

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

State of Ohio

Court of Appeals No. WD-12-002

Appellee

Trial Court No. 2006CR0047

v.

David O'Neill

DECISION AND JUDGMENT

Appellant

Decided: January 11, 2013

* * * * *

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

Kenneth J. Rexford, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, David O'Neill, appeals from a judgment of the Wood County Court of Common Pleas, which resentenced him to four years each on the counts of aggravated vehicular assault and aggravated vehicular homicide. The court further

ordered that those sentences be served concurrently to each other, but consecutively to the existing sentence of four years on the count of failure to stop after an accident, for a total prison term of eight years. We affirm.

A. Facts and Procedural Background

{¶ 2} This is the fifth time O’Neill has been before the court in this matter, our previous four decisions being reported in *State v. O’Neill*, 175 Ohio App.3d 402, 2008-Ohio-818, 887 N.E.2d 394 (6th Dist.) (*O’Neill I*), *State v. O’Neill*, 6th Dist. No. WD-10-029, 2011-Ohio-5688 (*O’Neill II*), *O’Neill v. Mayberry*, 6th Dist. No. WD-08-077, 2009-Ohio-1123 (*Mayberry I*), and *O’Neill v. Mayberry*, 6th Dist. No. WD-10-019, 2010-Ohio-1707 (*Mayberry II*). A summary of the relevant history of this case is set out in *O’Neill II*:

In February 2006, O’Neill was indicted on five counts in connection with an incident in which O’Neill struck two bicyclists with a silver Jeep; killing one and injuring the other. The counts, listed in numerical order were: (1) aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), a third degree felony, (2) failure to stop after an accident in violation of R.C. 4549.02(A) and (B), a third degree felony, (3) aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), a second degree felony, (4) operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), a first degree misdemeanor, and (5) operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f), a first degree misdemeanor.

The trial court denied O’Neill’s motion to suppress the results of his blood alcohol tests performed after his arrest. Pursuant to a negotiated plea agreement, O’Neill pleaded no contest to Counts 1, 2, 3, and 5, and was sentenced to an aggregate prison term of 12 years. Specifically, on Counts 1 and 2, O’Neill was sentenced to a four year prison term, to run concurrently; an eight year prison term as to Count 3, to run consecutively, and on count 5, a five month prison term, to run concurrently to the other sentences.

O’Neill appealed his convictions and sentences, asserting that the trial court erred in failing to suppress his blood-alcohol test results. In [*O’Neill I*], this court found that the state failed to demonstrate substantial compliance with applicable regulations governing blood-alcohol testing. Due to that error, we vacated O’Neill’s conviction for Count 5, operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f). Because O’Neill’s convictions for Count 1—aggravated vehicular assault, and Count 3—aggravated vehicular homicide—depended upon a violation of R.C. 4511.19, those convictions were also vacated. However, the conviction and sentence for Count 2—failure to stop after an accident [—] was affirmed. In disposing of the matter, the decision in [*O’Neill I*] did not specifically state that the case was remanded to the trial court for further

proceedings. *Mayberry I*, 6th Dist. No. WD-08-077, 2009-Ohio-1123] at ¶ 18.

Subsequently, the state proceeded to prosecute O’Neill under the original indictment. In an order denying O’Neill’s motion in opposition to jurisdiction, the trial court concluded that our decision on appeal placed O’Neill in the position he was in after indictment but prior to trial. O’Neill then filed his first petition for a writ of prohibition against respondent, seeking to prohibit the trial judge from exercising jurisdiction by conducting a jury trial on the remaining counts.

In a decision dated March 9, 2009, this court granted respondent’s motion for summary judgment and dismissed O’Neill’s first petition for a writ of prohibition. *See Mayberry I*, supra. In that case, O’Neill argued that the trial court lacked jurisdiction to proceed to trial because this court in [*O’Neill I*] had not remanded the case back to the trial court after appeal. Addressing the remand issue, we concluded that “the absence of language specifically remanding the case to the trial court was a technical mistake and indicated nothing with respect to the trial court’s jurisdiction.” *Mayberry I* at ¶ 18. We thereafter issued an order of errata correcting [*O’Neill I*], by adding the following sentence: “This matter is remanded to the trial court for further proceedings consistent with this decision and judgment entry.”

Also in *Mayberry I*, we determined that O’Neill was unable to demonstrate that the trial court patently and unambiguously lacked jurisdiction to try him on the remaining counts. In so holding, we relied on *State ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, [833 N.E.2d 293,] in which the Supreme Court determined that “[u]pon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred.” *Id.* at ¶ 11, quoting *State ex rel. Stevenson v. Murray* (1982), 69 Ohio St.2d 112, 113[, 431 N.E.2d 324]. In denying O’Neill’s motion in opposition to jurisdiction, the trial court determined that our decision in [*O’Neill I*], placed O’Neill back in the position he was in when the error occurred; namely, after the trial court’s ruling on the suppression motion, but before the plea agreement wherein the state dismissed Count 4 of the indictment—the general operating a vehicle under the influence (“OVI”) charge. In *Mayberry I*, we determined that the trial court’s judgment in this regard was correct. Therefore, because O’Neill was unable to demonstrate that the trial court patently and unambiguously lacked jurisdiction to try him on the charges that remained, he was not entitled to extraordinary relief in prohibition.

O’Neill then filed a second petition for a writ of prohibition contending that the trial court scheduled a trial for Monday, April 19, 2010, on the originally indicted charges of aggravated vehicular assault,

aggravated vehicular homicide, and the general OVI charge in violation of R.C. 4511.19(A)(1)(a). *See Mayberry II*, supra. O’Neill did not dispute the trial court’s jurisdiction to try him on Count 4—the general OVI charge under R.C. 4511.19(A)(1)(a). Rather, O’Neill contended that respondent had no jurisdiction to try him again for Count 1—the aggravated vehicular assault charge, and Count 3—the aggravated vehicular homicide charge, because this court in [*O’Neill I*] dismissed those charges and they were predicated on the similarly dismissed per se charge of OVI in violation of R.C. 4511.19(A)(1)(f).

In so dismissing appellant’s second motion for a writ of prohibition this court again relied on *Douglas* * * *. We reasoned that because we remanded the case to the trial court following our determination that appellant’s motion to suppress should have been granted in [*O’Neill I*], the trial court was required to proceed from the point at which the error occurred, that is, after it denied the motion to suppress but before the plea agreement in which the state dismissed Count 4—the general OVI offense. We also cautioned that any claim that O’Neill may have in regard to double jeopardy is “remediable by appeal rather than by extraordinary writ.” *Mayberry II*[, 6th Dist. No. WD-10-019, 2010-Ohio-1707] at ¶ 11.

Following our decision in *Mayberry II*, O’Neill pleaded no contest to Counts 1, 3, and 4 as set forth in the original indictment. As to Counts 1

and 3, O'Neill was sentenced to a four year prison term for each charge to run concurrently. As to Count 4, the court imposed a five month sentence, to run concurrently, for a net term of four years. The trial court then ordered these sentences to run consecutively to the four years previously imposed for Count 2, making an aggregate term of eight years. *O'Neill II*, 6th Dist. No. WD-10-029, 2011-Ohio-5688 at ¶ 3-11.

{¶ 3} O'Neill again appealed his sentence, raising five assignments of error:

I. Mr. O'Neill was denied his right under the Ohio Constitution and under the United States Constitution to Due Process of Law when the Trial Court allowed the prosecution to breach its contractual duty under the plea agreement to dismiss the (A)(1)(a) DUI charge and allowed the State to prosecute Mr. O'Neill for that offense both directly and as a necessary predicate to Counts I and III of the Indictment.

II. The Trial Court erred in sentencing Mr. O'Neill for a violation of R.C. §4511.19(A)(1)(a) as well as for Counts I and III, as the same were subject to merger and as not merging the same violated Double Jeopardy.

III. The Trial Court erred by denying Mr. O'Neill's motion and proceeding as to Count IV without jurisdiction.

IV. The Trial Court erred by running the sentence for Counts I and II consecutively after remand.

V. The Trial Court erred by requiring that Mr. O’Neill “shall be placed in solitary confinement and shown the video of the memorial service to again insure that he remembers the extent of his crime to assure no future recidivism” on the 15th of January of each year and by ordering Mr. O’Neill to read condolence letters. *Id.* at ¶ 13-17.

{¶ 4} In *O’Neill II*, we addressed O’Neill’s first and third assignments of error together. Those assignments challenged the trial court’s jurisdiction as to the state’s prosecution of Count 4 since that count was dismissed as part of the plea agreement. We began by citing the rule that “when a conviction is reversed on appeal, the trial court must proceed from the point at which the error occurred.” *Id.* at ¶ 20, citing *State ex rel. Stevenson v. Murray*, 69 Ohio St.2d 112, 113, 431 N.E.2d 324 (1982). The error, in O’Neill’s case, occurred when the trial court failed to suppress the blood-alcohol test results, prior to any plea agreement. Thus, we held that the trial court properly exercised jurisdiction over the proceedings on Count 4.

{¶ 5} We recognized, however, that “[i]nstead of vacating and remanding all of O’Neill’s convictions, our decision [in *O’Neill I*] errantly affirmed O’Neill’s conviction and sentence for Count 2—leaving the scene of the accident—resulting in much confusion as to whether the trial court had jurisdiction over Count 2 on remand.” We resolved this issue by turning to the law of the case. Citing *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984), we held that since O’Neill did not appeal or file an application for reconsideration of our decision affirming Count 2 in *O’Neill I*, nor was

there an intervening decision that would permit us to vacate our decision in *O’Neill I*, the law of the case prevented us from reversing and remanding Count 2. Accordingly, we found his first and third assignments of error to be without merit. *O’Neill II*, 6th Dist. No. WD-10-029, 2011-Ohio-5688 at ¶ 20-23.

{¶ 6} Regarding the rest of his assignments of error, we sustained O’Neill’s second assignment, and reversed the judgment of the trial court, finding that Count 4 should have merged with Counts 1 and 3 for purposes of sentencing. In light of our disposition of his second assignment of error, we found O’Neill’s fourth assignment of error to be moot. Finally, we found O’Neill’s fifth assignment of error not well-taken because the order for solitary confinement was not re-imposed during his resentencing following *O’Neill I*. We then remanded the case back to the trial court for resentencing in accordance with our merger analysis.¹ *Id.* at ¶ 25-44.

{¶ 7} Thereafter, the state elected to proceed to sentencing on Counts 1 and 3, as opposed to Count 4. The trial court sentenced O’Neill to four years each as to Counts 1 and 3, and ordered them to run concurrently to each other, but consecutively to Count 2.

B. Assignments of Error

{¶ 8} O’Neill has timely appealed, and now raises the identical assignments of error as he did in his first, third, and fourth assignments in *O’Neill II*:

¹ The Ohio Supreme Court did not accept for review O’Neill’s appeal of our decision in *O’Neill II*. See *State v. O’Neill*, 131 Ohio St.3d 1498, 2012-Ohio-1501, 964 N.E.2d 439.

I. Mr. O’Neill was denied his right under the Ohio Constitution and under the United States Constitution to Due Process of Law when the Trial Court allowed the prosecution to breach its contractual duty under the plea agreement to dismiss the (A)(1)(a) DUI charge and allowed the State to prosecute Mr. O’Neill for that offense both directly and as a necessary predicate to Counts I and III of the Indictment.

II. The Trial Court erred by denying Mr. O’Neill’s motion and proceeding as to Count IV without jurisdiction.

III. The Trial Court erred by running the sentence for Counts I and II consecutively after remand.

II. Analysis

{¶ 9} In support of his first and second assignments of error, O’Neill presents the same argument, verbatim, as he did in support of his first and third assignments of error in *O’Neill II*. O’Neill, however, does additionally argue that in *O’Neill II*, we seemingly agreed that *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), “is controlling authority that would have barred the prosecution from re-litigating the dismissed Count IV (or from using that legal theory derivatively as to Counts I and III) without thereby breaching its contract with Mr. O’Neill as to his tendered plea to Count II, consideration for that contract.” O’Neill contends that our analysis in *O’Neill II*—that the law of the case precludes reconsideration of whether Count 2 should be reversed and remanded—is flawed for three reasons.

{¶ 10} First, under *Santobello*, a prosecutor’s breach of a plea agreement can be remedied by either specific performance of the contract, or withdrawal from the contract. *Santobello* at 263. Thus, O’Neill argues that “[i]f Count II cannot be undone, as the law of the case, then that only negates the ability to use withdrawal from the contract as the remedy. Instead, specific performance can be enforced, and nothing that has transpired negates the ability to specifically enforce the contract.” Second, he argues that his contractual agreement to plead to Count 2 prohibited him from appealing our affirmance of the conviction and sentence as to that count in *O’Neill I*. Thus, this court should not use his failure to appeal as grounds for recognizing his conviction on Count 2 as the law of the case. Finally, O’Neill argues that we have “inexplicably” treated Counts 2 and 4 differently by recognizing the affirmance of Count 2 as the law of the case, but not recognizing the dismissal of Count 4 as the law of the case.

{¶ 11} O’Neill’s argument centers on the assumption that the state’s prosecution of Count 4 is a breach of his original plea agreement. This is not true. When the original conviction was reversed in *O’Neill I*, the proceedings in the trial court reverted back to the point of the suppression hearing, prior to any plea agreement. *Douglas*, 106 Ohio St.3d 180, 2005-Ohio-4382, 833 N.E.2d 293 at ¶ 11. Thus, it was as if no plea agreement existed. The prosecution was not bound to dismiss Count 4, and O’Neill was not bound to plead guilty to Count 2. Consequently, and contrary to his argument otherwise, his subsequent prosecution on Count 4 was not in breach of any contract, and he is not entitled to specific performance. Moreover, O’Neill was not prohibited by contract from

appealing or filing an application for reconsideration of our errant affirmance of his conviction and sentence as to Count 2. Because this was not done, *O’Neill II* properly concluded that O’Neill’s conviction and sentence as to Count 2 became the law of the case.

{¶ 12} Accordingly, O’Neill’s first and second assignments of error are not well-taken.

{¶ 13} In his third assignment of error, O’Neill argues that the trial court erred by ordering his sentences on Counts 1 and 3 to be served consecutively to his sentence on Count 2. He states that in the original sentencing entry, Count 2 was ordered to run concurrently with the sentence for Count 1. Count 2 has never been subject to resentencing. Therefore, he contends that the sentence for Count 2 must run concurrently with the sentence for Count 1.

{¶ 14} The issue we must decide is whether the concurrent designation is part of O’Neill’s sentence on Count 2. We hold that it is not. In so holding, we are informed by the Ohio Supreme Court’s analysis in rejecting the “sentencing package” doctrine, “a federal doctrine that requires the court to consider the sanctions imposed on multiple offenses as the components of a single, comprehensive sentencing plan.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 5. The Ohio Supreme Court reasoned that such an approach is not appropriate in Ohio where “there is no potential for an error in the sentence for one offense to permeate the entire multicount group of

sentences;” the felony-sentencing scheme “is clearly designed to focus the judge’s attention on one offense at a time.” *Id.* at ¶ 8. The Court continued:

Although imposition of concurrent sentences in Ohio may appear to involve a “lump” sentence approach, the opposite is actually true. Instead of considering multiple offenses as a whole and imposing one, overarching sentence to encompass the entirety of the offenses as in the federal sentencing regime, a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense. See R.C. 2929.11 through 2929.19. *Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively.*” (Emphasis added.) *Id.* at ¶ 9.

{¶ 15} Thus, the sentence imposed on O’Neill on Count 2 is comprised of the prison term ordered to be served; it does not include the designation that the term is to be served concurrently. See R.C. 2929.01(EE) (“‘Sentence’ means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to *an* offense.” (Emphasis added.)). Therefore, the trial court retained discretion to impose the sentences for Counts 1 and 3 concurrently or consecutively to the existing sentence for Count 2.

{¶ 16} Accordingly, O’Neill’s second assignment of error is not well-taken.

{¶ 17} Relatedly, but not responsive to the assignment of error, the state argues that the trial court failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences. It urges this court to remand the case solely for the entry of those findings. However, this issue was not raised as an assignment of error, nor argued by O'Neill in his merit brief, and is therefore not properly before us.

III. Conclusion

{¶ 18} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. O'Neill is ordered to pay the 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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>.