[Cite as *State v. West*, 2010-Ohio-1786.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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.:

{¶ 1} 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.

{¶ 2} 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 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.

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} Defendant timely appealed to this court from her conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT ERRED BY FAILING TO SUPPRESS STATEMENTS MADE BY APPELLANT WHEN SHE WAS UNABLE TO PROPERLY WAIVE HER MIRANDA RIGHTS."

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} 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.

{¶ 11} In *State v. Monticue*, Miami App. No. 06CA33, 2007-Ohio-4615, at ¶10, this court observed:

{¶ 12} "'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)."

{¶ 13} 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.

{¶ 14} 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.

{¶ 15} 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.

{¶ 16} 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.

{¶ 17} 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.

{¶ 18} 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.**

{¶ 19} 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.

{¶ 20} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 21} "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."

{¶ 22} 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.

{¶ 23} Defendant was convicted of a violation of R.C. 2903.08(A)(1)(a), which provides:

{¶ 24} "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:

{¶ 25} "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."

{¶ 26} 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.

{¶ 27} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 28} "APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE SHE WAS CONVICTED OF ALLIED OFFENSES OF SIMILAR IMPORT."

{¶ 29} Defendant argues that she cannot be convicted and

sentenced

{¶ 30} 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.

{¶ 31} 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.

{¶ 32} 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:

{¶ 33} "(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.

{¶ 34} "(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."

{¶ 35} "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.

{¶ 36} Defendant was found guilty of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), which states:

{¶ 37} "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:

{¶ 38} "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."

{¶ 39} 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:

{¶ 40} "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:

{¶ 41} "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."

{¶ 42} 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).

{¶ 43} 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.

{¶ 44} 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).

{¶ 45} 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.

{¶ 46} 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