518. See, also, *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶ 12.

{¶20} The test for determining a violation of the double jeopardy prohibition is "whether each offense requires proof of an element that the other does not." *Rance*, 85 Ohio St.3d at 634-635, citing *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306. In *Rance*, the Supreme Court of Ohio found that R.C. 2941.25, Ohio's multiple-count statute, answered both the constitutional and state statutory inquiries regarding the General Assembly's intent to permit cumulative punishments for the same conduct. *Rance*, 85 Ohio St.3d at 639.

B. Ohio's Multiple-Count Statute

{¶21} Ohio's multiple-count statute, R.C. 2941.25, provides:

{¶22} "(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.

{¶23} "(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."

{¶24} A two-step analysis is required to determine whether two crimes are allied offenses of similar import. See, e.g., *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117; *State v. Rance* (1999), 85 Ohio St.3d 632, 636. The first step requires a comparison of the elements of the two offenses. "If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." *Blankenship*, 38 Ohio St.3d at 117.

C. Allied Offenses of Similar Import

{¶25} We begin the first step of the analysis by comparing the elements of aggravated vehicular assault and OVI in order to determine whether they are allied offenses of similar import.

{¶26} Count 1, aggravated vehicular assault, R.C. 2903.08(A)(1)(a), provides:

{¶27} "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, water craft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:

{¶28} "(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance."

{¶29} Count 4, operation while under the influence, R.C. 4511.19(A)(1)(a), provides:

{¶30} "(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶31} "(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶32} To be guilty of aggravated vehicular assault under R.C. 2903.08(A)(1)(a), a defendant must cause serious physical harm to another person as a proximate result of operating a motor vehicle under the influence of alcohol or drugs. To be guilty of OVI, R.C. 4511.19(A)(1)(a), a defendant must operate a motor vehicle while under the influence of alcohol or drugs. Thus R.C. 4511.19(A)(1)(a) is a predicate offense to the

commission of R.C. 2903.08(A)(1)(a), a compound offense. See *Whalen v. United States* (1980), 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (Justice Rehnquist dissenting).

{¶33} Appellant maintains that the two offenses are offenses of similar import because, he asserts, when OVI is the predicate offense underlying a charge of aggravated vehicular assault pursuant to R.C. 2903.08(A)(1)(a), the elements of OVI are necessarily part of the aggravated vehicular assault. Therefore, he argues that the aggravated vehicular assault cannot be committed without committing the underlying OVI.

{¶34} The state contends upon appeal that the offenses cannot be allied because an individual can operate a motor vehicle while under the influence of alcohol, a drug of abuse, or a combination of both, without causing anyone serious physical harm. As such, the state argues that the offense of aggravated assault requires proof of an element (serious physical harm) that is not found in the OVI offense.

{¶35} Because a violation of R.C. 4511.19(A)(1)(a) is a predicate to a violation of R.C. 2903.08(A)(1)(a), even a strict textual comparison would mean that these two offenses are allied offenses of similar import under R.C. 2941.25(A). Our analysis of the parties' argument and Ohio caselaw compels us to find that aggravated vehicular assault and OVI are allied offenses of similar import.

{¶36} In *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, the Supreme Court of Ohio specifically considered the elements of the statutory provisions now before us, as well as the alternative element of vehicular assault based on reckless operation. See R.C. 2903.08(A)(2). In *Zima*, the appellant entered a no-contest plea in Cleveland Municipal

Court to a charge of driving under the influence in violation of a Cleveland Codified Ordinance that mirrors R.C. 4511.19. Appellant then moved to dismiss a state aggravated vehicular assault charge in the Cuyahoga County Common Pleas Court on the grounds of double jeopardy. The trial court granted appellant's motion to dismiss the aggravated vehicular assault charges, holding that "successive prosecutions for driving under the influence and aggravated vehicular assault are barred because the offense of driving under the influence 'is one of the elements' of aggravated vehicular assault." *Zima* at ¶ 32. The *Zima* court agreed that "driving under the influence is necessarily a lesser included offense of aggravated vehicular assault under R.C. 2903.08(A)(1), which proscribes causing serious physical harm to another as a proximate result of driving under the influence. By definition, a lesser included offense contains no element of proof beyond that for the greater offense." *Zima* at ¶ 41.

{¶37} Considering whether the accused was being prosecuted for the same offense, the court in *Zima* relied upon its prior holding in *State v. Best* (1975), 42 Ohio St.2d 530, in which it applied the "same elements" test articulated in *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306, holding that "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *Zima* at ¶ 19, quoting *Best* at paragraph three of the syllabus.

{¶38} The *Zima* court observed, however, that "the offense of driving under the influence is one of two *alternative* elements of aggravated vehicular assault, the other

being reckless operation." *Zima* at ¶ 32. Thus, the Z*ima* court agreed with the court of appeals in explaining that the state did not have to prove aggravated vehicular assault under R.C. 2903.08 (A)(1) but could instead have proven the offense under (A)(2) which does not contain the element of driving under the influence.

(1) Analysis of Ohio Caselaw

{¶39} The Ohio Supreme Court's decision regarding the successive prosecutions in *Zima* is consistent with its earlier decision in *State v. Rance* (1999), 85 Ohio St.3d 632, and its later decisions in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, and *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147. These decisions have successively provided guidance to Ohio courts in determining how the statutes apply to the nuances of individual cases involving a determination of whether certain crimes are allied offenses of similar import.

{¶40} In *State v. Rance* (1999), 85 Ohio St.3d 632, 635, the court emphasized the importance of legislative intent, holding that "when a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, application of *Blockburger* would be improper; the legislature's expressed intent is dispositive." See *Ohio v. Johnson* (1984), 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425. The *Rance* court determined that the General Assembly clearly intended to allow multiple sentences for certain offenses as permitted in Ohio's multiple-count

statute. The court advised that cases citing *Blockburger* are helpful, but not determinative, in examining cases in Ohio. *Rance*, 85 Ohio St.3d at 636.

{¶41} *Rance* also held that any finding of allied offenses of similar import under R.C. 2941.25 must be "compared *in the abstract*." *Rance*, 85 Ohio St.3d at 638. (Emphasis sic.) (Citation omitted.) "[C]omparison of the statutory elements in the abstract is the more functional test, producing 'clear legal lines capable of application in particular cases.'" *Rance*, 85 Ohio St.3d at 636, quoting *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 148, 119 S.Ct. 1167, 143 L.Ed.2d 238.

{¶42} Comparing the elements in the abstract, the court in *Rance* concluded that involuntary manslaughter and aggravated robbery are not allied offenses of similar import since "the commission of one will not automatically result in the commission of another." *Rance*, 85 Ohio St.3d at 639. The court found that because each of the offenses charged requires proof of an element that the other does not, they are not allied offenses of similar import.

{¶43} A decade later, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 21, the Supreme Court of Ohio rejected a narrow interpretation of *Rance* that favored a strict textual comparison of the compared offenses under R.C. 2941.25(A), concluding that such an interpretation "conflicts with legislative intent and causes inconsistent and absurd results." *Cabrales* at ¶ 27. The court in *Cabrales* declined "to find an exact alignment of the elements" and instead clarified that "if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense

will necessarily result in commission of the other, then the offenses are allied offenses of similar import." *Cabrales* at paragraph one of the syllabus.

{¶44} In its most recent decision in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶ 23, the Supreme Court of Ohio concluded that "Since felonious assault is an offense of violence, R.C. 2901.01(A)(9), the commission of attempted murder, as statutorily defined, necessarily results from the commission of an offense of violence, here felonious assault. Accordingly, felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined by R.C. 2903.02(B) and 2923.02."

{¶45} Relying on its holding in *Cabrales*, the court in *Williams* concluded that the commission of one crime will necessarily result in the commission of another.

{¶46} Appellant cites the decisions of several appeals courts to support his argument. Consistent with the ruling in *Zima*, Ohio appellate courts in *State v. Duncan*, 5th Dist. No. 2009CA028, 2009-Ohio-5668, ¶ 62, *State v. West*, 2d Dist. No. 23547, 2010-Ohio-1786, ¶ 43, and *State v. Phelps*, 12th Dist. No. CA2009-09-243, 2010-Ohio-3257, ¶ 31, have all held that violations of aggravated vehicular assault under R.C. 2903.08(A)(1)(a) and operating a motor vehicle under the influence of alcohol under R.C. 4511.19(A)(1)(h) are allied offenses of similar import.

{¶47} In this case, as in *Zima*, *Duncan*, *Williams*, *West*, and *Phelps*, since a predicate offense (OVI) exists as an element of another offense (aggravated vehicular assault), the two offenses are allied offenses of similar import. Accordingly, we proceed to step two to determine whether appellant acted with a separate animus.

D. Separately or with Separate Animus

{¶48} The state asserted both during the plea change and sentencing hearings that the aggravated vehicular assault in Count 1 and the OVI in Count 4 upon which appellant was sentenced, were not committed separately, or with a separate animus. The state also asserted that the two OVI charges on Counts 4 and 5 should not merge because they were committed with a separate animus.

{¶49} The judgment entry however, merged Counts 4 and 5. On appeal, the state changed its position and argued against the merger of the aggravated vehicular assault in Count 1 and the OVI in Count 4.

{¶50} The state did not object to or address in its brief, its earlier assertion that the two OVI offenses had been committed with a separate animus. Despite the merger of the two OVI charges, appellant cannot be sentenced on both the aggravated vehicular assault and the remaining OVI (Count 4). Instead, on remand, the state must elect which allied offense (Count 1 and 4) to pursue at sentencing. The state's argument that the two OVI offenses were committed with a separate animus is not relevant to sentencing on Counts 1 and 4.

{¶51} In *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, the Supreme Court of Ohio addressed the proper manner in which courts of appeal should remand cases after finding errors committed in sentencing on allied offenses. It held that "the trial court should fulfill its duty in merging the offenses for purposes of sentencing, but remain cognizant that R.C. 2941.25(A)'s mandate that a 'defendant may be convicted of only one'

allied offense is a proscription against sentencing a defendant for more than one allied offense." *Whitfield* at ¶ 26. Additionally, "[b]ecause R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. Thus, the trial court should not vacate or dismiss the guilt determination." Id. at ¶ 27.

{¶52} Accordingly, appellant's first assignment of error is well-taken and this matter is remanded for a new sentencing hearing.

III. NUMERICAL COMPARISON OF SENTENCE

{¶53} In his second assignment of error, appellant argues that:

{¶54} "The sentence of the trial court was an abuse of discretion as it did not properly apply the requirements of R.C. 2929.11(B)."

{¶55} Based on this court's disposition of appellant's first assignment of error, we conclude that appellant's second assignment of error is moot.

IV. CONCLUSION

{¶56} On consideration whereof, the court finds that substantial justice has not been done the party complaining and the judgment of the Erie County Common Pleas Court is reversed as to appellant's sentence. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED, IN PART,
AND REMANDED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE