[Cite as *State v. Phelps*, 2010-Ohio-3257.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-243
	:	O P I N I O N
- vs -		7/12/2010
	:	
MICHAEL D. PHELPS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-06-1116

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RINGLAND, J.

{¶1} Defendant-appellant, Michael D. Phelps, appeals his convictions for two counts of aggravated vehicular assault, two counts of vehicular assault, and one count of operating a vehicle under the influence ("OVI").

{¶2} Appellant's case arose from an automobile accident on April 25, 2008 in Hamilton. Appellant was operating a work truck at the intersection of B Street and Lagonda Avenue. As appellant attempted to turn left from B Street to Lagonda Avenue, he pulled out

in front of a vehicle operated by Nikki Goins, causing the vehicles to collide. Two passengers in Goins' vehicle, Ashley and Brooklyn Estridge, were transported to Fort Hamilton Hospital. Appellant was also transported to the hospital after complaining of chest pains.

{¶3} When questioned by officers from the Hamilton Police Department, the officers detected an odor of alcohol and observed glassy and bloodshot eyes and slurred speech, indicating that appellant might be under the influence of alcohol. A search warrant was obtained for appellant's blood that was withdrawn at the hospital. Laboratory test results indicated that appellant had 13 nanograms of marijuana metabolite per milliliter of blood, and 12 grams by weight of alcohol per 100 milliliters of plasma. Appellant admitted that he had consumed "a couple of beers," and claimed that he had been in the presence of two employees who were smoking marijuana, prior to the collision.

{¶4} Following a jury trial, appellant was found guilty of two counts of aggravated vehicular assault, two counts of vehicular assault, and one count of operating a vehicle under the influence. Appellant's counsel argued that the offenses were a single animus and allied offenses of similar import. The trial court overruled appellant's argument and sentenced appellant on all five counts to an aggregate prison term of seven years. Appellant timely appeals, raising a single assignment of error:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT CONVICTED APPELLANT OF MULTIPLE ALLIED OFFENSES OF SIMILAR IMPORT"

{¶6} In his sole assignment of error, appellant presents three arguments. Appellant first argues that aggravated vehicular assault and vehicular assault are allied offenses of similar import. Appellant next argues that all counts of the indictment arose from a single course of conduct, and as a result it was improper for him to be convicted of two separate charges of aggravated vehicular assault and/or vehicular assault. Finally, appellant argues that operating a motor vehicle under the influence and aggravated vehicular assault are allied

offenses of similar import.

Allied Offenses

{¶7} "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." R.C. 2941.25(A).

{¶8} "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(B).

{¶9} The Ohio Supreme Court has set forth a two-step analysis for determining whether offenses are of similar import under R.C. 2941.25. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14. The first step requires a reviewing court to compare the elements of the offenses in the abstract, without considering the evidence in the case. Id. at paragraph one of the syllabus. If the court finds that the elements of the offenses are so similar "that the commission of one offense will necessarily result in commission of the other," the court must proceed to the second step, which requires it to review the defendant's conduct to determine whether the crimes were committed separately or with a separate animus. Id. at ¶14. If the court finds that the offenses were committed separately or with a separate animus, the defendant may be convicted of both offenses. Id. See, also, *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291.

Aggravated Vehicular Assault/Vehicular Assault

{¶10} Appellant was convicted of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), which provides in pertinent part, "[n]o person, while operating * * * a motor

vehicle, * * * shall cause serious physical harm to another person * * * [a]s the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code * * *."

{¶11} Vehicular assault is defined, in pertinent part, as "[n]o person, while operating * * * a motor vehicle, * * * shall cause serious physical harm to another person * * * [r]ecklessly." R.C. 2903.08(A)(2)(b).

{¶12} Although some elements of aggravated vehicular assault and vehicular assault are identical, such as causing serious physical harm to a victim while operating a motor vehicle, vehicular assault requires the additional element that the defendant acted recklessly. In contrast, aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a) requires the defendant be under the influence of alcohol. As the Second Appellate District explained in *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, the offenses are not allied because an individual can be reckless without being under the influence of alcohol. Id. at ¶65.

{¶13} "As a practical matter, many different types of conduct can be reckless in connection with operation of a vehicle. Speeding is just one example. In addition, the state points out that an individual can be under the influence of alcohol without being reckless. We also agree with this statement because R.C. 4511.19(A)(1)(a) imposes strict liability and does not require a culpable mental state. See, e.g., *State v. Moine* (1991), 72 Ohio App.3d 584, 587; *State v. Cleary* (1986), 22 Ohio St.3d 198, 199; and *State v. Frazier*, Mahoning App. No. 01CA65, 2003-Ohio-1216, at ¶14." *Culver* at ¶66-67.

{¶14} The Tenth Appellate District found similarly in *State v. Griesheimer*, Franklin App. No. 05AP-1039, 2007-Ohio-837: "Both R.C. 2903.08(A)(1)(a) and R.C. 2903.08(A)(2) require proof that the defendant caused serious physical harm to another while operating a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft. R.C. 2903.08(A)(1)(a) requires proof that the serious physical harm to another person resulted from the person violating R.C. 4511.19(A), or a substantially equivalent municipal ordinance.

* * * R.C. 4511.19(A)(1)(a) imposes strict liability and does not require proof of a culpable mental state. See *State v. Harding*, Montgomery App. No. 20801, 2006-Ohio-481, at ¶61; *State v. Sabo*, Franklin App. No. 04AP-1114, 2006-Ohio-1521, at ¶18; *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, at ¶68. R.C. 2903.08(A)(2), however, requires proof of the culpable mental state of recklessness as an essential element of the crime and does not require the person to be under the influence of alcohol, a drug of abuse, or a combination of them. Thus, when the elements of the two crimes are compared in the abstract, they both require proof of an element that is not required by the other. This finding is in accord with the Second District Court of Appeals decision in *Culver*, which resolved that, when R.C. 2903.08(A)(1)(a) and R.C. 2903.08(A)(2) are compared in the abstract, the elements of aggravated vehicular assault and vehicular assault do not sufficiently correspond to constitute allied offenses of similar import." *Griesheimer* at ¶18.

{¶15} We agree with the decisions of the Second and Tenth Appellate Districts. Since the elements do not correspond, aggravated vehicular assault based upon alcohol impaired driving, in violation of R.C. 2903.08(A)(1)(a), and vehicular assault based upon recklessness, in violation of R.C. 2903.08(A)(2), are not allied offenses of similar import. Accordingly, the trial court did not err by failing to merge those convictions for purposes of sentencing.

Multiple Charges of Same Offense

{¶16} Where a defendant's conduct injures multiple victims, the defendant may be convicted and sentenced for each offense involving a separate victim. See *State v. Jones* (1985), 18 Ohio St.3d 116; *State v. Caudill* (1983), 11 Ohio App.3d 252; *State v. Lapping* (1991), 75 Ohio App.3d 354; *State v. Phillips* (1991), 75 Ohio App.3d 785, 789.

{¶17} Here, appellant caused serious physical harm to two separate victims, Brooklyn and Ashley. Accordingly, the trial court properly sentenced appellant to two counts of

aggravated vehicular assault and two counts of vehicular assault. *State v. Lawrence*, 180 Ohio App.3d 468, 2009-Ohio-33, ¶19; *State v. Angus*, Franklin App. No. 05AP-1054, 2006-Ohio-4455, ¶34.

Aggravated Vehicular Assault/OVI

{¶18} A conviction for aggravated vehicular assault pursuant to R.C. 2903.08(A)(1)(a) requires a violation of OVI pursuant to R.C. 4511.19 or an equivalent municipal ordinance. In support of its argument that the offenses are not allied, the state submits *State v. O'Neil*, Cuyahoga App. No. 82717, 2005-Ohio-4999. In *O'Neil*, the Eighth Appellate District concluded that aggravated vehicular assault and OVI are not allied offenses of similar import. Id. at ¶18. The *O'Neil* court reasoned as follows:

{¶19} "R.C. 2903.08, regarding aggravated vehicular assault, provides:

{¶20} "(A) No person, while operating * * * a motor vehicle * * * shall cause serious physical harm to another person * * *.

{¶21} "(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code * * *;

{¶22} "* * *

{¶23} "(2)(b) Recklessly.

{¶24} "R.C. 4511.19, regarding driving while under the influence of alcohol or drugs, provides that '(A)(1) No person shall operate any vehicle * * * within this state, if, at the time of the operation * * * (a) the person is under the influence of alcohol, a drug of abuse, or a combination of them.'

{¶25} "Considering the statutory elements of these offenses in the abstract, without reference to appellant's conduct in this matter, it is apparent that an individual could drive while under the influence of alcohol or drugs in violation of R.C. 4511.19 without causing

serious physical harm to another person. Likewise, one could drive recklessly, without being under the influence of drugs or alcohol, and injure someone. Accordingly, the elements of driving under the influence of alcohol do not correspond with the elements of aggravated vehicular assault to such a degree that the commission of one will result in the commission of the other and, therefore, they are not allied offenses of similar import." *O'Neil* at ¶12-18.

{¶26} In reviewing the offense of aggravated vehicular assault, the Eighth District attributes an element to the offense which is not an element. Specifically, the Eighth District in *O'Neil* found that "recklessly" was an element of aggravated vehicular assault. It is not.

{¶27} R.C. 2903.08(B)(1) provides, "[w]hoever violates division (A)(1) of this section is guilty of aggravated vehicular assault," while R.C. 2903.08(C)(1) states "[w]hoever violates division (A)(2) or (3) of this section is guilty of vehicular assault * * *." The "recklessly" element is not listed under R.C. 2903.08(A)(1), pertaining to aggravated vehicular assault. Rather, "recklessly" is the culpable mental state for vehicular assault in violation of R.C. 2903.08(A)(2). Accordingly, the Eighth District's attribution of "recklessly" as a differentiating element for the offense of aggravated vehicular assault is not supported by the statutory framework.

{¶28} Rather, we agree with the Second Appellate District's decision in *State v. West*, Montgomery App. No. 23547, 2010-Ohio-1786, ¶27-44, which correctly analyzes OVI in relation to aggravated vehicular assault. The *West* court stated:

{¶29} "Defendant was found guilty of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a) * * *. Defendant was also found guilty of operating a motor vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(h) * * *.

{¶30} "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. * * *

{¶31} "Any violation of R.C. 4511.19(A) is a predicate offense for aggravated vehicular assault under R.C. 2903.08(A)(1)(a). A violation of R.C. 4511.19(A)(1)(h) is one form or species of a R.C. 4511.19(A) OVI offense. Therefore, 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 as defined by R.C. 2941.25(A). Defendant may be convicted of only one, unless the two offenses were committed separately or with a separate animus as to each. R.C. 2941.25(B)." *West* at ¶36-44.

{¶32} Like the defendant in *West*, appellant in this case was convicted of both R.C. 2903.08(A)(1)(a) and R.C. 4511.19(A)(1)(h). As demonstrated by *West*, since appellant's conduct occurred during a single transaction, appellant cannot be convicted of both aggravated vehicular assault and OVI. Accordingly, we remand this matter to the trial court for merger of appellant's OVI conviction with his convictions for aggravated vehicular assault and resentencing.

{¶33} Appellant's assignment of error is sustained in part and overruled in part.

{¶34} Judgment affirmed in part, reversed in part, and this cause is remanded for

further proceedings consistent with this opinion.

POWELL, P.J., and HENDRICKSON, J., concur.

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