

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CY BIGERTON

Defendant-Appellant

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JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 14-CA-59

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, 2014 CR 00198

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

June 25, 2015

APPEARANCES:

For Plaintiff-Appellee

JOSHUA S. HORACEK
239 West Main Street
Suite 101
Lancaster, OH 43130

For Defendant-Appellant

WILLIAM T. CRAMER
470 Olde Worthington Road
Suite 200
Westerville, OH 43082

Farmer, J.

{¶1} On April 18, 2014, the Fairfield County Grand Jury indicted appellant, Cy Bigerton, on two counts of aggravated vehicular assault and two counts of vehicular assault in violation of R.C. 2903.08, one count of driving while under the influence of alcohol in violation of R.C. 4511.19, one count of failure to stop after an accident in violation of R.C. 4549.02, and one count of driving under suspension in violation of R.C. 4541.11. Said charges arose from an accident wherein appellant pulled out in front of a motorcycle causing the two occupants of the motorcycle to be ejected and sustain serious injuries. Appellant then fled from the scene, but was caught. Blood testing showed appellant was operating his vehicle with a .210 BAC.

{¶2} On October 13, 2014, appellant pled guilty to all the counts save for the two counts of vehicular assault which were nolle. The two counts of aggravated vehicular assault were amended from felonies in the second degree to felonies in the third degree. By judgment entry of sentence filed October 23, 2014, the trial court sentenced appellant to an aggregate term of sixty months in prison, plus five years of community control following his release from prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE TRIAL COURT VIOLATED DOUBLE JEOPARDY AND R.C. 2941.25 BY FAILING TO MERGE APPELLANT'S OVI CONVICTION WITH HIS CONVICTIONS FOR AGGRAVATED VEHICULAR HOMICIDE/ASSAULT."

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{¶5} Appellant claims the trial court erred in failing to merge his OVI conviction with his convictions for aggravated vehicle assault in violation of double jeopardy and R.C. 2941.25. We disagree.

{¶6} Based on the thorough and well-reasoned analysis of this court in *State v. Dunham*, 5th Dist. Richland No. 13CA26, 2014-Ohio-1042, under Assignment of Error V, and *State v. Kraft*, 5th Dist. Delaware No. 13 CAA 03 0013, 2013-Ohio-4658, under Assignment of Error III, we find the trial court did not violate double jeopardy and R.C. 2941.25 sub judice. We note both the *Dunham* and *Kraft* decisions quoted from the case of *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2002-Ohio-5469, and the Supreme Court of Ohio did not accept the *Bayer* appeal for review. *State v. Bayer*, 136 Ohio St.3d 1453, 2013-Ohio-3210. Appellant acknowledges the *Bayer*, *Dunham*, and *Kraft* cases in his brief, and states he is preserving the issue in light of a case currently pending in the Supreme Court of Ohio on the same subject, *State v. Earley*, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643. *State v. Earley*, 140 Ohio St.3d 1451, 2014-Ohio-4414.

{¶7} The sole assignment of error is denied.

{¶8} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

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