

**IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY**

STATE OF OHIO,
CITY OF RAVENNA,

Plaintiff-Appellee,

- VS -

JOSEPH EDWARD ENGELHART,

Defendant-Appellant.

CASE NO. 2025-P-0080

Criminal Appeal from the
Municipal Court, Ravenna Division

Trial Court No. 2024 TRC 09725 R

OPINION AND JUDGMENT ENTRY

Decided: September 8, 2026

Judgment: Affirmed in part, reversed in part, and remanded

Connie J. Lewandowski, Portage County Prosecutor, and *Timothy P. Bogner*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Adam M. VanHo, 37 South Main Street, Suite 3, P.O. Box 157, Munroe Falls, OH 44262 (For Defendant-Appellant).

EUGENE A. LUCCI, J.

{¶1} Appellant, Joseph Edward Engelhart, appeals the judgment of the Portage County Municipal Court, Ravenna Division, convicting him, after a trial by jury, of operating a vehicle under the influence (“OVI”) as well as a marked lanes violation. Mr. Engelhart challenges the sufficiency of the evidence upon which the jury premised its verdict. We affirm in part, reverse in part, and remand the matter for further proceedings as discussed in this opinion.

{¶2} On October 10, 2024, Trooper Lous Libessart of the Ohio State Highway Patrol was patrolling Portage County in a marked patrol cruiser at approximately 11:30

p.m. As the trooper was driving, he observed a vehicle driving towards him move left of center. Trooper Libessart stated that the oncoming vehicle was “full head-on” into his lane. The trooper moved his cruiser to avoid a possible collision, and the oncoming vehicle corrected itself. The trooper immediately turned around, pursued the vehicle, and initiated a traffic stop.

{¶3} Trooper Libessart advised the driver, Mr. Engelhart, the reason for stopping him, i.e., a marked-lanes violation. Mr. Engelhart admitted he did move left of center and advised the trooper that he was leaving work as a manager at a bar in Kent, Ohio. Trooper Libessart noticed an odor of alcoholic beverage emanating from the vehicle. The trooper asked Mr. Engelhart if he had a driver’s license, and Mr. Engelhart responded in the affirmative. Mr. Engelhart, however, could not immediately locate his wallet. As Mr. Engelhart rummaged through various items, clothing and the like, on the passenger seat of his vehicle, the trooper observed multiple containers of “Twisted Tea” in the vehicle. Some of the containers appeared to be “open.”

{¶4} Mr. Engelhart could not locate his wallet but produced an expired license for Trooper Libessart to inspect. The trooper asked Mr. Engelhart if he had been drinking that evening, to which the latter responded in the negative. During their conversation, Trooper Libessart noticed Mr. Engelhart’s wallet on the dashboard of the vehicle. Mr. Engelhart then provided the trooper with his active license. Considering the odor of alcoholic beverage, the various Twisted Tea containers, as well as the trooper’s stated observation that Mr. Engelhart’s eyes appeared bloodshot and glassy, which he characterized as possible signs of impairment, the trooper determined it was necessary to ask Mr. Engelhart to perform field sobriety tests (“FST”). The trooper asked Mr.

Engelhart to exit the vehicle, and Mr. Engelhart cooperated. Throughout the interaction, Trooper Libessart stated Mr. Engelhart was both “polite and concise” regarding his whereabouts and activities.

{¶5} Trooper Libessart directed Mr. Engelhart near his cruiser to perform the FST. When Mr. Engelhart exited the vehicle, the trooper noticed an odor of alcoholic beverage on his breath. Still, Trooper Libessart stated the strongest odor of alcoholic beverage was emitted from Mr. Engelhart’s vehicle. The trooper noted that Mr. Engelhart had no slurred speech.

{¶6} Prior to administering FST, Trooper Libessart asked Mr. Engelhart if he had any medical conditions. Mr. Engelhart stated he had a herniated disc in his back which could affect his ability to walk. He also advised the trooper that “within eight months” he had a concussion. The trooper also asked if Mr. Engelhart wore contacts in his eyes; Mr. Engelhart responded in the negative and stated he could “see well.”

{¶7} The trooper administered the Horizontal Gaze Nystagmus (“HGN”) test, during which Mr. Engelhart displayed “six clues out of six” for OVI. The trooper also conducted a Vertical Gaze Nystagmus (“VGN”) test. Trooper Libessart stated Mr. Engelhart did not display any clues on the VGN. The trooper testified that the HGN is the most reliable test available for detecting impairment.

{¶8} The trooper then directed Mr. Engelhart to perform the one-leg stand test. Mr. Engelhart completed this FST without demonstrating any clues. Trooper Libessart testified that Mr. Engelhart did not follow his instruction to look down at his feet during this FST, but the trooper stated this omission did not constitute one of the four clues for

impairment on the one-leg stand test. A walk-and-turn test was apparently administered, but the evidence was suppressed.

{¶9} Given the marked-lanes violation, the open containers, odor of an alcoholic beverage, and Mr. Engelhart's performance on the HGN, the trooper placed Mr. Engelhart under arrest for OVI. Because Mr. Engelhart had been convicted of two previous OVIs within ten years, the trooper stated he was required to seize the vehicle. During an inventory search of the vehicle, the trooper discovered "countless" open containers, empty "Fireball shots," and empty Twisted Tea containers. Also, the trooper noted some of the Twisted Tea containers were still cold, "with the dew" on them. Further, the trooper noted a stainless-steel cup in the console of the vehicle that contained liquid that smelled like tea with alcohol in it.

{¶10} Mr. Engelhart was taken to the Ohio State Patrol post in Ravenna, Ohio. Trooper Libessart reviewed the BMV 2255 Administrative License Suspension Form with Mr. Engelhart and explained the consequences of refusing a chemical test. Mr. Engelhart nevertheless refused the same.

{¶11} Mr. Engelhart was charged with one count of OVI, in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree; one count of OVI, a violation of R.C. 4511.19(A)(2)(a) and (b) (based upon his previous OVIs and his refusal to take a chemical test), a misdemeanor of the first degree; and failing to drive in marked lanes, in violation of R.C. 4511.33, a minor misdemeanor. A corresponding administrative license suspension was also filed.

{¶12} Mr. Engelhart pleaded not guilty and, prior to trial, stipulated to his prior OVI convictions. Mr. Englehart also filed a motion to suppress evidence. No transcript of this

proceeding was filed but, pursuant to the judgment entry, Mr. Engelhart only directly challenged the walk-and-turn test. The trial court granted the motion to suppress on that sole issue (the walk-and-turn-test results) for the trooper's failure to substantially comply with the National Highway Traffic Safety Administration's ("NHTSA") standards.¹

{¶13} A jury trial commenced after which Mr. Engelhart was found guilty of both OVI counts and the trial court found him guilty of the marked lanes violation.² The trial court's judgment indicates that the "[s]entence is merged for all counts." As such, Mr. Engelhart was sentenced to a term of 365 days in the Portage County Jail, with 335 days suspended. He was also ordered to complete 110 days of electronically monitored house arrest to be served with 60 days of work release. He was ordered to pay a fine and court costs, complete an alcohol and drug addiction program, complete a mental health assessment, and complete 12 months of reporting probation. Mr. Engelhart's license was suspended for four years, and he was required to have restricted license plates and either ignition interlock and/or SCRAM on his vehicle to obtain driving privileges. Mr. Engelhart's vehicle was also forfeited to the State, pursuant to statute. See R.C. 4503.234. This appeal follows.

{¶14} Mr. Engelhart assigns the following as error:

{¶15} "Appellant's conviction[] for operating a vehicle under the influence [is] unconstitutional as it is based on insufficient evidence, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Sections Ten

1. Although Mr. Engelhart's motion to suppress evidence challenged "[a]ll field sobriety tests[.]" the pleading did not specifically challenge the administration or reliability of the HGN test. And the trial court did not specifically mention any such challenge to the HGN tests in its judgment entry.

2. Mr. Engelhart concedes that the jury had sufficient evidence to sustain the conviction for the marked-lanes violation.

and Sixteen of the Ohio Constitution, and sections 4511.19(A)(1)(a) and 4511.19(A)(2) of the Ohio Revised Code.”

{¶16} The question of whether sufficient evidence supports a conviction “is a test of adequacy,” which we review de novo. *State v. Thompkins*, 1997-Ohio-52, ¶ 23. “In a sufficiency-of-the-evidence inquiry, the question is whether the evidence presented, when viewed in a light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.” *State v. Dent*, 2020-Ohio-6670, ¶ 15, citing *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶17} With these critical legal points in mind, we proceed to review the OVI counts for which sentence was apparently imposed. See *State v. Walker*, 2023-Ohio-1949, ¶ 12 (11th Dist.), *appeal not allowed*, 2023-Ohio-3169.

{¶18} The first count was a verdict pursuant to R.C. 4511.19(A)(1)(a), which provides: “No person shall operate any vehicle . . . within this state, if, at the time of the operation, any of the following apply: (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.”

{¶19} The second count was a verdict pursuant to R.C. 4511.19(A)(2), which provides:

No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) of this section, or any other equivalent offense shall do both of the following:

(a) Operate any vehicle . . . within this state while under the influence of alcohol . . .

(b) Subsequent to being arrested for operating the vehicle . . . as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

{¶20} “The term ‘under the influence’ means that ‘the defendant consumed some [alcohol], . . . in such a quantity, whether small or great, that it adversely affected and appreciably impaired the defendant’s actions, reactions, or mental processes under the circumstances then existing” *State v. Clark*, 2007-Ohio-3777, ¶ 12 (8th Dist.), quoting 4 *Ohio Jury Instructions* 6, § 545.25; see also *State v. Oliver*, 2024-Ohio-4542, ¶ 11 (11th Dist.).

{¶21} We will first consider the jury’s verdict on count one which involved an OVI violation pursuant to R.C. 4511.19(A)(1)(a). Regarding the jury’s determination on this charge, Mr. Engelhart argues that HGN results are not necessarily or always scientifically accurate and/or reliable. He additionally claims that the alleged consumption of alcoholic beverages does not render a driver of a motor vehicle necessarily impaired. Mr. Engelhart also points out that the NHTSA website sets forth various indicators of impairment, many of which were not present in this matter. He observes that had the General Assembly intended the failure of an HGN test to be sufficient for a conviction for OVI, it would have done so; he emphasizes, the legislature has not done so. He also points out that had the legislature desired to entirely eliminate the consumption of alcohol while one is driving, it would have done so. He emphasizes, it has not.

{¶22} When viewing the evidence in a light most favorable to the prosecution, we conclude that the State adduced sufficient evidence to support Mr. Engelhart's conviction for OVI under subsection (A)(1)(a) beyond a reasonable doubt.

{¶23} Initially, Mr. Engelhart takes issue with Trooper Louis Libessart's determinations regarding the HGN results, in particular, but also with the reliability of the results, in general. It bears emphasis that, although Mr. Engelhart challenged the validity of the FST in his motion to suppress, he did not specifically challenge the HGN test. Moreover, the trial court's judgment relating to the motion addressed *only* the trooper's administration of the walk-and-turn test. Further, the trial court stated the walk-and-turn test was "*the* issue raised by [Mr. Engelhart] in his Motion to Suppress" (Emphasis added.)

{¶24} Mr. Engelhart did not produce a transcript of the suppression hearing and, as a result, we shall presume regularity regarding the trial court's determination. See, e.g., *State v. Lopez-Tolentino*, 2019-Ohio-4778, ¶ 12 (10th Dist.) (When an appealing party fails to provide a transcript of relevant proceedings on appeal, an appellate court presumes the proceedings were valid and, absent a full transcript or an acceptable alternative, pursuant to App.R. 9(C), this court will presume the trial court's decision was correct and exhaustive.). In this regard, we find no error pertaining to the trial court's admission of the HGN test; any such admission goes to weight and not admissibility and the jury was free to consider the trooper's testimony regarding his methodology as it related to the NHTSA standards and accord that testimony appropriate weight.

{¶25} Assuming, however, the issue was preserved, we perceive no error in the trial court permitting Trooper Libessart to describe the HGN test, explain the various clues

he was looking for in conducting the test, and testifying to the results of the test. We point out that this court has previously concluded that the HGN FST is reliable for establishing probable cause to arrest in OVI matters. *Kirtland Hills v. Janisek*, 2016-Ohio-3401, ¶ 18, quoting *State v. Bresson*, 51 Ohio St.3d 123, 129 (1990) (“the HGN test has been shown to be a reliable test . . . in determining whether a person is under the influence of alcohol”). By implication, it follows that HGN results are fundamentally admissible on the substantive merits of an OVI charge in a trial.

{¶26} With this in mind, and as previously discussed, Trooper Libessart testified to the NHSTA standards regarding the administration of the test and, prior to discussing his results, pointed out that involuntary nystagmus, or “jerking of the eye,” is an indication of impairment. Finally, the trooper testified that Mr. Engelhart displayed “six clues out of six” on the HGN test. This evidence was sufficient for the jury to have an adequate basis to conclude that Mr. Engelhart’s performance on the HGN test indicated he was impaired and therefore under the influence for the purpose of R.C. 4511.19(A)(1)(a).

{¶27} Mr. Engelhart’s argument pertaining to the propriety of the admission of the HGN test based upon concerns of accuracy and/or reliability as well as any coincidental argument that the jury erred when it accorded weight to the results are without merit.

{¶28} Next, Mr. Engelhart argues that imbibing alcoholic beverages is not necessarily a basis for concluding a driver is impaired. We do not disagree with this general observation. Still, this matter involves more evidence than mere recognition that Mr. Engelhart consumed some alcoholic beverage(s).

{¶29} First, Mr. Engelhart conceded that he committed a marked-lanes violation. And, according to Trooper Libessart, Mr. Engelhart was fully in the trooper’s lane (of

oncoming traffic) when the violation occurred. Mr. Engelhart did not dispute this characterization. Further, the trooper noticed a strong odor of alcoholic beverage emanating from the vehicle. He also noticed multiple containers of Twisted Tea in the vehicle, some of which were open, and some showed signs of being recently consumed (because there was “dew” on the exterior of the container). The trooper also pointed out that Mr. Engelhart could not find his wallet, even though it was in front of him on the dashboard of the vehicle. The trooper additionally noted Mr. Engelhart’s eyes were bloodshot and glassy. And, once Mr. Engelhart exited the vehicle, the trooper noticed an odor of alcoholic beverage on his breath.

{¶30} We understand that any one of these factors, in isolation, might not rise to the level to prompt an arrest for OVI under R.C. 4511.19(A)(1)(a). Taken together, however, along with the results of the HGN test, we conclude, under the totality of the circumstances, there was sufficient evidence for the jury to convict Mr. Engelhart pursuant to that subsection.

{¶31} We point out that Mr. Engelhart, in his appellate brief, cites to the NHTSA’s website. This document/website was not particularly addressed or discussed during trial. Generally, such a document/website cannot be considered part of the appellate record. *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus. (“A reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.”). Even if, however, we were to assume the trial court considered the information on the public website, Mr. Engelhart’s citation does little to advance his position.

{¶32} In his brief, Mr. Engelhart cites the NHTSA guide for numerous factors indicating impairment, several of which were not present in this case. Simply because, however, Mr. Engelhart did not exhibit certain factors, e.g., “stopping problems; varying speed; slow speed; slow response to traffic or officer’s signals; driving without headlights; slurred speech; swaying or balance problems; repeating questions; difficulty exiting vehicles,” does not imply the arrest was improper. Indeed, as just discussed, Mr. Engelhart drifted out of his lane, he nearly struck the trooper’s vehicle due to this action, had a significant odor of alcoholic beverage coming from his vehicle, had the odor of alcoholic beverage on his breath, had multiple open or empty containers in his vehicle, and demonstrated all clues on the HGN test. Accordingly, the lack of the factors identified by Mr. Engelhart does not negate the factors that were present or undermine the jury’s verdict.

{¶33} This conclusion is additionally bolstered by the post-arrest inventory search of Mr. Engelhart’s vehicle. Namely, the trooper testified he found “[c]ountless open containers, Fireball shots, empty Fireball shots, empty—some empty . . . Twisted Teas.” Indeed, the trooper testified there was a “Fireball shot on [the vehicle’s] driver’s side floorboard.” He also testified that he recovered a stainless-steel cup from the vehicle’s console that smelled of tea mixed with an alcoholic beverage.

{¶34} The State did not rely only upon the HGN test results. There were multifarious facts upon which the State’s case was premised supporting the OVI charge under R.C. 4511.19(A)(1)(a). Mr. Engelhart’s argument relating to the sufficiency of the evidence on the R.C. 4511.19(A)(1)(a) charge is without merit.

{¶35} Next, we shall address the jury’s verdict on count two, found pursuant to R.C. 4511.19(A)(2). The record establishes that Mr. Engelhart stipulated to two previous OVIs within ten years. The trooper testified that he advised Mr. Engelhart regarding the protocol of chemical testing and the consequences of refusing the same. Moreover, it is not disputed Mr. Engelhart refused to take a breathalyzer (a chemical test) after his arrest. Because we conclude there was sufficient evidence that Mr. Engelhart was “under the influence” to sustain the jury’s verdict under R.C. 4511.19(A)(1)(a), there was sufficient evidence to support the jury’s verdict under R.C. 4511.19(A)(2).

{¶36} Despite our conclusion regarding the sufficiency of the State’s evidence, we underscore that the statement by the trial court that the “*sentence* is merged for all counts” is misleading and legally problematic regarding the law of merger. By definition, a *sentence* cannot be merged. See *State v. Whitfield*, 2010-Ohio-2, ¶ 13, 24 (“[F]or purposes of R.C. 2941.25(A), a conviction is a determination of guilt and the ensuing sentence . . . The defendant is not ‘convicted’ for purposes of R.C. 2941.25(A) until the sentence is imposed.”). As such, once a jury finds a defendant guilty and there are apparent allied offenses of similar import, pursuant to R.C. 2941.25(A), a trial court must merge those offenses *for purposes of sentencing*. The defendant is not “convicted” for purposes of R.C. 2941.25(A) until the sentence is imposed. *State v. Miller*, 2019-Ohio-4121, ¶ 12 (3d Dist.), citing *State v. Henderson*, 58 Ohio St.2d 171, 178 (1979).

{¶37} A “conviction,” as the term is used in R.C. 2941.25(A), can only be entered on one offense after the merger of two offenses, and thus, the trial court must memorialize which count the State has elected and which count thus received the court’s sentence. See *Whitfield*. When a trial court merges two offenses, only one offense

remains for sentencing, and a sentence can only be entered on that remaining offense. *Id.* at ¶ 17-18. Further, it is the province of the prosecution to elect which offense should merge with an allied offense. See, e.g., *State v. Wilson*, 2011-Ohio-2669, ¶ 13, citing *Whitfield* at ¶ 20 (“The General Assembly has made clear that it is the state that chooses which of the allied offenses to pursue at sentencing, and it may choose any of the allied offenses.” (Citation omitted.)).

“[W]hen a trial court concludes that an accused has in fact been found guilty of allied offenses of similar import, it cannot impose a separate sentence for each offense. Rather, the court has a mandatory duty to merge the allied offenses [before] imposing a single sentence, and the imposition of separate sentences for those offenses—even if imposed concurrently—is contrary to law because of the mandate of R.C. 2941.25(A).”

State v. Figueroa, 2020-Ohio-1328, ¶ 51 (11th Dist.), quoting *State v. Williams*, 2016-Ohio-7658, ¶ 28.

{¶38} To this point, R.C. 4511.19(C) provides: “In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1)(a) or (A)(2) and a violation of division (B)(1), (2), or (3) of this section, but the person may not be convicted of more than one violation of these divisions.” Mr. Engelhart was charged with and found guilty of OVI under both R.C. 4511.19(A)(1)(a) and (A)(2).

{¶39} A determination regarding the merger of these counts did not occur at the sentencing hearing. By stating that the “sentence” is merged, the court indicated there is more than one conviction for the charged OVIs. This is problematic because the imposition of concurrent sentences on allied offenses of similar import, i.e., for the OVIs, would allow for multiple convictions on the same violation contrary to R.C. 4511.19(C) and R.C. 2941.25(A). This arises to a statutory violation, and concurrent sentences do

not accomplish the merger of offenses. *State v. Damron*, 2011-Ohio-2268, ¶ 17 (“[t]he imposition of concurrent sentences is not the equivalent of merging allied offenses”).

{¶40} The error of entering a sentence on a merged count is not harmless. This is especially true where the judgment indicates the sentence ordered the imposition of concurrent sentences. “[E]ven when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law.” (Citations omitted.) *State v. Underwood*, 2010-Ohio-1, ¶ 31 (plain error even where it is a jointly recommended sentence), *see also State v. Smith*, 2013-Ohio-756, ¶ 74 (7th Dist.) (“As this court and the Ohio Supreme Court have stated multiple times, two merged counts cannot both receive sentences, even concurrent sentences. This is said to constitute plain error.” (Citations omitted.)).

{¶41} Since the judgment on sentence indicates the “sentences” were merged, we can only conclude Mr. Engelhart was improperly convicted of OVI under both counts. Accordingly, we sua sponte conclude that the “merger” issue is a matter that must be addressed below during a new sentencing hearing. *Wilson*, 2011-Ohio-2669, at paragraph one of the syllabus (“When a cause is remanded to a trial court to correct an allied-offenses sentencing error, the trial court must hold a new sentencing hearing for the offenses that remain after the state selects which allied offense or offenses to pursue.”). We therefore sua sponte reverse and remand the matter for a new sentencing hearing.

{¶42} Mr. Engelhart's assignment of error is without merit. For the reasons discussed in this opinion, however, the judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded for resentencing.

ROBERT J. PATTON, J.,

SCOTT LYNCH, J.,

concur.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court, appellant's assignment of error is without merit. Because of a sentencing error, however, this matter must be reversed and remanded for a new sentencing hearing. It is the judgment and order of this court that the judgment of the Portage County Municipal Court, Ravenna Division, is affirmed in part and reversed in part, and this matter is remanded for resentencing.

Costs to be taxed against appellant.

JUDGE EUGENE A. LUCCI

JUDGE ROBERT J. PATTON,
concur

JUDGE SCOTT LYNCH,
concur

THIS DOCUMENT CONSTITUTES A FINAL JUDGMENT ENTRY
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A certified copy of this opinion and judgment entry shall constitute the mandate pursuant to Rule 27 of the Ohio Rules of Appellate Procedure.
