

[Cite as *State v. Wiley*, 2018-Ohio-5352.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106899

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIO WILEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-621218-A

BEFORE: Jones, J., Blackmon, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: December 27, 2018

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant Mario Wiley (“Wiley”) appeals his convictions, that were rendered by way of a guilty plea, for aggravated vehicular homicide, a violation of R.C. 2903.06(A)(1)(a), driving while under the influence (“OVI”) a misdemeanor in violation of R.C. 4511.19(A)(1)(a), and endangering children a misdemeanor in violation of R.C. 2919.22(C)(1). He also appeals his five-year sentence. For the reasons that follow, we affirm the convictions, but remand for resentencing at which the trial court shall conduct a merger analysis.

{¶2} The facts giving rise to the indictment and convictions occurred on a September 2017 morning, when Wiley, while intoxicated and driving two minor children to daycare, lost control of his car and hit a tree. One of the minors died as a result of the accident.

{¶3} Wiley was charged with five crimes; he pleaded guilty to the three above-mentioned crimes and the state nolleed the remaining counts. At the conclusion of the plea hearing, Wiley's counsel requested a psychiatric investigation for mitigation purposes. The trial court granted the request and the report was prepared ahead of sentencing. The report showed that Wiley had a history of mental health issues.

{¶4} The trial court sentenced Wiley to five years on the aggravated vehicular homicide conviction, and 180 days on both the OVI and endangering children convictions. The terms were ordered to be served concurrently. Wiley now appeals, raising the following three assignments of error for our review:

I. The trial court erred when it did not determine that the defendant understood the nature of the offenses, the effects of the plea, and that he was waiving certain constitutionally guaranteed trial rights by pleading guilty in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I Section 10 of the Ohio Constitution and Ohio Crim.R. 11.

II. The trial court erred when it failed to merge Mr. Wiley's conviction for OVI with his conviction for aggravated vehicular homicide into a single count of conviction.

III. Defendant Mario Wiley was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution.

Guilty Plea

{¶5} For his first assigned error, Wiley challenges his guilty plea. When a defendant enters a plea in a criminal case, "the plea must be made knowingly, intelligently, and voluntarily.

Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). To ensure that a defendant enters a plea knowingly, voluntarily, and intelligently, a trial court must engage in an oral dialogue with the defendant in accordance with

Crim.R. 11(C). *Id.* The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Schmick*, 8th Dist. Cuyahoga No. 95210, 2011-Ohio-2263, ¶ 5.

{¶6} Crim.R. 11(C)(2) requires that a trial court determine from a colloquy with the defendant whether the defendant understands (1) the nature of the charge and maximum penalty, (2) the effect of the guilty plea, and (3) the constitutional rights waived by a guilty plea. *State v. Brown*, 8th Dist. Cuyahoga No. 104095, 2017-Ohio-184, ¶ 5, citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621. Before accepting the guilty plea, the court must address the defendant personally. Crim.R. 11(C)(2); *State v. Evans*, 8th Dist. Cuyahoga No. 100151, 2014-Ohio-3584, ¶ 9.

{¶7} We conduct a de novo review to determine whether the trial court accepted the plea in compliance with Crim.R. 11(C). *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26. Where the issue concerns a nonconstitutional requirement, such as whether the defendant understood the nature of the charges or the maximum penalties for the offenses, we review for substantial compliance. *See State v. Jordan*, 8th Dist. Cuyahoga No. 103813, 2016-Ohio-5709, ¶ 46, citing *Veney* at ¶ 14-17. “Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his [or her] plea and the rights he [or she] is waiving.” *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990); *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

{¶8} Wiley does not contend a specific violation of Crim.R. 11(C)(2). Rather, he contends that his plea was not knowingly, intelligently, and voluntarily made because he had a number of mental health issues that were not addressed prior to the court accepting his plea.

{¶9} It is well established that a defendant does not lack mental capacity to enter a plea,

or that a trial court does not err in accepting a plea, merely because a defendant was suffering from a mental illness or was taking psychotropic medication when he or she entered the plea. *See, e.g., State v. McClendon*, 8th Dist. Cuyahoga No. 103202, 2016-Ohio-2630, ¶ 16; *State v. Robinson*, 8th Dist. Cuyahoga No. 89136, 2007-Ohio-6831, ¶ 18; *State v. Harney*, 8th Dist. Cuyahoga No. 71001, 1997 Ohio App. LEXIS 1768, 4 (May 1, 1997); *State v. McDowell*, 8th Dist. Cuyahoga No. 70799, 1997 Ohio App. LEXIS 113, 4 (Jan. 16, 1997); *State v. Bowen*, 8th Dist. Cuyahoga Nos. 70054 and 70055, 1996 Ohio App. LEXIS 5612, 9 (Dec. 12, 1996); *see also State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 71 (“The fact that a defendant is taking * * * prescribed psychotropic drugs does not negate [the defendant’s] competence to stand trial.”).

{¶10} Furthermore, this court has held that a trial court “‘is not required to order an evaluation of a defendant’s mental health every time the issue is raised.’” *McClendon* at ¶ 17, quoting *Bowen* at 5, citing *State v. Bailey*, 90 Ohio App.3d 58, 67, 627 N.E.2d 1078 (11th Dist.1992). “A defendant is presumed competent to stand trial unless it is established that he [or she] is unable to understand the nature and objective of the proceedings or cannot assist in his defense.” *McClendon* at *id.*, citing R.C. 2945.37(G); *Robinson* at ¶ 20, citing *State v. Swift*, 86 Ohio App.3d 407, 411, 621 N.E.2d 513 (11th Dist.1993).

{¶11} Here, at the plea hearing, counsel raised the issue that Wiley was taking medication (Seroquel and Celexa), but informed the court that he “never had a problem conferring with [Wiley] and getting truthful, honest information.” Although, when asked by the trial court if he had difficulty reading or writing, Wiley answered “[y]es, but I can understand writing,” the record does not demonstrate that Wiley’s plea was anything but knowingly, intelligently, and voluntarily entered into.

{¶12} The trial court told Wiley “if there is something * * * that I say that you don’t understand, I need you to stop me and let me know so I can explain it to you in another way that hopefully you would understand.” Wiley indicated that he would do so. Wiley never indicated throughout the plea hearing that he did not understand or that he had any questions, however.

{¶13} Rather, the record demonstrates Wiley participated in, and understood, the proceedings. His answers to the court’s questions were responsive — they were not indicative of someone who was confused or unable to understand what was going on.

{¶14} In light of the above, Wiley’s first assignment of error is without merit and is therefore overruled.

{¶15} In his second assignment of error, Wiley contends that the trial court erred by failing to merge his aggravated vehicular homicide and OVI convictions.

{¶16} R.C. 2941.25, Ohio’s allied offense statute, provides that:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his [or her] 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.

{¶17} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Ohio Supreme Court clarified the applicable standard when determining whether offenses merge as allied offenses of similar import.

Rather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant’s conduct to determine whether one or more convictions may result, because an

offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation.

As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance?; (2) Were they committed separately?; and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

Id. at ¶ 30-31.

{¶18} The Ohio Supreme Court revisited the issue of allied offenses in *State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266. In *Earley*, the defendant pled guilty to aggravated vehicular assault and OVI. *Id.* at ¶ 2. The trial court sentenced the defendant for both offenses and ordered that her sentences be served concurrently. *Id.*

{¶19} The defendant appealed her sentences, claiming that aggravated vehicular assault is an allied offense of OVI and that they should have merged. *Id.* at ¶ 3. This court affirmed the judgment of the trial court and held that even assuming that aggravated vehicular assault and OVI are allied offenses, R.C. 2929.41(B)(3) creates an exception that permits a trial court to impose a sentence for both. *State v. Earley*, 2014-Ohio-2643, 15 N.E.3d 357, ¶ 20-21 (8th Dist.).

{¶20} The defendant appealed to the Ohio Supreme Court. The court embraced *Ruff*, which, as noted above, considers a defendant's conduct, his or her animus, and the import or significance of his or her offenses. Applying *Ruff*, the *Earley* court concluded that OVI and felony aggravated vehicular assault "are offenses of dissimilar import and significance that are to be punished cumulatively." *Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266 at ¶ 20.

{¶21} The *Earley* court rationalized its decision as follows:

By criminalizing aggravated vehicular assault under R.C. 2903.08(A)(1)(a) and classifying it as a third-degree felony with a mandatory prison term, the General Assembly emphasized the necessity of a strong punishment for and deterrent against individuals causing serious physical harm while driving under the influence. This felony offense has a different import and significance than merely driving under the influence, for aggravated vehicular assault necessarily involves causing serious physical harm to another person. A first-degree misdemeanor violation of R.C. 4511.19(A)(1)(a), on the other hand, occurs any time an individual drives under the influence of alcohol or drugs, and one who does so commits this offense regardless of any subsequent consequences that occur due to the impaired driver's actions. There is a legitimate justification for criminalizing each of these offenses separately, and R.C. 2941.25 permits separate convictions for both pursuant to the test set forth in *Ruff*.

Earley, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266 at ¶ 15.

{¶22} In support of his position, Wiley cites this court's decision in *State v. Kelley*, 8th Dist. Cuyahoga No. 98928, 2013-Ohio-1899. In *Kelley*, the defendant pleaded guilty to two counts of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), three counts of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), and one count of OVI, in violation of R.C. 4511.19(A)(1)(a). The trial court did not merge any of the counts, and the defendant challenged that issue, among other things, on appeal.

{¶23} In *Kelley*, the state conceded that the OVI conviction was an allied offense to the aggravated vehicular homicide and aggravated vehicular assault convictions. *Id.* at ¶ 11. This court vacated the sentence, and remanded for a new sentencing hearing, at which the state would elect which offense it wished to pursue for sentencing. *Id.* at ¶ 17.

{¶24} The state contends that this case is distinguishable because the state does not concede that the subject offenses are allied. The issue of allied offenses was not raised at the sentencing hearing here. At the plea hearing, however, the trial court stated, "[w]e said that the [OVI] is an allied offense, part of the first one, isn't it?" The assistant prosecuting attorney

responded, “[r]ight. I believe that it is, your honor. I would have to double check before sentencing.” The court replied, “I’m pretty sure it is, too.” Thus, although it is the state’s position now on appeal that the offenses are not allied, the record demonstrates that at some point in these proceedings the state believed that perhaps they were allied offenses.

{¶25} Because the record demonstrates that there is at least a facial issue of allied offenses but no merger analysis was conducted by the trial court, we remand the case to the trial court so that a merger analysis can be had. Accordingly, the second assignment of error is sustained, and the case is remanded for a resentencing hearing, at which the issue of allied offenses is to be analyzed and, if applicable, the state shall elect upon which count to proceed.

{¶26} In his final assignment of error, Wiley contends that his counsel was ineffective because he failed to have him evaluated prior to his plea, and he failed to raise the merger issue at sentencing.

{¶27} Reversal of a conviction for ineffective assistance of counsel requires a defendant to show that (1) counsel’s performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel’s performance must fall below an objective standard of reasonableness to be deficient in terms of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Moreover, the defendant must show that there exists a reasonable probability that, were it not for counsel’s errors, the results of the proceeding would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998).

{¶28} For the reasons already discussed, counsel was not ineffective for not requesting that Wiley be evaluated prior to his plea. Specifically, the record demonstrates that although

Wiley had mental health issues he was capable and competent of knowingly, voluntarily, and intelligently entering a plea. In regard to the merger issue, and as discussed, there is at least a facial issue that the subject offenses are subject to merger. Counsel, therefore, was ineffective for not raising it at the sentencing hearing, especially in light of the fact that the state indicated at the plea hearing that the subject crimes may merge.

{¶29} In light of the above, the third assignment of error is overruled in part and sustained in part.

{¶30} The convictions are affirmed; the case is remanded for a resentencing hearing, at which the trial court shall conduct a merger analysis. It is ordered that appellant and appellee split the 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 convictions having been affirmed, any bail pending appeal is terminated.

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

LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANITA LASTER MAYS, J., CONCUR

