[Cite as *State v. Caston*, 2012-Ohio-5260.]

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

State of Ohio	Court of Appeals No. E-11-077
Appellee	Trial Court No. 2008-CR-552
v.	
Shawn W. Caston	**DECISION AND JUDGMENT**
Appellant	Decided: November 9, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Ron Nisch for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals the judgment of the Erie County Court of Common Pleas, following remand for resentencing. Because we conclude that the trial court on remand properly denied appellant's motion to withdraw his guilty plea and double jeopardy did not apply to resentencing resulting from an appeal prosecuted by appellant, we affirm.

{¶ 2} On September 23, 2008, a Sandusky, Ohio police officer heard a crash and observed a damaged car driving at a high rate of speed. The officer gave chase for some distance until the driver abandoned the car in a gas station and fled on foot. Police eventually arrested appellant, Shawn W. Caston. Appellant performed poorly on field sobriety tests and failed a breathalyzer test. Other officers, investigating a hit and run accident that seriously injured a motorcycle rider, found appellant's front license at the scene.

{¶ 3} Appellant was named in two subsequent indictments totaling five counts: aggravated vehicular assault, failure to stop after an accident, tampering with evidence and operating a vehicle under the influence of alcohol ("OVI") offenses under R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(h). Appellant initially pled not guilty to all offenses, but following negotiations agreed to plead guilty to all charges except the tampering with evidence count, which was dismissed. Following a plea colloquy, the trial court accepted appellant's plea and found him guilty of the remaining offenses.

{¶ 4} For sentencing, the court merged the OVI offenses and sentenced appellant to a five year term of imprisonment for the aggravated vehicular assault, 11 months for failure to stop and six months for the OVI. The sentences for the assault and failure to stop were ordered to be served consecutively, but concurrent to the OVI sentence.

{¶ 5} Appellant appealed his sentence, arguing that the vehicular assault and OVI offense should also merge as allied offenses of similar import pursuant to R.C. 2941.25. On review, we agreed with appellant, but also concluded that the trial court had a duty to ascertain whether the two OVI charges were with a single or separate animus. *State v.*

Caston, 6th Dist. No. E-09-051, 2010-Ohio-6498, ¶ 12. We expressly affirmed the trial court's finding of guilt and remanded the matter for resentencing. *Id.* at ¶ 51-52.

{¶ 6} On remand, the trial court held a hearing and concluded that the two OVI counts should merge and that the merged remaining OVI count should merge with the vehicular assault count. The court elected to sentence on the aggravated vehicular assault offense and the failure to stop. The court again imposed a five-year term of incarceration for the vehicular assault and a consecutive 11-month term for failure to stop.

{¶ 7} From the judgment of conviction following resentencing, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

> I. The trial court's decision denying appellant's motion to withdraw his plea, and the trial court's failure to hold a hearing on this motion, was an abuse of discretion.
>
> II. The re-sentencing of appellant by the trial court to a prison term of five years on Count 1 of the Indictment violated appellant's rights under the Double Jeopardy Clause of the U.S. Constitution.

I. Motion to Withdraw Plea

{¶ 8} Between the announcement of the decision in appellant's appeal and resentencing on remand, appellant filed a number of pro se motions, including one seeking to withdraw his guilty plea. Appellant stated that had he known that, as the result of his plea, "he would have been compelled to years of confinement * * * he would not have pled guilty * * *." The trial court denied the motion without hearing.

{¶ 9} *State v. Carter*, 3d Dist. No. 1-11-36, 2011-Ohio-6104, cited by appellee is on point and dispositive of this issue. Carter pled guilty to kidnapping and aggravated robbery. The trial court found the counts allied offenses of similar import, but sentenced Carter to concurrent terms of imprisonment, rather than merge the offenses. The appeals court found sentencing error and remanded the matter to the trial court for resentencing. At this point, Carter moved to withdraw his guilty plea. When the trial court denied his motion, Carter again appealed.

{¶ 10} The appeals court affirmed the trial court, explaining, at ¶ 11,

> It has long been held that a trial court has no authority to even consider a motion to withdraw a plea after a conviction has been affirmed on appeal; or, if there was no appeal, after the time for filing the original appeal has passed. In [*State v.*] *Ketterer*, [126 Ohio St.3d 2010-Ohio-3831, 935 N.E.2d 9, ¶ 61] the Ohio Supreme Court affirmed its holding that "Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court. While Crim.R. 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do." (Some citations omitted.)

{¶ 11} In this matter, appellant's conviction was expressly affirmed on appeal and the matter was remanded to the trial court solely for the purpose of dealing with the merger issue. Since the trial court was without jurisdiction to consider any matter other than the merger issue, its rejection of appellant's motion to withdraw his plea was proper. Appellant's first assignment of error is not well-taken.

II. Resentencing

{¶ 12} In his remaining assignment of error, appellant maintains that, because he had already completed serving his sentence for the OVI, he may not now be resentenced for the alternative offense in the merger, aggravated vehicular assault. To do so, appellant insists, would be in violation of his right under the constitutions of Ohio and the United States not to be punished twice for the same behavior.

{¶ 13} The Fifth Amendment to the Constitution of the United States provides that "No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb * * *." The Ohio Constitution, Article I, Section 10, provides a similar prohibition: "No person shall be twice put in jeopardy for the same offense." The federal and state constitutional protections are coextensive. *State v. Brewer*, 121 Ohio St.3d 202, 2009- Ohio-593, 903 N.E.2d 284, ¶ 14. The clause provides protection from a second prosecution for the same offense after an acquittal, protection against a second prosecution after a conviction and protection against multiple punishments for the same offense. *U.S. v. DiFrancesco*, 449 U.S. 117, 129, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969).

{¶ 14} Appellant insists that, because the offenses of aggravated vehicular assault and the OVI are statutorily merged and he has completed the sentence originally imposed for the OVI, when he was resentenced on the vehicular assault offense he was being twice punished for what is in law the same offense. In support of this position, appellant relies on *Ex parte Lange*, 85 U.S. 163, 21 L.Ed. 872 (1873).

{¶ 15} Edward Lange was convicted in federal court for stealing mail bags which were the property of the U.S. Post Office. Lange was sentenced to one year's imprisonment *and* a $200 fine, under a federal statute that provided for a penalty of one year's imprisonment *or* a $200 fine. Lange paid the fine and petitioned for his release on the ground that the court only had statutory authority to sentence him to imprisonment *or* a fine. Lange was brought before the sentencing court, which resentenced him to a one year term of imprisonment. *Id.* at 164-165.

{¶ 16} Lange filed a second petition for habeas corpus and sought certiorari to the United States Supreme Court, which granted the writ and cert. In its opinion, *id.* at 176, the court held when a court sentences an individual to alternative punishments, and the offender completes one of these alternatives, the court is deprived of authority to impose further punishment.

{¶ 17} Appellant in this matter argues that R.C. 2941.25 creates alternative offenses in dictating the merger of allied offenses of similar import. Since he has completed his sentence for one of these alternative offenses, *Lange*, he insists, dictates that he may not be resentenced for the other alternative.

{¶ 18} Appellant's argument is unavailing. The *Lange* opinion itself sets out a class of cases in which double jeopardy does not apply: when a jury fails to agree on a verdict, the verdict is set aside on the accused's motion or when a judgment is set aside on appeal prosecuted by the defendant. *Id.* at 174-175; *accord State v. McAninch*, 1st Dist. No. C-010456, 2002-Ohio-2347, ¶ 9. Appellant's sentence was ordered modified in an appeal prosecuted by him. He cannot now complain that obtaining the relief he sought operates to his prejudice. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE