

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 8-14-21

v.

THOMAS J. WOODRUFF,

OPINION

DEFENDANT-APPELLANT.

Appeal from Logan County Common Pleas Court
Trial Court No. CR-14-05-0103

Judgment Affirmed

Date of Decision: April 6, 2015

APPEARANCES:

Marc S. Triplett for Appellant

Sarah J. Warren for Appellee

ROGERS, P.J.

{¶1} Defendant-Appellant, Thomas Woodruff, appeals the judgment of the Court of Common Pleas of Logan County overruling his motion to dismiss count two of the State's indictment. On appeal, Woodruff argues that the trial court erred in overruling his motion because his double jeopardy rights were violated and the offenses of vehicular assault and operating a vehicle under the influence are allied offenses of similar import. For the reasons that follow, we affirm the trial court's judgment.

{¶2} On December 18, 2013, Woodruff pled no contest, and was found guilty, of operating a vehicle while intoxicated, in violation of R.C. 4511.19(A)(1)(a), in 13TRC5358. *See* (Docket No. 39, p. 9). On May 13, 2014, the Logan County Grand Jury indicted Woodruff on one count of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), a felony of the third degree, and one count of vehicular assault in violation of R.C. 2903.08(A)(2)(b), a felony of the fourth degree, in CR14050103. Both cases arose from the same incident where Woodruff allegedly hit a woman in a parking lot with his vehicle, causing serious physical injuries to the woman.

{¶3} Woodruff filed a motion to dismiss count one of the indictment on August 22, 2014. In his motion, Woodruff argued that count one of the indictment was based upon the same incident and facts as the OVI charge he pled no contest

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to in 13TRC5358. The State did not oppose Woodruff's motion, and the trial court dismissed count one of the indictment. (Docket No. 33, p. 1). Woodruff then filed a motion to dismiss count two of the indictment on September 9, 2014. He again argued that the second count of the indictment was based upon the same incident and facts as the OVI charge he pled no contest to in 13TRC5358.

{¶4} The trial court denied Woodruff's second motion to dismiss on September 15, 2014. Specifically, the court found that the State's prosecution of the OVI charge did not prevent the State from prosecuting Woodruff for vehicular assault, even if they arose from the same set of facts.

{¶5} Woodruff timely appealed this judgment, presenting the following assignment of error for our review.

Assignment of Error

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO DISMISS COUNT TWO OF THE INDICTMENT.

{¶6} In his sole assignment of error, Woodruff argues that the trial court erred when it denied his second motion to dismiss because double jeopardy precludes the State from prosecuting him for vehicular assault. We disagree.

{¶7} This court will review a trial court's decision to grant or deny a motion to dismiss under a de novo standard of review. *State v. Hicks*, 3d Dist. Union Nos. 14-07-26, 14-07-31, 2008-Ohio-3600, ¶ 17, citing *State v. Collins*,

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12th Dist. Clermont No. CA2007-01-010, 2007-Ohio-5392, ¶ 7, citing *State v. Benton*, 136 Ohio App.3d 801, 805 (6th Dist.2000). “The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect the accused from being put in jeopardy twice for the same offense. These provisions protect an individual against successive punishments as well as successive prosecutions for the same offense.” *State v. Moore*, 110 Ohio App.3d 649, 652 (1st Dist.1996).

{¶8} In determining whether an accused is being successively prosecuted for the “same offense,” the Ohio Supreme Court has adopted the so called “same elements” test articulated in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932). *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, ¶ 18, citing *State v. Best*, 42 Ohio St.2d 530 (1975), paragraph three of the syllabus. Under *Blockburger*, “the Double Jeopardy Clause * * * prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes unless each statute ‘requires proof of a fact which the other does not.’ ” *State v. Tolbert*, 60 Ohio St.3d 89, 90 (1991), quoting *Blockburger* at 304. “This test focuses upon the elements of the two statutory provisions, not upon the evidence proffered in a given case.” *State v. Thomas*, 61 Ohio St.2d 254, 259 (1980), *overruled on other grounds in State v. Crago*, 53 Ohio St.3d 243 (1990).

{¶9} In addition to citing *Blockburger*, Woodruff also cites to R.C. 2941.25 and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, as the applicable test for determining whether certain offenses are allied offenses of similar import. However, we find that both R.C. 2941.25 and *Johnson* are inapplicable as the present case involves successive prosecutions in separate trials rather than cumulative punishments. See *State v. Thompson*, 1st Dist. Hamilton No. C-130053, 2013-Ohio-2647, ¶ 5 (“This court has held that successive-prosecution cases * * * are controlled by *Blockburger* * * *, and not R.C. 2941.25.”); *State v. Mullins*, 5th Dist. Fairfield No. 12CA17, 2013-Ohio-1826, ¶ 14 (finding successive prosecutions are controlled by *Blockburger*, not R.C. 2941.25); *State v. Lamp*, 9th Dist. Summit No. 26602, 2013-Ohio-1219, ¶ 7 (recognizing successive prosecution cases are controlled by *Blockburger* and not R.C. 2941.25 and *Johnson*). Therefore, for purposes of this appeal, we will only focus on the *Blockburger* test.

{¶10} We find that the facts of this case are almost identical to the facts in *Zima*. In that case, the appellant operated her vehicle left of center and collided with an oncoming motorcyclist. *Zima* at ¶ 1. She was charged with driving under the influence in violation of Cleveland Codified Ordinance 433.02(a)(1), entered into a plea agreement with the City of Cleveland, and was found guilty of driving under the influence. *Id.* at ¶ 1-2. *Zima* was then indicted by the Cuyahoga County

Grand Jury, charging her with aggravated vehicular assault in violation of R.C. 2903.08(A)(1) on the basis she was driving under the influence, and in violation of R.C. 2903.08(A)(2) on the basis she was driving recklessly. *Id.* at ¶ 1. Zima moved to dismiss the charges on grounds of double jeopardy. *Id.* at ¶ 3.

{¶11} Here, Woodruff was convicted of violating R.C. 4511.19(A)(1)(a), which provides: “No person shall operate any vehicle * * * within this state, if, at the same of the operation * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them.” The State now seeks to further prosecute Woodruff for vehicular assault in violation of R.C. 2903.08(A)(2)(b), which states: “No person, while operating or participating in the operation of a motor vehicle * * * shall cause serious physical harm to another person * * * [r]ecklessly.” Thus, Woodruff is facing the same charges as the appellant faced in *Zima*.¹

{¶12} The Ohio Supreme Court noted that “ ‘[r]ecklessness can occur without alcohol or drug involvement, and operating a motor vehicle while [under the influence] can occur without resulting physical injury.’ ” *Id.* at ¶ 33, quoting *State v. Hyman*, 10th Dist. Franklin No. 93AP-530, 1993 WL 387267, *2 (Sept. 28, 1993). Therefore, it held that “the principles of double jeopardy do not apply to bar successive prosecutions for the offense of driving under the influence in

¹ While the appellant in *Zima* was charged with “aggravated vehicular assault” in violation of R.C. 2903.08(A)(2), we note that R.C. 2903.08(C)(1) states that “[w]hoever violates division (A)(2) or (3) of this section is guilty of vehicular assault * * *.”

violation of R.C. 4511.19(A) (or a substantially equivalent municipal ordinance) and the offense of * * * vehicular assault under R.C. 2903.08(A)(2).” *Zima* at ¶ 37.

{¶13} To avoid this result, Woodruff argues that the State will “submit the evidence at trial that he was driving impaired to prove he was operating the vehicle in a reckless manner.” (Appellant’s Br., p. 7). However, the appellant in *Zima* made the same argument, which the Court found to be meritless. Specifically, the Court stated:

We find *Zima*’s assertions to be unsupported. *Blockburger* requires a comparison of elements, not evidence. R.C. 2903.08(A)(2) does not make driving under the influence and failure to yield necessary elements of recklessly causing serious physical harm. Indeed, the statute lists driving under the influence and recklessness as distinct predicate offenses. In reality, *Zima* is proposing that even though her subsequent prosecution for aggravated vehicular assault under R.C. 2903.08(A)(2) would pass the *Blockburger* test, that prosecution is nevertheless barred because the state will prove conduct that constitutes an offense for which she has already been prosecuted. This, however, is in substance a feature of the now-defunct “same conduct” test, which was adopted by the high court in *Grady v. Corbin* (1990), 495 U.S. 508, 510, 110 S.Ct. 2084, 109 L.Ed.2d 548, but then overruled in *Dixon*, supra, 509 U.S. at 711–712, 113 S.Ct. 2849, 125 L.Ed.2d 556.

In any event, there is nothing in the record to indicate that the state will have to rely on the components of the lesser offenses that were charged in the municipal proceedings in order to prove recklessness. Even under an evidentiary or conduct-related analysis, the mere possibility that the state may seek to rely on the ingredients of these lesser offenses to prove recklessness under R.C. 2903.08(A)(2) is not sufficient to bar the latter prosecution. See *Illinois v. Vitale* (1980), 447 U.S. 410, 419–420, 100 S.Ct. 2260, 65

L.Ed.2d 228. See, also, *Dixon*, 509 U.S. at 707, 113 S.Ct. 2849, 125 L.Ed.2d 556 (limiting *Vitale*).

(Footnote omitted.) *Id.* at ¶ 35-36.

{¶14} The State maintains, as the prosecution similarly did in *Zima*, that it will be able to prove recklessness by evidence other than the fact that Woodruff was driving impaired. Specifically, the State alleges that Woodruff was operating his motor vehicle in a way where he could not see over his dashboard and also asserts that he drove his vehicle knowing his brakes were not working properly.

{¶15} While Woodruff cites to *Zima* in his briefs, he does not explain how *Zima* is distinguishable or why it should not be followed in this case. We find that *Zima* controls the disposition of this matter and that Woodruff's arguments are meritless.

{¶16} Accordingly, we overrule Woodruff's sole assignment of error.

{¶17} Having found no error prejudicial to Woodruff in the particulars assigned and argued, we affirm the trial court's judgment.

Judgment Affirmed

SHAW and WILLAMOWSKI, J.J., concur.

/jlr