

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES iii

INTRODUCTION.....1

STATEMENT OF THE CASE AND FACTS2

ARGUMENT.....2

CERTIFIED 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 the trial court to impose a sentence for both?.....2

PROPOSITION OF LAW: When the offense of operating a vehicle while under the influence, R.C. 4511.19(A)(1)(a), is the predicate conduct for aggravated vehicular assault, R.C. 2903.08(A)(1)(a), Ohio’s merger statute, R.C. 2941.25, must be considered before a court may determine whether concurrent or consecutive sentences will be imposed under 2929.41(B)(3). Fifth and Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution; R.C. 2941.25.....3

CONCLUSION10

CERTIFICATE OF SERVICE11

APPENDIX:

State of Ohio v. Antonia Earley, Case No. 14-1278, Ohio Supreme Court, Notice of Appeal (July 25, 2014)..... A-1

State of Ohio v. Antonia Earley, Case No. 14-1454, Ohio Supreme Court, Appellant Antonia Earley’s Notice of Certification of Conflict (August 19, 2014) A-4

State of Ohio v. Antonia Earley, Case No. 100482, Cuyahoga County Court of Appeals, Journal Entry and Opinion (June 23, 2014)..... A-59

State of Ohio v. Antonia Earley, Case No. CR-13-571171-A, Cuyahoga County Common Pleas Court, Journal Entry (September 19, 2013)..... A-71

TABLE OF CONTENTS

Page No.

APPENDIX: (cont'd)

Fifth Amendment, United States Constitution.....	A-73
Fourteenth Amendment, United States Constitution	A-74
Section 10, Article I, Ohio Constitution	A-75
R.C. 1.49	A-76
R.C. 2901.04	A-77
R.C. 2903.08	A-78
R.C. 2929.41	A-82
R.C. 2941.25	A-84
R.C. 4511.19	A-85
Crim.R. 52.....	A-102

TABLE OF AUTHORITIES

	<u>Page No.</u>
CASES:	
<i>Albernaz v. United States</i> , 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)	5,7
<i>Consumers Product Safety Com'n v. GTE Sylvania, Inc.</i> , 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).....	5
<i>Missouri v. Hunter</i> , 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).....	5,7
<i>Ohio v. Johnson</i> , 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984).....	5
<i>State v. Arnold</i> , 61 Ohio St.3d 175, 573 N.E.2d 1079 (1991)	8
<i>State v. Bayer</i> , 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469.....	8
<i>State v. Brown</i> , 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149	4
<i>State v. Demirci</i> , 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399	8
<i>State v. Earley</i> , 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643.....	2,8
<i>State v. Green</i> , 11th Dist. Lake No. 2011-L-037, 2012-Ohio-2355	8
<i>State v. Johnson</i> , 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061	3,4,9
<i>State v. Kraft</i> , 5th Dist. Delaware No. 12 CAA 03 0013, 2013-Ohio-4658	8
<i>State v. Mendoza</i> , 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988.....	8
<i>State v. Moss</i> , 69 Ohio St.2d 515, 433 N.E.2d 181 (1982).....	5,7
<i>State v. Phelps</i> , 12th Dist. Butler No. CA2009-09-243, 2010-Ohio-3257	8
<i>State v. Rance</i> , 85 Ohio St.3d. 632, 710 N.E.2d 699 (1999)	5
<i>State v. Roberts</i> , 134 Ohio St.3d 459, 2012-Ohio-5684, 983 N.E.2d 334.....	5
<i>State v. Straley</i> , 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175	8
<i>State v. Underwood</i> , 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923.....	4,10
<i>State v. West</i> , 2d Dist. Montgomery No. 23547, 2010-Ohio-1786.....	8
<i>State v. Whitfield</i> , 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182.....	4

TABLE OF AUTHORITIES

Page No.

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, United States Constitution.....3
Fourteenth Amendment, United States Constitution3
Section 10, Article I, Ohio Constitution3

STATUTES:

R.C. 1.495
R.C. 2901.047
R.C. 2903.082,3,8
R.C. 2929.41 *passim*
R.C. 2941.251,3,6,7
R.C. 4511.192,3,9

RULES:

Crim.R. 52.....10

OTHER:

Am.Sub.S.B. No. 22.....6
Ohio Legislative Service Commission, Final Bill Analysis to Am.Sub.S.B. 22
(Dec. 8, 1999), available at <http://www.lsc.state.oh.us/analyses/99-sb22.pdf>.....6,7

INTRODUCTION

This case is about the relationship between two statutes: R.C. 2941.25, Ohio's merger statute, and R.C. 2929.41, a sentencing statute.

R.C. 2941.25, the merger statute, is the legislature's codification of the judicial doctrine of merger. It determines whether conduct can be double punished when it results in multiple offenses. Offenses determined to be allied and subject to merger may not be double punished unless the legislature has clearly indicated its intent to do so. And if offenses are merged, only one sentence remains to be imposed. Aggravated vehicular assault and its predicate, misdemeanor drunk-driving offense are allied under this Court's interpretation of the merger statute.

R.C. 2929.41(B)(3), the sentencing statute, is relevant *only* if it has been determined that two sentences can be imposed. It speaks to whether such sentences may be ordered to run consecutively. But, it is silent on the question of whether two sentences *can* be imposed when allied offenses were committed through the same conduct with a single animus. Simply, the merger statute must be considered before the sentencing statute can take effect.

Yet, courts of appeals have relied on this unrelated sentencing statute to circumvent the constitutional, statutory, and longstanding common law protection against double punishment by holding that it serves as an "exception" to the merger statute. This conclusion fails at three stages.

First, the plain language of R.C. 2929.41(B)(3) indicates that it is not an attempt to alter, amend, or act as an exception to the merger statute. Second, if this Court were to find the language of R.C. 2929.41(B)(3) not so plain, the legislative history makes clear that it is to be considered after R.C. 2941.25 is applied. And lastly, even if the legislative history still leaves

ambiguity, the rule of lenity provides that the statute be liberally construed in the defendant's favor. For these reasons, this Court should rule that the specific sentencing statute at issue here does not create an exception to the merger statute and remand this case to the trial court for resentencing.

STATEMENT OF THE CASE AND FACTS

Antonia Earley pleaded guilty to aggravated vehicular assault, endangering children, and operating a vehicle while under the influence (OVI). (Sept. 19, 2013, Sentencing Entry). Each of these charges stemmed from a single-car accident that occurred on or about January 3, 2013, in which Ms. Earley's son was severely injured. (Sept. 19, 2013, Sentencing Hearing Transcript, 18, 20). Ms. Earley was sentenced to 36 months for aggravated vehicular assault, 36 months for endangering children, and 6 months for OVI. (Sept. 19, 2013, Sentencing Entry). The sentences were ordered to run concurrently, resulting in a total sentence of 36 months in prison. *Id.* Ms. Earley appealed, challenging her double punishment for aggravated vehicular assault and OVI. *State v. Earley*, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643, ¶ 7-21. The court below affirmed the double punishment. *Id.* at ¶ 21. That court certified a conflict, which this Court accepted. This Court also accepted Ms. Earley's discretionary appeal. This Court consolidated the cases sua sponte.

ARGUMENT

CERTIFIED 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 the trial court to impose a sentence for both?

PROPOSITION OF LAW

When the offense of operating a vehicle while under the influence, R.C. 4511.19(A)(1)(a), is the predicate conduct for aggravated vehicular assault, R.C. 2903.08(A)(1)(a), Ohio's merger statute, R.C. 2941.25, must be considered before a court may determine whether concurrent or consecutive sentences will be imposed under 2929.41(B)(3). Fifth and Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution; R.C. 2941.25.

When allied offenses are committed with a single animus, merger must occur and only one sentence may be imposed. That merger renders R.C. 2929.41(B)(3) inapplicable and irrelevant. In this case, Ms. Earley's OVI and aggravated-vehicular-assault offenses were subject to merger. Double punishment was thus prohibited.

I. Because R.C. 2941.25 protects against double punishment by merging allied offenses into one offense prior to the imposition of a sentence, R.C. 2929.41(B)(3), as written, does not call for double punishment.

The protection against double punishment and "shotgun convictions" is well-established. *See State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 14-17, 43, 46. Both the United States and Ohio Constitutions guard against multiple punishments for the same offense. Fifth and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Section 10. The General Assembly codified this protection in 1974 through R.C. 2941.25. It provides:

(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.

In *Johnson*, this Court clarified the meaning of the merger statute by announcing a two-tier framework for analysis of potential allied offenses: (1) Is it possible to commit one offense and commit the other with the same conduct, and (2) were the offenses committed by the same conduct? *Johnson* at ¶ 48-49. Under the second question, conduct is interpreted as “a single act, committed with a single state of mind.” *Id.* at ¶ 49; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). If both questions can be answered in the affirmative, then the offenses must be merged. *See State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d, ¶ 26 (holding that the duty to merge allied offenses is mandatory, not discretionary).

The merger statute’s mandate that “a defendant may be ‘convicted’ of only one allied offense is a protection against multiple sentences rather than multiple convictions.” *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 18. A defendant’s choice to plead guilty to allied offenses does not waive this protection. *See Underwood* at ¶ 31-33.

To ensure a defendant does not receive improper cumulative punishments for allied offenses, “a court must determine *prior* to sentencing whether the offenses were committed by the same conduct.” (Emphasis added.) *Johnson* at ¶ 47. Accordingly, the allied-offenses analysis must be performed *before* a court determines whether to run sentences consecutively or concurrently. Because allied offenses will necessarily merge before sentencing, the sentencing statute at issue here, R.C. 2929.41(B)(3), is irrelevant because it does not explicitly call for double punishment for allied offenses.

II. The plain language and legislative history of R.C. 2929.41(B)(3) demonstrate that it does not supersede the merger statute when the offenses are subject to merger.

The Double Jeopardy Clause “does no more than prevent the sentencing court from prescribing greater punishments than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); *State v. Moss*, 69 Ohio St.2d 515, 517, 433 N.E.2d 181 (1982), paragraph one of the syllabus. “[W]hen 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, 710 N.Ed.2d 699 (1999), citing *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984).

The starting point in resolving a question of legislative intent is the language of the text itself. *Albernaz v. United States*, 450 U.S. 333, 336, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *State v. Roberts*, 134 Ohio St.3d 459, 2012-Ohio-5684, 983 N.E.2d 334, ¶ 12, 21; *see also* R.C. 1.49. “Absent a ‘clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.’” *Albernaz*, 450 U.S. at 336, quoting *Consumers Product Safety Com’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980); *see also Roberts* at ¶ 12, 21. Neither the plain language nor the legislative history of R.C. 2929.41(B)(3) provide a clear intent to negate the merger statute.

A. The plain language

R.C. 2929.41(B)(3) provides:

A jail term or sentence of imprisonment imposed for a misdemeanor violation of section 4510.11, 4510.14, 4510.16, 4510.21, or 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the

offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively.

The plain language of this statute does no more than permit a trial court, in certain circumstances, to order a misdemeanor sentence to run consecutively to a felony sentence. This provision is an exception to division (A) of the same statute, which states: "*Except as provided in division (B)(3) of this section*, a jail term or sentence of imprisonment for misdemeanor shall be served *concurrently* with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution." (Emphasis added.) R.C. 2929.41(A). A court thus has the discretion to order a sentence for OVI (a misdemeanor) to be served consecutively to a sentence for aggravated vehicular assault (a felony). But importantly, a sentencing court may only order consecutive sentences if there are *multiple* sentences to be imposed. Here, those offenses were allied under R.C. 2941.25, and the legislature did not clearly indicate in R.C. 2929.41 that double punishment was intended. The trial court did not have the discretion to ignore its duty to merge the allied offenses.

B. The legislative history

The exact language in the synopsis for 2000 Am.Sub.S.B. No. 22 indicates that the statute was not designed to apply to every OVI offender:

An act to amend * * * 2929.41 * * * *in certain circumstances* to eliminate for state OMVI and for driving under suspension or revocation offenses the prohibition against imposing a term of imprisonment imposed for a misdemeanor consecutively to a prison term imposed for a felony * * *

(Emphasis added.) The Legislative Service Commission analysis also explains that this act created an exception to the general rule against consecutive punishments for misdemeanors and felonies. *See* Ohio Legislative Service Commission, Final Bill Analysis to Am.Sub.S.B. 22, at 3 (Dec. 8, 1999), available at <http://www.lsc.state.oh.us/analyses/99-sb22.pdf> (accessed November

25, 2014). But it did not create an exception to the merger statute: “The act, *in specified circumstances*, eliminates for the misdemeanor state OMVI and misdemeanor driving under suspension or revocation offenses *the existing prohibition against imposing a term of imprisonment imposed for a misdemeanor consecutively to a prison term imposed for a felony.*” (Emphasis added.) *Id.*

Certainly, in some circumstances, this amendment will result in increased punishment. The legislature is authorized to pursue such ends. But, the legislature has also clearly prohibited, through the merger statute, multiple sentences for allied offenses of similar import. Because courts are capable of adhering to both statutes when issuing sentences, there is no reason to read into the sentencing statute a conflict that is not there. And there is certainly no reason to construe this professed conflict as a subtle directive to courts to abdicate their responsibility to merge allied offenses before sentencing. This interpretation is not warranted by either the plain language of the text or the legislative history.

III. Even if the two statutes create an ambiguity, the rule of lenity requires an interpretation against double punishment.

The requirement that a legislature *clearly* evince its intent to double punish certain crimes is further strengthened by the fact that Ohio codified the rule of lenity, which demands that criminal penalties “shall be strictly construed against the state, and liberally construed in favor of the accused.” R.C. 2901.04(A). Because the sentencing statute at issue does not address whether the named misdemeanor and felony offenses were committed through the same conduct with a single animus, it does not constitute a *clear* intent for double punishment when the offenses were committed through the same conduct. *See Hunter*, 459 U.S. at 368-369; *Albernaz*, 450 U.S. at 340, 344. This Court has alluded to that fact when analyzing R.C. 2941.25 and R.C. 2929.41(B)(1). *See State v. Moss*, 69 Ohio St.2d 515, 518-520, 433 N.E.2d 181 (1982). And

lower courts, in this context and others, have held the same. See *State v. Green*, 11th Dist. Lake No. 2011-L-037, 2012-Ohio-2355, ¶ 67; *State v. West*, 2d Dist. Montgomery No. 23547, 2010-Ohio-1786, ¶ 43-44; *State v. Mendoza*, 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988, ¶ 10; *State v. Phelps*, 12th Dist. Butler No. CA2009-09-243, 2010-Ohio-3257, ¶ 32; see also *State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399, ¶ 59-60 (Grendell, J., concurring in part and dissenting in part).

When statutes are ambiguous or in conflict with each other, the rule of lenity applies. *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 10; *State v. Arnold*, 61 Ohio St.3d 175, 179, 573 N.E.2d 1079 (1991). Though the plain language of R.C. 2929.41(B)(3) demonstrates that it is not in conflict with the merger statute, the State has argued that it is. Courts of appeals have held the same. See, e.g., *State v. Earley*, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643, ¶ 14-19; *State v. Kraft*, 5th Dist. Delaware No. 12 CAA 03 0013, 2013-Ohio-4658, ¶ 34; *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469, ¶ 21; *Demirci* at ¶ 48. But, at most, this professed conflict only supports a decision in favor of the defendant. Under Ohio's rule of lenity, if the sentencing statute is ambiguous or in conflict with another statute, it must be liberally construed in favor of the accused. In this case, that means an interpretation that does no more than maintain the standard procedure for courts to follow in cases involving allied offenses: determine whether the offenses merge and then impose a sentence that is authorized by law.

IV. In this case, the offenses are allied offenses of similar import and double punishment is prohibited.

The two offenses at issue here are aggravated vehicular assault and OVI. Aggravated vehicular assault under R.C. 2903.08(A)(1)(a) provides:

No person, while operating or participating in the operation of 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 or of a substantially equivalent municipal ordinance[.]

The OVI offense is defined in R.C. 4511.19(A)(1)(a), which states 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.”

Under *Johnson*, the trial court must determine if it is possible to commit one or more offenses with the same conduct, and if so, whether the offenses were committed by the same conduct. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48-49. The answer to the first question is “yes.” A person necessarily will have operated a motor vehicle while intoxicated if the person is being charged under section (A)(1)(a) of the aggravated-vehicular-assault statute. To the second question, the answer is also “yes.” In this case, it was “a single act”—driving while intoxicated—that resulted in both charged offenses. With both questions answered in the affirmative, the offenses must be merged.

Both OVI and aggravated vehicular assault are strict liability offenses, requiring the same kind of evidence regarding state of mind. The applicable criminal wrong is driving drunk. The applicable potential harm is danger, or actual physical harm, to all on and around the road. *See Johnson* at ¶ 48-49; *see also id.* at ¶ 67 (O’Connor, J., concurring in judgment) (discussing relevance of similar criminal wrongs and resulting harm). These commonalities further support the conclusion that these are allied offenses of similar import, and are thus appropriate for merger.

The trial court's failure to merge the aggravated-vehicular-assault and OVI offenses was plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31; Crim.R. 52(B). This case should be remanded to the trial court for resentencing.

CONCLUSION

The protection against multiple punishments for the same offense is deeply rooted in the common law, reflected in our constitutional protections, and codified in Ohio's merger statute. It requires much more to eliminate such a longstanding and firmly-ingrained protection than a subordinate and unambiguous sentencing statute.

Respectfully submitted,

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A copy of the foregoing **Merit Brief of Appellant Antonia Earley** was sent by regular U.S. mail to Tracy Regas and Brett Hammond, Assistant Cuyahoga County Prosecutors, The Justice Center, Courts Tower, 1200 Ontario Street – 9th Floor, Cleveland, Ohio 44113, on this 26th day of November 2014.



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IN T

OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ANTONIA EARLEY,

Defendant-Appellant.

Case No. 14-1278

PROCESSED On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

JUL 31 2014

CUYAHOGA COUNTY CLERK OF COURTS
IMAGING DEPARTMENT C.A. Case No. 100482

NOTICE OF APPEAL OF APPELLANT ANTONIA EARLEY

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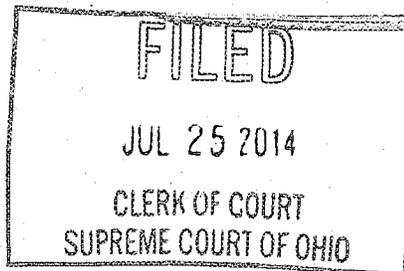
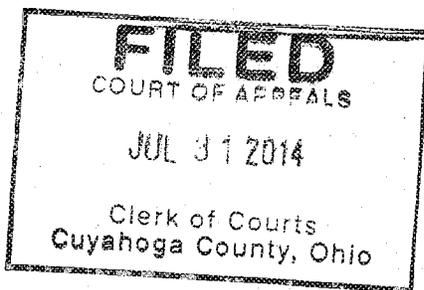
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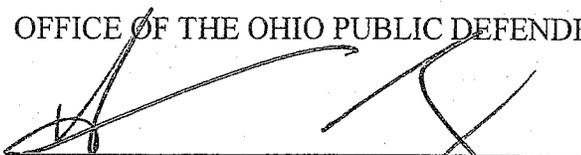
NOTICE OF APPEAL OF APPELLANT ANTONIA EARLEY

Appellant Antonia Earley hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Earley*, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643, and journalized on June 19, 2014.

This case raises a substantial constitutional question and is of public or great general interest.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



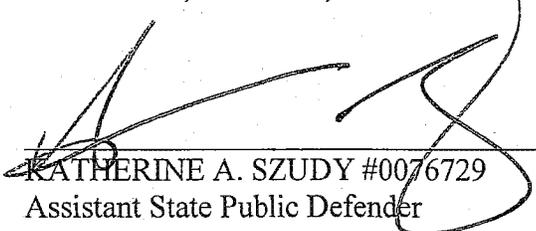
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **NOTICE OF APPEAL OF APPELLANT ANTONIA EARLEY** was forwarded by regular U.S. Mail, on this 25th day of July, 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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Case: 100482

IN

477861

OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ANTONIA EARLEY,

Defendant-Appellant.

Case No. 14-1154

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

C.A. Case No. 100482

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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Clerk of Courts
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SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

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

DEFENDANT-APPELLANT ANTONIA EARLEY'S
NOTICE OF CERTIFICATION OF CONFLICT

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



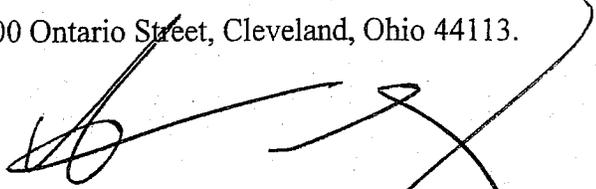
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COUNSEL FOR ANTONIA EARLEY

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 19th 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.



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
vs.	:	County Court of Appeals
	:	Eighth Appellate District
ANTONIA EARLEY,	:	
	:	C.A. Case No. 100482
Defendant-Appellant.	:	

APPENDIX TO DEFENDANT-APPELLANT ANTONIA EARLEY'S
NOTICE OF CERTIFICATION OF CONFLICT

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
100482

LOWER COURT NO.
CR-13-571171

COMMON PLEAS COURT

-vs-

ANTONIA EARLEY

Appellant

MOTION NO. 476223

Date 08/13/14

Journal Entry

Motion by Appellant to Certify a Conflict is granted. This court's decision in State v. Earley, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643, is in conflict with the following decisions:

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.

This court hereby certifies the following Issue to the Ohio Supreme Court pursuant to App.R. 25(A) and Article IV, Section 3(B)(4) of the Ohio Constitution:

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 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?

RECEIVED FOR FILING

AUG 13 2014

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

Presiding Judge FRANK D. CELEBREZZE, JR.,
Concurs _____

Judge EILEEN A. GALLAGHER, Concurs _____

[Signature]
KATHLEEN ANN KEOUGH
Judge

CA13100482

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AND RECORDED

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100482

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ANTONIA EARLEY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

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

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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 legislatures'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, Early 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.

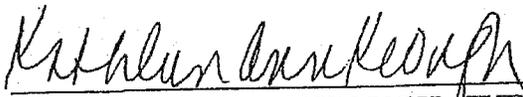
{¶31} Judgment affirmed.

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

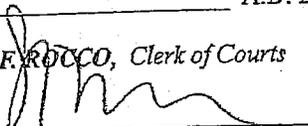
CA-100482 and that the same is correct transcript thereof.

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  Deputy Clerk



FILED

COURT OF APPEALS

2010 APR 23 AM 7:30

GREGORY A. BRUSH
CLERK OF COURTS
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.
Second Street, Suite 2150, Dayton, OH 45402

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

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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



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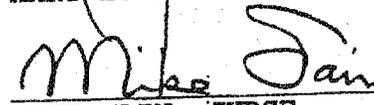
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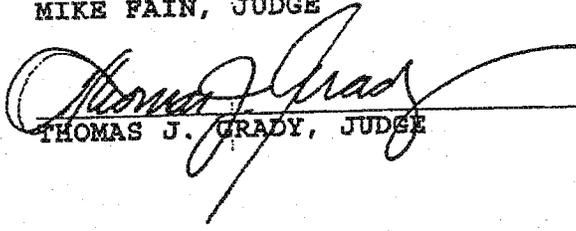
GREYDON A. BRUSH
IN THE COURTS OF APPEALS OF MONTGOMERY COUNTY, OHIO
MONTGOMERY CO. OHIO

STATE OF OHIO³⁶ :
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

1.

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

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 752

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

2.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 753

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.

3.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 754

{¶ 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,

4.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 755

¶ 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. Grysinger* (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.

5.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 756

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.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 757

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

7.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 758

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

8.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 759

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

9.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 760

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

10.

**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

Vol. 34 Pg. 761

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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**JOURNALIZED
COURT OF APPEALS**

APR 22 2011

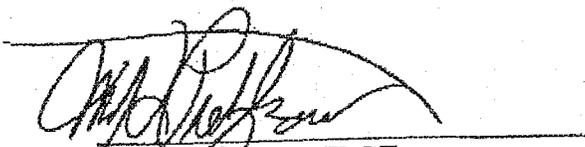
Vol. 34 Pg. 763

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.

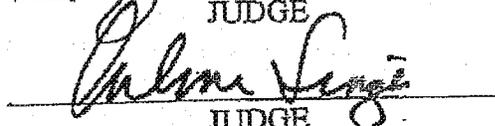
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.



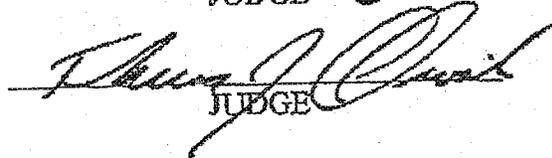
JUDGE

Arlene Singer, J.



JUDGE

Thomas J. Osowik, P.J.
CONCUR.



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**

APR 22 2011

Vol. 34 Pg. 764

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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.

CASE NO. CA2009-09-243

FILED BUTLER CO.
COURT OF APPEALS

JUDGMENT ENTRY

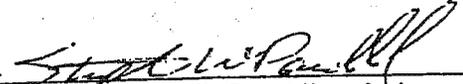
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CINDY CARPENTER
CLERK OF COURTS

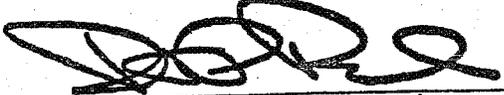
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed in part, reversed in part, and this cause is remanded for further proceedings according to law and consistent with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

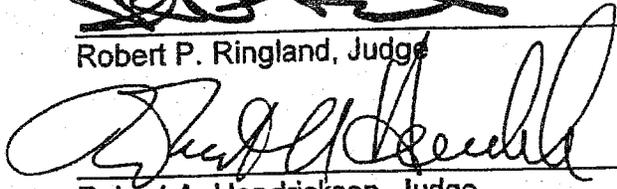
Costs to be taxed 50% to appellee and 50% to appellant.



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,

- vs -

MICHAEL D. PHELPS,

Defendant-Appellant.

CASE NO. CA2009-09-243

OPINION

7/12/2010

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, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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

RINGLAND, J.

{11} 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").

{12} 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>

JUN 19 2014

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100482

PROCESSED

JUN 23 2014

CUYAHOGA COUNTY CLERK
OF COURTS
IMAGING DEPARTMENT

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTONIA EARLEY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

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

RECEIVED
JUN 23 2014

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.

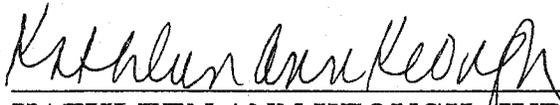
{¶31} Judgment affirmed.

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



81158423

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

ANTONIA EARLEY
Defendant

Case No: CR-13-571171-A

Judge: BRIAN J CORRIGAN

INDICT: 2903.08 AGGRAVATED VEHICULAR ASSAULT /FORS
2903.08 AGGRAVATED VEHICULAR ASSAULT /FORS
2919.22 ENDANGERING CHILDREN /FORS
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT. COUNSEL RUSSELL W TYE PRESENT.
COURT REPORTER LISA HROVAT PRESENT.

ON A FORMER DAY OF COURT THE DEFENDANT PLEAD GUILTY TO AGGRAVATED VEHICULAR ASSAULT 2903.08 A(1)(A) F3 WITH FORFEITURE SPECIFICATION(S) (2941.1417) AS AMENDED IN COUNT(S) 1 OF THE INDICTMENT. TO CHANGE THE NAME IN THE INDICTMENT OF JOHN DOE TO AYDEN MEANS

ON A FORMER DAY OF COURT THE DEFENDANT PLEAD GUILTY TO ENDANGERING CHILDREN 2919.22 A F3 WITH FORFEITURE SPECIFICATION(S) (2941.1417) AS AMENDED IN COUNT(S) 3 OF THE INDICTMENT. TO CHANGE THE NAME IN THE INDICTMENT OF JOHN DOE TO AYDEN MEANS

ON A FORMER DAY OF COURT THE DEFENDANT PLEAD GUILTY TO DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS 4511.19 A(1)(A) M1 WITH FORFEITURE SPECIFICATION(S) (2941.1417) AS CHARGED IN COUNT(S) 4 OF THE INDICTMENT.

COUNT(S) 2, 5, 6 WAS/WERE NOLLED.

DEFENDANT TO FORFEIT TO THE STATE: FIREARM, SERIAL NUMBER TCT50198 AND A 2012 TOYOTA CAMRY. DEFENDANT ADDRESSES THE COURT, PROSECUTOR ADDRESSES THE COURT.

THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.

THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.

THE COURT IMPOSES A PRISON SENTENCE AT THE OHIO REFORMATORY FOR WOMEN OF 3 YEAR(S).

DEFENDANT IS SENTENCED TO 3 YEARS ON COUNT ONE AND 36 MONTHS ON COUNT THREE AND 6 MONTHS ON COUNT FOUR TO RUN CONCURRENTLY TO EACH OTHER FOR A TOTAL CONFINEMENT OF 3 YEARS.

POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR UP TO 3 YEARS FOR THE ABOVE FELONY(S) UNDER R.C.2967.28. DEFENDANT ADVISED THAT IF/WHEN POST RELEASE CONTROL SUPERVISION IS IMPOSED FOLLOWING HIS/HER RELEASE FROM PRISON AND IF HE/SHE VIOLATES THAT SUPERVISION OR CONDITION OF POST RELEASE CONTROL UNDER RC 2967.131(B), PAROLE BOARD MAY IMPOSE A PRISON TERM AS PART OF THE SENTENCE OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE OFFENDER.

DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 5 DAY(S), TO DATE.

DRIVER'S LICENSE SUSPENSION UNTIL 09/19/2023.

COURT IMPOSES A CLASS 3 LICENSE SUSPENSION UNDER COUNT ONE AND ORDERS DEFENDANT'S LICENSE SUSPENDED FOR A PERIOD OF TEN YEARS WITH SIX POINTS ASSESSED UNDER THIS COUNT. COURT ORDERS A CLASS 5 LICENSE SUSPENSION UNDER COUNT FOUR AND ORDERS DEFENDANT'S LICENSE SUSPENDED FOR A PERIOD OF 3 YEARS WITH 6 POINTS ASSESSED AND A MANDATORY FINE OF \$375.00.

THE DEFENDANT IS ORDERED TO PAY A FINE IN THE SUM OF \$ 375.00.

DEFENDANT ADVISED OF APPEAL RIGHTS.

DEFENDANT INDIGENT, COURT APPOINTS EDWARD F. BORKOWSKI, JR. AS APPELLATE COUNSEL.

TRANSCRIPT AT STATE'S EXPENSE.

THE COURT HEREBY ENTERS JUDGMENT AGAINST THE DEFENDANT IN AN AMOUNT EQUAL TO THE COSTS OF

SENT

09/19/2013

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ANDREA F. ROCCO, CLERK



81158423

THIS PROSECUTION.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT ANTONIA EARLEY, DOB: 03/10/1984, GENDER: FEMALE, RACE:
BLACK.

09/19/2013
CP1PS 09/19/2013 15:13:35

Judge Signature

09/19/2013

THE STATE OF OHIO Cuyahoga County	} SS.	I, THE CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <u>Prisoner</u> <u>Antonina Earley</u> <u>DOB 5/10/84</u>		
NOW ON FILE IN MY OFFICE		
WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>26</u> DAY OF <u>Sept</u> 20 <u>13</u>		
CUYAHOGA COUNTY CLERK OF COURTS		
By <u>Andrea McAllen</u> , Deputy		

SENT
09/19/2013

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ANDREA F. ROCCO, CLERK

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

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OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

ORC Ann. 1.49 (2014)

§ 1.49. Ambiguous statutes

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

HISTORY:

134 v H 607. Eff 1-3-72.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

ORC Ann. 2901.04 (2014)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

HISTORY:

134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

ORC Ann. 2903.08 (2014)

§ 2903.08. Aggravated vehicular assault; vehicular assault

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

(1) (a) As the proximate result of committing a violation of division (A) of *section 4511.19 of the Revised Code* or of a substantially equivalent municipal ordinance;

(b) As the proximate result of committing a violation of division (A) of *section 1547.11 of the Revised Code* or of a substantially equivalent municipal ordinance;

(c) As the proximate result of committing a violation of division (A)(3) of *section 4561.15 of the Revised Code* or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

(a) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a reckless operation offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the reckless operation offense in the construction zone and does not apply as described in division (E) of this section;

(b) Recklessly.

(3) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a speeding offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the speeding offense in the construction zone and does not apply as described in division (E) of this section.

(B) (1) Whoever violates division (A)(1) of this section is guilty of aggravated vehicular assault. Except as otherwise provided in this division, aggravated vehicular assault is a felony of the third degree. Aggravated vehicular assault is a felony of the second degree if any of the following apply:

(a) At the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code.

(b) The offender previously has been convicted of or pleaded guilty to a violation of this section.

(c) The offender previously has been convicted of or pleaded guilty to any traffic-related homicide, manslaughter, or assault offense.

(d) The offender previously has been convicted of or pleaded guilty to three or more prior violations of *section 4511.19 of the Revised Code* or a substantially equivalent municipal ordinance within the previous six years.

(e) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of *section 1547.11 of the Revised Code* or of a substantially equivalent municipal ordinance within the previous six years.

(f) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(3) of *section 4561.15 of the Revised Code* or of a substantially equivalent municipal ordinance within the previous six years.

(g) The offender previously has been convicted of or pleaded guilty to three or more prior violations of any combination of the offenses listed in division (B)(1)(d), (e), or (f) of this section.

(h) The offender previously has been convicted of or pleaded guilty to a second or subsequent felony violation of division (A) of *section 4511.19 of the Revised Code*.

(2) In addition to any other sanctions imposed pursuant to division (B)(1) of this section, except as otherwise provided in this division, the court shall impose upon the offender a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of *section 4510.02 of the Revised Code*. If the offender previously has been convicted of or pleaded guilty to a violation of this section, any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, the court shall impose either a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of that section or a class one suspension as specified in division (A)(1) of that section.

(C) (1) Whoever violates division (A)(2) or (3) of this section is guilty of vehicular assault and shall be punished as provided in divisions (C)(2) and (3) of this section.

(2) Except as otherwise provided in this division, vehicular assault committed in violation of division (A)(2) of this section is a felony of the fourth degree. Vehicular assault committed in violation of division (A)(2) of this section is a felony of the third degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code, if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense, or if, in the same

course of conduct that resulted in the violation of division (A)(2) of this section, the offender also violated *section 4549.02, 4549.021, or 4549.03 of the Revised Code.*

In addition to any other sanctions imposed, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of *section 4510.02 of the Revised Code* or, if the offender previously has been convicted of or pleaded guilty to a violation of this section, any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of that section.

(3) Except as otherwise provided in this division, vehicular assault committed in violation of division (A)(3) of this section is a misdemeanor of the first degree. Vehicular assault committed in violation of division (A)(3) of this section is a felony of the fourth degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of *section 4510.02 of the Revised Code* or, if the offender previously has been convicted of or pleaded guilty to a violation of this section, any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of *section 4510.02 of the Revised Code.*

(D) (1) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(1) of this section.

(2) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(2) of this section or a felony violation of division (A)(3) of this section if either of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or *section 2903.06 of the Revised Code.*

(b) At the time of the offense, the offender was driving under suspension under Chapter 4510. or any other provision of the Revised Code.

(3) The court shall impose a mandatory jail term of at least seven days on an offender who is convicted of or pleads guilty to a misdemeanor violation of division (A)(3) of this section and may impose upon the offender a longer jail term as authorized pursuant to *section 2929.24 of the Revised Code.*

(E) Divisions (A)(2)(a) and (3) of this section do not apply in a particular construction zone unless signs of the type described in *section 2903.081 of the Revised Code* are erected in that construction zone in accordance with the guidelines and design specifications established by the director of

transportation under *section 5501.27 of the Revised Code*. The failure to erect signs of the type described in *section 2903.081 of the Revised Code* in a particular construction zone in accordance with those guidelines and design specifications does not limit or affect the application of division (A)(1) or (2)(b) of this section in that construction zone or the prosecution of any person who violates either of those divisions in that construction zone.

(F) As used in this section:

(1) "Mandatory prison term" and "mandatory jail term" have the same meanings as in *section 2929.01 of the Revised Code*.

(2) "Traffic-related homicide, manslaughter, or assault offense" and "traffic-related murder, felonious assault, or attempted murder offense" have the same meanings as in *section 2903.06 of the Revised Code*.

(3) "Construction zone" has the same meaning as in *section 5501.27 of the Revised Code*.

(4) "Reckless operation offense" and "speeding offense" have the same meanings as in *section 2903.06 of the Revised Code*.

(G) For the purposes of this section, when a penalty or suspension is enhanced because of a prior or current violation of a specified law or a prior or current specified offense, the reference to the violation of the specified law or the specified offense includes any violation of any substantially equivalent municipal ordinance, former law of this state, or current or former law of another state or the United States.

HISTORY:

143 v S 131 (Eff 7-25-90); 144 v S 275 (Eff 7-1-93) *; 145 v H 236 (Eff 9-29-94); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 239 (Eff 9-6-96); 148 v S 107. Eff 3-23-2000; 149 v S 123, § 1, eff. 1-1-04; 150 v H 50, § 1, eff. 10-21-03; 150 v H 50, § 4, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 151 v H 461, § 1, eff. 4-4-07.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
MULTIPLE SENTENCES

ORC Ann. 2929.41 (2014)

§ 2929.41. Multiple sentences

(A) Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of *section 2971.03 of the Revised Code*, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.

(B) (1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of *section 2907.322, 2921.34, or 2923.131 of the Revised Code*.

When consecutive sentences are imposed for misdemeanor under this division, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months.

(2) If a court of this state imposes a prison term upon the offender for the commission of a felony and a court of another state or the United States also has imposed a prison term upon the offender for the commission of a felony, the court of this state may order that the offender serve the prison term it imposes consecutively to any prison term imposed upon the offender by the court of another state or the United States.

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

When consecutive jail terms or sentences of imprisonment and prison terms are imposed for one or more misdemeanors and one or more felonies under this division, the term to be served is the aggregate of the consecutive terms imposed, and the offender shall serve all terms imposed for a felony before serving any term imposed for a misdemeanor.

HISTORY:

134 v H 511 (Eff 1-1-74); 137 v H 202 (Eff 10-9-78); 139 v S 1 (Eff 10-19-81); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 142 v H 51 (Eff 3-17-89); 143 v S 258 (Eff 11-20-90); 144 v H 561 (Eff 4-9-93); 145 v H 571 (Eff 10-6-94); 146 v S 2 (Eff 7-1-96); 146 v H 154 (Eff 10-4-96); 146 v H 180 (Eff 1-1-97); 148 v S 107 (Eff 3-23-2000); 148 v S 22. Eff 5-17-2000; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 SB 337, § 1, eff. Sept. 28, 2012.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2941. INDICTMENT
FORM AND SUFFICIENCY

ORC Ann. 2941.25 (2014)

§ 2941.25. Multiple counts

(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.

HISTORY:

134 v H 511. Eff 1-1-74.

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TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT
CHAPTER 4511. TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES
DRIVING WHILE INTOXICATED

ORC Ann. 4511.19 (2014)

§ 4511.19. Operation while under the influence of alcohol or drug of abuse or with specified concentration of alcohol or drug in certain bodily substances; chemical test; penalties; underage alcohol consumption

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

(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

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

(c) The person has a concentration of ninety-six-thousandths of one per cent or more but less than two hundred four-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(e) The person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

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

(g) The person has a concentration of two hundred four-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.

(h) 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.

(i) The person has a concentration of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.

(j) Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:

(i) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.

(ii) The person has a concentration of cocaine in the person's urine of at least one hundred fifty nanograms of cocaine per milliliter of the person's urine or has a concentration of cocaine in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.

(iii) The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.

(iv) The person has a concentration of heroin in the person's urine of at least two thousand nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.

(v) The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.

(vi) The person has a concentration of L.S.D. in the person's urine of at least twenty-five nanograms of L.S.D. per milliliter of the person's urine or a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten nanograms of L.S.D. per milliliter of the person's whole blood or blood serum or plasma.

(vii) The person has a concentration of marihuana in the person's urine of at least ten nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.

(viii) Either of the following applies:

(I) The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen nanograms of marihuana metabolite

per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(II) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

(ix) The person has a concentration of methamphetamine in the person's urine of at least five hundred nanograms of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.

(x) The person has a concentration of phencyclidine in the person's urine of at least twenty-five nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

(xi) The state board of pharmacy has adopted a rule pursuant to *section 4729.041 of the Revised Code* that specifies the amount of salvia divinorum and the amount of salvinorin A that constitute concentrations of salvia divinorum and salvinorin A in a person's urine, in a person's whole blood, or in a person's blood serum or plasma at or above which the person is impaired for purposes of operating any vehicle, streetcar, or trackless trolley within this state, the rule is in effect, and the person has a concentration of salvia divinorum or salvinorin A of at least that amount so specified by rule in the person's urine, in the person's whole blood, or in the person's blood serum or plasma.

(2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:

(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under *section 4511.191 of the Revised Code*, and being advised by the officer in accordance with *section 4511.192 of the Revised Code* of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

(B) No person under twenty-one years of age shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(1) The person has a concentration of at least two-hundredths of one per cent but less than eight-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

(2) The person has a concentration of at least three-hundredths of one per cent but less than ninety-six-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.

(3) The person has a concentration of at least two-hundredths of one gram but less than eight-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

(4) The person has a concentration of at least twenty-eight one-thousandths of one gram but less than eleven-hundredths of one gram by weight of alcohol per one hundred milliliters of the person's urine.

(C) In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1)(a) or (A)(2) and a violation of division (B)(1), (2), or (3) of this section, but the person may not be convicted of more than one violation of these divisions.

(D) (1) (a) 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.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense that is vehicle-related, the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of *section 4511.192 of the Revised Code* as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. The court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under *section 4511.191 of the Revised Code* or a blood or urine sample is obtained pursuant to a search warrant. Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to *section 3701.143 of the Revised Code*.

(c) As used in division (D)(1)(b) of this section, "emergency medical technician-intermediate" and "emergency medical technician-paramedic" have the same meanings as in *section 4765.01 of the Revised Code*.

(2) In a criminal prosecution or juvenile court proceeding for a violation of division (A) of this section or for an equivalent offense that is vehicle-related, if there was at the time the bodily substance was withdrawn a concentration of less than the applicable concentration of alcohol specified in divisions (A)(1)(b), (c), (d), and (e) of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (A)(1)(j) of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. This division does not limit or affect a criminal prosecution or juvenile court proceeding for a violation of division (B) of this section or for an equivalent offense that is substantially equivalent to that division.

(3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney, immediately upon the completion of the chemical test analysis.

If the chemical test was obtained pursuant to division (D)(1)(b) of this section, the person tested may have a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist of the person's own choosing administer a chemical test or tests, at the person's expense, in addition to any administered at the request of a law enforcement officer. If the person was under arrest as described in division (A)(5) of *section 4511.191 of the Revised Code*, the arresting officer shall advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. If the person was under arrest other than described in division (A)(5) of *section 4511.191 of the Revised Code*, the form to be read to the person to be tested, as required under *section 4511.192 of the Revised Code*, shall state that the person may have an independent test performed at the person's expense. The failure or inability to obtain an additional chemical test by a person shall not preclude the admission of evidence relating to the chemical test or tests taken at the request of a law enforcement officer.

(4) (a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration" means the national highway traffic safety administration established as an administration of the United States department of transportation under *96 Stat. 2415 (1983), 49 U.S.C.A. 105*.

(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

(i) The officer may testify concerning the results of the field sobriety test so administered.

(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

(iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.

(c) Division (D)(4)(b) of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (D)(4)(b) of this section.

(E) (1) Subject to division (E)(3) of this section, in any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(b), (c), (d), (e), (f), (g), (h), (i), or (j) or (B)(1), (2), (3), or (4) of this section or for an equivalent offense that is substantially equivalent to any of those divisions, a laboratory report from any laboratory personnel issued a permit by the department of health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine, or other bodily substance tested and that contains all of the information specified in this division shall be admitted as prima-facie evidence of the information and statements that the report contains. The laboratory report shall contain all of the following:

(a) The signature, under oath, of any person who performed the analysis;

(b) Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite of a controlled substance, or a combination of them that was found;

(c) A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;

(d) An outline of the analyst's or test performer's education, training, and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the department of health.

(2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type described in division (E)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding, other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

(3) A report of the type described in division (E)(1) of this section shall not be prima-facie evidence of the contents, identity, or amount of any substance if, within seven days after the defendant to whom the report pertains or the defendant's attorney receives a copy of the report, the defendant or the defendant's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven-day time limit in the interest of justice.

(F) Except as otherwise provided in this division, any physician, registered nurse, emergency medical technician-intermediate, emergency medical technician-paramedic, or qualified technician,

chemist, or phlebotomist who withdraws blood from a person pursuant to this section or *section 4511.191 or 4511.192 of the Revised Code*, and any hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section or *section 4511.191 or 4511.192 of the Revised Code*, is immune from criminal liability and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division also extends to an emergency medical service organization that employs an emergency medical technician-intermediate or emergency medical technician-paramedic who withdraws blood under this section. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

As used in this division, "emergency medical technician-intermediate" and "emergency medical technician-paramedic" have the same meanings as in *section 4765.01 of the Revised Code*.

(G) (1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

(a) Except as otherwise provided in division (G)(1)(b), (c), (d), or (e) of this section, the offender is guilty of a misdemeanor of the first degree, and the court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of three consecutive days. As used in this division, three consecutive days means seventy-two consecutive hours. The court may sentence an offender to both an intervention program and a jail term. The court may impose a jail term in addition to the three-day mandatory jail term or intervention program. However, in no case shall the cumulative jail term imposed for the offense exceed six months.

The court may suspend the execution of the three-day jail term under this division if the court, in lieu of that suspended term, places the offender under a community control sanction pursuant to *section 2929.25 of the Revised Code* and requires the offender to attend, for three consecutive days, a drivers' intervention program certified under *section 5119.38 of the Revised Code*. The court also may suspend the execution of any part of the three-day jail term under this division if it places the offender under a community control sanction pursuant to *section 2929.25 of the Revised Code* for part of the three days, requires the offender to attend for the suspended part of the term a drivers' intervention program so certified, and sentences the offender to a jail term equal to the remainder of the three consecutive days that the offender does not spend attending the program. The court may require the offender, as a condition of community control and in addition to the required attendance at a drivers' intervention program, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 5119. of the Revised Code by the director of mental health and addiction services that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose on the offender any other conditions of community control that it considers necessary.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program that is certified pursuant to *section 5119.38 of the Revised Code*. As used in this division, three consecutive days means seventy-two consecutive hours. If the court determines that the offender is not conducive to treatment in a drivers' intervention program, if the offender refuses to attend a drivers' intervention program, or if the jail at which the offender is to serve the jail term imposed can provide a driver's intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days.

The court may require the offender, under a community control sanction imposed under *section 2929.25 of the Revised Code*, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 5119. of the Revised Code by the director of mental health and addiction services, in addition to the required attendance at drivers' intervention program, that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose any other conditions of community control on the offender that it considers necessary.

(iii) In all cases, a fine of not less than three hundred seventy-five and not more than one thousand seventy-five dollars;

(iv) In all cases, a class five license suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 and 4510.13 of the Revised Code*.

(b) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court shall require the offender to be assessed by a community addiction services provider that is authorized by *section 5119.21 of the Revised Code*, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The purpose of the assessment is to determine the degree of the offender's alcohol usage and to determine whether or not treatment is warranted. Upon the request of the court, the services provider shall submit the results of the as-

assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days. The court shall impose the twenty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the twenty-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court shall require the offender to be assessed by a community addiction service provider that is authorized by *section 5119.21 of the Revised Code*, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The purpose of the assessment is to determine the degree of the offender's alcohol usage and to determine whether or not treatment is warranted. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than five hundred twenty-five and not more than one thousand six hundred twenty-five dollars;

(iv) In all cases, a class four license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 and 4510.13 of the Revised Code*.

(v) In all cases, if the vehicle is registered in the offender's name, immobilization of the vehicle involved in the offense for ninety days in accordance with *section 4503.233 of the Revised Code* and impoundment of the license plates of that vehicle for ninety days.

(c) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of thirty consecutive days. The court shall impose the thirty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in *sections 2929.21 to 2929.28 of the Revised Code*, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory jail term of sixty consecutive days. The court shall impose the sixty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the sixty-day mandatory jail term. Notwithstanding the jail terms set forth in *sections 2929.21 to 2929.28 of the Revised Code*, the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

(iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than eight hundred fifty and not more than two thousand seven hundred fifty dollars;

(iv) In all cases, a class three license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 and 4510.13 of the Revised Code*.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with *section 4503.234 of the Revised Code*. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, the court shall order the offender to participate with a community addiction services provider authorized by *section 5119.21 of the Revised Code*, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The operator of the services provider shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 of the Revised Code* or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of *section 2929.13 of the Revised Code* or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term

in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of *section 2929.13 of the Revised Code*, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of *section 2929.14 of the Revised Code*, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of *section 2929.13 of the Revised Code*. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 of the Revised Code* or, in the discretion of the court, either a mandatory term of local incarceration of one hundred twenty consecutive days in accordance with division (G)(1) of *section 2929.13 of the Revised Code* or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the one hundred twenty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of *section 2929.13 of the Revised Code*, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of *section 2929.14 of the Revised Code*, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of *section 2929.13 of the Revised Code*. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding *section 2929.18 of the Revised Code*, a fine of not less than one thousand three hundred fifty nor more than ten thousand five hundred dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of *section 4510.02 of the Revised Code*. The court may grant limited driving privileges relative to the suspension under *sections 4510.021 and 4510.13 of the Revised Code*.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with *section 4503.234 of the Revised Code*. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, the court shall order the offender to participate with a community addiction services provider authorized by *section 5119.21 of the Revised Code*, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services

provider. The operator of the services provider shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(vii) In all cases, if the court sentences the offender to a mandatory term of local incarceration, in addition to the mandatory term, the court, pursuant to *section 2929.17 of the Revised Code*, may impose a term of house arrest with electronic monitoring. The term shall not commence until after the offender has served the mandatory term of local incarceration.

(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

(i) If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 of the Revised Code* or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 of the Revised Code* or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of *section 2929.13 of the Revised Code* if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(iii) In all cases, notwithstanding *section 2929.18 of the Revised Code*, a fine of not less than one thousand three hundred fifty nor more than ten thousand five hundred dollars;

(iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of *section 4510.02 of the Revised Code*. The

court may grant limited driving privileges relative to the suspension under *sections 4510.021 and 4510.13 of the Revised Code*.

(v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with *section 4503.234 of the Revised Code*. Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.

(vi) In all cases, the court shall order the offender to participate with a community addiction services provider authorized by *section 5119.21 of the Revised Code*, subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The operator of the services provider shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

(2) An offender who is convicted of or pleads guilty to a violation of division (A) of this section and who subsequently seeks reinstatement of the driver's or occupational driver's license or permit or nonresident operating privilege suspended under this section as a result of the conviction or guilty plea shall pay a reinstatement fee as provided in division (F)(2) of *section 4511.191 of the Revised Code*.

(3) If an offender is sentenced to a jail term under division (G)(1)(b)(i) or (ii) or (G)(1)(c)(i) or (ii) of this section and if, within sixty days of sentencing of the offender, the court issues a written finding on the record that, due to the unavailability of space at the jail where the offender is required to serve the term, the offender will not be able to begin serving that term within the sixty-day period following the date of sentencing, the court may impose an alternative sentence under this division that includes a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring.

As an alternative to a mandatory jail term of ten consecutive days required by division (G)(1)(b)(i) of this section, the court, under this division, may sentence the offender to five consecutive days in jail and not less than eighteen consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the five consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The five consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of twenty consecutive days required by division (G)(1)(b)(ii) of this section, the court, under this division, may sentence the offender to ten consecutive days in jail and not less than thirty-six consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the ten consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The ten consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to a mandatory jail term of thirty consecutive days required by division (G)(1)(c)(i) of this section, the court, under this division, may sentence the offender to fifteen con-

secutive days in jail and not less than fifty-five consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the fifteen consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The fifteen consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of sixty consecutive days required by division (G)(1)(c)(ii) of this section, the court, under this division, may sentence the offender to thirty consecutive days in jail and not less than one hundred ten consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the thirty consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The thirty consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

(4) If an offender's driver's or occupational driver's license or permit or nonresident operating privilege is suspended under division (G) of this section and if *section 4510.13 of the Revised Code* permits the court to grant limited driving privileges, the court may grant the limited driving privileges in accordance with that section. If division (A)(7) of that section requires that the court impose as a condition of the privileges that the offender must display on the vehicle that is driven subject to the privileges restricted license plates that are issued under *section 4503.231 of the Revised Code*, except as provided in division (B) of that section, the court shall impose that condition as one of the conditions of the limited driving privileges granted to the offender, except as provided in division (B) of *section 4503.231 of the Revised Code*.

(5) Fines imposed under this section for a violation of division (A) of this section shall be distributed as follows:

(a) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii), thirty-five dollars of the fine imposed under division (G)(1)(b)(iii), one hundred twenty-three dollars of the fine imposed under division (G)(1)(c)(iii), and two hundred ten dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to an enforcement and education fund established by the legislative authority of the law enforcement agency in this state that primarily was responsible for the arrest of the offender, as determined by the court that imposes the fine. The agency shall use this share to pay only those costs it incurs in enforcing this section or a municipal OVI ordinance and in informing the public of the laws governing the operation of a vehicle while under the influence of alcohol, the dangers of the operation of a vehicle under the influence of alcohol, and other information relating to the operation of a vehicle under the influence of alcohol and the consumption of alcoholic beverages.

(b) Fifty dollars of the fine imposed under division (G)(1)(a)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section and was confined as a result of the offense prior to being sentenced for the offense but is not sentenced to a term of incarceration, the fifty dollars shall be paid to the political subdivision that paid the cost of housing the offender during that period of confinement. The political subdivision shall use the share under this division to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this sec-

tion or a municipal OVI ordinance, costs of any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(c) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii) and fifty dollars of the fine imposed under division (G)(1)(b)(iii) of this section shall be deposited into the county or municipal indigent drivers' alcohol treatment fund under the control of that court, as created by the county or municipal corporation under division (F) of *section 4511.191 of the Revised Code*.

(d) One hundred fifteen dollars of the fine imposed under division (G)(1)(b)(iii), two hundred seventy-seven dollars of the fine imposed under division (G)(1)(c)(iii), and four hundred forty dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. The political subdivision shall use this share to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs for any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.

(e) Fifty dollars of the fine imposed under divisions (G)(1)(a)(iii), (G)(1)(b)(iii), (G)(1)(c)(iii), (G)(1)(d)(iii), and (G)(1)(e)(iii) of this section shall be deposited into the special projects fund of the court in which the offender was convicted and that is established under division (E)(1) of section 2303.201, division (B)(1) of section 1901.26, or division (B)(1) of *section 1907.24 of the Revised Code*, to be used exclusively to cover the cost of immobilizing or disabling devices, including certified ignition interlock devices, and remote alcohol monitoring devices for indigent offenders who are required by a judge to use either of these devices. If the court in which the offender was convicted does not have a special projects fund that is established under division (E)(1) of section 2303.201, division (B)(1) of section 1901.26, or division (B)(1) of *section 1907.24 of the Revised Code*, the fifty dollars shall be deposited into the indigent drivers interlock and alcohol monitoring fund under division (I) of *section 4511.191 of the Revised Code*.

(f) Seventy-five dollars of the fine imposed under division (G)(1)(a)(iii), one hundred twenty-five dollars of the fine imposed under division (G)(1)(b)(iii), two hundred fifty dollars of the fine imposed under division (G)(1)(c)(iii), and five hundred dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be transmitted to the treasurer of state for deposit into the indigent defense support fund established under *section 120.08 of the Revised Code*.

(g) The balance of the fine imposed under division (G)(1)(a)(iii), (b)(iii), (c)(iii), (d)(iii), or (e)(iii) of this section shall be disbursed as otherwise provided by law.

(6) If title to a motor vehicle that is subject to an order of criminal forfeiture under division (G)(1)(c), (d), or (e) of this section is assigned or transferred and division (B)(2) or (3) of *section 4503.234 of the Revised Code* applies, in addition to or independent of any other penalty established by law, the court may fine the offender the value of the vehicle as determined by publications of the national automobile dealers association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.

(7) In all cases in which an offender is sentenced under division (G) of this section, the offender shall provide the court with proof of financial responsibility as defined in *section 4509.01 of the Revised Code*. If the offender fails to provide that proof of financial responsibility, the court, in

addition to any other penalties provided by law, may order restitution pursuant to *section 2929.18* or *2929.28 of the Revised Code* in an amount not exceeding five thousand dollars for any economic loss arising from an accident or collision that was the direct and proximate result of the offender's operation of the vehicle before, during, or after committing the offense for which the offender is sentenced under division (G) of this section.

(8) As used in division (G) of this section, "electronic monitoring," "mandatory prison term," and "mandatory term of local incarceration" have the same meanings as in *section 2929.01 of the Revised Code*.

(H) Whoever violates division (B) of this section is guilty of operating a vehicle after underage alcohol consumption and shall be punished as follows:

(1) Except as otherwise provided in division (H)(2) of this section, the offender is guilty of a misdemeanor of the fourth degree. In addition to any other sanction imposed for the offense, the court shall impose a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of *section 4510.02 of the Revised Code*.

(2) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one or more violations of division (A) or (B) of this section or other equivalent offenses, the offender is guilty of a misdemeanor of the third degree. In addition to any other sanction imposed for the offense, the court shall impose a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of *section 4510.02 of the Revised Code*.

(3) If the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1416 of the Revised Code* and if the court imposes a jail term for the violation of division (B) of this section, the court shall impose upon the offender an additional definite jail term pursuant to division (E) of *section 2929.24 of the Revised Code*.

(4) The offender shall provide the court with proof of financial responsibility as defined in *section 4509.01 of the Revised Code*. If the offender fails to provide that proof of financial responsibility, then, in addition to any other penalties provided by law, the court may order restitution pursuant to *section 2929.28 of the Revised Code* in an amount not exceeding five thousand dollars for any economic loss arising from an accident or collision that was the direct and proximate result of the offender's operation of the vehicle before, during, or after committing the violation of division (B) of this section.

(I) (1) No court shall sentence an offender to an alcohol treatment program under this section unless the treatment program complies with the minimum standards for alcohol treatment programs adopted under Chapter 5119. of the Revised Code by the director of mental health and addiction services.

(2) An offender who stays in a drivers' intervention program or in an alcohol treatment program under an order issued under this section shall pay the cost of the stay in the program. However, if the court determines that an offender who stays in an alcohol treatment program under an order issued under this section is unable to pay the cost of the stay in the program, the court may order that the cost be paid from the court's indigent drivers' alcohol treatment fund.

(J) If a person whose driver's or commercial driver's license or permit or nonresident operating privilege is suspended under this section files an appeal regarding any aspect of the person's trial or sentence, the appeal itself does not stay the operation of the suspension.

(K) Division (A)(1)(j) of this section does not apply to a person who operates a vehicle, street-car, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:

(1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(2) The person injected, ingested, or inhaled the controlled substance in accordance with the health professional's directions.

(L) The prohibited concentrations of a controlled substance or a metabolite of a controlled substance listed in division (A)(1)(j) of this section also apply in a prosecution of a violation of division (D) of *section 2923.16 of the Revised Code* in the same manner as if the offender is being prosecuted for a prohibited concentration of alcohol.

(M) All terms defined in *section 4510.01 of the Revised Code* apply to this section. If the meaning of a term defined in *section 4510.01 of the Revised Code* conflicts with the meaning of the same term as defined in *section 4501.01* or *4511.01 of the Revised Code*, the term as defined in *section 4510.01 of the Revised Code* applies to this section.

(N) (1) The Ohio Traffic Rules in effect on January 1, 2004, as adopted by the supreme court under authority of *section 2937.46 of the Revised Code*, do not apply to felony violations of this section. Subject to division (N)(2) of this section, the Rules of Criminal Procedure apply to felony violations of this section.

(2) If, on or after January 1, 2004, the supreme court modifies the Ohio Traffic Rules to provide procedures to govern felony violations of this section, the modified rules shall apply to felony violations of this section.

HISTORY:

GC § 6307-19; 119 v 766, § 19; Bureau of Code Revision, 10-1-53; 125 v 461; 130 v 1083 (Eff 7-11-63); 132 v H 380 (Eff 1-1-68); 133 v H 874 (Eff 9-16-70); 134 v S 14 (Eff 12-3-71); 135 v H 995 (Eff 1-1-75); 139 v S 432 (Eff 3-16-83); 141 v S 262 (Eff 3-20-87); 143 v S 131 (Eff 7-25-90); 143 v H 837 (Eff 7-25-90); 145 v S 82 (Eff 5-4-94); 148 v S 22 (Eff 5-17-2000); 149 v S 163, § 1, Eff 4-9-2003; 149 v S 123, § 1, eff. 1-1-04; 149 v H 490, § 1, eff. 1-1-04; 149 v S 163, § 3, eff. 1-1-04; 150 v H 87, § 1, eff. 6-30-03; 150 v H 87, § 4, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 151 v S 8, § 1, eff. 8-17-06; 151 v H 461, § 1, eff. 4-4-07; 152 v S 209, § 1, eff. 3-26-08; 152 v S 17, § 1, eff. 9-30-08; 152 v H 215, § 1, eff. 4-7-09; 153 v S 58, § 1, eff. 9-17-10; 2011 HB 5, § 1, eff. Sept. 23, 2011; 2013 HB 59, § 101.01, eff. Sept. 29, 2013.

OHIO RULES OF COURT SERVICE
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*** Rules current through rule amendments received through October 8, 2014 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 52 (2014)

Review Court Orders which may amend this Rule.

Rule 52. Harmless error and plain error

(A) Harmless error.

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.