[Cite as *State v. Schidecker*, 2015-Ohio-1400.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26334
	:	
v.	:	Trial Court Case No. 2012-CR-3489
	:	
RACHEL R. SCHIDECKER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . .

O P I N I O N

Rendered on the 10th day of April, 2015.

. . . .

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WELBAUM, J.

{¶ 1} In this case, Defendant-Appellant, Rachael Schidecker, appeals from her conviction and sentence on charges of Aggravated Vehicular Homicide ("AVH"), Aggravated Vehicular Assault ("AVA"), and Operating a Vehicle Under the Influence ("OVI"). After Schidecker pled no contest to the six counts alleged in the indictment (two counts of AVH, two counts of AVA, and two counts of OVI), the trial court merged the vehicular homicide convictions, merged the vehicular assault convictions, and merged the OVI convictions. The court then sentenced Schidecker to three years for vehicular homicide and 30 months for vehicular assault, with those prison terms to be served concurrently. In addition, the court sentenced Schidecker to 30 days in jail on the OVI offense, to be served consecutively to the prison sentence. The court also imposed a lifetime driver's license suspension.

{¶ 2} In support of her appeal, Schidecker contends that the trial court erred in failing to merge the OVI conviction with the other convictions. Schidecker also contends that the trial court erred in requiring that the OVI sentence be served consecutively to the terms for the other convictions.

{¶ 3} We conclude that the trial court did not err in refusing to merge the OVI conviction. Although R.C. 2941.25 is the primary legislative statement on the prohibition of multiple punishments, other sections of the Ohio Revised Code, including R.C. 2929.41(B)(3), allow courts to impose multiple punishments without violating double jeopardy protections.

{¶ 4} We further conclude that the trial court erred in holding that it was required to impose a consecutive sentence for a misdemeanor OVI conviction pursuant to R.C.

2929.41(B)(3). Under this statute, the trial court is permitted, but is not required, to impose consecutive sentences. Accordingly, the judgment of the trial court will be affirmed in part, and reversed only as to the consecutive sentence imposed for the defendant's OVI conviction. On remand, the court is to determine whether the record supports consecutive sentences.

I. Facts and Course of Proceedings

{¶ 5} On August 11, 2012, after having consumed alcohol, Rachel Schidecker drover her Ford Explorer almost four miles the wrong way on Interstate 75. At approximately 11:55 p.m., Schidecker crashed into a car being driven by Chereece Rule, killing Rule, and setting Rule's passenger, David Wilson, on fire. Wilson was seriously injured in the crash. When Schidecker's blood was tested, her blood alcohol content was .236. Since Schidecker was under age 21 at the time, her blood alcohol level was more than 20 times over the legal limit.

{¶ 6} In March 2013, Schidecker was indicted on six counts, including: Count I – AVH, in violation of R.C. 2903.06(A)(1)(a), a felony of the second degree; Count II – AVH (recklessly), in violation of R.C. 2903.06(A)(2)(a), a felony of the third degree; Count III – AVA (proximate result/OVI), in violation of R.C. 2903.08(A)(1)(a), a felony of the third degree; Count IV – AVA (recklessly), in violation of R.C. 2903.08(A)(2)(b), a felony of the fourth degree; Count V – OVI, in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree; and Count VI – OVI (blood concentration), in violation of R.C. 4519.19(A)(1)(f), a misdemeanor of the first degree.

{¶ 7} On May 17, 2013, Schidecker filed a motion to suppress evidence. After

hearings held on September 26, 2013, and October 25, 2013, the trial court overruled the motion to suppress. The matter was then set for trial on June 6, 2014.

{¶ 8} On May 20, 2014, Schidecker appeared in court and pled no contest to all six counts. Schidecker subsequently filed a motion to merge her convictions for purposes of sentencing, as well as a sentencing memorandum. After the State responded, the trial court merged Count II with Count I, merged Count IV with Court III, and merged Counts V and VI. The State elected to have Schidecker sentenced on Counts I, III, and VI, and the trial court, as noted, sentenced Schidecker to three years in prison on Count I and 30 months on Count III, with the sentences to be served concurrently. The court then sentenced Schidecker to thirty days in jail on Count VI, to be served consecutive to the three-year prison term. Schidecker now appeals from her conviction and sentence.

II. Merger

{¶ 9} Schidecker's First Assignment of Error states that:

> The Trial Court Erred in Failing to Merge Count VI into Counts I and III.

{¶ 10} Under this assignment of Error, Schidecker contends that the trial court erred in refusing to merge Count VI (the OVI charge) with the other counts that were based on an underlying OVI offense. When the court refused to merge the convictions, the trial court stated that it had relied on the authority cited in the State's sentencing memorandum, and had found the authority persuasive. In its sentencing memorandum, the State argued that the sentences should not be merged based on R.C. 2929.41(B)(3).

{¶ 11} In pertinent part, R.C. 2929.41 states that:

> (A) Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.
>
> * * *
>
> [B](3) A jail term or sentence of imprisonment imposed for a misdemeanor violation of section 4510.11, 4510.14, 4510.16, 4510.21, or 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively.

{¶ 12} According to Schidecker, authority from our district, as well as the Sixth and Twelfth District Courts of Appeal, holds that AVH and AVA offenses based on OVI are allied offenses of similar import under R.C. 2941.25(A), because commission of the predicate OVI offense is a necessary component of the vehicular assault offense. Schidecker thus argues that the OVI conviction should have been merged.

{¶ 13} In contrast, the State argues that under R.C. 2929.41(B)(3), the legislature has specifically authorized cumulative punishments for OVI offenses. In this regard, the State relies on authority from the Fifth, Eighth, Tenth, and Eleventh District Courts of Appeal, which have adopted that view. Before addressing these issues, we note that "a reviewing court should review the trial court's R.C. 2941.25 determination de novo." *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 1.

{¶ 14} "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect criminal defendants against multiple prosecutions for the same offense." *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 14. In Ohio, R.C. 2941.25 "incorporates the constitutional protections against double jeopardy. These protections generally forbid successive prosecutions and multiple punishments for the same offense." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 7. However, where multiple punishments are concerned, "a defendant is protected only from multiple punishments that were not intended by the legislature. Legislatures are empowered to either permit or prohibit multiple punishments for the same offense." *Id.* at ¶ 8, citing *State v. Childs*, 88 Ohio St.3d 558, 561, 728 N.E.2d 379 (2000*). Accord State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 10-11. Thus, "the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense, but rather ' "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended." ' " *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 12, quoting *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999), which was overruled on other grounds in *State v.*

Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, syllabus. (Other citations omitted.)

{¶ 15} "Absent a more specific legislative statement, R.C. 2941.25 is the primary indication of the General Assembly's intent to prohibit or allow multiple punishments for two or more offenses resulting from the same conduct." *Washington* at ¶ 11, citing *Childs* at 561. In this regard, R.C. 2941.25 provides that:

> (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

{¶ 16} In *Johnson*, the Supreme Court of Ohio attempted to eliminate wide-spread confusion over how to apply the allied offenses test, stating that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at syllabus. In another very recent decision, the Supreme Court of Ohio also held that:

> In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate

factors – the conduct, the animus, and the import.

> Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

State v. Ruff, Slip Op. No. 2015-Ohio-995 (March 25, 2014), paragraphs one and two of the syllabus.

{¶ 17} In the case before us, Schidecker was found guilty of six counts, and the State elected to have Schidecker sentenced on three counts (I, III, and VI), which included violations of R.C. 2903.06(A)(1)(a) (AVH); R.C. 2903.08(A)(1)(a) (AVA); and R.C. 4511.19(A)(1)(f) (unlawful blood concentration of alcohol).

{¶ 18} In pertinent part, R.C. 2903.06 provides that:

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:
>
> (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; * * *.

{¶ 19} Similarly, R.C. 2903.08 states, in relevant part, that:

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in

any of the following ways:

(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; * * *.

{¶ 20} Finally, R.C. 4511.19 provides, in pertinent part, that:

(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:

* * *

(f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.

{¶ 21} In an opinion filed before *Johnson* was decided, we held that

Conduct that constitutes the offense of aggravated vehicular assault, R.C. 2903.08(A)(1)(a), necessarily also constitutes the offense of operation of a vehicle while under the influence of alcohol, as defined by R.C. 4511.19(A)(1)(h), because commission of that predicate offense is a necessary component of the resulting aggravated vehicular assault offense. Because the predicate offense is subsumed into the resulting offense, the two are allied offenses of similar import for purposes of R.C. 2941.25(A). *State v. Duncan*, Richland App. No.2009CA028, 2009-Ohio-5668. The merger mandated by that section is not avoided because the R.C. 2903.08(A)(1)(a) offense requires a further finding that

> serious physical harm proximately resulted from the predicate R.C. 4511.19(A) offense. Requiring an identity of all elements of both offenses would limit application of R.C. 2941.25(A) to two violations of the same section of the Revised Code, which double jeopardy bars when both are predicated on the same conduct.

State v. West, 2d Dist. Montgomery No. 23547, 2010-Ohio-1786, ¶ 43.

{¶ 22} In a case also decided prior to *Johnson*, the Twelfth District Court of Appeals agreed with *West* that these offenses are allied offenses of similar import. *See State v. Phelps,* 12th Dist. Butler No. CA2009-09-243, 2010-Ohio-3257, ¶ 28-32. In addition, the Sixth District Court of Appeals held in a case decided after *Johnson* that the trial court had erred in failing to merge the defendant's convictions for violations of R.C. 2903.06(A)(1)(a) (AVH) and R.C. 2903.08(A)(1)(a) (AVA), with his conviction under R.C. 4511.19(A)(1)(a) (OVI). *State v. Mendoza*, 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988, ¶ 10-11.

{¶ 23} Schidecker contends that we should follow our prior decision in *West*, as well as the other cases that have required merger in situations like the present. The State, however, argues that we should follow the view held by the Fifth, Eighth, Tenth, and Eleventh District Courts of Appeals. *See State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469; *State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399; *State v. Dunham*, 5th Dist. Richland No. 13CA26, 2014-Ohio-1042; and *State v. Earley*, 2014-Ohio-2643, 15 N.E.3d 357 (8th Dist.).

{¶ 24} In all these cases, which involved either AVH or AVA and some violation of R.C. 4511.19(A), the courts concluded that even if the offenses were allied offenses of

similar import, "R.C. 2929.41(B)(3) creates an exception to the general rule provided in R.C. 2941.25 that allied offenses must be merged [and] the trial court had the discretion, pursuant to R.C. 2929.419(B)(3), to enter convictions * * * and to sentence [defendant] to serve consecutive sentences for" these crimes. *Bayer* at ¶ 22*; Demirci* at ¶ 48-49; *Dunham* at ¶ 76-77; and *Earley* at ¶ 19-20.

{¶ 25} As was noted, R.C. 2929.41(B)(3) contains an exception to concurrent sentences for misdemeanors, by providing that:

> A jail term or sentence of imprisonment imposed for a misdemeanor violation of section 4510.11, 4510.14, 4510.16, 4510.21, or 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively.

{¶ 26} The appellate courts in the Fifth, Eighth, Tenth, and Eleventh Districts concluded that while R.C. 2941.25 expresses the legislature's general intent regarding merger of allied offenses, courts can also resort to "other more specific legislative statements of legislative intent * * *." *Bayer* at ¶ 19. *See, also*, *Demirci* at ¶ 46-47; *Dunham* at ¶ 76; and *Earley* at ¶18-19.

{¶ 27} In October 2014, the Supreme Court of Ohio accepted a certified conflict between the decision in *Earley* and the decisions in *West*, *Phelps*, and *Mendoza*. *See State v. Earley*, 140 Ohio St.3d 1450, 2014-Ohio-4414, 17 N.E.3d 597 (Table). The

court described the certified question as follows:

> When the offense of operating a motor vehicle while under the influence 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?

Id.

{¶ 28} Previously, in *Earley,* the Eighth District Court of Appeals made a number of observations about the decisions in the alleged conflict cases. The Eight District Court of Appeals first noted the State's comment that the legislature's intent in allowing multiple punishments in R.C. 2929.41(B)(3) "conflicts with the legislature's intent in R.C. 2941.25 against multiple punishments." *Earley*, 2014-Ohio-2643, 15 N.E.3d 357 (8th Dist.), at ¶ 16. The court of appeals then stated that:

> This conflict has also been recognized in the Second, Sixth, and Twelfth Districts; however, these district have taken an opposing view that Ohio's General Assembly cannot abrogate the double-jeopardy prohibition of multiple punishments for the same offense, and because R.C. 2929.41(B)(3) does not explicitly trump R.C. 2941.25, aggravated vehicular assault and OVI can be allied offenses that merge for sentencing. *See State v. West*, 2d Dist. Montgomery No. 23547, 2010-Ohio-1786, 2010 WL 1632316, *State v. Mendoza*, 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988, 2012 WL 6617859, *appeal not accepted*, 129 Ohio St.3d 1489, 2011-Ohio-5129, 954 N.E.2d 662; *State v. Phelps*, 12th Dist. Butler

No. CA2009-09-243, 2010-Ohio-3257, 2010 WL 2723103.

Earley at ¶ 17.

{¶ 29} These statements in *Earley* are inaccurate, however, because *West, Mendoza*, and *Phelps* did not discuss, nor did they even mention, R.C. 2929.41(B)(3). In *West*, we considered only the application of R.C. 2941.25, and we made no statements about the General Assembly's ability to abrogate or otherwise affect the prohibition against multiple punishments in R.C. 2941.25. *West*, 2d Dist. Montgomery No. 23547, 2010-Ohio-1786, at ¶ 28-44. Furthermore, while we concluded in *West* that the offenses were allied offenses of similar import, we remanded the case so that the trial court could make findings regarding the application of R.C. 2941.25(B). *Id.* at ¶ 45.

{¶ 30} Likewise, in *Phelps*, the Twelfth District Court of Appeals did not discuss either R.C. 2929.41(B)(3) or the General Assembly's ability to affect the prohibition of multiple punishments. Instead, the court of appeals simply followed our decision in *West*, and concluded that AVA and OVI are allied offenses of similar import. *Phelps*, 12th Dist. Butler No. CA2009-09-243, 2010-Ohio-3257, at ¶ 18-32.

{¶ 31} Finally, the *Mendoza* decision also does not discuss these matters. The *Mendoza* decision is very brief. Notably, the case was before the court of appeals on the state's concession of error and request that the case be remanded for resentencing. *Mendoza*, 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988, at ¶ 9. With almost no discussion of the applicable law, the court of appeals remanded the case so that the trial court could merge the OVI conviction with the AVH and AVA convictions, and resentence the defendant. *Id.* at ¶ 9-10.

{¶ 32} Our district also has not previously considered the interplay of R.C.

2929.41(B)(3) and R.C. 2941.25 in other cases.

{¶ 33} Recently, the Supreme Court of Ohio stressed that "R.C. 2941.25 * * * is not the sole legislative declaration in Ohio on the multiplicity of indictments." *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 10, citing *Childs,* 88 Ohio St.3d at 561, 728 N.E.2d 379. The court further observed that " '[w]hile our two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the legislature's intent is clear from the language of the statute.' " *Id.,* quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 37.

{¶ 34} In *Miranda*, the Supreme Court of Ohio considered whether trial courts "can impose separate sentences for engaging in a pattern of criminal activity under R.C. 2923.32(A)(1) ('RICO') and for the underlying predicate offenses." *Id.* at ¶ 1. The court acknowledged that R.C. 2941.25 is the "primary legislative statement on the multiplicity issue." *Id.* at ¶ 7. As was noted, however, the court also emphasized that multiple punishment could be imposed by other sections of the Ohio Revised Code. *Id.* at ¶ 10.

{¶ 35} According to the court, the starting point for analysis is with the statute itself. *Id.* at ¶ 11. In this regard, the Supreme Court of Ohio instructed that:

> "The primary goal in construing a statute is to ascertain and give effect to the intent of the legislature." *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, ¶ 15. "A court must look to the language and purpose of the statute in order to determine legislative intent." *State v. Cook*, 83 Ohio St.3d 404, 416, 700 N.E.2d 570 (1998). "[W]hen the General Assembly has plainly and unambiguously

conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written." *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, syllabus.

Miranda at ¶ 11.

{¶ 36} Turning to the statutes themselves, we note that R.C. 2941.25 was enacted in 1972 and was effective on January 1, 1974. It has not been amended since it was enacted. About twenty-five years later, in 1999, the language in R.C. 2929.41(B)(3) was added to existing R.C. 2929.41.[1] *See* Am.Sub.S.B. 22, 148 Ohio Laws, Part IV, 8353, 8390. At that time, the General Assembly would have been aware of the existence of R.C. 2941.25, its language regarding allied offenses, and its prohibition of multiple punishments.

{¶ 37} In addition, when R.C. 2929.41(B)(3) [previously B)(2)] was enacted, it specifically referred to the fact that jail terms imposed for misdemeanor violations of R.C. 4511.19 could be served consecutively to prison terms imposed for felony violations of R.C. 2903.06 and R.C. 2903.08. Notably, both R.C. 2903.06 and R.C. 2903.08 are the statutes being advanced in the case before us as allied offenses of similar import to the offenses listed in R.C. 4511.19. Again, the legislature would have been aware of the existence of R.C. 2941.25 and the prohibition of multiple punishments for allied offenses. Nonetheless, the legislature chose to allow for multiple punishments in R.C. 2929.41(B)(3). We also see no ambiguity in the language of R.C. 2929.41(B)(3).

{¶ 38} Finally, other than having been subsequently renumbered as subsection (B)(3), this part of R.C. 2929.41 has remained essentially the same since it was enacted.

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[1] In the original amendment in 1999, the subsection containing the language was designated as R.C. 2929.41(B)(2). It was later renumbered as R.C. 2929.41(B)(3).

Thus, despite changing ideas from the Supreme Court of Ohio about how to apply the allied offenses statute, the legislature has never amended R.C. 2929.41(B)(3) in any substantive way.

{¶ 39} In view of these facts, the only conclusion that can be drawn is that the General Assembly intended to allow for multiple punishments in R.C. 2929.41(B)(3), despite the prohibitions in R.C. 2941.25. Accordingly, even if Schidecker's AVH and AVA convictions are considered allied offenses of similar import to the OVI conviction, the trial court could have chosen to also sentence Schidecker for the OVI conviction. The court was not required to merge that conviction with the others.

{¶ 40} We also note that even if the offenses were allied offenses under R.C. 2941.25(A), the court could also have sentenced Schidecker for OVI if the court concluded that the circumstances of her violation fell within R.C. 2941.25(B). For example, in *State v. Campbell*, 2012-Ohio-4231, 978 N.E.2d 970 (1st Dist.), the court of appeals concluded that the defendant's OVI conviction under R.C. 4511.19 was not predicated on the same conduct as the AVH verdicts, because a police officer had noticed the defendant's drunk driving before the fatal collision. *Id.* at ¶ 15. In the case before us, Schidecker was observed driving the wrong way on Interstate 75 for four miles before the collision. However, the trial court made no findings in this regard, and we express no opinion on whether such a finding would have been appropriate. We also note that any findings under R.C. 2941.25(B) must now be analyzed under the standards recently established in *Ruff,* Slip Op. No. 2015-Ohio-995 (March 25, 2014), paragraphs one and two of the syllabus.

{¶ 41} Based on the preceding discussion, the trial court did not err in failing to

merge the OVI conviction with the AVH and AVA convictions. Accordingly, the First Assignment of Error is overruled.

III. Consecutive Sentence

{¶ 42} Schidecker's Second Assignment of Error states that:

> The Trial Court Erred in Requiring the Sentence for the OVI Charge (Count VI) to Run Consecutively to Counts I and III.

{¶ 43} Under this assignment of error, Schidecker contends that the trial court erred in imposing the misdemeanor OVI sentence consecutively to the two other sentences. Schidecker's argument is based on the fact that the trial court apparently concluded it had no choice under R.C. 2929.41(B)(3) other than to impose the sentence consecutively.

{¶ 44} During the sentencing hearing, the trial court stated that:

> The Court imposes a sentence of 30 consecutive days of local incarceration which, by law, must run consecutively to the sentence on Count I and Count III. I will say again that the Court believes, as a matter of law, that the sentence on Count VI, the OVI count, must run consecutively to the sentence on Count I and Count III. That's my legal determination based on the authorities I've reviewed prior to sentencing. The first six consecutive days of that sentence on Count VI are mandatory and cannot be reduced.

July 1, 2014 Sentencing Hearing Transcript, pp. 170-171.

{¶ 45} We agree with Schidecker that the trial court erred when it concluded that it was required to impose the misdemeanor OVI sentence consecutively. In this regard,

R.C. 2929.41(B)(3) states, in pertinent part, that "[a] jail term or sentence of imprisonment imposed for a misdemeanor violation of section * * * 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code * * * *when the trial court specifies that it is to be served consecutively*." (Emphasis added.)

{¶ 46} The wording of the statute clearly gives the trial court discretion to decide whether the misdemeanor term should be served consecutively. Thus, in *Bayer*, the court of appeals stressed that the trial court "had the discretion pursuant to R.C. 2929.41(B)(3)" to order consecutive sentences. *Bayer*, 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469, at ¶ 22. This is consistent with the statute, and we agree that R.C. 2929.41(B)(3) permits, but does not require the trial court to impose consecutive sentences. *See also, Dunham*, 5th Dist. Richland No. 13CA26, 2014-Ohio-1042, ¶ 22 (trial court imposed a six-month sentence for OVI to be served concurrently with the AVH and AVA sentences.), and *Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399, at ¶ 12 (trial court imposed a 180-day sentence on the OVI conviction, to be served concurrently with the AVA sentence).

{¶ 47} Likewise, the trial court in *Earley*, 2014-Ohio-2643, 15 N.E.3d 357 (8th Dist.), ordered the felony and misdemeanor OVI sentences to run concurrently. *Id.* at ¶ 5. In all these cases, the appellate courts concluded that the trial courts had acted within their discretion, and affirmed the imposition of the OVI sentence, whether it had been imposed consecutively or concurrently. *Bayer* at ¶ 22; *Dunham* at ¶ 76-78; *Demirci* at ¶ 49-50; and *Earley* at ¶ 20-21.

{¶ 48} As a final matter, we note that the State does not explicitly concede error in

its brief, but does indicate that if some confusion exists, the matter should be remanded to the trial court for clarification.

{¶ 49} Based on the preceding discussion, the Second Assignment of Error is sustained. The judgment of the trial court will be reversed, but only with respect to the consecutive sentence imposed for the OVI conviction, and this matter will be remanded to the trial court for further proceedings, including consideration of whether the record supports consecutive sentences.

IV. Conclusion

{¶ 50} Schidecker's First Assignment of Error having been overruled, and her Second Assignment of Error having been sustained, the judgment of the trial court is affirmed in part, and reversed only with respect to the consecutive sentence imposed for Schidecker's OVI conviction. On remand, the trial court is to determine whether the record supports consecutive sentences. This matter is remanded for further proceedings consistent with this opinion.

. . . .

DONOVAN, J. and HALL, J., concur.

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