

[Cite as *State v. Buitrago*, 2010-Ohio-1984.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93380

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MITCHELL BUITRAGO

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506485

BEFORE: McMonagle, Gallagher, A.J., and Celebrezze, J.

RELEASED: May 6, 2010

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief, per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Mitchell Buitrago, drove his car on the highway while under the influence of alcohol. He lost control of the car, struck the center median, and spun to a stop. Both of the passengers in his car were injured; one passenger shattered his pelvis, the other broke both wrists.

{¶ 2} Buitrago pled guilty to two first degree misdemeanor charges of operating a motor vehicle while intoxicated (OMVI) and two fourth degree felony counts of vehicular assault (one count for each injured passenger). The trial court sentenced him to six months in county jail on the OMVI charges, concurrent to 15 months incarceration on each of the vehicular assault counts, to run consecutive, for a total of 30 months incarceration. Buitrago now appeals his sentence.

I. Allied Offenses

{¶ 3} Under R.C. 2941.25, “(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.” In his first assignment of error, Buitrago argues that the trial court erred in sentencing him on two counts of vehicular assault, because the offenses arose out of the same course of conduct (driving once while impaired) and therefore only one conviction is authorized by R.C. 2941.25. He contends that his convictions should merge and one of the 15-month sentences should be vacated.

{¶ 4} As an initial matter, we address the State’s erroneous argument that Buitrago waived his right to challenge whether his crimes were allied offenses by pleading guilty. The Ohio Supreme Court considered this issue recently in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, and concluded that a defendant’s plea to multiple counts does not affect the trial court’s duty to merge allied offenses at sentencing nor bar appellate review of the sentence. *Id.* at ¶26-29.

{¶ 5} We agree with the State, however, that the two counts of vehicular assault are not allied offenses of similar import because they involve separate victims. Under R.C. 2903.08(A)(2), to which Buitrago pled guilty, no person, while operating a motor vehicle, shall recklessly cause serious physical harm to another person. In *State v. Jones* (1985), 18 Ohio St.3d 116, 117, 480 N.E.2d 408, the Ohio Supreme Court construed Ohio’s aggravated vehicular homicide statute (R.C. 2903.06) to allow a conviction for

each person killed as the result of a single instance of a defendant's reckless operation of his vehicle. Likewise, Buitrago could be convicted of vehicular assault for each person injured as a result of his reckless drunk driving. See, also, *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶48 (rejecting defendant's argument that he set only one fire and therefore committed only one arson; held that defendant committed six aggravated arsons because defendant knowingly set a fire that created a substantial risk of serious harm or injury to six people).

{¶ 6} As Buitrago recklessly caused injury to two persons as a result of his drunk driving, the trial court did not err in convicting him of two counts of vehicular assault; his first assignment of error is therefore overruled.

II. Findings of Fact

{¶ 7} In his second assignment of error, Buitrago argues that the trial court erred in sentencing him to consecutive sentences without making the necessary findings required by R.C. 2929.14. He contends that the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517, implicitly overruled *State v. Foster*, 120 Ohio St.3d 23, 2008-Ohio-4912, 845 N.E.2d 470, in which the Ohio Supreme Court held that trial courts have full discretion to impose any sentence within the statutory range and need not give reasons for imposing maximum, consecutive, or more than minimum sentences. *Id.* at paragraph seven of the

syllabus. He argues that in light of *Ice*, the trial court was required to state its reasons for imposing consecutive sentences.

{¶ 8} In *Ice*, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive sentences, thereby calling into question the continuing validity of *Foster*. This court has chosen to apply the holding in *Foster*, however, and reserve any reconsideration for the Ohio Supreme Court. See, e.g., *State v. Moore*, 8th Dist. No. 92654, 1020-Ohio-770, ¶14.¹ Buitrago's argument is therefore without merit and his second assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

¹We anticipate that the Ohio Supreme Court will consider the impact of *Ice* on *Foster* in *State v. Hodge*, Supreme Court Case No. 2009-1997, currently pending before the Ohio Supreme Court.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR