[Cite as *State v. O'Neill*, 2011-Ohio-5688.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-10-029

Appellee — Trial Court No. 2006CR0047

v.

David O'Neill — **DECISION AND JUDGMENT**

Appellant — Decided: November 4, 2011

* * * * *

Paul Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, and
Heather M. Baker, Assistant Prosecuting Attorney, and
Jacqueline M. Kirian, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

* * * * *

YARBROUGH, J.

{¶1} Appellant, David O'Neill, appeals from a judgment of the Wood County Court of Common Pleas, in which he was convicted of aggravated vehicular assault,

aggravated vehicular homicide, and operating a vehicle under the influence. On each conviction, appellant was sentenced to a four year prison term, to run concurrently. These sentences were also ordered to run consecutively to a four year prison term previously imposed on a conviction for failing to stop after an accident—making an aggregate prison term of eight years.

{¶2} The procedural history of this case has been sufficiently set forth in *State v. O'Neill*, 175 Ohio App.3d 402, 2008-Ohio-818 (*O'Neill*), *O'Neill v. Mayberry*, 6th Dist. No. WD-08-077, 2009-Ohio-1123 (*Mayberry I*), and *O'Neill v. Mayberry*, 6th Dist. No. WD-10-019, 2010-Ohio-1707 (*Mayberry II*).

{¶3} Nevertheless, for clarity in this decision, a brief summary of the relevant history is appropriate. In February 2006, O'Neill was indicted on five counts in connection with an incident in which O'Neill struck two bicyclists with a silver Jeep; killing one and injuring the other. The counts, listed in numerical order were: (1) aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), a third degree felony, (2) failure to stop after an accident in violation of R.C. 4549.02(A) and (B), a third degree felony, (3) aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), a second degree felony, (4) operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), a first degree misdemeanor, and (5) operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f), a first degree misdemeanor.

{¶4} The trial court denied O'Neill's motion to suppress the results of his blood alcohol tests performed after his arrest. Pursuant to a negotiated plea agreement, O'Neill pleaded no contest to Counts 1, 2, 3, and 5, and was sentenced to an aggregate prison term of 12 years. Specifically, on Counts 1 and 2, O'Neill was sentenced to a four year prison term, to run concurrently; an eight year prison term as to Count 3, to run consecutively; and on count 5, a five month prison term, to run concurrently to the other sentences.

{¶5} O'Neill appealed his convictions and sentences, asserting that the trial court erred in failing to suppress his blood-alcohol test results. In *O'Neill*, this court found that the state failed to demonstrate substantial compliance with applicable regulations governing blood-alcohol testing. Due to that error, we vacated O'Neill's conviction for Count 5, operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f). Because O'Neill's convictions for Count 1— aggravated vehicular assault, and Count 3— aggravated vehicular homicide—depended upon a violation of R.C. 4511.19, those convictions were also vacated. However, the conviction and sentence for Count 2—failure to stop after an accident was affirmed. In disposing of the matter, the decision in *O'Neill* did not specifically state that the case was remanded to the trial court for further proceedings. *Mayberry I* at ¶ 18.

{¶6} Subsequently, the state proceeded to prosecute O'Neill under the original indictment. In an order denying O'Neill's motion in opposition to jurisdiction, the trial

court concluded that our decision on appeal placed O'Neill in the position he was in after indictment but prior to trial. O'Neill then filed his first petition for a writ of prohibition against respondent, seeking to prohibit the trial judge from exercising jurisdiction by conducting a jury trial on the remaining counts.

{¶7} In a decision dated March 9, 2009, this court granted respondent's motion for summary judgment and dismissed O'Neill's first petition for a writ of prohibition. *See Mayberry I*, supra. In that case, O'Neill argued that the trial court lacked jurisdiction to proceed to trial because this court in *O'Neill* had not remanded the case back to the trial court after appeal. Addressing the remand issue, we concluded that "the absence of language specifically remanding the case to the trial court was a technical mistake and indicated nothing with respect to the trial court's jurisdiction." *Mayberry I* at ¶ 18. We thereafter issued an order of errata correcting *O'Neill*, by adding the following sentence: "This matter is remanded to the trial court for further proceedings consistent with this decision and judgment entry."

{¶8} Also in *Mayberry I*, we determined that O'Neill was unable to demonstrate that the trial court patently and unambiguously lacked jurisdiction to try him on the remaining counts. In so holding, we relied on *State ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, in which the Supreme Court determined that "[u]pon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." Id. at ¶ 11, quoting *State ex rel. Stevenson v. Murray* (1982), 69 Ohio

St.2d 112, 113. In denying O'Neill's motion in opposition to jurisdiction, the trial court determined that our decision in *O'Neill*, placed O'Neill back in the position he was in when the error occurred; namely, after the trial court's ruling on the suppression motion, but before the plea agreement wherein the state dismissed Count 4 of the indictment—the general operating a vehicle under the influence ("OVI") charge. In *Mayberry I*, we determined that the trial court's judgment in this regard was correct. Therefore, because O'Neill was unable to demonstrate that the trial court patently and unambiguously lacked jurisdiction to try him on the charges that remained, he was not entitled to extraordinary relief in prohibition.

{¶9} O'Neill then filed a second petition for a writ of prohibition contending that the trial court scheduled a trial for Monday, April 19, 2010, on the originally indicted charges of aggravated vehicular assault, aggravated vehicular homicide, and the general OVI charge in violation of R.C. 4511.19(A)(1)(a). See *Mayberry II*, supra. O'Neill did not dispute the trial court's jurisdiction to try him on Count 4—the general OVI charge under R.C. 4511.19(A)(1)(a). Rather, O'Neill contended that respondent had no jurisdiction to try him again for Count 1—the aggravated vehicular assault charge, and Count 3—the aggravated vehicular homicide charge, because this court in *O'Neill* dismissed those charges and they were predicated on the similarly dismissed per se charge of OVI in violation of R.C. 4511.19(A)(1)(f).

{¶10} In so dismissing appellant's second motion for a writ of prohibition this court again relied on *Douglas*, which held: "Upon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." *Douglas* at ¶ 11. We reasoned that because we remanded the case to the trial court following our determination that appellant's motion to suppress should have been granted in *O'Neill*, the trial court was required to proceed from the point at which the error occurred, that is, after it denied the motion to suppress but before the plea agreement in which the state dismissed Count 4— the general OVI offense. We also cautioned that any claim that O'Neill may have in regard to double jeopardy is "remediable by appeal rather than by extraordinary writ." *Mayberry II* at ¶ 11.

{¶11} Following our decision in *Mayberry II*, O'Neill pleaded no contest to Counts 1, 3, and 4 as set forth in the original indictment. As to Counts 1 and 3, O'Neill was sentenced to a four year prison term for each charge to run concurrently. As to Count 4, the court imposed a five month sentence, to run concurrently, for a net term of four years. The trial court then ordered these sentences to run consecutively to the four years previously imposed for Count 2, making an aggregate term of eight years.

{¶12} In his instant appeal, O'Neill asserts the following assignments of error:

{¶13} "I. Mr. O'Neill was denied his right under the Ohio Constitution and under the United States Constitution to Due Process of Law when the Trial Court allowed the prosecution to breach its contractual duty under the plea agreement to dismiss the

(A)(1)(a) DUI charge and allowed the State to prosecute Mr. O'Neill for that offense both directly and as a necessary predicate to Counts I and III of the Indictment.

{¶14} "II. The Trial Court erred in sentencing Mr. O'Neill for a violation of R.C. §4511.19(A)(1)(a) as well as for Counts I and III, as the same were subject to merger and as not merging the same violated Double Jeopardy.

{¶15} "III. The Trial Court erred by denying Mr. O'Neill's motion and proceeding as to Count IV without jurisdiction.

{¶16} "IV. The Trial Court erred by running the sentence for Counts I and II consecutively after remand.

{¶17} "V. The Trial Court erred by requiring that Mr. O'Neill 'shall be placed in solitary confinement and shown the video of the memorial service to again insure that he remembers the extent of his crime to assure no future recidivism' on the 15th of January of each year and by ordering Mr. O'Neill to read condolence letters."

I. Contractual Duty under the Initial Plea Agreement and Jurisdiction

{¶18} Because appellant's first and third assignments of error are interrelated, they will be addressed together. In his first assignment of error, O'Neill argues that the state, on remand, should have been bound by its initial plea agreement in which the state agreed to dismiss Count 4. O'Neill cites as authority *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. In *Santobello*, the prosecution agreed to dismiss two felony counts in exchange for Santobello's plea to a lesser included misdemeanor offense.

The prosecution also agreed to remain silent at sentencing as part of the plea agreement. In the end, after several delays, the prosecution failed to keep its bargain in remaining silent at sentencing, and instead recommended the maximum sentence to the misdemeanor offense. Even though the trial judge stated that he was not affected by the prosecutor's recommendation, Santobello was sentenced to the maximum term of incarceration. In response to the prosecution's breach, the *Santobello* court held that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration. The ultimate relief to which petitioner is entitled we leave to the discretion of the state court * * * to decide whether the circumstances of this case require * * * specific performance of the agreement on the plea * * * or whether * * * the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty." The *Santobello* court also noted that "[i]f the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge on two felony counts." Id. at 263 fn. 2, 92 S.Ct. at 499, 30 L.Ed.2d 427.

{¶19} Appellant's argument is that, like in *Santobello*, the prosecution initially agreed to dismiss Count 4 of the indictment, and therefore, the prosecution then breached this agreement by proceeding with the prosecution of Count 4 on remand after *O'Neill*. The problem with this, appellant argues, is that "Mr. O'Neill forfeited his right to contest

[Count 2—leaving the scene of the accident] and is serving time for that offense, despite the prosecution inducing that plea with a breached promise." In response to this argument, appellee cites our previous decision in *State v. Woodland*, 6th Dist. No. WD-03-044, 2004-Ohio-2772, ¶ 13, and argues that "[b]y entering a guilty plea to counts one, three, and four on April 19, 2010, O'Neill forfeited the right to complain on appeal that the state had breached the May 16, 2006 plea agreement." In fact, when O'Neill entered the plea agreement which is the subject of the instant appeal, O'Neill signed the following statement: "I further understand that if convicted at a trial, I would have the full right of appeal, but if I plead No Contest I would have a very limited right to appeal my sentence within 30 days."

{¶20} In response to O'Neill's argument, case law is clear that when a conviction is reversed on appeal, the trial court must proceed from the point at which the error occurred. *State ex rel. Stevenson v. Murray*, 69 Ohio St.2d at 113; *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 240; *State v. Harris*, 6th Dist. No. E-04-034, 2007-Ohio-2397, ¶ 14; *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, ¶ 61; *State v. Leonard* (June 21, 2001), 10th Dist. No. 00AP-1229. In this case, the error occurred at the point where O'Neill's motion to suppress was denied, as stated in *Mayberry I* and *Mayberry II*. The record reflects that this was prior to the initial plea agreement, in which the prosecution agreed to dismiss Count 4.

{¶21} However, in *O'Neill*, instead of specifically stating that all counts were remanded to the trial court, we ordered the case to be remanded to the trial court for proceedings consistent with our opinion. Instead of vacating and remanding all of O'Neill's convictions, our decision errantly affirmed O'Neill's conviction and sentence for Count 2— leaving the scene of the accident—resulting in much confusion as to whether the trial court had jurisdiction over Count 2 on remand. This is evidenced by O'Neill's numerous motions on the issue in the trial court as well as two applications for writs of prohibition in this court. Nevertheless, the state proceeded to prosecute O'Neill on Counts 1, 3, and 4, leaving intact his conviction and sentence for Count 2, per our mandate.

{¶22} In resolving this issue, we must turn to the doctrine of the law of the case which provides that a decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing level. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. Therefore, absent extraordinary circumstances, such as an intervening decision from this court, the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same court and case. Id. at 4-5. Here, O'Neill did not appeal our decision in *O'Neill* which affirmed Count 2, nor was a motion for reconsideration filed. Further, there was no intervening decision which would permit us to vacate our decision in *O'Neill*. Thus,

given the circumstances presented in this case, we find no error in the state's decision to re-prosecute O'Neill on Counts 1, 3, and 4, as stated in the original indictment.

{¶23} In light of our discussion regarding appellant's first assignment of error, we hold that the trial court properly exercised jurisdiction over the proceedings on Count 4 on remand, despite O'Neill's argument to the contrary as stated in his third assignment of error.

{¶24} Accordingly, we find appellant's first and third assignments of error not well-taken.

II. Merger and Double Jeopardy

{¶25} For his second assignment of error, O'Neill contends that the trial court erred in sentencing him for a violation of R.C. 4511.19(A)(1)(a), as well as for counts 1 and 3, as the same were subject to merger.

{¶26} Because we find that an objection was not made in the trial court with respect to whether the aggravated vehicular homicide, the aggravated vehicular assault, and the operating a vehicle while intoxicated are allied offenses of similar import, our review is limited to whether plain error exists. *State v. Long* (1978), 53 Ohio St.2d 91, 95; Crim.R. 52(B). Therefore, appellant must demonstrate that but for an obvious error, the outcome of the trial clearly would have been otherwise. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶ 63.

{¶27} R.C. 2941.25 provides:

{¶28} "(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*.

{¶29} "(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." (Emphasis added.)

{¶30} The Supreme Court has held that "[w]hen determining whether two offenses are allied offenses of a similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus. Thus, a court must first decide, prior to sentencing, "whether it is possible to commit one offense and commit the other with the same conduct." *State v. Dority*, 6th Dist. No. E-09-027, 2011-Ohio-2438, ¶ 13, quoting *Johnson* at ¶ 48. See, also, *State v. Mitchell*, 6th Dist. No. E-09-064, 2011-Ohio-973, ¶ 36. Thereafter, if the multiple offenses can be committed by the same conduct, we then must determine whether the offenses in question were committed with the same animus. Or more specifically whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." *Johnson* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50.

{¶31} If both of these inquiries are answered affirmatively, then "the offenses are allied offenses of similar import and [they] will be merged." *Johnson* at ¶ 51. However, if "the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) Id. Applying *Johnson* to appellant's argument, we find that Count 4 should merge with Counts 1 and 3. However, Counts 1 and 3 should not merge.

{¶32} As to the first inquiry, the applicable portion of former R.C. 4511.19(A)(1)(a) provided, "No person shall operate any vehicle * * * within this state, if, at the time of the operation * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." Former R.C. 2903.06(A)(1)(a) provided that, "No person, while operating * * * a motor vehicle * * * shall cause the death of another * * * [a]s the proximate result of committing a violation of [R.C.] 4511.19 * * *." Former R.C. 2903.08(A)(1)(a) stated, "No person, while operating * * * a motor vehicle * * * shall cause serious physical harm to another person * * * [a]s the proximate result of committing a violation of division (A) of [R.C.] 4511.19 * * *." Therefore, it is possible to commit the offenses of aggravated vehicular homicide and aggravated vehicular assault with the same conduct of driving under the influence of alcohol.

{¶33} As to the second inquiry, "Where a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for

each offense." *Mitchell* at ¶ 41, quoting *State v. Gregory* (1993), 90 Ohio App.3d 124, 129. Additionally, there is a dissimilar import towards each victim affected by a singular conduct where the "offense is defined in terms of conduct towards another." Id. quoting *State v. Jones* (1985), 18 Ohio St.3d 116, 118.

{¶34} Applying the analysis to the facts presented on appeal, we find that it is possible to commit the offenses of aggravated vehicular homicide and aggravated vehicular assault, while also committing a violation of operating a motor vehicle under the influence. See, also, *State v. Caston*, 6th Dist. No. E-09-051, 2010-Ohio-6498. Therefore, O'Neill's conviction for Count 4 shall merge with Count 1 and Count 3.

{¶35} Further, appellant's conduct of striking two cyclists with his vehicle— killing one and injuring the other— was committed while the appellant operated his vehicle under the influence of alcohol. The crimes against each victim are of dissimilar import with separate animus. See *State v. Jones*, 18 Ohio St.3d at 118, holding that R.C. 2903.06 authorizes a conviction for each person killed by a reckless driver. See, also, *State v. Buitrago*, 8th Dist. No. 93380, 2010-Ohio-1984, ¶ 5, in which a conviction of vehicular assault was appropriate for each person injured as a result of a single instance of drunk driving. Thus, appellant's convictions for aggravated vehicular homicide and vehicular assault will not merge pursuant to R.C. 2941.25(B), because each offense involves a separate victim.

{¶36} In sum, we find that appellant's conviction for Count 4 should be merged into Counts 1 and 3. We also find that Counts 1 and 3 are not allied offenses of similar import and therefore will not merge.

{¶37} Finally, for purposes of R.C. 2941.25, a "conviction" consists of a guilty verdict and the imposition of a sentence or penalty. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 12. Therefore, O'Neill's sentences for Counts 1, 3, and 4 are vacated, but the guilt determinations remain intact on remand from this appeal. On remand, the state must choose which of the allied offenses to pursue. Id. at ¶ 21.

{¶38} Accordingly, appellant's second assignment of error is well-taken in part and not well-taken in part.

III. Consecutive sentences

{¶39} Appellant argues in his fourth assignment of error that the trial court erred by not running the sentence imposed for Count 1 concurrently to the sentence previously imposed for Count 2. Because we have vacated the portion of the sentence in Count 1 to which O'Neill complains pursuant to our ruling on O'Neill's second assignment of error, we find that his fourth assignment of error is moot pursuant to App.R. 12(A)(1)(c) and need not be decided.

IV. Solitary confinement

{¶40} In his final assignment of error, O'Neill argues that the trial court erred by including the following order as part of his initial sentence:

{¶41} "The Court further orders the Defendant to read the condolence letters so that he can begin to understand the extent of his crime and to assist in the rehabilitation of the Defendant.

{¶42} "The Court also orders that on January 15 of each year, the Defendant shall be placed in solitary confinement and shown the video of the memorial service to again insure that he remembers the extent of his crime to assure no future recidivism."

{¶43} Our decision in *O'Neill*, in affirming appellant's conviction and sentence as to Count 2, stated, "The conviction for failure to stop after an accident and the sentence of four years' incarceration is affirmed. The order of monetary restitution to the victims of appellant's failure to stop and the other orders of the court are likewise unaffected." *O'Neill* at ¶ 41. The solitary confinement order to which O'Neill now complains was made part of his original sentence. However, the portion of the sentence ordering solitary confinement clearly only related to O'Neill's conviction for aggravated vehicular homicide, and was not affirmed in our decision in *O'Neill*. As such, this part of O'Neill's sentence was remanded as part of our decision in *O'Neill*. Because O'Neill was subsequently resentenced on the aggravated vehicular homicide, and the later judgment entry did not re-impose this order for solitary confinement, we find that appellant's fifth assignment of error is not well-taken.

{¶44} Judgment affirmed in part, reversed in part and remanded to the trial court for proceedings consistent with this opinion.

{¶45} Pursuant to App.R. 24, appellant and appellee are ordered to each pay half the costs of this appeal.

JUDGMENT AFFIRMED, IN PART
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J _____
CONCUR.
JUDGE