[Cite as *State v. Vanderhoof,* 2015-Ohio-2198.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-L-036**
- vs -	:	
DANIEL A. VANDERHOOF, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 12 CR 000846.

Judgment: Affirm.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Thomas Rein, Leader Building, #940, 526 Superior Avenue, Cleveland, OH 44114 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Daniel A. Vanderhoof, Jr., appeals from the judgment of sentence entered by the Lake County Court of Common Pleas. This court originally affirmed the trial court's judgment of sentence in *State v. Vanderhoof*, 11th Dist. Lake No. 2013-L-036, 2013-Ohio-5366. Vanderhoof filed an application to reopen his appeal based upon ineffective assistance of appellate counsel, which this court granted. The issue before this court upon reopening is whether appellate counsel was

ineffective for failing to raise the issue of merger as it relates to the offenses of Aggravated Vehicular Assault and Operating a Vehicle While Under the Influence (OVI). For the following reasons, we affirm the judgment of sentence of the trial court.

{¶2} Following an incident in which Vanderhoof crashed his vehicle into an occupied home while intoxicated, the Lake County Grand Jury issued an 11-count indictment against him.

{¶3} Vanderhoof entered a plea of guilty to Count One, Aggravated Vehicular Assault, a felony of the second degree, in violation of R.C. 2903.08(A)(1)(a); Count Two, Aggravated Vehicular Assault, a felony of the second degree, in violation of R.C. 2903.08(A)(1)(a); and Count Three, OVI, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(a). The court nolled the remaining counts of the indictment.

{¶4} Following a hearing, the court filed a Judgment Entry of Sentence, ordering Vanderhoof to serve a prison term of eight years on Count One; eight years on Count Two; and 180 days of local incarceration on Count Three. The court ordered the terms imposed for Counts One and Two to be served consecutively, for an aggregate term of 16 years. The court ordered the 180-day term of incarceration to follow that prison term.

{¶5} Vanderhoof appealed and, in *Vanderhoof, supra*, this court held that his maximum and consecutive sentences were proper and were consistent with other sentences, pursuant to R.C. 2929.11(B). *Id.* at ¶ 17 and 25. Based on this, we affirmed the trial court's imposition of sentence. *Id.* at ¶ 27.

{¶6} Vanderhoof filed an application to reopen his appeal pursuant to App.R. 26(B). In granting the application, this court found that "[t]he record appears to establish

a colorable claim for ineffective assistance of appellate counsel" due to counsel not raising an "error related to the failure to merge the charges of Aggravated Vehicular Assault and Operating a Vehicle While Under the Influence."

{¶7} Vanderhoof raises the following assignment of error on reopening:

{¶8} "Appellant was denied effective assistance of appellate counsel as guaranteed by Section 10, Article I, of the Ohio Constitution and the Sixth and Fourteenth Amendments when appellate counsel failed to raise error related to the failure to merge the charges of Aggravated Vehicular Assault and Operating a Vehicle While Under the Influence."

{¶9} The test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the proper standard to apply in assessing whether a defendant has raised a genuine issue as to the ineffectiveness of appellate counsel under App.R. 26(B). *State v. Davie*, 96 Ohio St.3d 133, 2002-Ohio-3753, 772 N.E.2d 119, ¶ 5. To prevail on an ineffective assistance of counsel claim, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland* at 687-688. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's performance was reasonable considering all the circumstances." *Strickland* at 688. "There is a strong presumption that the attorney's performance was reasonable." *State v. Gotel*, 11th Dist. Lake No. 2006-L-015, 2007-Ohio-888, ¶ 10.

{¶10} Under his assignment of error, Vanderhoof asserts that there was no justification for appellate counsel's failure to raise the issue of merger, since OVI and Aggravated Vehicular Assault are allied offenses.

{¶11} The State argues that counsel could not be ineffective for failing to raise merger because an OVI jail term should run consecutively with an Aggravated Vehicular Assault prison term.

{¶12} R.C. 2941.25 provides that, "[w]here 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). However, "[w]here 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).

{¶13} The argument in this matter is centered around whether OVI and Aggravated Vehicular Assault must merge, given that the commission of Aggravated Vehicular Assault under R.C. 2903.08(A)(1)(a) requires the commission of an OVI: "[n]o 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 [OVI]."

{¶14} This court, in *State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399, evaluating this exact issue, held that the trial court's entry of convictions for both Aggravated Vehicular Assault and OVI and its order that jail/prison terms for the

offenses be served concurrently, was "authorized by the discretion afforded the court under R.C. 2929.41(B)(3)." *Id* at ¶ 49. That statute provides, in pertinent part:

> 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.

{¶15} In support of its holding in *Demirci*, this court cited *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469, in which the Tenth District concluded that R.C. 2929.41(B)(3) "evinces a legislative intent to permit cumulative punishments where a defendant is found guilty of both aggravated vehicular assault and operating a vehicle under the influence." *Demirci* at ¶ 46, citing *Bayer* at ¶ 19-22. The *Bayer* court summarized, "[a]ssuming, 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." *Bayer* at ¶ 22.

{¶16} In light of the fact that this court's sole opinion on this specific issue holds that a defendant may receive separate sentences for Aggravated Vehicular Assault and OVI, regardless of whether the opinion's conclusion was arguable, we cannot find that

appellate counsel was ineffective for failing to raise the merger issue. Given the principle that a court should follow its own precedent, and that the trial court is bound by this court's authority, appellate counsel's decision not to raise an issue already adjudicated by this court in *Demirci* does not constitute ineffective representation. *See Aulizia v. Westfield Natl. Ins. Co.*, 11th Dist. Trumbull No. 2006-T-0057, 2007-Ohio-3017, ¶ 44, citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (stare decisis requires a court to follow the authority of a superior court which has decided the issue under review). Appellate counsel is not required to raise and argue assignments of error that are meritless. *Jones v. Barnes*, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The lower courts, as well as attorneys defending clients, are entitled to rely on the precedent of this court in making decisions. Such reliance on prior appellate decisions cannot serve as a basis for a finding of ineffectiveness of counsel or plain error. It is logical that a defense attorney would not raise arguments that have already been settled by this court, especially given that "appellate counsel need not raise every possible issue in order to render constitutionally effective assistance" and may choose which arguments are most likely to succeed. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 7.

{¶17} Since appellate counsel was not ineffective for failing to raise the issue of merger as already determined in *Demirci*, there is no basis to reverse the lower court's judgment and the prior judgment of this court is confirmed.

{¶18} The sole assignment of error is without merit.

{¶19} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, sentencing Vanderhoof to serve consecutive terms for Aggravated Vehicular Assault and OVI, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents.