[Cite as *State v. Carozza*, 2015-Ohio-1783.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P. J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 14-COA-028
ANDREW G. CAROZZA	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Ashland Municipal Court, Case No. 14-TRC-002169
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	May 8, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
ANDREW BUSH 1213 E. Main Street Ashland, OH 44805	DANIEL MASON ERIN POPLAR 103 Milan Ave., Suite 6 Amherst, OH 44001

Gwin, P.J.

{¶1} Appellant State of Ohio appeals the September 8, 2014 Judgment Entry of the Ashland Municipal Court granting appellee Andrew G. Carozza's ["Carozza"] motion to dismiss on Double Jeopardy grounds.

Facts and Procedural History

{¶2} At approximately 5:55 a.m. on April 5, 2014, the Mansfield Post of the Ohio State Highway Patrol was dispatched to a location on State Route 545 in Richland County, Ohio near the residence of a Thomas Shoup. Troopers found that a vehicle had veered off the right side of the road striking a cement barrier then careened to the left side of the road striking Shoup's home. The vehicle then continued into the Olivesburg General Store parking lot diagonally across the street from the Shoup residence. At 6:23 a.m., authorities located a vehicle with damage consistent with the earlier accident at the Shoup residence some four and a half miles away on State Route 96 in Ashland County, Ohio. Carozza was found alongside this vehicle. Carozza later tested .258 on a breathalyzer.

{¶3} Carozza was charged in Ashland County with two counts of Operating a Vehicle Under the Influence of Alcohol and/or Drugs (OVI) in violation of 4511.19(A)(1)(h) and 4511.19(A)(1)(a) and one count of Unsafe Vehicle in violation of 4513.02. Carozza was also charged with OVI in violation of 4511.19(A)(1)(a) in Richland County as well as Operating a Vehicle Without a Valid License in violation of 4510.12, Failure to Control in violation of 4511.202 and Hit Skip in violation of 4511.202.

{¶4} On June 3, 2014, Carozza pled guilty to the Hit Skip and Reckless Operation charges and was convicted thereon in Richland County.

{¶5} Carozza filed a motion to dismiss the OVI charges in Ashland County based on double jeopardy on July 3, 2014. The trial court held an evidentiary hearing on Carozza's motion.

{¶6} At the hearing on Carozza's motion to dismiss, Carozza testified that he did not remember the collision with Mr. Shoup's residence, but did remember coming to a stop in Ashland County. Carozza was unable to elaborate on why it took him over twenty minutes to travel four miles and when asked if his operation of a vehicle in Richland County and Ashland County was a continuous course of conduct, Carozza stated, "I cannot say for sure, no." The evidence at the hearing further revealed that Carozza flagged down Larry Evans. Mr. Evans called 9-1-1 within a minute or two of being flagged down. The call records show that call was placed at 6:23 a.m.

{¶7} Mr. Shoup, the owner of the residence struck by Carozza's vehicle, testified that he heard the loud crashing noises outside his home at approximately 5:55 a.m. Mr. Shoup spoke to his wife for a moment, got up out of a recliner, and walked over to a window to see the vehicle involved in the accident stopped in a small parking lot next to his property. In the time that elapsed between the accident and when Mr. Shoup made his way to the window, Carozza sat stopped in this small parking lot.

{¶8} The vehicle left gouge marks in the roadway traveling towards the Olivesburg General Store and towards the Ashland County line. Trooper Werner was investigating this accident when he learned that a vehicle with significant damage was involved in an accident in Ashland County about the same time. Trooper Werner traveled to S.R. 96 in Ashland County and observed Carozza and Carozza’s vehicle disabled along the road. The vehicle's damage and missing parts were consistent with

the damage to the Shoup residence and both rocker panels were missing from the vehicle. Trooper Werner determined that Carozza's vehicle was the vehicle involved in the accident in Richland County.

{¶9} Trooper Burgett from the Ashland County post of the Highway Patrol was at the scene as well. Carozza was charged with OVI in both counties. At the place where the Carozza's vehicle came to rest, it had traveled approximately 4 1/2 miles from the Shoup residence, the scene of the first accident.

{¶10} By Judgment Entry filed September 8, 2014, the trial court granted Carozza's motion to dismiss. Carozza then pled guilty to the Unsafe Vehicle charge and was fined $150.00 plus court costs.

Assignments of Error

{¶11} The state raises two assignments of error,

{¶12} "I. THE TRIAL COURT ERRED IN FINDING THAT THE APPELLEE'S CONDUCT IN RICHLAND COUNTY CONSTITUTED THE SAME COURSE OF CONDUCT AS HIS CONDUCT IN ASHLAND COUNTY FOR DOUBLE JEOPARDY PURPOSES.

{¶13} "II. THE TRIAL COURT ERRED IN FINDING THAT THE APPELLEE'S CONVICTIONS IN RICHLAND COUNTY WERE ALLIED OFFENSES OF SIMILAR IMPORT TO THE APPELLEES CHARGES OF OVI IN ASHLAND COUNTY."

I. & II.

{¶14} The State's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶15} The state argues that the trial court erred in finding that Carozza's conduct in Richland County constituted the same continuing course of conduct as his conduct in Ashland County for double jeopardy purposes. The state further contends the trial court erred in ordering dismissal of the Ashland County charges based on the doctrine of allied offenses.

{¶16} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect criminal defendants against multiple prosecutions for the same offense. The Ohio Supreme Court has recognized that "[t]he protections afforded by the two Double Jeopardy Clauses are coextensive." *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, ¶ 7, *citing State v. Gustafson* (1996), 76 Ohio St.3d 425, 432, 668 N.E.2d 435.

{¶17} The principle behind the Double Jeopardy Clause "'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for the alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *State v. Roberts*, 119 Ohio St.3d 294, 2008-Ohio-3835, 893 N.E.2d 818, ¶ 11, *quoting Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199(1957). The federal and state constitutions' double jeopardy protection further guards citizens against cumulative punishments for the "same offense." *State v. Moss*, 69 Ohio St.2d 515, 518, 433 N.E.2d 181(1982). "[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature

intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535, 542(1983). *See, also, Moss*, 69 Ohio St.2d at 518, 433 N.E.2d at 184-185. In *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425(1984), the United States Supreme Court stated:

> Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, *United States v. Wiltberger*, 5 Wheat. 76, 93, 5 L.Ed. 37 (1820), the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent, see *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983).

{¶18} The Double Jeopardy Clause of the federal constitution "protects only against the imposition of multiple criminal punishments for the same offense, * * * and then only when such occurs in successive proceedings." (Citations omitted.) *Hudson v. United States,* 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450(1997); *State v. Martello*, 97 Ohio St.3d 398, 2002–Ohio–6661, 780 N.E.2d 250, ¶8.

{¶19} In *State, ex rel. Sawyer, v. O'Connor,* the Ohio Supreme Court addressed the issue of double jeopardy where a trial judge sua sponte found a defendant guilty of reckless operation after a plea of no contest to the original charge of operating a motor vehicle while under the influence of alcohol. Therein, the Supreme Court stated:

> [Defendant] was placed in jeopardy at the time the trial court exercised its discretion to accept a no contest plea. See *United States v. Martin Linen Supply Co.* (1977), 430 U.S. 564. The trial court's finding of guilt of reckless operation constituted a finding of not guilty of the charge

> of operating an automobile under the influence of alcohol. For purposes of double jeopardy, this case is no different than had the trial court found defendant not guilty of any offense after accepting the plea of no contest. Thus, so far as the charge of driving while intoxicated is concerned, there has been a final determination of not guilty irrespective of whether, in arriving at that determination, the trial court grossly abused its discretion or erroneously determined that reckless operation is a lesser-included offense of the principal charge.

54 Ohio St.3d 380, 382-383, 377 N.E.2d 494(1978). However, the case at bar is distinguishable from the facts in *Sawyer.* In the case at bar, the evidence in the record concerning Carozza's OVI offense in Richland County is the Richland County Court's docket sheet. (T. Aug. 14, 2014 at 5; 44; Defendant's Exhibit D). The Docket Sheet and testimony establish that the OVI charge in Richland County was amended by the state to a charge of Reckless Operation, a misdemeanor of the fourth degree in violation of R.C. 4511.20 before Carozza changed his plea. Carozza then entered a plea to the charge of Reckless Operation.

{¶20} In the Ohio Supreme Court's decision in *State v. Adams*, 43 Ohio St.3d 67, 538 N.E.2d 1025(1989), the defendant was initially charged with a violation of R.C. 4511.19(A)(3) for having a specified amount of alcohol concentration on his breath. *Adams*, 43 Ohio St.3d at 67, 538 N.E.2d 1025. Based on the same facts and circumstances, the defendant was later charged with a violation of R.C. 4511.19(A)(1) for operating a motor vehicle while under the influence of alcohol. The trial court found that the speedy trial waiver executed with respect to the first charge extended to the

later charge because the two charges fell under the state statute and generally involved the same conduct. Id. at 69, 538 N.E.2d 1025. That decision was affirmed on appeal. The Supreme Court later reversed, however, concluding that Adams' waiver to the second charge was not knowingly, voluntarily, and intelligently made because the charges were distinctly different from one another, so much so that they "could involve different defenses at [the] time of trial." Id. Accordingly, the Court determined that Adams could not have made a knowing and intelligent waiver of his right to a speedy trial because he did not know, "the exact nature of the crime he [was] charged with" when he executed the waiver. Id. at 70, 538 N.E.2d 1025. The Supreme Court explained that the fact that Adams was not driving on a public road would have been an effective defense to the original charge. Since this was not a valid defense to the offense as amended, Adams could not have made a knowing and intelligent waiver of his right to a speedy trial because he did not know, "the exact nature of the crime he [was] charged with," when he executed the waiver. Id. at 70, 538 N.E.2d 1025.

{¶21} In the case at bar, Carozza was charged in Richland County with OVI "under the influence" in violation of R.C. 4511.19(A)(1)(a); In Ashland County Carozza was charged an OVI "prohibited level" in violation of R.C. 4511.19(A)(1)(h).

{¶22} The phrase "under the influence of intoxicating liquor" has been defined as "[t]he condition in which a person finds himself after having consumed some intoxicating beverage in such quantity that its effect on him adversely affects his actions, reactions, conduct, movement or mental processes or impairs his reactions to an appreciable degree, thereby lessening his ability to operate a motor vehicle." *Toledo v. Starks* (1971), 25 Ohio App .2d 162, 166. See, also, *State v. Steele* (1952), 95 Ohio App. 107,

111 ("[B]eing 'under the influence of alcohol or intoxicating liquor' means that the accused must have consumed some intoxicating beverage, whether mild or potent, and in such quantity, whether small or great, that the effect thereof on him was to adversely affect his actions, reactions, conduct, movements or mental processes, or to impair his reactions, under the circumstances then existing so as to deprive him of that clearness of the intellect and control of himself which he would otherwise possess"). See, *State v. Henderson,* 5th Dist. Stark No. 2004-CA-00215, 2005-Ohio-1644, ¶32. [Citing *State v. Barrett*, 5th Dist. Licking App. No. 00 CA 47, 2001 WL 194782(Feb. 26, 2001)].

{¶23} In *Defiance v. Kretz*, the Ohio Supreme Court held:

> R.C. 4511.19 is a strict liability statute. * * * In R.C. 4511.19(A)(3) the General Assembly defined the point at which an individual can no longer drive without being a substantial danger to himself and others. * * * In determining whether the defendant committed the per se offense, the trier of fact is not required to find that the defendant operated a vehicle while under the influence of alcohol or drugs, but only that the defendant's chemical test reading was at the prescribed level and that the defendant operated a vehicle within the state. . . The accuracy of the test results is a critical issue in determining a defendant's guilt or innocence.
>
> The admissibility of test results to establish alcoholic concentration under R.C. 4511.19 turns on substantial compliance with ODH regulations. *State v. Plummer* (1986), 22 Ohio St.3d 292, 294, 22 OBR 461, 463-464, 490 N.E.2d 902, 905; *Cincinnati v. Sand* (1975), 43 Ohio St.2d 79, 87, 72 O.O.2d 44, 48, 330 N.E.2d 908, 912-913. *See, also, State*

> *v. Dickerson* (1986), 25 Ohio St.3d 64, 66, 25 OBR 86, 88, 495 N.E.2d 6, 8; *State v. Steele* (1977), 52 Ohio St.2d 187, 192, 6 O.O.3d 418, 421, 370 N.E.2d 740, 743; *Mentor v. Giordano* (1967), 9 Ohio St.2d 140, 146, 38 O.O.2d 366, 369, 224 N.E.2d 343, 347.

60 Ohio St.3d 1, 3, 573 N.E.2d 32(1991).

{¶24} In the case at bar, each separate crime proscribed by R.C. 4511.19(A) that Carozza was charged with requires proof of an additional different fact; the mere fact that Carozza was charged in Ashland County with OVI "prohibited level" in violation of R.C. 4511.19(A)(1)(h) does not, in and of itself, mean that Carozza was "under the influence of alcohol" for purposes of the Richland County "under the influence" charge.

{¶25} R.C. 2941.25, Multiple counts states:

> (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.

{¶26} In *State v. Ruff,* ___ Ohio St.3d __, 2015-Ohio-995, ___N.E.2d ___, 2015 WL 1343062, the Ohio Supreme Court revised its allied-offense jurisprudence,

> 1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors—the conduct, the animus, and the import.
>
> 2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

Ruff, at *syllabus.* The Court further explained,

> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

{¶27} The offenses of OVI in Richland County and OVI in Ashland County are, under the facts of this case, of dissimilar significance and have separate and identifiable harm. Testimony was presented that Carozza's vehicle had stopped after the accident in Richland County. This accident caused damage to Shoup's property. Carozza then decides to flee the scene of this accident. His obvious purpose and goal now becomes to elude detection for OVI and to evade responsibility for the damage he caused to the

Shoup property. Carozza enters Ashland County and continues to drive until his vehicle eventually ends up in a ditch.

{¶28} Thus, Carozza's continued driving into Ashland County after leaving the scene of the accident in Richland County caused separate, identifiable harm, was committed separately and was committed with a separate motivation. Thus under *Ruff,* Carozza's act of driving OVI in Richland County was separate and distinct from his act of driving while under the influence in Ashland County.

{¶29} The state's first and second assignments of error are sustained.

{¶30} The judgment of the Ashland Municipal Court is reversed and this matter is remanded for proceedings in accordance with our opinion and the law.

By Gwin, P.J.,

Wise, J., and

Baldwin, J., concur