[Cite as *State v. Bayer*, 2012-Ohio-5469.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-733
v.	:	(C.P.C. No. 10CR-3434)
Peggy S. Bayer,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 27, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Yeura Venters, Franklin County Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Peggy S. Bayer, appeals from a judgment of the Franklin County Court of Common Pleas convicting and sentencing her on one count of aggravated vehicular assault ("AVA"), R.C. 2903.08, and one count of operating a vehicle while under the influence of alcohol or drugs ("OVI"), R.C. 4511.19(A). The court entered the convictions following appellant's plea of guilty to those offenses.

{¶ 2} We conducted an independent review of this case pursuant to *Anders v. California*, 386 U.S. 738 (1967), and identified two issues warranting further briefing. We ordered and received supplemental briefs on those issues. We now conclude that the trial court erred in sentencing appellant to a lifetime suspension of her driver's license. We

therefore reverse the judgment of the trial court and remand the case for resentencing.

I. Trial Court Proceedings

{¶ 3} On June 10, 2010, the Franklin County Grand Jury indicted appellant on four criminal counts as follows: (1) one count of AVA in violation of subsection (A)(1)(a) of R.C. 2903.08, in that, while operating a motor vehicle on December 2, 2009, appellant caused serious physical harm to an individual as a proximate result of committing a violation of division (A) of R.C. 4511.19; (2) one count of vehicular assault in violation of R.C. 2903.08(A)(2), in that appellant recklessly caused serious physical harm to an individual while operating a motor vehicle; (3) one count of OVI in violation of R.C. 4511.19, in that appellant operated a vehicle while under the influence of alcohol; and (4) one count of OVI in violation of R.C. 4511.19, in that appellant operated a vehicle with a concentration of seventeen-hundredths of one percent (0.17) of alcohol in her blood.

{¶ 4} On March 10, 2011, the trial court held a hearing, at which it conducted a plea colloquy with appellant. At the conclusion of the hearing, the court allowed appellant to withdraw her previous pleas of not guilty and accepted her pleas of guilty to AVA, as charged in Count 1, a felony of the third degree, and OVI, as charged in Count 3, a misdemeanor of the first degree. The court found that appellant had knowingly, voluntarily, and understandingly entered guilty pleas to those counts. The state entered a nolle prosequi as to Counts 2 and 4.

{¶ 5} On April 27, 2011, the trial court conducted a sentencing hearing. The court sentenced appellant to four years in prison on the AVA count and six months on the OVI count, the two sentences to be served concurrently. In its judgment entry, the court observed that it was required to impose a mandatory prison term for the AVA, pursuant to R.C. 2929.13(F).[1] In addition, the court ordered the suspension of appellant's Ohio driver's license for life, without work driving privileges, and ordered appellant to pay $115,314.72 in restitution to the victim of the AVA.

{¶ 6} On August 29, 2011, appellant, acting pro se, filed in this court a motion for leave to file a delayed appeal, pursuant to App.R. 5, which we granted. She

[1] R.C. 2903.08(D)(1) provides: "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."

contemporaneously filed in the court of common pleas a notice of appeal and a motion for appointment of counsel, which was also granted.

{¶ 7} On February 29, 2012, appellant's appointed counsel filed an *Anders* brief, in which he asserted that he had reviewed the original court file and transcripts and could find "no error by the trial court prejudicial to the rights of appellant which may be argued to this court on appeal." (Appellant's brief at 3.) He requested permission to withdraw as counsel for appellant on the basis that the appeal was frivolous. He suggested that this court, while conducting its independent review of the case pursuant to *Anders*, consider the following "potential assignments of error: (1) whether the trial court erred by failing to comply with Crim.R. 11 in accepting appellant's plea; and (2) whether the trial court erred in sentencing appellant." (Appellant's brief at 3.)

{¶ 8} In addition, counsel certified that he had sent a copy of the *Anders* brief to appellant with instructions that she might file her own brief with the court if she chose to do so. Similarly, on March 2, 2011, this court ordered that a copy of the *Anders* brief be sent to appellant and granted her an extension of time until April 16, 2012, to file her own brief. On April 9, 2012, the state filed its brief, in which it asserted that the trial court complied with Crim.R. 11 in accepting appellant's plea and properly sentenced appellant. Appellant did not, however, file a pro se brief.

II. Procedure Pursuant to *Anders v. California*

{¶ 9} This court recently reviewed the procedure an appellant court must follow as established in *Anders*:

> In *Anders,* the United States Supreme Court held that if, after a conscientious examination of the record, a defendant's counsel concludes that the case is wholly frivolous, she should so advise the court and request permission to withdraw. *Id* . at 744. Counsel must accompany her request with a brief identifying anything in the record that could arguably support the client's appeal. *Id*. Counsel also must: (1) furnish the client with a copy of the brief and request to withdraw; and (2) allow the client sufficient time to raise any matters that the client chooses. *Id*.
>
> Upon receiving an *Anders* brief, we must conduct a full examination of all the proceedings to decide whether the case is wholly frivolous. *Penson v. Ohio,* 488 U.S. 75, 80, 109 S.Ct.

> 346 (1988), citing *Anders* at 744. After fully examining the proceedings below, if we find only frivolous issues on appeal, we then may proceed to address the case on its merits without affording appellant the assistance of counsel. *Penson* at 80. However, if we conclude that there are nonfrivolous issues for appeal, we must afford appellant the assistance of counsel to address those issues. *Anders* at 744; *Penson* at 80.

State v. Matthews, 10th Dist. No. 11AP-532, 2012-Ohio-1154, ¶ 9-10.

{¶ 10} In the case before us, we conducted an examination of the proceedings below as required by *Anders* and identified two nonfrivolous issues, as follows:

> (1) Whether the trial court improperly convicted and sentenced appellant for two allied offenses based on the same conduct, contrary to R.C. 2941.25(A); and
>
> (2) Whether the trial court improperly imposed a Class II driver's license suspension on appellant, pursuant to R.C. 4510.02(A)(2) and (3) and 2903.08(B)(2), where the record does not disclose that appellant had previously been convicted of, or pleaded guilty to, a prior aggravated vehicular assault, or any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault or attempted murder offense.

{¶ 11} We granted the motion to withdraw filed by appellant's first appellate counsel and appointed the Franklin County Public Defender to represent appellant and file a supplemental brief on the two aforementioned issues. The public defender filed a brief asserting the following assignments of error:

> **Assignment of error number one**
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> The trial court committed plain error when it convicted and sentenced the defendant on both the charge of aggravated vehicular assault in violation of r.c. 2903.08(a)(l)(a) [sic], which proscribes causing serious physical harm to another as a proximate result of operating a vehicle while under the influence, and the charge of operating a vehicle while under the influence, in violation of r.c. 4511.19(a) [sic], since the offenses are allied offenses of similar import under r.c. 2941.25 [sic], which precludes multiple convictions and sentencing for the same conduct and also because the constitutional provisions of the double jeopardy clause prohibit the infliction of cumulative punishment for both

> greater and lesser included offenses.
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> **Assignment of error number two**
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> The trial court erred when it imposed a lifetime driving suspension when the law only allowed for a class three suspension of two to ten years.

The state filed a supplemental brief in response.

III. Nature of Guilty Pleas

{¶ 12} Appellant's original appellate counsel suggested that this court review whether the trial court erred by failing to comply with Crim.R. 11 in accepting appellant's guilty pleas.

{¶ 13} Crim. R. 11(C)(2) provides in part:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
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> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the hearing.
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> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
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> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights [1] to jury trial, [2] to confront witnesses against him or her, [3] to have compulsory process for obtaining witnesses in the defendant's favor, and [4] to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which [5] the defendant cannot be compelled to testify against himself or herself.

{¶ 14} The law concerning the validity of a guilty plea is well-established:

> "Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required

> by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)." *State v. Veney*, 120 Ohio St.3d 178, 2008-Ohio-5200, ¶13. "While the trial court must strictly comply with [Crim.R. 11(C)(2)(c)] regarding the constitutional notifications listed in it, the trial court need only substantially comply with the non-constitutional provisions of the rule." *State v. Enyart*, 10th Dist. No. 08AP-184, 2008-Ohio-6418, ¶ 15.
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> * * *
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> In *Veney* at ¶ 22, the Supreme Court of Ohio reaffirmed that "a court must strictly comply with Crim.R. 11(C)(2)(c)" when advising a defendant of his constitutional rights. The Supreme Court stated that "[a] trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination." *Id.* at syllabus.
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> * * *
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> "[T]he trial court may vary slightly from the literal wording of the rule in the colloquy"; however, "the court cannot simply rely on other sources to convey these rights to the defendant." *Id.* Further, "a signed written waiver of constitutional rights does not effect a legal waiver in the absence of the necessary colloquy between the court and the defendant." *State v. Reece*, 10th Dist. No. 05AP-527, 2006-Ohio-4073, ¶ 18.

State v. Allen, 10th Dist. No. 11AP-640, 2012-Ohio-2986, ¶ 10-14.

{¶ 15} We reviewed the transcript of the hearing at which the trial court conducted the plea colloquy required by Crim.R. 11 and determined that the court substantially complied with Crim.R. 11(C)(2)(a) and (b) and strictly complied with Crim.R. 11(C)(2)(c). We find no credible appellate issue warranting further review concerning appellant's guilty pleas.

IV. Conviction and Sentencing—Allied Offenses Analysis

{¶ 16} R.C. 2941.25, Ohio's multiple count statute, 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.

{¶ 17} Pursuant to R.C. 2941.25, allied offenses described in subdivision (A) merge, with the result that a defendant charged with allied offenses may be sentenced for only one of the charged offenses. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50-51. (Lanzinger, J., concurring in judgment only); *State v. Botta*, 27 Ohio St.2d 196 (1971); *State v. Logan*, 60 Ohio St.2d, 126, 131 (1979).

{¶ 18} On December 29, 2010, in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Supreme Court of Ohio announced a new standard for determining whether two charged offenses constitute allied offenses of similar import under R.C. 2941.25.[2] *Johnson* additionally established that determination of allied offenses is separate from determination of the issue whether allied offenses merge. *Id.* at ¶46 ("In determining whether two offenses should be merged, the intent of the General Assembly is controlling."). For purposes of this discussion, we will assume, without deciding, that OVI and AVI are allied offenses[3] and consider only whether they should merge. In so doing, we will look at the intent of the General Assembly with respect to these offenses, as

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[2] The syllabus of *Johnson* states: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, overruled.)"

[3] *See State v. Phelps*, 12th Dist. No. CA2009-09-243, 2010-Ohio-3257; *State v. Caston*, 6th Dist. No. E-09-051, 2010-Ohio-6498; *State v. West*, 2d Dist. No. 23547, 2010-Ohio-1786.

mandated by *Johnson*.

{¶ 19} Generally, the General Assembly's intent as to merger of allied offenses is reflected in R.C. 2941.25. *Id*. That intent is that the state may file charges of two or more allied offenses of similar import but may obtain conviction of only one, absent the circumstances described in R.C. 2941.25(B). But, where other more specific legislative statements of legislative intent exist, a court may consider those statements in determining whether the General Assembly intended to allow imposition of cumulative punishments for allied offenses. *State v. Thomas*, 10th Dist. No. 10AP-557, 2011-Ohio-1191, ¶ 19, citing *Johnson*, and *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, ¶ 11.

{¶ 20} In its supplemental brief, the state has directed us to R.C. 2929.41, which provides rules as to whether sentences for multiple convictions run concurrently or consecutively, and includes the following provisions:

> (A) * * * 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) * * * (3) A jail term or sentence of imprisonment imposed for a misdemeanor violation of section * * * 4511.19 of the Revised Code [the OVI statute] *shall be served consecutively* to a prison term that is imposed for a felony violation of section * * * 2903.08 * * * [the AVA statute] of the Revised Code * * * *when the trial court specifies that it is to be served consecutively*.

(Emphasis added.)

{¶ 21} The General Assembly thereby clearly reflected its intent that a trial court may, in its discretion, sentence a defendant for both OVI and AVA. That intent conflicts with the intent reflected in R.C. 2941.25. That is, R.C. 2929.41 evidences the intent of the legislature that those two offenses should not merge—a conclusion that necessarily follows from the fact that a trial court could not order sentences to be served consecutively unless the court had first imposed more than just one sentence. Pursuant to the merger analysis for allied offenses established by the general rule of R.C. 2941.25, the prosecutor in appellant's case would have been required to elect between the two allied offenses to

which the defendant pled guilty and then pursued sentencing on only one. This is so because, in applying the merger of allied offenses rule established in R.C. 2941.25, "the trial court must accept the state's choice among allied offenses, 'merge the crimes *into a single conviction for sentencing*, and impose a sentence that is appropriate for the merged offense.' " (Emphasis added.) *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 13, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 24, and *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 41. *See also Whitfield* at ¶ 12 ("[F]or purposes of R.C. 2941.25, a 'conviction' consists of a guilty verdict *and* the imposition of a sentence or penalty." (Emphasis sic.)).

{¶ 22} In short, we find that, where a defendant is found guilty of operating a motor vehicle while intoxicated and is also found guilty of aggravated vehicular assault, that defendant may be found guilty and sentenced on both. Assuming, arguendo, that OVI and AVA 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, i.e., found guilty and sentenced, on either the OVI or the AVA, but not both. Accordingly, the trial court had the discretion, pursuant to R.C. 2929.419(B)(3), to enter convictions of both OVI and AVA and to sentence appellant to serve consecutive sentences for those two crimes.

V. Sentencing—Lifetime Driver's License Suspension

{¶ 23} The state acknowledges that the trial court erred in sentencing appellant to a lifetime driver's license suspension. Pursuant to R.C. 2903.08(B)(2), a defendant convicted of aggravated vehicular assault is to be punished with a class three driver's license suspension unless the "offender previously has been convicted of or pleaded guilty to a violation of [the aggravated vehicular assault statute], any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense." The record lacks evidence that appellant was convicted of or pled guilty to any of the crimes listed above. Accordingly, the court should have imposed a class three driver's license suspension, which has a duration of a definite period of two to ten years. R.C. 4510.02(A)(2).

VI. Conclusion

{¶ 24} We therefore overrule appellant's first assignment of error and sustain her second assignment of error. We affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand this case to that court with instructions to correct appellant's sentence by imposing a driver's license suspension of no more than ten years.

Judgment affirmed in part and reversed in part;
cause remanded with instructions.

BROWN, P.J., and FRENCH, J., concur.

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