[Cite as *State v. McKenzie*, 2021-Ohio-3170.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

GLENN A. MCKENZIE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 CO 0024

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 19 CR 455

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Vacated and Remanded.

Atty. Stephanie Anderson and Atty. Margaret B. Tomaro, Special Assistant Prosecuting Attorneys, Atty. Micah R. Ault, Associate Assistant Attorney General, Ohio Attorney General, 615 West Superior Ave., 11th Floor, Cleveland, Ohio 44113, for Plaintiff-Appellee and

Atty. J. Gerald Ingram, 7330 Market Street, Boardman, OH 44512, for Defendant-Appellant.

Dated: September 10, 2021

Robb, J.

{¶1} Defendant-Appellant Glenn McKenzie appeals from his conviction in Columbiana County Common Pleas Court for aggravated vehicular assault, vehicular assault, and operating a vehicle while under the influence of drugs and/or alcohol. The issues in this case are whether the trial court misapplied the law of merger and whether the trial court erred in imposing a lifetime driver's license suspension. The state concedes error. For the reasons set forth below, the trial court failed to merge the aggravated vehicular assault charges with the vehicular assault charges and incorrectly sentenced Appellant to a lifetime driver's license suspension. The sentences for aggravated vehicular assault and vehicular assault and the imposition of a lifetime drivers' license suspension are vacated with the matter remanded for a new sentencing hearing for the trial court to impose a driver's license suspension that is allowable by law (a definite term within the range of two to ten years) and for the state to elect which offense (aggravated vehicular assault or vehicular assault) it will pursue against Appellant.

Statement of the Facts and Case

{¶2} Appellant was indicted for two counts of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), third-degree felonies; two counts of vehicular assault in violation of R.C. 2903.08(A)(2)(b), fourth-degree felonies; and operating a vehicle while under the influence of alcohol, a drug of abuse or a combination of them in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor. 10/18/19 Indictment. The offenses were committed on December 7, 2018 and Wilma L. Smith and Donald L. Smith were each the victims of one count of aggravated vehicular assault and vehicular assault. 10/18/19 Indictment. Appellant was involved in a two vehicle car crash occurring on State Route 39 in Columbiana County, Ohio. 11/14/19 Bill of Particulars. Appellant was driving when his vehicle hit Wilma and Donald Smith's vehicle head-on. Sentencing Tr. 6-14. Appellant was alleged to have been driving under the influence of both marijuana and alcohol (BAC .112). 10/18/19 Indictment. The victims incurred serious physical harm;

Wilma was hospitalized with bone fractures, lacerations, and more, and Donald was hospitalized with bone fractures, subdural hematoma, serious infection, pneumonia, and more. 11/14/19 Bill of Particulars.

{¶3} A plea agreement was reached between the state and Appellant. The parties jointly recommended an aggregate three-year sentence and an operator's license suspension within the range of two to ten years. 6/26/20 J.E.

{¶4} Following a hearing, the trial court accepted the guilty plea to all counts. 6/26/20 J.E. The trial court opted to not accept the jointly recommended sentence and instead sentenced Appellant to an aggregate term of 45 months and a lifetime driver's license suspension. 9/15/20 J.E. Appellant was sentenced to 36 months for each count of aggravated vehicular assault, 9 months for each count of vehicular assault, and 180 days for operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them. 9/15/20 J.E. The sentences for aggravated vehicular assault were ordered to be served concurrent to each other. 9/15/20 J.E. Likewise, the sentences for vehicular assault were also ordered to be served concurrent to each other. 9/15/20 J.E. However, the aggravated vehicular assault sentences were ordered to be served consecutive to the vehicular assault sentences. 9/15/20 J.E. The sentence for operating a vehicle while under the influence was ordered to be served concurrent with the aggravated vehicular assault sentences. 9/15/20 J.E.

{¶5} Appellant timely appealed the sentence.

First Assignment of Error

"The trial court erred when it failed to merge the Defendant-Appellant's sentences for vehicular assault with his underlying sentences for aggravated vehicular assault."

{¶6} As explained above, for conduct occurring on December 7, 2018, Appellant was convicted of two counts of aggravated vehicular assault. There was a separate victim for each count; Wilma was the victim identified for count one and Donald was the victim identified for count two. Appellant was also convicted of two counts of vehicular assault for the same conduct. Similar to the first aggravated vehicular assault counts, these separate victims were listed for each vehicular assault count. Wilma was identified as the victim of count three (vehicular assault) and Donald was identified as the victim of count four (vehicular assault). The trial court ordered 36 month sentences on each aggravated

vehicular assault charge and ordered those sentences to be served concurrent. It then ordered 9 months on each vehicular assault charge and ordered those sentences to be served concurrent to each other, but consecutive to the aggravated vehicular assault sentence. Appellant objected to the failure to merge the aggravated vehicular assault convictions with the vehicular assault convictions. Sentencing Tr. 28-30. The trial court noted the objection, but found merger was not applicable. Sentencing Tr. 30.

{¶7} Appellant argues the trial court's failure to merge the aggravated vehicular assault convictions with the vehicular assault convictions violates the law of merger. The state concedes error.

{¶8} "Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph three of the syllabus. We review a trial court's R.C. 2941.25 determination de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 1.

{¶9} Appellant was found guilty of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a). This statute provides that, "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 section 4511.19 of the Revised Code." He was also found guilty of vehicular assault in violation of subsection (A)(2) of that statute, which states no person, while operating a motor vehicle recklessly shall cause serious physical harm to another person.

{¶10} In deciding whether the two offenses are based upon the same conduct, the focus is upon whether both crimes were accomplished by a single act. *State v. Riley,* 11th Dist. Trumbull No. 2020-T-0063, 2021-Ohio-1367, ¶ 16.

{¶11} This case involves a car accident. From the limited record before this court, Appellant was driving a vehicle while under the influence of marijuana and alcohol. His vehicle crossed the centerline and collided head-on into the victims' vehicle causing both victims serious physical harm. This act could constitute violating both R.C.

2903.08(A)(1)(a) and (A)(2), operating the vehicle recklessly. Thus, merger is required in this situation.

{¶12} This conclusion is supported by appellate court decisions. The First Appellate District faced with similar facts and argument explained:

> In this case, as the state concedes, the trial court erred in sentencing Sow for both OVI-based aggravated vehicular assault and recklessness-based vehicular assault. The offenses were allied offenses of similar import under R.C. 2941.25. They were predicated upon the same conduct which resulted in serious physical harm to a single victim. The harm resulting from each offense was not separate and identifiable. *See State v. Smith*, 2017-Ohio-537, 85 N.E.3d 304, ¶ 19 (8th Dist.). And the offenses cannot be said to have been committed either separately or with a separate animus as to either. *See Ruff* at ¶ 31; *see also State v. Campbell*, 2012-Ohio-4231, 978 N.E.2d 970, ¶ 14 (1st Dist.) (holding, in a pre-*Ruff* decision, that OVI-based aggravated vehicular homicide and recklessness-based aggravated vehicular homicide were allied offenses of similar import).

State v. Sow, 1st Dist. Hamilton No. C-160835, 2019-Ohio-3641, ¶ 8.

{¶13} Thus, the aggravated vehicular assault verdict for the serious physical harm caused to Wilma was required to merge with the vehicular assault verdict for the serious physical harm caused to Wilma. Likewise, the aggravated vehicular assault verdict for the serious physical harm caused to Donald was required to merge with the vehicular assault verdict for the serious physical harm caused to Donald. The trial court erred when it failed to merge those convictions.

{¶14} However, as the state and Appellant pointed out merger is not applicable when the offenses involve separate victims. *Ruff*, 2015-Ohio-995 at ¶ 26. In that instance, the offenses are of dissimilar import. *Id*. Thus, in this situation, the offenses committed against Wilma were not required to merge with the offenses committed against Donald. Following the guilty plea, the state could have elected to pursue the aggravated vehicular assault to sentencing for each victim and the trial court would have been

permitted to impose a sentence for both aggravated vehicular assault verdicts. However, the matter did not proceed in that manner.

{¶15} Based upon the above, the sentences for aggravated vehicular assault and vehicular assault are vacated and the matter remanded to the trial court for a new sentencing hearing at which the state must elect which allied offense (for each victim) it will pursue against Appellant. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph two of the syllabus and ¶ 24-25; *Sow*, at ¶ 19. At oral argument, counsel asked this court to impose sentence. However, given the law, we decline to take that action. The law on merger is clear; the state elects which allied offense it will pursue for sentencing.

{¶16} This assignment of error has merit.

Second Assignment of Error

"The trial court erred when it imposed a lifetime driver's license suspension, as the Defendant-Appellant's maximum driver's license suspension as set forth in O.R.C. 2903.08(B)(2) is a class three suspension of two (2) to ten (10) years."

{¶17} The trial court imposed a lifetime driver's license suspension. Appellant argues this was not permitted by law. The state concedes error.

{¶18} Appellant was convicted of aggravated vehicular assault and vehicular assault, both defined in R.C. 2903.08. Section (B)(2) of that statute provides, in addition to any other sanction under subsection (B)(1), the court shall impose a class three suspension of the offender's driver's license from the range specified in R.C. 4510.02(A)(3). The statute does state if the offender previously has been convicted of or plead guilty to a violation of this section, any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, the court shall impose either a class two suspension of the offender's driver's license from the range specified in R.C. 4510.02(A)(2) or a class one suspension as specified R.C. 4510.02(A)(1). R.C. 2903.08(B)(2). A class three suspension requires the imposition of a definite period of suspension from the range of two to ten years. R.C. 4510.02(A)(3). A lifetime suspension is not an option for a class three suspension; however, it is an option for a class two suspension and is required for a class one

suspension. R.C. 4510.02(A)(1)-(3). Nothing in the record indicates the requirements for a class 1 or 2 suspension are met.

{¶19} Facing a similar argument and concession by the state, the First Appellate District has aptly explained:

> "Crimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute." *Colegrove v. Burns*, 175 Ohio St. 437, 438, 195 N.E.2d 811 (1964); *see State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 23. As the state concedes, under R.C. 2903.08(B)(2) and 4510.02(A)(3), the trial court was authorized to impose a driver's license suspension only for a definite term of two to ten years. A lifetime suspension was not authorized by statute. Thus that part of Sow's sentence was contrary to law. *Fischer* at ¶ 23. Accordingly, we sustain the third assignment of error.

Sow, 2019-Ohio-3641 at ¶ 18.

{¶20} Consequently, based on all the above, this assignment of error has merit. The trial court had no authority to impose a lifetime driver's license suspension.

Conclusion

{¶21} Both assignments of error have merit. The sentences for aggravated vehicular assault, vehicular assault, and the imposition of the lifetime driver's license suspension are vacated and the matter is remanded for resentencing. On remand, the state must elect which allied offense it will pursue against Appellant. The trial court is instructed that a lifetime driver's license suspension is not available as a sentence; the trial court must imposed a definite term from the range of two to ten years.

Waite, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the aggravated vehicular assault and vehicular assault and the imposition of a lifetime drivers' license suspension are vacated with the matter remanded to the trial court for a new sentencing hearing to impose a driver's license suspension that is allowable by law (a definite term within the range of two to ten years) and for the state to elect which offense (aggravated vehicular assault or vehicular assault) it will pursue against Appellant according to law and consistent with this Court's Opinion. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.