

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

June 26, 2019

[Cite as *06/26/2019 Case Announcements #2, 2019-Ohio-2497.*]

MERIT DECISIONS WITHOUT OPINIONS

2019-0424. *State v. Wiley.*

Cuyahoga App. No. 106899, 2018-Ohio-5352. On appellant's jurisdictional memoranda. Appeal accepted and cause reversed on the authority of *State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266.

O'Connor, C.J., and Kennedy, French, DeWine, Donnelly, and Stewart, JJ., concur.

Fischer, J., concurs in part and dissents in part, with an opinion.

FISCHER, J., concurring in part and dissenting in part.

{¶ 1} I concur in the majority's judgment accepting jurisdiction of this case. And based on the facts presented by the parties in their memoranda, this court's decision in *State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266, probably applies to prevent merger of the aggravated-vehicular-homicide and driving-while-under-the-influence charges against appellee, Mario Wiley. I must dissent, however, from the majority's judgment summarily reversing the judgment of the Eighth District Court of Appeals based solely on *Earley* due to the other issues that are likely present in this appeal. Instead, I would grant jurisdiction over the state's appeal and allow the cause to be briefed before issuing a final decision.

{¶ 2} By summarily reversing the Eighth District's judgment based on *Earley*, this court in essence determines that the state's purported concession at Wiley's plea hearing that the aggravated-vehicular-homicide offense and the driving-while-under-the-influence offense may

well be allied offenses of similar import, *see* 2018-Ohio-5352, ¶ 24, has no effect on the trial court's allied-offenses analysis. While I believe that this court's decisions in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, and *Earley* make clear what the trial court is to consider in an allied-offenses analysis and that the state's purported concession likely makes no difference in that analysis, this court has not yet ruled on that specific issue.

{¶ 3} Furthermore, summarily reversing the Eighth District's judgment forecloses the possibility of addressing other issues that are affected by the application of *Earley* to this case, such as Wiley's ineffective-assistance-of-counsel claim. While there is certainly an argument that the applicability of *Earley* resolves Wiley's ineffective-assistance-of-counsel claim, as Wiley likely cannot show prejudice as required by *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), this court should not make that determination summarily. Because of this issue, and perhaps others, this case should have the benefit of briefing and further review.

{¶ 4} In jurisdictional appeals, this court does not receive the record until we accept the cause for review. At this stage in the proceedings, I am not comfortable in this case, given the limited record, with simply reversing based on *Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266. At the very least, the court should remand the cause to the court of appeals to reconsider Wiley's ineffective-assistance-of-counsel claim in light of this court's determination that *Earley* indeed applies in this case.

{¶ 5} In order to give full consideration to the issues in this appeal, I would grant jurisdiction and allow the cause to be briefed before making a final decision. Therefore, I concur in the majority's judgment accepting jurisdiction over this cause, but I respectfully dissent from its summary reversal.