

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.	<b>14-1454</b>
	:		
Plaintiff-Appellee,	:		
	:	On Appeal from the Cuyahoga	
vs.	:	County Court of Appeals	
	:	Eighth Appellate District	
ANTONIA EARLEY,	:		
	:	C.A. Case No. 100482	
Defendant-Appellant.	:		

ON APPEAL FROM THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY APP. NO. 100482

APPELLANT ANTONIA EARLEY'S  
NOTICE OF CERTIFICATION OF CONFLICT

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COUNSEL FOR ANTONIA EARLEY

**FILED**  
 AUG 19 2014  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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STATE OF OHIO,	:	
	:	Case No.
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DEFENDANT-APPELLANT ANTONIA EARLEY'S  
NOTICE OF CERTIFICATION OF CONFLICT

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Pursuant to Article IV, Section 3(B(4) of the Ohio Constitution, Appellant Antonia Earley hereby gives notice that on August 13, 2014, the Cuyahoga County Court of Appeals, Eighth Appellate District, certified that its June 19, 2014, decision in this case is in conflict with the decisions in *State v. West*, 2d Dist. Montgomery No. 23547, 2010-Ohio-1786; *State v. Mendoza*, 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988, *appeal not accepted*, 129 Ohio St.3d 1489, 2011-Ohio-5129, 954 N.E.2d 662; and *State v. Phelps*, 12th Dist. Butler No. CA2009-09-243, 2010-Ohio-3257. More specifically the Eighth District Court of Appeals certified the following question:

**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?**

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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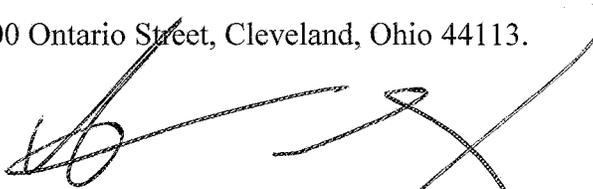
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Appellant Antonia Earley's Notice Of Certification Of Conflict* was forwarded by regular U.S. Mail, on this 19<sup>th</sup> day of August, 2014, to the Cuyahoga County Prosecutor's Office, Attorney Holly Welsh, Assistant Cuyahoga County Prosecutor, 9th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.



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KATHERINE A. SZUDY #0076729  
Assistant State Public Defender

COUNSEL FOR ANTONIA EARLEY

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Cuyahoga
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APPENDIX TO DEFENDANT-APPELLANT ANTONIA EARLEY'S  
NOTICE OF CERTIFICATION OF CONFLICT

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JUN 19 2014

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 100482

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ANTONIA EARLEY**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-571171

**BEFORE:** Keough, J., Celebrezze, P.J., and E.A. Gallagher, J.

**RELEASED AND JOURNALIZED:** June 19, 2014



**ATTORNEY FOR APPELLANT**

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FILED AND JOURNALIZED  
PER APP.R. 22(C)

JUN 19 2014

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By [Signature] Deputy

ALL PARTIES - COSTS TAKEN

KATHLEEN ANN KEOUGH, J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. The purpose of an accelerated appeal is to allow the appellate court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983); App.R. 11.1(E).

{¶2} Defendant-appellant, Antonia Earley, appeals her sentence. For the reasons that follow, we affirm.

{¶3} In January 2013, Earley was charged in a six-count indictment — two counts of aggravated vehicular assault and operating a vehicle while under the influence (“OVI”), and one count each of endangering children and using weapons while intoxicated. Each count sought forfeiture of property or weapon. The charges stemmed from Earley driving her car while intoxicated at a high rate of speed with her one-year-old son riding in the front passenger seat. Earley crashed the car into a pole and her child sustained serious permanent injuries as a result.

{¶4} In June 2013, Earley pleaded guilty to an amended count of aggravated vehicular assault with forfeiture specifications, an amended count of endangering children with forfeiture specifications, and one count of OVI.

{¶5} Earley was sentenced to thirty-six months for aggravated vehicular assault, thirty-six months for endangering children, and six months for OVI.

The sentences were ordered to run concurrently, for a total sentence of three years in prison.

{¶6} Earley now appeals, raising three assignments of error.

#### I. Allied Offenses

{¶7} In her first assignment of error, Earley contends that the trial court erred by failing to merge allied offenses of similar import for purposes of sentencing. Specifically, she contends that aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a) and OVI in violation of R.C. 4511.19(A)(1)(a) are allied offenses and should merge for sentencing.

{¶8} Although Earley did not raise the issue of allied offenses at the time of sentencing, this court has held that the issue of allied offenses may constitute plain error, which this court can address on appeal. *State v. Rogers*, 2013-Ohio-3235, 994 N.E.2d 499 (8th Dist.).

{¶9} The question as to whether crimes are allied offenses arises from the Double Jeopardy Clause of the Fifth Amendment, which protects individuals from multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). The Ohio legislature has codified this protection in R.C. 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the court held that a defendant's conduct must be considered when determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25. *Johnson* at ¶ 44. Thus,

a defendant can be convicted and sentenced on more than one offense if the evidence shows that the defendant's conduct satisfies the elements of two or more disparate offenses. But if the conduct satisfies elements of offenses of similar import, then a defendant can be convicted and sentenced on only one, unless they were committed with separate intent.

*State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 36

(Lanzinger, J., concurring in part and dissenting in part).

{¶10} In other words,

[i]f the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

*Johnson* at ¶ 49-50, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting).

{¶11} In this case, Earley pleaded guilty to aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), which provides

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 \* \* \* [a]s 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[.]

{¶12} Earley also pleaded guilty to OVI, in violation of R.C. 4511.19(A)(1)(a), which provides that "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation,

\* \* \* [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them.”

{¶13} In support of her argument that aggravated vehicular assault and OVI are allied and should merge for sentencing, Earley cites to this court’s decision in *State v. Kelley*, 8th Dist. Cuyahoga No. 98928, 2013-Ohio-1899. In *Kelley*, the defendant assigned as error that the trial court erred in failing to merge the offenses of aggravated vehicular assault and OVI because the two offenses were allied. The state conceded the error, therefore, no independent analysis was conducted by this court as to whether the offenses were actually allied and merged for sentencing; rather, this court reversed the sentence and remanded the case for resentencing.

{¶14} In this case, however, the state does not concede that the offenses of aggravated vehicular assault and OVI are allied offenses. Instead, the state directs this court to consider the holdings of the Fifth, Tenth, and Eleventh Districts for the proposition that *even assuming arguendo* that OVI and aggravated vehicular assault are allied offenses, 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 so that a defendant may be convicted on either the offenses, but not both. *See State v. Kraft*, 5th Dist. Delaware No. 13 CAA 03 0013, 2013-Ohio-4658, *appeal not accepted*, 138 Ohio St.3d 1451, 2014-Ohio-1182, 5 N.E.3d 668; *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469, *appeal not*

*accepted*, 136 Ohio St.3d 1453, 2013-Ohio-3210, 991 N.E.2d 258, *State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399 (Grendell, J., dissenting). The exception being that a trial court possesses the discretion to sentence a defendant for both of these crimes pursuant to R.C. 2929.41(B)(3).

{¶15} Specifically, R.C. 2929.41(B)(3) provides,

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 \* \* \* 2903.08 \* \* \* 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.

{¶16} The state maintains that this section evidences the legislature's intent that a trial court may, in its discretion, sentence a defendant for both OVI and aggravated vehicular assault. The state concedes this intent conflicts with the legislature's intent in R.C. 2941.25 against multiple punishments.

{¶17} 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, *State v. Mendoza*, 6th Dist. Wood No.

WD-10-008, 2012-Ohio-5988, *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.

{¶18} The Double Jeopardy Clause prohibits cumulative punishments for the same offense. *State v. Moss*, 69 Ohio St.2d 515, 518, 433 N.E.2d 181 (1982). However, a legislature may proscribe the imposition of cumulative punishments for crimes that constitute the same offense without violating federal or state protections against double jeopardy. *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *State v. Bickerstaff*, 10 Ohio St.3d 62, 65, 461 N.E.2d 892 (1984). Thus, “the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); *Moss* at paragraph one of the syllabus. “When a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, \* \* \* the legislature’s expressed intent is dispositive.” *State v. Rance*, 85 Ohio St.3d 632, 635, 1999-Ohio-291, 710 N.E.2d 699, citing *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984).

{¶19} R.C. 2929.41 was amended through 1999 Am.Sub.S.B. 22, effective May 17, 2000, to amend subsection (B)(3) to allow consecutive sentences for certain misdemeanors and felony offenses. When Am.Sub.S.B. 22 was enacted,

the Ohio Legislative Service Commission expressly stated that one of its primary purposes of the bill was to impose stricter penalties for OVI offenses. While the bill also amended the overall penalties for OVI under R.C. 4511.19, it also allowed for certain misdemeanor offenses to run consecutively to certain felony offenses, including OVI and aggravated vehicular assault. The General Assembly in amending R.C. 2929.41(B)(3), specifically intended to permit cumulative punishments were a defendant is found guilty of both aggravated vehicular assault and OVI; thus, the protection against double jeopardy is not violated in these instances.

{¶20} Accordingly, we follow the rationale of the Fifth, Tenth, and Eleventh Districts that, even assuming aggravated vehicular assault and OVI are allied offenses, R.C. 2929.41(B)(3) creates an exception that allows a trial court to impose a sentence for both offenses.

{¶21} In this case, the trial court entered convictions on both aggravated vehicular assault and OVI and ordered them to be served concurrently, which is authorized by the discretion afforded to the court under R.C. 2929.41(B)(3). We find no plain error; Earley's first assignment of error is overruled.

## II. Overstatement of Postrelease Control

{¶22} In her second assignment of error, Earley contends that the trial court erred when it imposed a mandatory period of postrelease control of three years.

{¶23} During the plea hearing, the trial court advised Earley that she would be subject to a period of postrelease control “up to three years.” However, at sentencing, the trial court advised Earley that she would be subject to “three years” of postrelease control. The sentencing journal entry correctly stated “postrelease control is part of this prison sentence for up to 3 years for the above felony(s) under R.C. 2967.28.”

{¶24} We addressed this issue in a factually similar case in *State v. Cromwell*, 8th Dist. Cuyahoga No. 91452, 2010-Ohio-768, wherein we concluded that when a trial court overstates the penalty for violating postrelease control at the sentencing hearing, but remedies such overstatement in the journal entry, the error is harmless, and, unless the defendant can demonstrate prejudice, the sentence will not be rendered void. *Id.* at ¶ 8-11, citing *State v. Spears*, 9th Dist. Medina No. 07CA0036-M, 2008-Ohio-4045.

{¶25} Because the overstatement of postrelease control was made during sentencing and both the plea colloquy and sentencing journal entry accurately reflect both the discretionary nature and length of term of postrelease control, we find no prejudice to Earley. The error in the trial court’s pronouncement during sentencing was harmless. *See* Crim.R. 52(A); *see also Spears*.

{¶26} Accordingly, because Earley cannot demonstrate prejudice, we find no error and overrule her second assignment of error.

### III. Sentence — Contrary to Law

{¶27} In her third assignment of error, Earley contends that her sentence is contrary to law. Specifically, Earley contends that the record is devoid of any indication that the trial court considered the relevant factors under R.C. 2929.11 and 2929.12.

{¶28} As for the argument that the court disregarded the applicable statutory factors, the sentencing entry states that “the court considered all required factors of the law” and “that prison is consistent with the purpose of R.C. 2929.11.” These statements, without more, are sufficient to fulfill the court’s obligations under the sentencing statutes. *State v. Saunders*, 8th Dist. Cuyahoga No. 98379, 2013-Ohio-490, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18; *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61.

{¶29} We also find Earley’s sentence was not contrary to law under R.C. 2953.08(A)(4) because her sentence does not fall outside the statutory limits for the particular degree of offenses. Earley pleaded guilty to aggravated vehicular assault, endangering children, and OVI. She faced a mandatory prison term of at least nine months, with a maximum penalty of six and one-half years. Earley was sentenced to a three-year sentence, which is well within the statutory range. Accordingly, her sentence is not contrary to law.

{¶30} Earley’s third assignment of error is overruled.

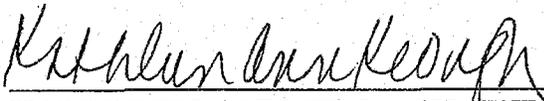
{¶31} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

  
KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and  
EILEEN A. GALLAGHER, J., CONCUR

The State of Ohio, }  
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 06-19-2014 CA-100482

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 06-19-2014

CA-100482 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 19th day of June A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By [Signature] Deputy Clerk



FILED

COURT OF APPEALS

2010 APR 23 AM 7:30

GREGORY A. CRUSH  
CLERK OF COURTS  
MONTGOMERY COUNTY OF APPEALS OF MONTGOMERY COUNTY, OHIO  
36

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 23547

vs. : T.C. CASE NO. 08CR4851

MADISON E. WEST : (Criminal Appeal from  
Common Pleas Court)

Defendant-Appellant :

O P I N I O N

Rendered on the 23rd day of April, 2010.

Mathias H. Heck, Jr., Pros. Attorney; R. Lynn Nothstine, Asst.  
Pros. Attorney, Atty. Reg. No. 0061560, P.O. Box 972, Dayton, OH  
45422

Attorneys for Plaintiff-Appellee

Jon Paul Rion, Atty. Reg. No. 0067020, P.O. Box 10126, 130 W.  
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Attorney for Defendant-Appellant

GRADY, J.:

Defendant, Madison E. West, appeals from her convictions and sentence for aggravated vehicular assault and operating a motor vehicle while under the influence of alcohol.

At 1:30 a.m. on December 14, 2008, Oakwood police responded to the 100 block of Oakwood Avenue on a report of a vehicular collision. Three vehicles, each with moderate to heavy damage, were involved in the collision. A green Honda station wagon driven by Defendant sustained heavy front end damage. Defendant

was sitting on the ground outside her vehicle. Another driver, who sustained serious injuries, was still inside another vehicle. It appeared that Defendant had caused the collision.

Police suspected that Defendant was intoxicated. She was talking loudly, with rambling and slurred speech, and had a strong odor of alcohol about her person. Defendant could not stand and maintain her balance. Out of concern for her safety, police decided to not perform field sobriety tests.

Defendant was placed under arrest and put in the backseat of a police cruiser. After being advised of her Miranda rights, Defendant made incriminating statements to police. Defendant was given a breathalyzer test at the Kettering police department which resulted in a reading of .214, nearly three times the legal limit.

Defendant was indicted on one count of aggravated vehicular assault, R.C. 2903.08(A)(1), and one count of operating a motor vehicle with a prohibited concentration of breath alcohol. R.C. 4511.19(A)(1)(h), (G)(1)(a). Defendant filed a motion to suppress evidence, including her statements to the police. Following a hearing, the trial court overruled Defendant's motion to suppress. Defendant also filed a motion to dismiss the indictment, which the trial court never ruled upon. Defendant subsequently entered pleas of no contest to both charges and was found guilty. The trial court sentenced Defendant to a mandatory prison term of one year and suspended her driver's license for four years.

Defendant timely appealed to this court from her conviction and sentence.

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY FAILING TO SUPPRESS STATEMENTS MADE BY APPELLANT WHEN SHE WAS UNABLE TO PROPERLY WAIVE HER MIRANDA RIGHTS."

Defendant argues that the trial court erred in failing to suppress her statements to police because she was unable to knowingly and voluntarily waive her Miranda rights due to her level of intoxication.

The warnings identified in *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, do not apply whenever police question a person. *State v. Biros*, 78 Ohio St.3d 426, 1997-Ohio-204. Rather, Miranda warnings apply only when a person is subjected to custodial interrogation. *Miranda* at 478-479; *Oregon v. Mathiason* (1977), 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714. Miranda defines custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.*, at 444.

In order to determine if a person is in custody for purposes of *Miranda*, the court must determine whether there was a formal arrest or a restraint of freedom of movement of the degree associated with a formal arrest. *California v. Beheler* (1983), 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275. Roadside questioning of a motorist by police following a traffic accident

is typically not considered custodial interrogation. *State v. Stafford*, 158 Ohio App.3d 509, 2004-Ohio-3893. Interrogation includes express questioning as well as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297.

In *State v. Monticue*, Miami App. No. 06CA33, 2007-Ohio-4615, at ¶10, this court observed:

"In order for a waiver of the rights required by *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, to be valid, the State bears the burden of demonstrating a knowing, intelligent, voluntary waiver based upon the totality of the facts and circumstances surrounding the interrogation. What is essential is that the defendant have a full awareness of the nature of the constitutional rights being abandoned and the consequences of his decision to abandon them, and that the waiver not be the product of official coercion. An express written or oral waiver, while strong proof of the validity of that waiver, is neither necessary nor sufficient to establish waiver. The question is not one of form, but whether defendant in fact knowingly and voluntarily waived his rights.' *State v. Dotson*, Clark App. No. 97-CA-0071 (citations omitted)."

Prior to being arrested for OVI, Defendant told Officer Wilson that she had caused the collision. Defendant made these statements while she was sitting on the ground outside her

damaged vehicle, after Officer Wilson initially approached and questioned her. Although Defendant's statement was made in response to Officer Wilson's questions, and thus was the product of interrogation, Miranda warnings were not required because Defendant was not in custody at that time.

Defendant was in custody for purposes of *Miranda* when she was placed under arrest for OVI, handcuffed, and placed in the rear of Officer Wilson's cruiser. Before asking any questions, Officer Wilson advised Defendant of her Miranda rights by reading them to her from a pre-interview form. Defendant did not sign a waiver of rights form because she was handcuffed. However, the record demonstrates that Defendant indicated to Officer Wilson that she understood her rights and was willing to waive them and speak to police.

The record does not reflect that Defendant suffered any injury during the accident that impaired her ability to reason and understand her rights or the consequences of waiving them. Officer Wilson did not observe any injuries on Defendant, and she did not exhibit any symptoms of a concussion. Medic crews evaluated Defendant and found no significant injuries. Defendant denied that she was injured and refused medical treatment.

Defendant argues that she was so intoxicated that she could not make a knowing and intelligent waiver of her Miranda rights. In support of that claim, Defendant points out that she exhibited signs of intoxication, her physical coordination was impaired, and her breathalyzer test produced a result nearly three times

the legal limit. Furthermore, Officer Wilson testified that someone that intoxicated probably has impaired decision making skills.

Defendant clearly exhibited behavior consistent with a person who is intoxicated. Her breathalyzer test result shows that she was highly intoxicated. Nevertheless, this record supports the conclusion that Defendant's ability to reason was not so impaired that she was unable to understand her Miranda rights or the consequences of waiving them.

In her conversation with Officer Wilson, Defendant was very talkative, open, and engaging, and did not refuse to answer any question. Defendant just kept talking, wanting to get out her side of the story. Defendant was not incoherent, disoriented, or losing consciousness or falling asleep inside the cruiser. Furthermore, the evidence does not demonstrate that Defendant did not understand her circumstances or what was going on, or that she did not respond appropriately to questions Officer Wilson asked. Most importantly, Defendant indicated to Officer Wilson that she understood the rights he read to her and that she was willing to waive them and talk to him. On these facts, there is sufficient evidence to support a determination that Defendant's ability to reason was not so impaired by alcohol that she could not knowingly, intelligently and voluntarily waive her Miranda rights. *State v. Ecton*, Montgomery App. No. 21388, 2006-Ohio-6069; *State v. Stewart* (1991), 75 Ohio App.3d 141; *State v. Lewis* (July 21, 1998), Franklin App. No. 97APA09-1263; *State v.*

Stanberry, Lake App. No. 2002-L-028, 2003-Ohio-5700.

After taking a breathalyzer test at the Kettering Police Department, Defendant was transported back to the Oakwood police station. While completing the portion of his report involving paperwork for the "DUI packet," Officer Wilson again advised Defendant of her Miranda rights. This time, Defendant refused to waive her rights or answer any further questions. Officer Wilson therefore did not question Defendant further, and continued preparing his report. As he did so, Defendant made spontaneous, volunteered statements to the effect that she should not have been driving. These statements need not be suppressed because they are not the product of any interrogation by police. *State v. Johnson*, Montgomery App.No. 20624, 2005-Ohio-1367. The trial court did not err in overruling Defendant's motion to suppress.

Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY NOT DISMISSING APPELLANT'S CASE AS SHE WAS CHARGED AND CONVICTED UNDER A FAULTY INDICTMENT WHICH FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF THE OFFENSE OF AGGRAVATED VEHICULAR ASSAULT."

Relying upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), Defendant argues that the trial court erred in failing to grant her motion to dismiss the aggravated vehicular assault charge because the indictment was fatally defective, to the extent that it failed to include an essential element of that offense, the culpable mental state of recklessness.

Defendant was convicted of a violation of R.C. 2903.08(A)(1)(a), which provides:

"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:

"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."

We have held that R.C. 2903.08(A)(1)(a) is a strict liability offense that does not require any culpable mental state for a finding of criminal liability. Therefore, if the State proves that an accused was operating a motor vehicle while under the influence of alcohol when he caused serious physical harm to another, it is irrelevant whether the accused was driving recklessly when he caused the accident and/or that he was reckless in becoming intoxicated. *State v. Harding*, Montgomery App.No. 20801, 2006-Ohio-481. The trial court did not err in failing to dismiss the aggravated vehicular assault charge because of a faulty indictment.

Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

"APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE SHE WAS CONVICTED OF ALLIED OFFENSES OF SIMILAR IMPORT."

Defendant argues that she cannot be convicted and sentenced for both 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), because those offenses are allied offenses of similar import pursuant to R.C. 2941.25.

The State argues that this court is precluded from reviewing this assignment of error because Defendant failed to provide a transcript of the sentencing hearing. We disagree. The termination entry in this case that was filed on July 24, 2009, demonstrates that Defendant was convicted and sentenced for both aggravated vehicular assault and operating a motor vehicle under the influence of alcohol. Defendant's allied offenses argument presents an issue of law, and the grounds upon which she bases that argument are contained in the termination entry. Thus, the record before us is sufficient to permit review of the error Defendant assigns.

In Ohio, the vehicle for determining application of the Double Jeopardy Clause to the issue of multiple punishments is R.C. 2941.25. That section states:

"(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."

"A two-step analysis is required to determine whether two crimes are allied offenses of similar import. E.g. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; *Rance*, 85 Ohio St.3d at 636, 710 N.E.2d 699. Recently, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, we stated: 'In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, 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.' *Id.* at paragraph one of the syllabus. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus. *Id.* at ¶ 31." *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, at ¶16.

Defendant was found guilty of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), which states:

"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:

"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."

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), which states:

"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:

"The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath."

The elements of R.C. 2903.18(A)(1)(a) and 4511.19(A)(1)(h) do not exactly align when those two offenses are compared in the abstract, but they are allied offenses of similar import per R.C. 2941.25(A) nevertheless. That section requires merger of offenses when "the same conduct by defendant can be construed to constitute two" or more offenses. For purposes of a defendant's criminal liability for an offense, conduct "includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing." R.C. 2901.21(A).

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.

The State argues that because the OVI statute, R.C. 4511.19(A)(1) and (2), contains multiple subsections that define multiple ways of committing an OVI offense, it is possible to commit aggravated vehicular assault by committing an OVI offense which is different from the specific OMVI offense with which Defendant was charged, and therefore the two offenses are not allied offenses of similar import. We are not persuaded by this argument. 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).

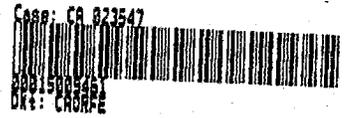
While R.C. 2941.25(A) requires consideration of the elements of two offenses in the abstract, which presents an issue of law, R.C. 2941.25(B) presents a mixed issue of fact and law. Defendant was convicted on her pleas of no contest. While the record of the suppression hearing exemplifies the acts or omissions her two offenses involve, we believe that the parties are entitled to argue the application of R.C. 2941.25(B) specifically, in relation to those facts, and that any finding concerning the application of R.C. 2941.25(B) to those facts should be made by the trial court. Defendant's sentences will be reversed and the case will be remanded to the trial court to make findings with respect to the application of R.C. 2941.25(B) and to resentence Defendant if merger is required. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2. Defendant's third assignment of error is sustained.

The judgment from which the appeal is taken will be affirmed, in part, and reversed, in part, and the cause is remanded for further proceedings consistent with this opinion.

DONOVAN, P.J., and FAIN, J., concur.

Copies mailed to:

R. Lynn Nothstine, Esq.  
Jon Paul Rion, Esq.  
Hon. Mary Katherine Huffman



FILED  
COURT OF APPEALS

2010 APR 23 AM 7:30

GREGORY A. BRUSH  
IN THE COURTS OF APPEALS OF MONTGOMERY COUNTY, OHIO  
MONTGOMERY CO. OHIO

STATE OF OHIO<sup>36</sup> :

Plaintiff-Appellee : C.A. CASE NO. 23547

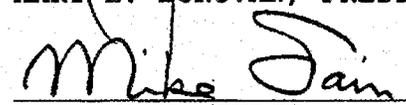
vs. : T.C. CASE NO. 08CR4851

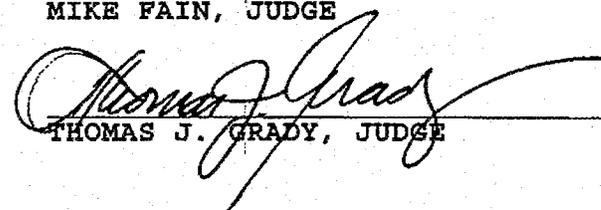
MADISON E. WEST : FINAL ENTRY

Defendant-Appellant :

Pursuant to the opinion of this court rendered on the  
23rd day of April, 2010, the judgment of the trial  
 court is Affirmed, in part, Reversed, in part and the matter is  
 Remanded to the trial court for further proceedings consistent  
 with the opinion. Costs are to be paid as follows: 50% by  
 Appellant and 50% by Appellee.

  
 MARY E. DONOVAN, PRESIDING JUDGE

  
 MIKE FAIN, JUDGE

  
 THOMAS J. GRADY, JUDGE

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Hon. Michael T. Hall

FILED  
WOOD COUNTY, OHIO  
2011 APR 22 A 9 18

SIXTH APPELLATE DISTRICT  
WOOD COUNTY, OHIO

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

State of Ohio

Court of Appeals No. WD-10-008

Appellee

Trial Court No. 2008CR0529

v.

Cory Mendoza aka Waltz

DECISION AND JUDGMENT

Appellant

Decided: APR 22 2011

\*\*\*\*\*

Paul A. Dobson, Wood County Prosecuting Attorney,  
Gwen Howe-Gebers and Jacqueline M. Kirian, Assistant  
Prosecuting Attorneys, for appellee.

Mollie B. Hojnicky, for appellant.

\*\*\*\*\*

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that found appellant guilty, after trial to a jury, of two counts of aggravated vehicular homicide, two counts of aggravated vehicular assault, one count of operation of

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I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT  
COPY OF THE ORIGINAL DOCUMENT FILED AT WOOD CO.  
COMMON PLEAS COURT, BOWLING GREEN, OHIO  
BY CINDY A. HOFNER, CLERK OF COURTS  
DEPUTY CLERK  
THIS 22nd DAY OF April, 2011

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a motor vehicle while under the influence, one count of endangering children, one count of failure to comply with the order or signal of a police officer and one count of failure to stop after an accident. Appellant was sentenced to an aggregate term of 39 years imprisonment. For the reasons that follow, the judgment of the trial court is affirmed in part and reversed in part.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "First Assignment of Error: The trial court erred in denying appellant's motion to suppress the results of the blood test where the state made no showing of substantial compliance.

{¶ 4} "Second Assignment of Error: The trial court's imposition of the maximum and consecutive sentences was contrary to law and constituted an abuse of discretion.

{¶ 5} "Third Assignment of Error: The trial court's order requiring the warden of the institution where the appellant is housed to place the appellant in solitary confinement every October 5th is contrary to law.

{¶ 6} "Fourth Assignment of Error: The evidence at appellant's trial was insufficient to support a conviction and appellant's conviction is against the manifest weight of the evidence."

{¶ 7} The undisputed facts relevant to the issues raised on appeal are as follows. While on duty on the afternoon of October 5, 2008, Sergeant Gregory Konrad of the Wood County Sheriff's Office noticed a white Bonneville approaching him at a high rate of speed on Sand Ridge Road in Wood County. The car moved into Konrad's lane and

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the officer was forced to drive off the road to avoid a collision. Konrad turned around and followed the car with his lights and siren activated, at one point traveling at approximately 90 m.p.h. as he attempted to keep up. Konrad briefly lost sight of the car at a curve in the road and, as he rounded the curve, saw a minivan lodged against a tree on the side of the road. Farther down the road, Konrad saw the white car, which had rolled onto its roof and caught fire. Sharon and William DeWitt, two of the minivan's passengers, died in the crash. The DeWitts' daughter, Shelen Steven, was seriously injured. Steven's three-year-old son was also in the minivan but was not seriously injured. Appellant, who had fled the scene, was located walking along the road about a mile from the crash site.

{¶ 8} On October 15, 2008, appellant was indicted as follows: Counts 1 and 2, aggravated vehicular homicide with specifications, in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(b)(i); Counts 3 and 4, aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a) and (B)(1)(a); Count 5, driving while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a); Count 6, endangering children, with a specification, in violation of R.C. 2919.22(C)(1) and (E)(5)(b); Count 7, failure to comply with an order or signal of police officer, with a specification, in violation of R.C. 2921.331(B) and (C)(5)(a)(i), and Count 8, failure to stop after an accident in violation of R.C. 4549.02(A) and (B).

{¶ 9} Appellant entered pleas of not guilty to all counts.

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{¶ 10} On December 29, 2008, appellant filed a motion to suppress statements and a motion to suppress blood test results. The state filed a motion in limine to allow the blood test results to be introduced as evidence and a motion in opposition to the motions to suppress. After hearings on the motions, the trial court granted the motion to suppress statements appellant made while sitting in the police cruiser immediately after the crash, ruled admissible appellant's statements made while in the hospital on October 7, 2008, denied appellant's motion to suppress the blood test results, and granted the state's motion in limine.

{¶ 11} Following a three-day trial, the jury found appellant guilty as to all counts. The trial court proceeded directly to sentencing and imposed the following prison terms, to be served consecutively: a mandatory ten years as to Count 1, a mandatory ten years as to Count 2, eight years as to Count 3, four years as to Count 4, four years as to Count 7, and three years as to Count 8. As to Count 5, the trial court ordered appellant incarcerated in the Wood County Justice Center for ten days, and for six months on Count 6, with those sentences to be served concurrently with the prison terms. Finally, the trial court ordered that appellant be placed in solitary confinement every year on October 5, the anniversary of the crash.

{¶ 12} In his first assignment of error, appellant asserts that the trial court erred in denying his motion to suppress the results of his blood alcohol test.

{¶ 13} Initially, we note that "[a]ppellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372,

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¶ 8. In ruling on a motion to suppress, "the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.*, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*, *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, we must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *State v. Luckett*, 4th Dist. Nos. 09CA3108 and 09CA3109, 2010-Ohio-1444, ¶ 8, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 14} Appellant relies on *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, in which the Ohio Supreme Court held that upon a defendant's motion to suppress the results of a blood alcohol test, the state must "show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm.Code Chapter 3701-53 before the test results are admissible." *Mayl* at ¶ 48.

{¶ 15} The results of the test in this case indicated that appellant's blood alcohol level was .114 percent. Appellant argues that the state failed to test his blood sample in substantial compliance with the Ohio Department of Health regulations pursuant to Ohio Adm.Code 3701-53-01, et seq., which provides that "[w]hen collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohol shall be used as a skin antiseptic." The nurse who performed the blood draw testified at the suppression hearing that she first disinfected appellant's arm with an alcohol swab.

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Therefore, appellant asserts, the state failed to establish that it substantially complied with the requirements of R.C. 4511.19(D)(1) and Ohio Adm.Code Chapter 3701-53, rendering the results of the blood test inadmissible at trial.

{¶ 16} Two years after the *Mayl* decision, however, the Ohio General Assembly passed Am.Sub.H.B. No. 461, effective April 4, 2007, which enacted R.C. 4511.19(D)(1)(a). The version of R.C. 4511.19(D)(1)(a) in effect on October 5, 2008, states:

{¶ 17} "In any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(a) of this section *or for an equivalent offense that is vehicle-related*, the result of any test of any blood or urine *withdrawn and analyzed at any health care provider, as defined in section 2317.02 of the Revised Code*, may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant." (Emphasis added.)

{¶ 18} The Twelfth District Court of Appeals discussed the application of R.C. 4511.19(D)(1)(a) in *State v. Davenport*, 12th Dist. No. CA2008-04-011, 2009-Ohio-557, and concluded that, based on the plain language of R.C. 4511.19(D)(1)(a), "the results of 'any test of any blood' may be admitted with expert testimony and considered with any other relevant and competent evidence in order to determine the guilt or innocence of the defendant for purposes of establishing a violation of division R.C. 4511.19(A)(1)(a), or 'an equivalent offense,' including aggravated vehicular homicide in violation of R.C.

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2903.06(A)(1)(a), so long as the blood was withdrawn and analyzed at a 'health care provider' as defined by R.C. 2317.12" (Emphasis sic.)

{¶ 19} Immediately after the collision, appellant was transported to the hospital, where he underwent a non-forensic, or medical, blood alcohol test. We find that R.C. 4511.19(D)(1)(a), in effect on October 5, 2008, applies to this case and authorizes the admission of appellant's blood test results. We note first that appellant stipulated that the hospital where his blood was drawn is a "health care provider" as required by the statute. Further, appellant was charged with violations of R.C. 4511.19(A)(1)(a), 2903.06(A)(1)(a) and 2903.08(A)(1)(a); according to R.C. 4511.181(A)(4), violations of those three offenses are "equivalent offenses" as set forth in R.C. 4511.19(D)(1)(a). It also is not disputed that the prosecution in this case is "vehicle related."

{¶ 20} For the reasons set forth above, we agree with the trial court's application of R.C. 4511.19(D)(1)(a) as well as the holding in *Davenport* and find that the trial court did not err in denying appellant's motion to suppress the results of his blood alcohol test. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 21} In his second assignment of error, appellant asserts that the trial court abused its discretion when it imposed maximum and consecutive sentences for his convictions on two counts of aggravated vehicular homicide and two counts of aggravated vehicular assault. Appellant also argues that the trial court erred by failing to reference either R.C. 2929.11 or 2929.12 during the sentencing hearing, which, appellant

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asserts, indicates that the trial court did not consider any of the relevant factors set forth in those statutory sections.

{¶ 22} The Supreme Court of Ohio has established a two-step procedure for reviewing a felony sentence. *State v. Kalish* (2008), 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *Id.* at ¶ 15. The second step requires the trial court's decision to be reviewed under an abuse of discretion standard. *Id.* at ¶ 19. An abuse of discretion is "more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 23} Appellant's sentences all fell within the statutory range and thus meet the criteria of the first step. The ten-year maximum sentences for the two convictions of aggravated vehicular homicide with specifications were mandatory pursuant to R.C. 2903.06(B)(2)(b)(i). As to the convictions for aggravated vehicular assault with specifications, both sentences were within the statutory range. While the eight-year sentence for Count 3 was the maximum allowed by statute for a second-degree felony, the four-year sentence for Count 4, also a second-degree felony, was less than the maximum.

{¶ 24} This court has repeatedly held that *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, is the controlling law regarding this issue. *Foster* held several of Ohio's

sentencing statutes unconstitutional in violation of the Sixth Amendment to the United States Constitution. Since that ruling, trial courts have no longer been required to make specific findings of fact or give their reasons for imposing maximum, consecutive or greater than minimum sentences. *State v. Donald*, 6th Dist. No. S-09-027, 2010-Ohio-2790, ¶ 8. Thus, *Foster* vests trial courts with full discretion to impose a prison sentence which falls within the statutory range. *Id.*

{¶ 25} We note that where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes. *Kalish* at fn. 4 (citing *State v. Adams* (1988), 37 Ohio St.3d 295, paragraph three of the syllabus). Nevertheless, the record in this case clearly reflects that, although the court did not specifically cite R.C. 2929.11 and 2929.12, it acknowledged that it was required to consider the principals and purposes of criminal sentencing prior to imposing appellant's sentences. The record is clear that appellant's sentences were based upon the trial court's proper consideration of the relevant statutes and factors. We cannot find that the trial court abused its discretion when imposing the sentences or when ordering that they be served consecutively. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 26} In his third assignment of error, appellant asserts that the trial court erred by ordering him to be placed in solitary confinement on October 5 of each year. The state in this case concedes that Ohio courts have held that solitary confinement is not an acceptable penalty for a trial court to impose. We agree. The punishments set forth in

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the Ohio Revised Code for appellant's convictions do not provide for any period of solitary confinement. There is no statutory provision for this type of punishment and it is contrary to law. See, e.g., *State v. Williams*, 8th Dist. No. 88737, 2007-Ohio-5073. Appellant's third assignment of error is well-taken and, accordingly, the offending portion of appellant's sentence must be vacated.

{¶ 27} In his fourth assignment of error, appellant asserts that the evidence at trial was insufficient to support a conviction and that his conviction was against the manifest weight of the evidence.

{¶ 28} A manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, supra, at 386, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 29} In contrast, "sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *Thompkins*, supra, at 386. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must examine "the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the

defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins*, supra, at 386-387.

{¶ 30} Appellant's sole argument in support of his challenges to the sufficiency of the evidence and the weight of the evidence is that the state failed to establish that he was driving the car at the time of the crash. Appellant argues that the undisputed fact that his father also fled the scene, and smelled of alcohol according to witnesses, strongly suggests that his father was the driver of the car, not appellant. Additionally, appellant challenges the credibility of the three witnesses who were passengers in the car at the time of the crash, all of whom testified that appellant was the driver. Appellant states that the witnesses all admitted to drinking prior to the crash and asserts that alcohol clouded their memories.

{¶ 31} Trinity Jay testified that on the afternoon of the crash appellant picked her up along with Jay's friends Roger Lambert and Alivia Baron. Appellant was driving; his young son and his father were also in the car. The group spent the next several hours driving around the area with appellant at the wheel. At one point, appellant and his father argued because appellant was driving extremely fast and swerving on the road. At the time of the crash, Jay testified, appellant was driving. Although everyone else had been

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drinking alcoholic beverages, Jay testified that she had not. Roger Lambert testified that appellant was driving at the time of the crash. Lambert confirmed Jay's testimony that shortly before the crash, appellant and his father argued about who should drive since everyone was drinking. Alivia Baron testified that she and her friends had been drinking as they drove around town and that appellant and his father argued because appellant was "too drunk to drive." Additionally, Tamara Cook, a cashier at a gas station in Weston, Ohio, testified that appellant and several others had come into the store to purchase gas and other items in the early evening. She identified appellant as the one driving the car when it left the station.

{¶ 32} Based on the foregoing, we find that appellant's convictions were not against the manifest weight of the evidence. The jury clearly reached the rational conclusion, based on the testimony summarized above, that appellant was driving the car at the time of the crash. Further, we find that the state presented sufficient evidence that appellant was driving the car to support the convictions. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 33} Because we find that the trial court erred in ordering solitary confinement as part of its sentence, we affirm in part and reverse in part. It is ordered that a special mandate issue out of this court directing the Wood County Court of Common Pleas to carry this judgment into execution by modifying its judgment entry to delete that portion ordering solitary confinement. The judgment of the Wood County Court of Common

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Pleas is otherwise affirmed. This matter is remanded to the trial court for correction of sentence. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

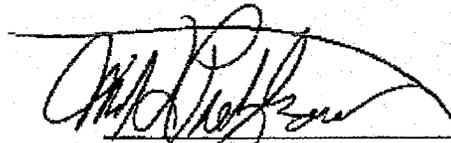
JUDGMENT AFFIRMED IN PART  
AND REVERSED IN PART.

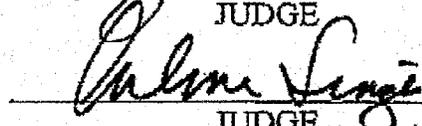
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

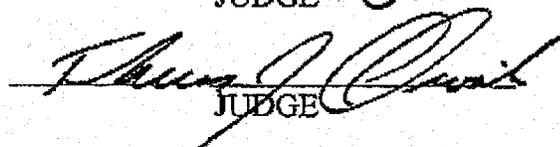
Mark L. Pietrykowski, J.

Arlene Singer, J.

Thomas J. Osowik, P.J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

**JOURNALIZED  
COURT OF APPEALS**

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FILED  
2010 JUL 12 PM 3:31  
CINDY CARPENTER  
BUTLER COUNTY  
CLERK OF COURTS

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

MICHAEL D. PHELPS,

Defendant-Appellant.

FILED BUTLER CO.  
COURT OF APPEALS

JUL 12 2010

CINDY CARPENTER  
CLERK OF COURTS

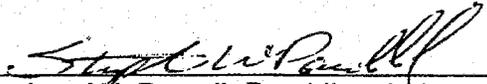
CASE NO. CA2009-09-243

JUDGMENT ENTRY

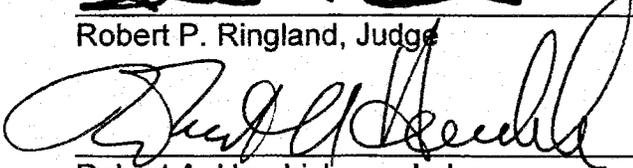
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed in part, reversed in part, and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed 50% to appellee and 50% to appellant.

  
Stephen W. Powell, Presiding Judge

  
Robert P. Ringland, Judge

  
Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

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

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

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamdawi, Government Services Center, 315 High Street, 11<sup>th</sup> Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Brian K. Harrison, P.O. Box 80, Monroe, Ohio 45050, for defendant-appellant

**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.

{¶13} 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.

{¶14} 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:

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

{¶16} 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.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>