[Cite as *State v. Zima*, 2002-Ohio-6327.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80824

STATE OF OHIO	:	ACCELERATED DOCKET
	:	
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
KAREN ZIMA	:	
	:	
Defendant-Appellee	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 21, 2002
CHARACTER OF PROCEEDING	:	Criminal appeal from the Cuyahoga County Court of Common Pleas
		:
		Case No. CR-413126
JUDGMENT	:	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellant:

WILLIAM D. MASON
Cuyahoga County Prosecutor
MATTHEW T. NORMAN
Assistant County Prosecutor
Justice Center, Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellee:

ROBERT L. TOBIK
Cuyahoga County Public Defender
MARK A. SPADARO

PAUL KUZMINS
Assistant Public Defenders
100 Lakeside Place
1200 West Third Street
Cleveland, Ohio 44113

JUDGE TERRENCE O'DONNELL:

{¶1} The State of Ohio appeals from a judgment of the common pleas court which granted Karen Zima's motion to dismiss indictments against her for aggravated vehicular assault and driving under the influence of alcohol. The state argues that the court misapplied *State v. Carpenter* (1993), 68 Ohio St.3d 59, and erred in granting Zima's motion alleging that the indictments for aggravated vehicular assault and driving under the influence do not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

{¶2} After a careful review of the record, we agree and have concluded that the court erred in granting Zima's motion to dismiss the charge of aggravated vehicular assault, but properly dismissed the charge of driving under the influence of alcohol. Accordingly, we affirm in part, reverse in part, and remand this case for further proceedings.

{¶3} The record reveals the following facts pertinent to this appeal. On July 3, 2001, Zima operated her vehicle left of center on Broadview Road in Cleveland striking a motorcyclist traveling northbound causing him to be thrown into a utility pole and sustain serious injuries.

{¶4} Cleveland police, investigating the accident, arrived on the scene and arrested Zima after she failed four field sobriety tests. On July 6, 2001, the City of Cleveland filed a complaint in the Cleveland Municipal Court charging Zima with driving under the influence, driving under suspension, failure to yield, and failure to wear a seatbelt. On August 23, 2001, a Cuyahoga County Grand Jury returned a three-count indictment against Zima, charging her with two counts of aggravated vehicular assault and one count of driving under the influence. Subsequently, on August 27, 2001, Zima appeared in Cleveland Municipal Court and pled no contest to driving under the influence and the city nolled the remaining charges. On October 3, 2001, the municipal court sentenced her to 27 days in jail, imposed one year of probation with a license suspension and ordered her to complete the MADD program. Her counsel at that time informed the court of pending felony charges in common pleas court, but the municipal court judge stated:

{¶5} "I don't think that charge is going to hold any water because they chose to charge her with two forms and I think jeopardy is going to attach and that way, the case is going to go away with the dinosaurs.

{¶6} "That's my personal belief that the city prosecutor made an error for charging the case here. If their real goal was to charge it as a felony, they should have just charged it there as a felony, piggy-back the DUI on the aggravated vehicular assault. I don't know. Certainly, in my view with sentencing and that is going

to have a very strong argument for double jeopardy in any case in common pleas court and with respect to this, I understand the DUI."

{¶7} On October 22, 2001, at her appearance in common pleas court, Zima moved to dismiss the felony charges, contending the indictments violated double jeopardy based on her no contest plea in the Cleveland Municipal Court and the above-cited comments of the municipal court judge. The state objected and following a hearing, the court, after quoting the above statements of the municipal court judge, ruled that the indictments for aggravated vehicular assault violated the Double Jeopardy Clause of the United States and Ohio Constitutions, and that under *State v. Carpenter,* the "state could not indict the defendant in the instant matter because she reasonably relied on her former negotiated plea agreement, and neither the Prosecutor nor anyone else on the record informed the defendant that she would be facing additional felony charges * * *."

{¶8} The state now appeals pursuant to R.C. 2945.67(A) raising two assignments of error. The first states:

{¶9} "THE TRIAL COURT MISAPPLIED STATE V. CARPENTER AND IMPROPERLY DISMISSED THE INDICTMENT IN THE INSTANT MATTER."

{¶10} The state contends the common pleas court misapplied *State v. Carpenter*, and improperly dismissed the indictments. Zima argues the felony prosecution should be barred because by entering her plea of guilty to driving under the influence, she reasonably and justifiably anticipated termination of criminal charges against her.

{¶11} In *Carpenter,* the Ohio Supreme Court held:

{¶12} "The state cannot indict a defendant for murder after the court has accepted a negotiated guilty plea to a lesser offense and the victim later dies of injuries sustained in the crime, unless the state expressly reserves the right to file additional charges on the record at the time of the defendant's plea."

{¶13} Here, the trial court determined:

{¶14} "Applying the ruling from *State v. Carpenter* (1993), 68 Ohio St.3d 59, the state could not indict the defendant in the instant matter because she reasonably relied on her former negotiated plea agreement, and neither the prosecutor nor anyone else on the record informed the defendant that she would be facing additional felony charges, thus reserving the state's right to lodge additional criminal charges against this defendant."

{¶15} We note that *Carpenter* has been limited to cases with similar fact patterns, i.e. the subsequent death of a victim following the conviction on a lesser offense. See *State v. Browning*, (April 22, 2001), Cuyahoga App. No. 77972; hence it cannot be applied to the facts in this case. Thus, the court erred in following *Carpenter, and therefore*, the state's first assignment of error has merit and is sustained.

{¶16} "THE STATE'S PROSECUTION OF APPELLEE FOR AGGRAVATED VEHICULAR ASSAULT DOES NOT VIOLATE DOUBLE JEOPARDY."

{¶17} In its second assignment of error the state contends the common pleas court erred in granting Zima's motion to dismiss

the aggravated vehicular assault charges on double jeopardy grounds. Zima argues that her plea in the municipal court prevented the state from bringing any additional charges against her.

{¶18} It is well established that the Double Jeopardy Clause protects against successive prosecutions for the same offense. *United States v. Dixon* (1993), 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072; *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 443.

{¶19} Double jeopardy embodies three basic protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *Grady v. Corbin* (1990), 495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072.

{¶20} In *State v. Best* (1975), 42 Ohio St.2d 530, 533, the court set forth four factors to consider when reviewing claims of double jeopardy: (1) whether there was a prior prosecution in the same state for the identical offense; (2) whether the same person was charged relative to the first prosecution; (3) whether the same parties were involved in both prosecutions; and (4) whether the first offense prosecuted was of such a nature as to constitute a bar to the successive prosecution. Id. at 533.

{¶21} The court in *Best* reiterated the test to determine whether a conviction for one offense bars prosecution of a related offense as set forth in *Blockburger v. United States* (1932), 284 U.S. 299, 304, 75 L.Ed. 306, 52 S.Ct. 180:

{¶22} "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, 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. *Gavieres v. United States*, 220 U.S. 338, 342, 55 L.Ed. 489, 31 S.Ct. 421, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

{¶23} In order to address the issue of double jeopardy, we must first review the elements of aggravated vehicular assault under R.C. 2903.08 which provides:

{¶24} "(A) No person, while operating or participating in the operation of a motor vehicle * * * shall cause serious physical harm to another person or another's unborn in either of the following ways:

{¶25} "(1) 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;

{¶26} "(2) Recklessly."

{¶27} Driving while under the influence of alcohol or drugs under R.C. 4511.19 provides:

{¶28} "(A) No person shall operate any vehicle * * * within this state, if any of the following apply:

{¶29} "(1) The person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse."

{¶30} Aggravated vehicular assault proscribes causing serious physical harm to another while operating a motor vehicle either as the proximate result of driving under the influence of alcohol or recklessly. The sentencing scheme set forth under the amended version of R.C. 2903.08 presupposes a conviction under either provision.

{¶31} The common pleas court determined that under *Best*, Zima could not be convicted of aggravated vehicular assault following her plea in the municipal court to driving under the influence because driving under the influence is an essential element of aggravated vehicular assault. This, however, is not correct.

{¶32} Under the *Blockburger* and *Best* tests, each of these statutes requires proof of a fact that the other does not. In order to convict Zima of aggravated vehicular assault under R.C. 2903.08(A)(2), the state would only be required to prove that she

caused serious physical harm to the victim while recklessly operating a motor vehicle. The state does not have to prove the elements of R.C. 4511.19(A)(1), i.e. that Zima was operating a vehicle while she was under the influence of alcohol. Consequently, a conviction for driving under the influence cannot preclude that prosecution for aggravated vehicular assault.

{¶33} We recently addressed the use of double jeopardy in the context of aggravated vehicular assault and driving under the influence of alcohol in *State v. Strzala* (April 29, 2001), Cuyahoga App. No. 79182, where we held:

{¶34} "As can be seen from the statutory language for these two offenses, the facts needed for a conviction of R.C. 2903.08 require additional facts which are not required by the other offense, to-wit, R.C. 2903.08 requires recklessness or a violation of R.C. 4511.19. Thus, double jeopardy does not attach."

{¶35} Here, it was error to hold that aggravated vehicular assault requires as an element the violation of R.C. 4511.19, driving under the influence of alcohol. Aggravated vehicular assault may also be shown by proving reckless behavior. Thus, it was error to grant Zima's motion to dismiss as to the counts of aggravated vehicular assault.

{¶36} However, the court correctly dismissed the count of driving under the influence because it is barred, since Zima cannot be twice convicted of the same offense arising out of the same incident. At the hearing on the motion to dismiss in common pleas

court and at oral argument before our court, the state conceded that this charge should be dismissed.

{¶37} Accordingly, the state's second assignment of error has merit. The judgment of the common pleas court is affirmed as to its dismissal of the driving under the influence charge but is reversed as to its dismissal of the aggravated vehicular assault charges. This case is therefore remanded to common pleas court for further proceedings consistent with this opinion.

{¶38} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that each party bear its own costs herein.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE
TERRENCE O'DONNELL

COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE CONCURRING OPINION);

ANNE L. KILBANE, P.J., CONCURS IN PART AND DISSENTS IN PART (WITH SEPARATE CONCURRING AND DISSENTING OPINION).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, J., CONCURRING:

{¶39} I concur in judgment only and write separately to clarify one important issue raised in the majority opinion. The majority quotes the municipal judge's discourse regarding the pending felony DUI charge. The judge predicted that one charge faced a double jeopardy challenge. That statement is entirely consistent with our holding. Furthermore, the municipal judge ordered Zima returned from the Cleveland House of Corrections on October 11, 2001, and reduced her sentence because she faced the pending felony. Therefore, she benefitted in the misdemeanor DUI case from having a pending felony and cannot now argue that she was in any way "misled" by the municipal judge's action or that she "reasonably relied on her former negotiated plea agreement" as the common pleas court found.

ANNE L. KILBANE, P.J., CONCURRING IN PART AND DISSENTING IN PART:

{¶40} On this appeal from an order of Judge Mary J. Boyle, I concur in judgment only on assignment one, and concur in part and dissent in part on assignment two. I would affirm the dismissal of

count one of the indictment, which alleges aggravated vehicular assault under R.C. 2903.08(A)(1), and reverse the dismissal of count two only, which alleges aggravated vehicular assault under R.C. 2903.08(A)(2).

{¶41} While I agree that *State v. Carpenter*[1] does not authorize dismissal of the common pleas indictment, I do not agree that *Carpenter*'s rationale applies only to cases in which subsequent events lead to further charges. The rationale of *Carpenter* and the cases it relied upon focused on the defendant's "reasonable and justified" belief that the entry and acceptance of a guilty plea had the effect of "terminating the incident" and that no more charges would be forthcoming from it.[2] Indeed, in *State v. Lordan*,[3] a case cited in *Carpenter*, the New Hampshire Supreme Court applied *State v. Thomas*[4] where a subsequent indictment was based on facts already known and chargeable at the time of the first indictment.[5] The relevant question in this case, as in *Carpenter*, *Thomas*, and *Lordan*, should be whether Zima entered her no contest plea with a justifiable understanding that no further charges would be filed concerning the incident.

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[1]68 Ohio St.3d 59, 1993-Ohio-226, 623 N.E.2d 66.

[2]Id. at 61-62, quoting *State v. Thomas* (1972), 61 N.J. 314, 323, 294 A.2d 57.

[3](1976), 116 N.H. 479, 363 A.2d 201.

[4](1972), 61 N.J. 314.

[5]Id. at 481.

{¶42} Although I am wary of relying on the October 3, 2001, sentencing transcript to determine Zima's understanding at the time of her August 27, 2001 plea, I nevertheless agree with Judge Cooney's concurring opinion finding that she failed to show a reasonable belief that no further charges would be filed. Although the circumstances of plea agreements ordinarily suggest that a defendant's guilty plea is understood to preclude further charges, the understanding is not irrebuttably presumed. Where the prosecutor has "knowledge of and jurisdiction over" the defendant's offenses, a plea agreement ordinarily discharges all offenses arising from a single incident unless the prosecutor gives notice or "the defendant otherwise knows or ought reasonably to expect that further charges may be brought."[6]

{¶43} While a municipal prosecutor has jurisdiction to file a felony complaint against a defendant, a municipal court judge has only limited jurisdiction to hear a felony charge, which consists of holding a preliminary hearing and binding the defendant over to common pleas court, reducing the charge to a misdemeanor upon adequate evidence that the felony charge is not supported by probable cause, or discharging the defendant.[7] Moreover, once a grand jury returns an indictment a municipal court judge loses jurisdiction to hold a preliminary hearing, and has no further

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[6]Id. at 482.

[7]R.C. 1901.20(B); Crim.R. 5(B)(4); *State v. Nelson* (1977), 51 Ohio App.2d 31, 36, 5 O.O.3d 158, 365 N.E.2d 1268.

authority over the determination of the case.[8] Even though it appears that Zima was unaware of its filing at the time of her no contest plea on August 27, 2001, the common pleas indictment was filed on August 23, 2001. Despite the lack of notice the indictment divested the municipal court judge of jurisdiction over felony charges, and thus divested the municipal prosecutor of authority to make representations concerning such charges in plea negotiations.

{¶44} A defendant should be aware that a plea taken before a municipal judge with limited criminal jurisdiction might not dispose of the matter fully. Therefore, Zima cannot simply rely on an implied representation that no further charges would be brought but must articulate the circumstances showing why her belief was reasonable in this case, which she has failed to do. For these reasons I concur in the disposition of the first assignment of error.

{¶45} In the second assignment of error the majority reverses the dismissal of two of the three counts charged in the indictment. Count one of the indictment charged Zima with aggravated vehicular assault by causing serious physical harm to Gary J. Schlairet as a result of driving under the influence in violation of state or municipal law,[9] count two alleged that she committed the same aggravated vehicular assault by causing

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[8]R.C. 1901.20(B); Crim.R. 5(B)(1); *State v. Chavis* (Dec. 26, 1996), Franklin App. No. 96APA04-508.

[9]R.C. 2903.08(A)(1).

Schlairet's harm recklessly,[10] and count three alleged DUI in violation of the state statute.[11] There is no dispute that the municipal and state DUI charges constituted the same offense, and thus I agree that count three was properly dismissed. However, the majority mistakenly fails to affirm the dismissal of the first count, which alleges aggravated vehicular assault based on the DUI violation.

{¶46} The same-elements test stated in *Blockburger v. United States*[12] applies to determine whether two offenses are the same for double jeopardy purposes, regardless of whether the complaint objects to multiple punishments or successive prosecutions.[13] While the *Blockburger* test is applied using the abstract elements of statutes, statutes containing alternative elements are analyzed separately, as though each alternative had been written as a separate statute.[14] The offense of aggravated vehicular assault requires proof of serious harm caused by a driver in one of two ways; (1) by violation of a DUI statute or ordinance, or (2) recklessly. The first alternative is constitutionally barred

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[10]R.C. 2903.08(A)(2).

[11]R.C. 4511.19.

[12](1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

[13]*United States v. Dixon* (1993), 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556.

[14]*Whalen v. United States* (1980), 445 U.S. 684, 694 and n.8, 100 S.Ct. 1432, 63 L.Ed.2d 715; *Pandelli v. United States* (C.A.6, 1980), 635 F.2d 533, 537.

because Zima has already been prosecuted for the DUI violation, and that offense is necessarily included within R.C. 2903.08(A)(1) and is the same offense under the *Blockburger* test. Therefore, the State should be limited to proving aggravated vehicular assault under R.C. 2903.08(A)(2).[15]

{¶47} I recognize that the Ohio Supreme Court purported to adopt Justice Rehnquist's dissenting opinion in *Whalen* as the standard for determining whether two offenses are allied under the multiple punishment statute, R.C. 2941.25.[16] I do not believe, however, that the *Rance* court intended to disregard the majority opinion in *Whalen*, and to the extent such a result was intended it must, at least, be limited to the interpretation of whether multiple punishments are legislatively authorized under R.C. 2941.25 and not to whether successive prosecutions are authorized. While *Blockburger*'s same-elements test has been called a rule of statutory construction,[17] it is nonetheless a rule of statutory construction with constitutional implications,[18] and so should not be altered by inferior courts.

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[15]*Whalen*, 445 U.S. at 694; see, also, *Illinois v. Vitale* (1980), 447 U.S. 410, 420-421, 100 S.Ct. 2260, 65 L.Ed.2d 228.

[16]*State v. Rance*, 85 Ohio St.3d 632, 637, 1999-Ohio-291, 710 N.E.2d 699.

[17]*Whalen*, 445 U.S. at 691-92.

[18]*Brown v. Ohio* (1977), 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed.2d 187.

{¶48} Although state courts have the final authority to construe statutes,[19] this does not give state courts discretion to alter the *rules* of statutory construction set forth by the Supreme Court for use in determining whether a fundamental constitutional right has been abridged. State court discretion to adopt different rules of statutory construction extends only to determining whether the legislature clearly intended to allow multiple punishments even when the offenses are the same under *Blockburger*.[20] In the absence of clear legislative intent found elsewhere, *Blockburger* is a constitutional test because "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."[21]

{¶49} Furthermore, even if a state court could alter the *Blockburger* rule in the context of multiple punishments, no amount of otherwise-expressed legislative intent can save successive prosecutions from double jeopardy if the offenses have the same elements,[22] and thus state courts must apply that test as intended by the Supreme Court, which means *Whalen*'s majority opinion

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[19]Id. at 167-168.

[20]*Missouri v. Hunter* (1983), 459 U.S. 359, 368-369, 103 S.Ct. 673, 74 L.Ed.2d 535; *Ohio v. Johnson* (1984), 467 U.S. 493, 499 n.8, 104 S.Ct. 2536, 81 L.Ed.2d 425.

[21]*Albernaz v. United States* (1981), 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275; see, also, *Rance*, 85 Ohio St.3d at 635.

[22]*Brown*, 432 U.S. at 166.

controls. The Ohio Supreme Court might have authority to adopt Justice Rehnquist's *Whalen* dissent as the standard for defining "allied offenses of similar import" under R.C. 2941.25,[23] but *Whalen*'s interpretation of *Blockburger* cannot be disregarded when analyzing "same offense" issues that are not controlled by R.C. 2941.25.[24] Therefore, *Whalen* must be applied in successive prosecution cases, and can only be interpreted to bar a prosecution under R.C. 2903.08(A)(1) in this case.

{¶50} I would affirm the dismissal of counts one and three of the indictment, and reverse only as to count two.

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[23]I note, however, that attributing this understanding as the clear legislative intent in enacting R.C. 2941.25 is a tenuous proposition; the statute was enacted in 1974, while *Whalen* was decided in 1980.

[24]See *Rance*, 85 Ohio St.3d at 634 ("This case does not involve the successive-prosecution branch of the Double Jeopardy Clause.").