

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

State of Ohio

Court of Appeals No. WD-10-008

Appellee

Trial Court No. 2008CR0529

v.

Cory Mendoza aka Waltz

DECISION AND JUDGMENT

Appellant

Decided: December 14, 2012

* * * * *

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

Christopher F. Cowan, for appellant.

* * * * *

OSOWIK, J.

{¶1} This matter is before the court pursuant to our August 16, 2011 decision which granted appellant's application for reopening, pursuant to App.R. 26(B), based

upon a claim of ineffective assistance of appellate counsel on direct appeal. For the reasons which follow, the judgment of the trial court is reversed in part.

{¶2} Appellant's application for reopening was granted "solely on the issue of whether [Mendoza's] ten-day OVI sentence should have merged with his sentences for aggravated vehicular homicide and aggravated vehicular assault." *State v. Mendoza*, 6th Dist. No. WD-10-008, 2011-Ohio-4139, ¶ 8. Appellant now sets forth six separate assignments of error, all of which essentially address the issue stated above:

{¶3} The performance of prior appellate counsel was deficient and Mr. Mendoza was prejudiced by this deficiency, where this counsel failed to brief and argue that the trial court erred in convicting and sentencing Mr. Mendoza for OVI in Count V and for aggravated vehicular homicide and aggravated vehicular assault in Counts I, II, III and IV, as the same were subject to merger and as not merging the same violated R.C. 2941.25 and the Fifth Amendment's prohibition against double jeopardy.

{¶4} The trial court erred in convicting and sentencing Mr. Mendoza for OVI in Count V and for aggravated vehicular homicide and aggravated vehicular assault in Counts I, II, III and IV, as the same were subject to merger and as not merging the same violated R.C. 2941.25 and the Fifth Amendment's prohibition against double jeopardy and R.C. 2941.25.

{¶5} The trial court erred in sentencing Mr. Mendoza for a violation of R.C. 4511.19(A)(1)(a) and as well for Counts I, II, III and IV, as the same were subject to merger and as not merging the same violated Double Jeopardy.

{¶6} The performance of prior appellate counsel was deficient and Mr. Mendoza was prejudiced by this deficiency, where this counsel failed to brief and argue that trial counsel was ineffective in failing to object to the trial court's convicting and sentencing Mr. Mendoza for OVI in Count V and for aggravated vehicular homicide and aggravated vehicular assault in Counts I, II, III and IV, as the same were subject to merger and as not merging the same violated R.C. 2941.25 and the Fifth Amendment's prohibition against double jeopardy.

{¶7} Trial counsel was ineffective in failing to object to the trial court's convicting and sentencing Mr. Mendoza for OVI in Count V and for aggravated vehicular homicide and aggravated vehicular assault in Counts I, II, III and IV, as the same were subject to merger and as not merging the same violated R.C. 2941.25 and the Fifth Amendment's prohibition against double jeopardy.

{¶8} Trial counsel was ineffective when it allowed the trial court to sentence Mr. Mendoza for a violation of R.C. 4511.19(A)(1)(a) and as well

as for Counts I, II, III and IV, as the same were subject to merger and as not merging the same violated Double Jeopardy.

{¶9} This court notes at the outset that appellee state of Ohio concedes error and requests that the matter be remanded for resentencing.

{¶10} Upon thorough consideration of appellant's arguments, the undisputed facts contained in the record, and the relevant law, this court finds that appellant was prejudiced. Appellant's six assignments of error are found well-taken to the extent they assert that the trial court erred by failing to merge appellant's OVI sentence with his sentences for aggravated vehicular homicide and aggravated vehicular assault and, as well, with respect to the claims that trial counsel and appellate counsel were ineffective with regard to their failure to raise this issue. *See State v. O'Neill*, 6th Dist. No. WD-10-029, 2011-Ohio-5688; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶11} On consideration whereof, this court finds that appellant was prejudiced and, accordingly, this matter is remanded to the trial court in order that appellant's sentence for the conviction as to R.C. 4511.19(A)(1)(a) be merged with his sentences under R.C. 2903.06(A)(1)(a) and R.C. 2903.08(A)(1)(a), consistent with the foregoing. Costs of this reopened appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed in part.

State of Ohio
v. Cory Mendoza aka Waltz
WD-10-008

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

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
